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A

CONCISE TREATISE

ON THE

CONSTRUCTION OF WILLS.

BY

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WITH

NOTES AND REFERENCES TO AMERICAN DECISIONS

BY

JOHN SWORD,
OF THE PHILADELPHIA BAR.

SECOND AMERICAN EDITION,

WITH ADDITIONAL NOTES AND REFERENCES,

BY

FREDERICK M. LEONARD.

...

PHILADELPHIA:

T. & J. W. JOHNSON & CO.,
LAW BOOKSELLERS, PUBLISHERS, AND IMPORTERS,
No. 535 CHESTNUT STREET.

1885.

95866

Entered according to Act of Congress, in the year 1885, by
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IN this edition the notes have been extended to recent cases, and have been increased by the addition of the Canadian cases pertinent to the subject.

F. M. L.

PHILADELPHIA, 1885.

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ADVERTISEMENT

TO THE

FIRST AMERICAN EDITION.

IN the present edition of Mr. Hawkins's treatise, an effort has been made to show what is the law on the topics treated of in the text in the various states of this country, so far as the same has been determined by decided cases or by statutes. Where the English rules laid down in the text have been adopted by the courts of this country, the editor has simply referred to cases, deeming it useless to add to the concise, yet in every respect sufficient statement, of them given by his author. Where the American cases differ from the English, he has stated briefly the character of the difference. Speculations as to the correctness of the doctrines advanced by the American courts, or as to the probable effect of particular decisions upon the general rules of law, have been carefully avoided. The decision is simply stated as it is found, and the reader is left to draw his own inferences.

The editor takes great pleasure in acknowledging his indebtedness to Mr. JAMES S. ROWE, of Bangor, Me. ; Messrs. FLETCHER and HEYWARD, of Lancaster, N. H. ; Mr. DANL. ROBERTS, of Burlington, Vt. ; The Honorable C. C. CONANT, of Greenfield, Mass. ; Messrs. WALDO, HUBBARD and HYDE, of Hartford, Conn. ; the Honorable D. M. BATES, of Wilmington, Del. ; Mr. GEORGE H. BATES, of Wilmington, Del. ; Mr. HENRY KYD DOUGLAS, of Hagerstown, Md. ; Messrs. SCARBURGH and DUFFIELD, of Norfolk,

(v)

Va. ; Mr. S. F. PHILLIPS, of Raleigh, N. C. ; Mr. J. S. G. RICHARDSON, of Sumter, S. C. ; the Honorable W. M. REESE, of Washington, Ga. ; Mr. T. A. HAMILTON, of Mobile, Ala. ; Mr. J. Z. GEORGE, of Carrollton, Miss. ; the Honorable GEORGE HOADLEY, of Cincinnati, Ohio ; Mr. W. C. P. BRECKINRIDGE and Mr. B. F. BUCKNER, of Lexington, Ky. ; the Honorable T. M. COOLEY, of Ann Arbor, Mich. ; Mr. F. S. LOVELL, of Kenosha, Wis., and Mr. N. W. Cox, of Little Rock, Ark.

To these gentlemen the editor is indebted for a large part of his information concerning the American statutes upon the subject of his labors, and also for some useful references to decisions of the courts of their own states. He is also indebted to Mr. P. FRAZER SMITH, for the privilege of consulting the proof-sheets of his forthcoming volume of Pennsylvania Reports.

In addition to the citation of American cases, a selection has been made from the English decisions published since the first appearance of this treatise, of cases of interest, either as illustrating further the propositions of the text, or settling some points which were previously considered doubtful. Hoping that in some slight degree at least, his labors have added to the usefulness of this valuable treatise, the editor submits the present edition to the judgment of the American profession.

J. S.

PHILADELPHIA, AUGUST 1, 1872.

PREFACE.

THE object of the present work is to embody, in a definite and intelligible form, that portion of the vast mass of reported cases on testamentary construction which really constitutes the law of the Courts at the present day, and governs the judicial construction of Wills. This body of law consists of a number of rules, called Rules of Construction, determining the construction which the Courts are bound, in the absence of a sufficiently declared intention to the contrary, to put upon particular words, expressions, and forms of disposition occurring in wills. Rules of Law, which are not rules of construction, are not included in the present treatise.

A rule of construction may always be reduced to the following form: Certain words or expressions, which may mean either *x* or *y*, shall, *prima facie*, be taken to mean *x*. A rule of construction always contains the saving clause, "unless a contrary intention appear by the will:" though some rules are much stronger than others, and require a greater force of intention in the context to control them. On the other hand, a rule of law which is not a rule of construction (as, the rule in *Shelley's Case*, the rules as to perpetuity, mortmain, lapse, &c.), acts independently of intention, and applies to dispositions of property in whatever form of words expressed. This difference is fundamental, and lies at the root of the subject.

The existing rules of construction are mainly of two classes: first, the old rules, some of very ancient date, not a few very inconvenient in their operation, and not seldom traceable to a misconception of the cases on which they originally rested; and secondly, the more modern rules, chiefly relating to minor matters

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and subordinate parts of the testamentary disposition, and in many cases useful and beneficial to the intention. The latest rule, *Bullock v. Downes* (p. 95), is a good example of this class. It seems now generally recognized that the utility of rules of construction is almost confined to the smaller questions arising on wills; that their function is to remedy some of the ordinary slips and ambiguities of language, and to supply the omissions of the testator in points of detail not affecting the vital parts of the disposition; and that upon wide and general questions, where the whole frame and language of the will bear on the construction, no general rules can usefully be laid down.

A certain want of congruity is perhaps unavoidable in a system of construction elaborated by a succession of judges, some inclining rather to the *grammatical* or literal, others to the *logical* or inferential, interpretation of testamentary instruments. Every rule of construction settles a disputed or disputable point, on which different minds would entertain different opinions; and it generally happens that in some parts of the subject the one view has prevailed, and in others the opposite. If a rule is pushed too far, a reaction sets in, and the balance is inconveniently and unduly shifted.

Rules of Construction are also to be distinguished from Rules of Administration,—such as those which define the order in which devises and bequests are made liable to payment of debts, in the absence of any special intention appearing on the will. The statute called Locke King's Act prescribes a rule of administration only, and not a rule of construction:—a point perhaps not immaterial with reference to recent arguments respecting it. So the rule in *Howe v. Lord Dartmouth* is, as explained by Sir J. Wigram in *Hinves v. Hinves*, 3 Hare 609, only a rule applied in the absence of intention, *i. e.*, a rule of administration: had it been a rule of construction, the extremely slight indications which have been held to exclude its operation would scarcely be compatible with its existence as a rule.

The elaborate development of the English law of testamentary construction is due in great measure to the salutary rule, which excludes parol evidence of the testator's actual intentions except in cases of equivocal description; which has compelled interpre-

ters to draw their conclusions exclusively from an accurate study of the document itself. I have elsewhere* endeavored to show that the rule which excludes parol evidence in aid of interpretation is not, as has been contended by high authority, a necessary result of the requirement of a written will: indeed Roman jurisprudence proves the contrary. The anomalous cases of what are called "presumptions" of law are in reality rules of construction derived from the civil law, which having obtained a lodgment in English law, but being disapproved of, have been allowed to retain their own antidote in the shape of the capability of being rebutted by parol evidence, which (in common, however, with other rules of construction) they possessed in the system from which they were originally derived.

The present work is intended to embrace all the questions of testamentary law on which rules of construction exist. Where there is no such rule laid down, the intention is the sole guide: reported cases may assist by supplying suggestions, but they do not *govern*. It seems to have been thought by some that a rule ought to exist upon every possible point of construction: but the tendency of the courts now is to avoid creating (except in minor matters) any fresh rules, and not to extend the older rules beyond their present limits. If this principle be acted on, the law *necessary to be known* for purposes of construction may be reduced within moderate dimensions, and the present treatise is designed to show (however imperfectly) the form in which it might be permanently retained.

It is hardly necessary to say that every point in the book has been independently worked out by the author, and no results have been merely taken from other writers.† There is no subject on which isolated cases and statements of cases are so misleading as in the construction of wills: the law on any particular point is to be gained only by a study of the cases as a whole, and it requires much acquaintance with the subject to determine how far any

* In a paper on "Legal Interpretation," 2 Juridical Society's Papers, p. 298.

† Every writer on this subject, however, must feel under very great obligations to "Jarman on Wills," and to the labors both of its author and its subsequent editors.

given case found in the books is or is not an authority beyond its own particular circumstances. It is too much to hope that no errors will be discovered in the following pages: but great pains have been taken that they should represent accurately the present state of the law on each point, and that the best authorities should be referred to. The cases given in the large print are the leading authorities, and, taken together, form the framework and main body of the law.

It was originally intended to indicate by asterisks those rules which appear to be inconvenient in their results, and to deserve to be repealed: the reader can, if he pleases, do this for himself. Any legislative alteration of the law of construction should proceed by simply declaring that certain reported cases (on which the rule is founded) shall no longer be of authority, and not by adding fresh rules which will require judicial interpretation. With some alterations of this nature, and with the introduction by judicial authority of a few rules on subordinate points (see *e. g.* p. 253, and Appendix II.), it does not seem but that a reasonable and beneficial system of construction would be attained, and that within a moderate compass. Something will be gained towards simplifying and consolidating the law, if it can be brought to a form in which it may be easily known and recollected.

F. V. H.

7, STONE BUILDINGS, LINCOLN'S INN,
March 31, 1863.

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THE LAW OF CONSTRUCTION OF WILLS.

INTRODUCTION.

1. GENERAL PRINCIPLES OF CONSTRUCTION.

THE General Principles which govern the Construction of Wills are fully settled by authority, and may be conveniently expressed, for purposes of reference, in the Four Propositions following, with the accompanying quotations, viz:—

PROP. I. In construing a will, the object of the Courts is to ascertain, not the *intention* simply, but the *expressed intentions* of the testator, *i. e.*, the intention which the will itself, either expressly or by implication, declares: or (which is the same thing) the meaning of the words—the meaning, that is, which the words of the will, properly interpreted, convey.¹

In *Shore v. Wilson*, 9 Cl. & F. 525, Coleridge, J., says: “The object of all exposition of written instruments must be, to ascertain the *expressed meaning* or intention of the writer, the expressed meaning being equivalent to the intention.”

In *Doe d. Brodbelt v. Thomson*, 12 Moo. P. C. C. 116, Turner,

¹ *Arcularius v. Geisenheimer*, 3 Brndf. 73; *Jackson v. Luquere*, 5 Cowen, 228; *Hone v. Van Shaick*, 3 Comst. 540; *Provost v. Provost*, 27 N. J. Eq. 296; *Walston v. White*, 5 Md. 304; *Wotten v. Redd*, 12 Gratt. 205; *Heyward v. Heyward*, 7 Rich. Eq. 314; *Allan v. Van Meter*, 1 Met. (Ky.) 276.

L. J., says: "It is upon intention either *expressly declared* or *2] *collected by just reasoning* upon *the terms of the instrument, or evidenced by surrounding circumstances, where surrounding circumstances can be called in aid, and not upon conjecture merely, that the Court feels bound to proceed."

In *Abbott v. Middleton*, 7 H. L. C. 68, Lord Cranworth says: "It is not the duty of a Court of Justice to search for the testator's meaning, otherwise than by fairly interpreting the words he has used."

And Lord Wensleydale, in the same case: "The use of the expression, that the intention of the testator is to be the guide, unaccompanied by the constant explanation that it is to be sought in his words, and a rigorous attention to them, is apt to lead the mind insensibly to speculate upon what the testator may be supposed to have intended to do, instead of strictly attending to the true question, which is, *what that which he has written means*. The will must be in writing, and that writing only is to be considered."

PROP. II. In construing a will, the words and expressions used are to be taken in their *ordinary, proper, and grammatical* sense;—unless upon so reading them in connection with the entire will, or upon applying them to the facts of the case, an ambiguity or difficulty of construction, in the opinion of the Court, arises: in which case the primary meaning of the words may be modified, extended, or abridged, and words and expressions supplied or rejected, in accordance with the presumed intention, *so far* as to remove or avoid the difficulty or ambiguity in question, but no further.¹

It follows from Prop. I., that in every case the words used must be *capable of bearing* the meaning sought to be put upon them.

¹ *Perkins v. Mathes*, 49 N. H. 110; *Chrystie v. Phyfe*, 19 N. Y. 348; *Cromer v. Pinckney*, 3 Barb. Ch. 475; *Evens v. Griscom*, 42 N. J. L. 579; *Hammett v. Hammett*, 48 Md. 307; *McAuley's Succession*, 29 La. Ann. 33; *Duryea v. Duryea*, 85 Ill. 41.

In *Shore v. Wilson*, 9 Cl. & F. 565, Tindal, C. J., says: "The general rule I take to be, that when the words of any written instrument are free from ambiguity in themselves, *and where [*3 external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the *strict, plain, common meaning* of the words themselves."

In *Abbott v. Middleton*, 7 H. L. C. 68, Lord Wensleydale says: "It is now, I believe, universally admitted that, in construing a will, the rule is to read it in the ordinary and grammatical sense of the words, unless some obvious absurdity, or some repugnance or inconsistency with the declared intentions of the writer, to be extracted from the whole instrument, should follow from so reading it. Then the sense may be modified, extended, or abridged, so as to avoid those consequences, but no further. This rule, in substance, is laid down by Mr. Justice Burton, in the case so frequently quoted of *Warburton v. Loveland*, 1 Huds. & Br. 648. It had been previously described as 'a rule of common sense as strong as can be,' by Lord Ellenborough, in the case of *Doe v. Jessep*, 12 East, 293. It is stated as 'a cardinal rule, from which, if we depart, we launch into a sea of difficulties not easy to fathom,' by my noble and learned friend when Chancellor, in *Gundry v. Pinniger*, 1 D. M. & G. 502, and as 'the golden rule,' when applied to Acts of Parliament, by C. J. Jervis, in *Mattison v. Hart*, 14 C. B. 385 (E. C. L. R. vol. 78), and by the late Mr. Justice Maule, as 'the most general of rules, a general rule of great utility:' *Gether v. Cupper*, 24 L. J., C. P. 71. Many other authorities might be cited, but there is no doubt of the excellence and generality of the rule.

"Quite consistently with this rule, words and limitations may be supplied or rejected when warranted by the immediate context or the general scheme of the will, but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the instrument."

PROP. III. As a corollary to, or part of, the last [*4
*Proposition—*technical* words and expressions must

be taken in their *technical* sense, unless a *clear* intention can be collected to use them in another sense, and that other can be ascertained.¹

In *Doe d. Winter v. Perratt*, 6 M. & G. 342 (E. C. L. R. vol. 46), Lord Wensleydale (then Parke, J.) says: "It is a rule in the judicial exposition of wills, that technical words, or words of known legal import, are to be considered as having been used in their technical sense, or according to their strict acceptation, unless the context contains a clear indication to the contrary. Such is the rule laid down by Eyre, C. J., in *Buck v. Nurton*, 1 B. & P. 57, by Lord Alvanley, M. R., in *Thellusson v. Woodford*, 4 Ves. 329, and in *Poole v. Poole*, 3 B. & P. 620, citing *Goodright v. Pulleyn*, 2 Lord Raym. 1437, and, lastly, by Lord Redesdale, in *Jesson v. Wright*, 2 Bligh, 1, and other authorities.

In *Roddy v. Fitzgerald*, 6 H. L. C. 877, Lord Wensleydale says: "Another rule of construction has been referred to by several of the Irish as well as by some of the English Judges, viz.: that the general intention of the testator was to prevail over the particular intention. This doctrine, which commenced, I believe, with Lord C. J. Wilmot, and has prevailed a long time, had, I thought, notwithstanding the use of those terms by Lord Eldon, in the leading case of *Jesson v. Wright*, been put an end to by Lord Redesdale's opinion in the same case, and by the powerful arguments against its adoption in Mr. Hayes's Principles, and by Mr. Jarman in his excellent work on Wills, and by the judgment of the Court delivered by Lord Denman in *Doe v. Gallini*, 5 B. & Ad. 640 (E. C. L. R. vol. 27), in which the opinion of Lord Redesdale is approved and adopted. And certainly, if accuracy of expression is important, the use of those terms had better be discontinued, though if qualified and understood as explained in the last-mentioned case, and in the opinion of some of the Judges—

*5] Baron Watson, for example—it can make no difference in the result. Lord Redesdale says, 'that the *general intent

¹ *Haley v. Boston*, 108 Mass. 576; *Phelps v. Robbins*, 40 Conn. 250; *Doebler's Appeal*, 64 Penn. St. 15; *France's Est.*, 75 id. 220; *Grandy v. Sawyer*, Phill. Eq. 9; *Evans v. Godbold*, 6 Rich. Eq. 36; *Waddell v. Leonard*, 53 Ga. 694; *Eisman v. Poindexter*, 52 Ind. 401; *Butler v. Heustis*, 68 Ill. 594; *Hascall v. Cox*, 49 Mich. 435.

shall overrule the particular, is not the most accurate expression of the principles of decision. The rule is, that *technical words shall have their legal effect, unless from other words it is very clear the testator meant otherwise.*'¹

PROP. IV. Notwithstanding the last two Propositions—the intention of the testator, which can be collected with reasonable certainty from the entire will, with the aid of extrinsic evidence of a kind properly admissible, must have effect given to it, beyond, and even against the literal sense of particular words and expressions. The intention, when legitimately proved, is competent not only to *fix* the sense of *ambiguous* words, but to *control* the sense even of *clear* words, and to *supply* the place of *express* words, in cases of difficulty or ambiguity.²

In *Key v. Key*, 4 D. M. & G. 73, Knight Bruce, L. J., says: "I agree 'certa pro incertis non relinquenda;' but I say also 'in

¹ The language of Lord Eldon is adopted in *Smith v. Bell*, 6 Peters, 78; *Kane v. Astor*, 5 Sandf. S. C. 533; *Hitchcock v. Hitchcock*, 35 Penn. St. 399; *Chase v. Lockerman*, 11 Gill & Johns. 206; *Robert v. West*, 15 Ga. 141; *Thrasher v. Ingram*, 32 Ala. 660; and it is held to apply not only to questions as to the meaning of technical words, but to cases where it is necessary to choose between inconsistent clauses in a will. *Smith v. Bell*, 6 Peters, 78; *Parks v. Parks*, 9 Paige, 120; *Doebler's Appeal*, 64 Penn. St. 15; *Jones's Appeal*, 3 Grant Cas. 171; *Millor v. Flournoy*, 26 Ala. 727.

The language of Lord Redesdale is adopted in *Den v. McMurtrie*, 3 Green, 281.

² *Findlay v. King*, 3 Peters, 377; *Dow v. Dow*, 36 Me. 216; *Burleigh v. Clough*, 52 N. H. 267; *Richardson v. Paige*, 54 id. 373; *Hibbard v. Hurlburt*, 10 Vt. 178; *Homer v. Shelton*, 2 Metc. 199; *Brimmer v. Sohler*, 1 Cush. 129; *Minot v. Harris*, 132 Mass. 528; *Parks v. Parks*, 9 Paige, 116; *De Kay v. Irving*, 5 Denio, 654; *Lottimer v. Blumenthal*, 61 How. Pr. 360; *Phillips v. Davies*, 92 N. Y. 199; *Fetrow's Estate*, 58 Penn. St. 427; *Stokes v. Tilly*, 1 Stockt. 132; *Heald v. Heald*, 56 Md. 300; *Carr v. Green*, 2 McCord, 84; *Houser v. Ruffner*, 18 W. Va. 244; *Roberts v. Watson*, 4 Jones L. 320; *Howerton v. Henderson*, 88 N. C. 597; *O'Neill v. Boozer*, 4 Rich. Eq. 22; *Clark v. Clark*, 19 S. C. 345; *Aulick v. Wallace*, 12 Bush, 531; *Emmert v. Hays*, 89 Ill. 11; *Tewksbury v. French*, 44 Mich. 100; *Wolf v. Schaffer*, 51 Wisc. 53; *Carter v. Alexander*, 71 Mo. 585; *Watson v. Blackwood*, 50 Miss. 15; *Moreland v. Brady*, 8 Or. 303.

obscuris quod verisimilius,' and as 'leges non ex verbis sed ex mente intelligendas,' so of wills. In common with all men, I must acknowledge there are many cases upon the construction of documents, in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of the instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorized and bound to construe the writing accordingly.

"Such decisions upon controversies 'ex scripto et sententiâ'—as Cicero terms them (*De Inv.* II., c. 42);—'scripti et voluntatis'—in the language of Quintilian (*Inst. Or.* VII., c. 6, s. 1), who, citing the *Judicium Curianum*, says, 'In testamentis et illa accidunt ut voluntas manifesta sit, scriptum nihil sit,' and adds, 'Id *6] quoque, quod huic contrarium est, accidit nupur ut esset scriptum quod appareret scriptorem noluisse,' have been of course frequent and familiar, when and wherever justice has been administered among civilized and enlightened men. This is a controversy of that class; and though it may perhaps seem neither necessary nor very apt in a cause of the particular species of the present to refer to such cases as *Browne v. De Laet*, 4 B. C. C. 527, *Church v. Munday*, 12 Ves. 426, and *Bootle v. Blundell*, 1 Mer. 193; 19 Ves. 494, yet the language of Lord Thurlow and Lord Eldon in those instances seems to me not without application. Nor does Lord Eldon's reference, with apparent assent, in *Wykham v. Wykham*, 18 Ves. 395, and *Wilkinson v. Adam*, 1 V. & B. 466, to Lord Hardwicke's expression in *Coryton v. Helyar*, 2 Cox, 340. The language as given in *Wilkinson v. Adam* is, 'Necessary implication means, not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator cannot be supposed.' The phrases given in *Wykham v. Wykham*, are 'probable necessity,' and 'an implication so probable that the mind could not resist it.' Mr. Cox's report is thus: 'There is hardly any case where an implication is of necessity, but it is called "necessary" because the Court finds it so to answer the intention of the devisor.' Finally, I may men-

tion the present Lord Chancellor's opinion in a recent case of *Hart v. Tulk*, 2 D. M. & G. 300, where it was held by his lordship and myself that a schedule had been described in a will by a wrong number, and the authorities there referred to."¹

Lord St. Leonards in *Grey v. Pearson*, 6 H. L. C. 61, says: "Nobody is more disposed than I am to abide by clear words, and to give to them their natural and grammatical meaning; but I never did and I never can come to this conclusion, that the words of a will cannot admit of modification according to the real intention of the testator, as you find it from other expressions, or from the whole context of the will. It is difficult to lay down any abstract rule upon the subject, but where I find the *intention, [*7 and I find words pointing out the intention, and that if I give to the words their simple meaning according to grammar and according to their plain *primâ facie* import, I defeat the intention,— I hold that I am bound, by every rule both of law and equity, to see whether I cannot give to them, by natural construction, an import which will effectuate and not defeat the intention."

Lord Kingsdown, in *Towns v. Wentworth*, 11 Moo. P. C. C. 526, says: "In order to determine the meaning of a will, the Court must read the language of the testator in the sense which it appears he himself attached to the expressions which he has used, with this qualification, that when a rule of law has affixed a certain determinate meaning to technical expressions, that meaning must be given to them, unless the testator has by his will excluded, beyond all doubt, such construction.

"When the main purpose and intention of the testator are ascertained to the satisfaction of the Court, if particular expressions are found in the will which are inconsistent with such intention, though not sufficient to control it, or which indicate an intention which the law will not permit to take effect, *such expressions must be discarded or modified*; and on the other hand, if the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the Court is to *supply the defect by implication*, and thus to mould the language of the testator, so as to carry into effect, as far as possible,

¹ *Carr v. Green*, 2 M'Cord 86.

the intention which it is of opinion that the testator has on the whole will sufficiently declared."

2. ON PUNCTUATION.

Punctuation, &c., to be adverted to.—Notwithstanding a dictum of Sir W. Grant in *Sanford v. Raikes*, 1 Mer. 651, it appears to be settled, that in construing a will marks of punctuation, as parentheses, stops, capital letters, &c., may be taken into consideration.¹

*8] *In *Morrall v. Sutton*, 1 Phill. 533, there was a bequest of leaseholds "to Sarah Callcott, her executors, administrators, and assigns (*subject to the said annuities charged thereon*)," in a parenthesis, "during the term of her natural life." Parke, J., in his judgment, observed: "That proposed by the appellant besides being a very strained construction, requires us to reject the marks of parenthesis which are clearly visible in the probate of the will, and which show that the testator meant the sentence to be read, passing over the intermediate words, as if it had contained a gift to Sarah Callcott, her executors, administrators, and assigns, for her natural life."

In *Compton v. Bloxham*, 2 Coll. 201, V.-C. Knight Bruce sent for and examined the original will, and decided on the ground that the words "my monies" began an entire new sentence.

It would seem that marks of punctuation, as stops, capital letters, &c., in the original will may be adverted to, though not in the probate, and though the question relates to personal estate: (*Oppenheim v. Henry*, 9 Hare 802 *n.*) But the probate is conclusive as to what the *words* of the will are.

In *Manning v. Purcell*, 7 D. M. & G. 55, where the will, one of personalty, was a common printed form filled up by the testator, with parts of the form struck out, the original will was sent for, and Turner, L. J., in giving judgment, said: "In coming to this conclusion, I have not overlooked the effect to be given to the erasures, as they appear *on the original will*." (p. 66.)

¹ *Howard v. Wofford*, 16 S. C. 148. "Punctuation may perhaps be resorted to when no other means exist of solving an ambiguity; but not in cases where no real ambiguity exists except what the punctuation itself creates." *Arcularies v. Sweet*, 25 Barb. 406.

In *Child v. Elsworth*, 2 D. M. & G. 679, there were several gifts of legacies, the last gift followed by the words "to be paid twelve months after the decease of A." The question was, whether the direction for postponement of payment applied to all the legacies, or only to the last of them. It was held to apply to all the legacies; and Cranworth, L. J., in giving judgment, said: "It is only necessary to add, that we have caused the original will to be examined, and it appears that the whole gift in question to the children and grandchildren of W. D., including the *direction [¶] for the time of payment, is written continuously as one sentence, and is closed with a full stop." (p. 683.)

In *Gauntlett v. Carter*, 17 B. 586, the testator devised his freehold estates, "situate in Bullen Court, Strand, and Maiden Lane." Before and after the word "Strand" there were commas. The testator having houses in Bullen Court, and others in the Strand but not in Bullen Court, the question was whether the word "Strand" was part of the description of Bullen Court, or whether it operated to pass freehold estates of the testator situate in the Strand. Romilly, M. R., decided in favor of the latter construction; and observed, "the introduction of commas before and after the word Strand is a circumstance of importance." (p. 591.)

3. PAROL EVIDENCE OF INTENTION, WHEN ADMISSIBLE.

Generally speaking, all *material* evidence which can be brought in aid of the construction of a will, is admissible for that purpose. "In *every* case of ambiguity, whether latent or patent, evidence is admissible to show the state of the testator's family or property." (*Stringer v. Gardiner*, 27 B. 37.)¹ But, with the exception of certain cases of (what are called) "presumptions" of law, it is an universal rule that—

RULE. Parol evidence to show what were *actual testamentary intentions* of the testator (such as the instructions given for the will, memoranda, or declarations by the testator as to what he had done or meant to do by his will, etc.), is admissible only to determine which of

¹ *Powers v. Eachern*, 7 S. C. 290.

several persons or things was intended under an *equivocal description*. (*Miller v. Travers*, 8 Bing. 244 (E. C. L. R. vol. 21); *Doc d. Hiscocks v. Hiscocks*, 5 M. & W. 363.)¹

Equivocal descriptions are, "where one name and appellation doth denominate divers things" (Bac. Max. 23); *10] as a devise to John Cluer of Calcot, *there being two persons of that place named John Cluer, father and son (*Jones v. Newman*, 1 W. Bl. 60): or a devise of "the close in Kirton, now in the occupation of J. W." there being two closes in Kirton belonging to the testator both in the occupation of J. W. at the date of the will. (*Richardson v. Watson*, 4 B. & Ad. 799, E. C. L. R. vol. 24.)²

¹ *Howard v. Peace Soc.* 49 Me. 288; *Perkins v. Mathes*, 49 N. H. 113; *Bodman v. Tract. Soc.*, 9 Allen, 449; *Ingersoll v. Ingersoll*, 36 N. J. Eq. 127; *Vernor v. Henry*, 3 Watts 385; *Coleman v. Eberly*, 76 Penn. St. 197; *Porter's App.*, 94 Penn. St. 332; *Carson v. Hickman*, 4 Houst. 328; *Deaf and Dumb Institute v. Norwood*, 1 Busb. Eq. 68; *Stokely v. Gordon*, 8 Md. 496; *Hawman v. Thomas*, 44 id. 30; *Gass v. Ross*, 3 Sneed 214; *Burke v. Lee*, 76 Va. 386; *Hill v. Felton*, 47 Ga. 455; *Clark v. Clark*, 2 Lea, 682; *Brownfield v. Wilson*, 78 Ill. 467; *Doc d. Lowry v. Grant*, 7 U. C. Q. B. 125; *Campbell v. Campbell*, 14 id. 17; *O'Day v. Black*, 31 id. 38; *Lawrence v. Ketchum*, 28 U. C. C. P. 406; 4 Ont. App. 92; *Re Shaver*, 6 Ont. R. 312, where the erroneous part of a description was rejected on the evidence, distinguishing *Summers v. Summers*, 5 Ont. R. 110, where evidence of testator's *intention* to devise one lot by description of another was rejected as inadmissible.

In many American cases it is stated that parol evidence is admissible in all cases of latent ambiguity, such as misdescription (without any equivocation), &c. But it is conceived that this statement arises from an omission to observe the distinction between evidence of the state of the testator's property or family, or of his surrounding circumstances, in aid of the construction of the will, and direct evidence of the testator's intention. *Winkley v. Kaime*, 32 N. H. 268; *Tudor v. Terrell*, 2 Dana 47; *Deaf and Dumb Institute v. Norwood*, 1 Busb. Eq. 68; *Lanning v. Sisters of St. Francis*, 35 N. J. Eq. 392; *Allen v. Lyons*, 2 Wash. C. C. 475; *Newell's App.*, 24 Penn. St. 199; *Hawkins v. Garland*, 76 Va. 149; *John v. Barnes*, 21 W. Va. 498; *Townsend v. Townsend*, 25 Oh. St. 477; *Morgan v. Burrows*, 45 Wisc. 211; *Chambers v. Watson*, 60 Iowa 339.

² *McCall v. McCall*, 4 Rich. Eq. 453.

“Where the description of the thing devised, or of the devisee, is clear upon the face of the will, but upon the death of testator it is found that there are more than one estate or subject-matter of devise, or more than one person whose description follows out and fills the words used in the will:—as where the testator devises his manor of Dale, and at his death it is found that he has two manors of that name, South Dale and North Dale, or where a man devises to his son John and he has two sons of that name:—in each of these cases respectively parol evidence is admissible to show, which manor was intended to pass and which son was intended to take. (*Miller v. Travers*, 8 Bing. 244, E. C. L. R. vol. 21.)

What is not evidence of intention.—It is to be observed that evidence in the shape of sayings, &c., of the testator, may be, in certain cases, adduced to show in what sense he *habitually* used certain words, even where the description is not equivocal (provided the sense thus sought to be put on them does not contravene their ordinary and legitimate meaning): this being distinct from evidence adduced to show in what sense he used the words *on the particular occasion* of writing his will.

In *Duke of Leeds v. Amherst*, 9 Jur. 359, Lord Lyndhurst held that the fact of the testator having been accustomed to describe a particular picture belonging to himself as a *portrait*, might be admitted to show that it properly passed under that description in his will.

And where the description of a legatee is *inaccurate* but not equivocal, a *former will* may be admitted to show that the testator habitually called a certain person by the inaccurate description. (*Camoy's v. Blundell*, 1 H. L. C. *778.) Thus, where the bequest was to “Thomas Turner of Regency Square,” there [*11 being no Thomas Turner of Regency Square, but a *James Turner* of Regency Square, *surgeon*, and a Thomas Turner of Daventry, both of whom claimed the bequest, it was held that a former will in which the testator gave a legacy to *Thomas Turner* of Regency Square, *surgeon*, was admissible to show that he habitually misdescribed the surgeon of Regency Square as “Thomas,” and that he, and not Thomas Turner, was the legatee intended. (*Re Feltham's Trusts*, 1 K. & J. 528.) But in this case, if there had

been a Thomas Turner of Regency Square, though not a surgeon, the former will would not have been admissible to show that James Turner the surgeon was intended.

As to what constitutes an equivocal description.—The general test of an equivocal description is, that it must apply with entire propriety to *each* of the persons or things in question. A description which applies partly to one and partly to another of the persons or things in question, is not equivocal. . (Doe v. Hiscocks, 5 M. & W. 363.) Thus a devise to John Thomas Smith, there being a John Smith and also a Thomas Smith, is not equivocal with respect to them.¹

Descriptions, however, which are partly inaccurate are, or are considered as, equivocal, if the inaccurate part of the description applies to *none* of the persons or things in question, while the remaining description is equivocal with respect to them. (Doe v. Hiscocks, 5 M. & W. 363.) Thus a devise to John Thomas Smith is equivocal, if there be no Smith bearing the Christian name of Thomas, but two or more Smiths with the Christian name of John. In this case, the word "Thomas," which is inapplicable to *any* of the claimants, being rejected, the description John Smith remains, which is equivocal. So where the devise was to "Robert Careless, my nephew, the son of *Joseph* Careless," the testator having no brother named Joseph, but having two brothers each of whom had a son named Robert, the word "Joseph" was rejected, and *12] the description thus became equivocal. *(Careless v. Careless, 1 Mer. 384.) But a description which is *wholly* inapplicable to any of the persons or things in question, cannot be equivocal (Miller v. Travers, 8 Bing. 244): for in this case, when the inaccurate part of the description is rejected, nothing remains.²

Again, a description may be equivocal, which applies with propriety to each of the persons or things in question, although it

¹ Stokely v. Gordon, 8 Md. 509; Roy v. Rouzie, 25 Gratt. 599. But in Doe v. Roe, 1 Wend. 541, it was held that where two parts of a description apply respectively to two different properties, evidence of the testator's declarations might be admitted to show which property was intended.

² Tucker v. Seaman's Aid Soc., 7 Metc. 188; Re Cahn, 3 Redf. 31; Stokely v. Gordon, 8 Md. 507.

may apply with somewhat more propriety to one of them than to another.

Thus a devise to William Marshall is equivocal, there being two persons, one named William Marshall *simpliciter*, and the other William John Robert Blandford Marshall (*Bennett v. Marshall*, 2 K. & J. 740): although if no parol evidence were forthcoming to show which was the devisee intended, the testator would be presumed to mean the one called William Marshall *simpliciter*, rather than William John Robert Blandford Marshall (*ib.*). And it was said that if a man has two sons named John, speaking of John *simpliciter*, he would be presumed to mean the eldest; and that John Smith means John Smith the father rather than John Smith the son: but that both these descriptions are equivocal, and let in parol evidence of intention (*ib.*).

Similarly, it has been held that under a bequest to Miss Sanders, the *eldest* Miss S. would be presumed to be intended, if there were several at the date of the will (*Lee v. Pain*, 4 Hare 249): but this description would, it should seem, be equivocal.

A legacy to "The Clergy Society" was held to be equivocal, there being *no* society strictly so called, but several societies *popularly called* Clergy Societies. (*Re The Clergy Society*, 2 K. & J. 615.) Had there been a society properly bearing the name, it would of course have been entitled.

It is to be observed, that parol evidence of intention is *only* admissible to determine *which* of the persons or things in question was intended, and not (*e. g.*) to show that the words were used in a sense which would include more than one of them. In *Richardson v. Watson*, 4 B. * & Ad. 799 (E. C. L. R. vol. 24), [*13 where the equivocal description was "all that close in Kirton in the occupation of J. W." there being two closes each of which answered to that description, parol evidence was admitted to show *which* of the two closes was intended. The evidence went to show that the testator supposed the *two* closes to be in fact one close: but it was held that the evidence was admissible only to show that one or other was intended to pass, and not to show that *both* were intended to pass.

The evidence of intention is not excluded by the fact, that the will itself shows the existence of several persons or things each

answering to the equivocal description. (*Doe v. Needs*, 2 M. & W. 129.) Thus where the will contained a devise to George Gord the son of *John* Gord, another to George Gord the son of *George* Gord, and a third to George Gord the son of Gord: it was held that the third description was equivocal, and that parol evidence was admissible to show whether George Gord or John Gord was intended by it (*ib.*).

If the context shows decisively which of the persons or things in question was intended, no ambiguity arises, and evidence of intention will not be receivable (*Doe v. Westlake*, 4 B. & Ald. 57, E. C. L. R. vol. 6), where the devise was to "Matthew Westlake my brother, and Simon Westlake my brother's son," *i. e.*, my *said* brother's son.¹

But if the evidence from context is not conclusive, but furnishes an argument only, parol evidence will be admitted. (*Doe v. Allen*, 12 Ad. & Ell. 451, E. C. L. R. vol. 40.)

Declarations by the testator, not contemporaneous with the will, may be received as evidence of intention. (*Doe v. Allen*, 12 Ad. & Ell. 441, E. C. L. R. vol. 40.)

¹ *Ballantyne v. Turner*, 6 Jones Eq. 228.

CHAPTER I.

DESCRIPTIONS OF PROPERTY, TO WHAT PERIOD REFERABLE.

IN Wills made before Jan. 1, 1838, the rules are as follows:—

1. *Freeholds.*

RULE. Every devise of freehold lands speaks from the date of the will, and describes only the land then belonging to the testator. (*Brouncker v. Coke*, Holt 248.)¹

Thus a devise of “all my lands,” or, “all my lands in A.,” neither passes, nor is construed as intending to pass, lands answering to the description acquired by the testator after the date of the will. But,

RULE. Any codicil duly executed has, *primâ facie*, the effect of republishing the will, so as to make the will speak from the date of the codicil, and include lands acquired before the date of the codicil. (*Acherly v. Ver-*

¹ Apart from statutory changes this rule has prevailed generally throughout the United States. *George v. Green*, 13 N. H. 521; *Haven v. Foster*, 14 Pick. 537; *Brewster v. M'Call*, 15 Conn. 289; *Green v. Dikeman*, 18 Barb. 537; *Quinn v. Hardenbrook*, 54 N. Y. 83; *Lanning v. Cole*, 2 Halst. Ch. 105; *Gardner v. Gardner*, 37 N. J. Eq. 487; *Girard v. City*, 4 Rawle, 333; *McElfresh v. Schley*, 2 Gill. 198; *Allen v. Harrison*, 3 Call 289; *Jiggets v. Maney*, 1 Murph. (N. C.) 264; *Drayton v. Rose*, 7 Rich. Eq. (S. C.) 328; *Jones v. Shoemaker*, 35 Ga. 153; *Attwood v. Beck*, 21 Ala. 625; *Roberts v. Elliot*, 3 Monr. 396.

non, Com. Rep. 381 ; *Goodtitle v. Meredith*, 2 M. & Sel. 15.)¹

The execution of the codicil has this effect on the construction of the will, although the codicil relates only to personal estate. (*Piggott v. Waller*, 7 Ves. 98.) And it is not necessary that the codicil should purport to confirm the will. (*Re Earl's Trusts*, 4 K. & J. 673.)

Thus, if the testator by his will devises all his lands in the parish of A. to B., and by a codicil ten years *afterwards
*15] gives a legacy to C., the effect of the codicil will be to make the devise to B. in the will include any lands in the parish of A. which may have been acquired by the testator between the dates of the will and codicil.

Exceptions—The identical property referred to.—But an exception to this rule exists in certain cases, where the testator, by referring to the devise in the will, is held to show an intention to deal only with the *identical* property devised by the will, and no more. (*Bowes v. Bowes*, 2 B. & P. 500 ; *Hughes v. Hosking*, 11 Moo. P. C. C. 1.)

“ That a codicil makes the will speak as of its own date, must be admitted to be the general rule ; but it may, nevertheless, be framed in such a manner as to operate as a partial republication only, or to work no republication at all. If, for example, I leave by will all my farms at Dale to A., and having afterwards acquired another farm at Dale, I say in a subsequent codicil, ‘ I hereby give to B. the identical farms which my will has given to A., it would obviously be doing violence to the language to construe these words as carrying the newly-acquired farm.’ ” (*Monypenny v. Bristow*, 2 Russ. & My. 132.)

Thus, where the testator, having by his will devised all his real estate to trustees, by a codicil revoked the devise so far as related to two of the trustees, and devised *the said lands* to the remaining

¹ *Wait v. Belding*, 24 Pick. 134 ; *Van Kortland v. Kip*, 1 Hill (N. Y.) 593 ; *Jack v. Schœnberger*, 22 Penn. St. 416 ; *Hatch v. Hatch*, 2 Hayw. (N. C.) 32 ; *Drayton v. Rose*, 7 Rich. Eq. 333 ; *Jones v. Shoemaker*, 35 Ga. 154 ; *Brownill v. De Wolf*, 3 Mason (C. C.) 494 ; *Reynolds v. Shirely*, 7 Ohio 363.

trustees, it was held that the after-acquired lands did not pass. (*Bowes v. Bowes*, 2 B. & P. 500.)

So where the testator by the codicil, reciting that he had by his will devised all his estates in the town of Birmingham to A., revoked the devise and devised all and every his *said* estate to B. (*Monypenny v. Bristow*, 2 Russ. & My. 117.)

But in a case similar to the above, if the testator go on to say, "and in all other respects *I confirm my said will*," it seems that the latter words take the case out of the authority of *Bowes v. Bowes*, and bring down the description of the will to the date of the codicil. (*Doe v. Walker*, 12 M. & W. 591.)¹

* *Codicil does not revive a revoked Devise.*—The effect of the execution of a codicil under the above rule, is to *extend* [*16 the description contained in the will to other property besides that previously comprised in it; but if, immediately before the date of the codicil, there were no property to which the description in the original will applied, *i. e.*, if the property originally comprised in the devise had been withdrawn from its operation, it does not appear that the codicil would have the effect of reviving the devise thus revoked, so as to cause after-acquired lands to pass by it. Thus, suppose the testator by the will to devise all his lands in the parish of A., and subsequently to sell all his lands in that parish, afterwards to acquire other lands in that parish, and finally to make a codicil to the will: it does not seem that the codicil would have the effect of causing the description in the will to apply to such after-acquired lands. "It is true that a codicil republishing a will makes the will speak as from its own date, for the purpose

¹ But in *Haven v. Foster*, 14 Pick. 541, where the original devise was of "half of all my estate to A.," and by a codicil the said devise was revoked, and to B. was devised "all and every part of the estate which in said will was given to" A., it was held that lands acquired between the date of the will and the codicil passed. From this it would seem that a mere repetition of, or reference to, the terms of the description in the original devise, does not confine the devise to the same lands. From the fact that the *devise* is expressed to be identical, it does not follow that the *lands* to be included therein are to be considered identical also; though perhaps this principle should be applied with caution to any but such general devises as that above mentioned, that is, of "all my estate," or a certain proportion of "all my estate."

of passing after-purchased lands, but not for the purpose of reviving a legacy revoked, adeemed, or satisfied. *The codicil can only act upon the will as it existed at the time:* and at the time, the legacy revoked, adeemed, or satisfied formed no part of it. Any other rule would make a codicil, merely republishing a will, operate as a new bequest." (*Powys v. Mansfield*, 3 Myl. & Cr. 376.)

2. Leaseholds.

In a will made before 1838, a devise of "all my freehold estates," can only mean, "all I possess now, *i. e.*, at the date of the will," the testator having no power to devise by anticipation freehold estates which he might acquire subsequently. But as the testator could, by a will made before 1838, bequeath leaseholds for years which he might acquire after the date of it, a gift of "all my leasehold estates" in such a will is ambiguous: it may mean either "all I now possess," or "all I shall possess at my death." So a gift of "my leasehold premises at A." may mean "the lease I now possess of premises at A.," or "the leasehold *17] interest which I may have at my death *in the premises at A., which I now hold on lease." But in the absence of a contrary intention, the rule is (in wills made before Jan. 1, 1838), that—

RULE. A bequest of leaseholds *primâ facie* speaks from the date of the will, and does not include after-acquired leaseholds, nor a renewed lease. (*James v. Dean*, 11 Ves. 383.)¹

Thus, if the testator bequeaths "the premises I hold on lease at A.," and after the date of the will takes a renewed lease of the same premises, such after-acquired lease does not, *primâ facie*, pass under the bequest.

"I agree that in *Coppin v. Fernyhough*, 2 Bro. C. C. 291, and *Hone v. Medcraft*, 1 Bro. C. C. 260, this general principle is established: that where there is a general bequest in the terms 'all my leasehold estates,' and the testator afterwards surrenders

¹ *Warner v. Van Swearingen*, 6 Dana (Ky.) 202.

and takes a new lease, that is a revocation. But it depends upon the context of the whole will, whether that general doctrine is to be applied. A leasehold interest for years may be disposed of by a will made before the testator acquired that interest. But the general doctrine is, that you must show that intention. This will upon some parts, particularly the last bequest, must be interpreted to pass the future renewed lease." Per Lord Eldon (*James v. Dean*, 11 Ves. 390).

3. *General Personal Estate.*

With respect to the general personal estate, which consists of fluctuating particulars, and is not ascertained till the death, a different rule prevailed; and (in wills made as well before as after Jan. 1, 1838),—

RULE. A bequest of "all my personal estate," or "the residue of my personal estate," means the personal estate existing at the death of the testator.¹

The rule was the same as to a bequest of "all my household goods." (*Masters v. Masters*, 1 P. Wms. 424.)

But this rule did not, in wills made before Jan. 1, 1838, extend to other bequests of personal estate.

*Thus, where a testator bequeathed "as many of my shares in the Grand Junction Canal Navigation as I shall [*18 leave children me surviving or born in due time after my death," assigning one share to each such child, only the shares existing at the date of the will (though less than the number of children) were held to pass. (*Miller v. Little*, 2 Beav. 259.) So a bequest of "all the property that I possess in the public funds" was held to mean "all I now possess," i. e., at the date of the will. (*Cockran v. Cockran*, 14 Sim. 248.)

¹ *Canfield v. Bostwick*, 21 Conn. 553; *Garrett v. Garrett*, 2 Strobb. Eq. 283; *Dennis v. Dennia*, 5 Rich. L. 468; *Warner v. Van Swearingen*, 6 Dana 196.

II. NEW LAW.

In wills made or republished on or after Jan. 1, 1838, the 24th section of the Wills Act establishes, with respect to devises and bequests generally, the rule that,—

RULE. Descriptions of real or personal estate, the subject of gift, *primâ facie* refer to and comprise the property answering to the description at the death of the testator. (Stat. 1 Vict. c. 26, s. 24.)

Thus a devise of “all my freehold lands,” or “all my leasehold estates” (*Lady Langdale v. Briggs*, 3 Sm. & G. 246, 2 Jur. N. S. 982), passes after-acquired freeholds or leaseholds. So a bequest of “my New 3½ per Cent. Annuities” passes all the stock of that description possessed by the testator at his death. (*Goodlad v. Burnett*, 1 K. & J. 341.)¹

¹ Statutes abolishing or modifying the rule of common law in respect to the time from which devises of freeholds speak have been passed in almost every state and in Ontario.

In New Jersey, Maryland, Virginia, North Carolina, South Carolina, Georgia, Kentucky, California, and Dakota, the rule of construction contained in the text is adopted in terms or in substance. In some of these states, as in England, the rule of construction applies only to wills made or republished after the act went into effect; that is, in Virginia after July 1, 1850: Code 1873, tit. 33, ch. 118, § 11; *Raines v. Barker*, 13 Gratt. 128; in West Virginia, R. S. 1879, Ch. 201, § 1; in North Carolina after February 8, 1844: R. S. 1873, Ch. 119, § 6; South Carolina, Gen. Stat. 1882, § 1850; in Georgia after January 1, 1861: *Gibbon v. Gibbon*, 40 Ga. 576; Code ed. 1882, § 2461; and in Kentucky after July 1, 1852; Gen. Stat. 1881, Ch. 112, § 2, § 16; but in Maryland by its terms the Act of 1849 applies to all wills taking effect after June 1, 1850, and to all wills taking effect after February 23, 1850, if an intention to dispose of after-acquired real estate appear therein: *Alexander v. Worthington*, 5 Md. 478; *Magruder v. Carroll*, 4 Id. 346; *Wilson v. Wilson*, 6 Id. 488. But in the re-enactment of this provision by the Revised Code of 1860, the section which extended the operation of the rule to wills made before June 1, 1850, was omitted, and since the date of that Code the rule extends only to wills made after June 1, 1850: *Johns v. Hodges*, 33 Md. 515. The Revised Code of 1878, Art. 49, § 15, re-enacts without change the provision of the Code of

Stat. 1 Vict. c. 26, s. 24. "And be it further enacted, that every will shall be construed, with reference to the real estate

1860. In New Jersey (R. S. 1877, p. 1248, pl. 24) the act applies to all wills taking effect after March 12, 1851; and in South Carolina to wills taking effect after Dec. 21, 1858; *Bell v. Towell*, 18 S. C. 94. In Dakota the application of the act is unlimited; Rev. Civ. Code, 1883, § 734; and so also in California Civ. Code, 1876, § 1331.

In the other states, while the common law rule is not perhaps wholly abolished, it is nevertheless very materially modified and abridged in its operation.

In New York (by the Code taking effect January 1, 1830) R. S. 1875, part 2, Ch. 6, tit. 1, § 7, Alabama (by the Code taking effect January 17, 1853) Code of 1876, § 2277, and Indiana (by the Revised Code of 1843) R. S. 1881, § 2567, the rule is, that a devise of all real estate or in terms denoting an intention to dispose of all real estate, shall pass all real estate owned by the testator at the time of his death. In Pennsylvania (Act 8 April, 1833), the rule is that a general devise of real estate shall pass after acquired real estate unless an intention appear to the contrary. It is perhaps doubtful whether this phrase "general devise" means a devise of all real estate, thus making the rule identical with that of New York, etc., or whether it would include all devises in terms of general description, such as all real estate of a particular kind or in a particular place, which would make the rule wider in its operation than that of New York. *Pond v. Bergh*, 10 Paige 149; *Byrnes v. Baer*, 86 N. Y. 210.

In Indiana it has been held that the statute applies only to cases in which the will purports to devise all the real estate equally or in proportions among all the devisees, and not to cases of residuary devises following devises of particular pieces of property: *Bowen v. Johnson*, 6 Ind. 111. In New York, however, it would appear to apply to devises of all real estate not otherwise disposed of: *Brown v. Brown*, 16 Barb. 569; *Youngs v. Youngs*, 45 N. Y. 254.

These statutes give a new rule of construction and therefore apply only to wills made after the respective acts took effect: *Parker v. Bogardus*, 1 Seld. 311; *Gable v. Daub*, 40 Penn. St. 223.

Literally construed, these statutes give power to dispose of after-acquired estates only by means of a certain kind of devise, viz., a general devise or a devise of all real estate, and they not only give the power but also a rule of construction by which an intention is presumed to execute it by these devises. It would seem reasonable that if the statutes in the cases mentioned both grant the power and presume the intention, in cases where the intention is plain, the power should not be wanting. Accordingly in *Pond v. Bergh*, 10 Paige 149, Chancellor Walworth was of opinion that while a simple devise of all property of a particular kind or in a particular place would not come within the statute, yet if there was a plainly expressed intention to dispose of all property of that description, or in in that place, at the time of the

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."

testator's death, it would be clearly within its intent and spirit, though not within its letter. If this, then, be a correct view of these statutes, their effect is the same as those included in the class next mentioned.

In Ontario, a will made before, and not re-executed, republished, or revived after Jan. 1, 1874, by any person dying after March 6, 1884, and which 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, passes after-acquired land; R. S. O. cap. 106, sec. 3. *Doe d. Heilliwell v. Hugill*, 6 U. C. Q. B. O. S. 241; but in such a will a mere general devise of all the testator's real and personal property does not carry after-acquired real estate: *Whately v. Whately*, 14 Grant Ch. (U. C.) 430. By sections 8 and 26 of the same statute, the will of every person dying on or after Jan. 1, 1869, 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 appears by the will; and the presumption is that the testator intended to pass all his estate as he has it at his death unless the contrary intention appears by the will; *Plumb v. McGannon*, 32 U. C. Q. B. 8; *Beilstein v. Beilstein*, 27 Grant Ch. (U. C.) 41. Under a devise of all the remainder of the testator's real estate which specified the parcels of which it was composed, and which contained a correct enumeration of them at the date of the will, it was held that the devisee did not take after-acquired property; the contrary intention being evidenced by the particular descriptions; *Crombie v. Cooper*, 24 id. 470. In *Vansickle v. Vansickle*, 1 Ont. R. 107, the testator devised eighty acres "except so much thereof as I may have sold and conveyed." The portion which he had, at the time of making his will, sold and conveyed, he subsequently acquired. *Ferguson, J.*, held that the after-acquired portion did not pass, inasmuch as the expressions used by the testator amounted to a specific description of the portion owned by him at the date of the will. The Court of Appeal were equally divided, two judges holding with *Ferguson, J.*, on that point; and two holding that the will, speaking from the death, included the whole eighty acres, for at the death none had been sold or conveyed; *Vansickle v. Vansickle*, 9 Ont. App. 352. *Crombie v. Cooper*, though not cited to the Court of Appeal was practically affirmed in principle.

In Alabama an after-acquired interest in an estate specifically devised will pass by will; Code of 1876, § 2277.

In the remaining states the statutes are as follows: (1) Those which declare that after-acquired real estate shall pass by a devise when such appears to have been the intention of the testator, or (2) in which power is simply given to dispose of after-acquired real estate. The states in which such statutes have been passed, with dates at which the respective statutes took effect

The words "with reference to the real and personal estate comprised in it," mean "so far as the will comprises dispositions of

are as follows: Maine, October 22, 1840, R. S. 1871, Ch. 74, § 5; New Hampshire, March 1, 1843, Gen. Laws, 1878, Ch. 193, § 2; Vermont, November 19, 1839, R. S. 1880, § 2040; Massachusetts, April 30, 1836, Pub. Stat. 1882, Ch. 127, § 25; Rhode Island, July 1, 1857, Pub. Stat. 1882, p. 471, § 1; Delaware, January 1, 1853, Rev. Code, 1874, § 1668; Ohio, October 1, 1840, R. S. 1880, § 5969; Tennessee, 1842, Milliken and Vortrees' Code, 1884, § 3035; Michigan, September 1, 1838; How. Ann. Stat. 1882, § 5787; Wisconsin, January 1, 1850, R. S. 1878, § 2279; Minnesota, 1851, Stat. at Large, 1873, Ch. 35, § 3; Iowa, 1851, McL. Ann. Stat. 1880, § 2323; Kansas, March 2, 1858, Comp. Laws, 1879, § 6165; California, April 10, 1850, Civ. Code, 1872, §§ 1331-3; Connecticut, June 2, 1830, Gen. Stat. 1875, p. 368; Florida, November 20, 1828; Mississippi, 1821, Rev. Code, 1880, § 1262; Texas, January 28, 1840, R. S. 1879, § 4858; Illinois, 1845; Missouri, 1807, R. S. 1879, § 3960; *Smith v. Hutchinson*, 61 Mo. 83; see *Applegate v. Smith*, 31 id. 169; *Liggart v. Hart*, 23 id. 137; Nevada, Comp. Laws, 1873, § 831; Nebraska, Comp. Stat. 1881, Ch. 23, § 125. And in Virginia and Kentucky similar statutes were in effect from January 1, 1785, and March 1, 1797, respectively, to the respective dates of the passage of the statutes before mentioned as being in force now in those states: *Warner v. Swearingen*, 6 Dana 199; *Marshall v. Porter*, 10 B. Mon. 2; *Allen v. Harrison*, 3 Call. 304.

These statutes give no new rule of interpretation, and have therefore in most of the states been held to apply to all wills taking effect after the date of the act: *Loveren v. Lamprey*, 2 Foster (N. H.) 447; *Cushing v. Alwyn*, 12 Metc. 174. But in *Brewster v. M'Call*, 15 Conn. 290, the statute in that state was held to apply only to wills made after the act.

Under these statutes an express declaration of an intention to dispose of after-acquired property is not necessary. It is sufficient if it can be inferred from the terms of the will: *Blaisdell v. Hight*, 69 Me. 306; *Brimmer v. Sohier*, 1 Cush. 133; *Wynne v. Wynne*, 2 Swan (Tenn.) 407. It has therefore been frequently held that a devise of all real estate manifesting an intention not to die intestate of real estate, will pass after-acquired estates; *Loveren v. Lamphrey*, 2 Foster, 444; *Brimmer v. Sohier*, 1 Cush. 133; *Cushing v. Alwyn*, 12 Metc. 174; *Pruden v. Pruden*, 14 Ohio St. 253; *Wynne v. Wynne*, 2 Swan 407; *Henderson v. Ryan*, 27 Texas 674; *Willis v. Watson*, 4 Scam. (Ill.) 67.

But on the contrary, under the old statutes in Virginia and Kentucky, it was held that the intention must be expressed or inferred from the language of the will as the actual intention, and that a devise of *all real estate* speaks from the date of the will only: *Allen v. Harrison*, 3 Call. 304; *Smith v. Edrington*, 8 Cranch 66; *Warner v. Swearingen*, 6 Dana 199; *Marshall v. Potter*, 10 B. Mon. 2.

real and personal estate.” (Per Turner, L. J., *Lady Langdale v. Briggs*, 2 Jur. N. S. 996.)

*19] **Effect of Sect. 24 on the Execution of Powers.*—This section will have an important effect in causing devises and bequests to operate as an execution of powers of appointment *created after the date of the will*. We must distinguish between *general* and *special* powers of appointment, the former of which are affected by the 27th section of the Wills Act (post, Chap. II.) as well as the 24th, while the latter are affected by the 24th section only.

(a.) As regards general powers of appointment, the effect of the 24th and 27th sections combined will be, it appears, to make all *general* devises and bequests operate as an execution by anticipation of all general powers vested in the testator at the time of his death, although created by an instrument subsequent in date to the will, unless the language of the power be such as to forbid its being exercised by anticipation. (*Stillman v. Weedon*, 16 Sim. 26; so *Thomas v. Jones*, 2 John. & H. 475.)¹

Thus, if by a deed subsequent to the date of the will, property be limited “upon such trusts as A. (the testator) shall by deed or will appoint,” the will may operate on the property subject to the power, the word “shall” not containing any emphatic reference to *future* time. But if the property be given on such trusts as the testator “shall *hereafter* appoint,” the power cannot, it appears, be executed by an antecedent will. (*Stillman v. Weedon*, 16 Sim. 26.)

(b.) It appears from the above case of *Stillman v. Weedon*, that even special powers of appointment created after the date of the will may be exercised by a bequest contained in the will, if the bequest contain a sufficient description of the particular property afterwards made the subject of the power to show that the testator *had the subject of the power in view*, which is the test of execution as regards special powers. (See post, Chap. II.) In *Stillman v. Weedon*, 16 Sim. 26, the testator by a will made in 1845, be-

¹ *Boyes v. Cook*, L. R. 14 Ch. D. 53. Where a general power is given to a number of persons and the survivor of them, a general devise made during the joint lives by the ultimate survivor will operate as an execution of the power. *Thomas v. Jones*, 2 John. & H. 475.

queathed to his children "all the effects due to me from the estate of T. Hedges." The testator subsequently by deed settled the effects due to *him from the estate of Hedges in trust for [*20 himself for life, with remainder to his children as he should *by deed or will appoint*. It was held that the effect of the 24th section being to make the will speak from the death, and the property comprised in the settlement being distinctly referred to, the will operated as an execution of the after-acquired special power of appointment contained in the settlement.

Exceptions to Sect. 24.—The exceptions to the rule established by the 24th section will fall under two heads:

(1.) *The will refers to its own date.*—Where the date of the will as opposed to the death, is distinctly referred to. (*Cole v. Scott*, 1 Mac. & G. 518.)

Thus if the testator devise "all that my messuage with the buildings and lands belonging thereto *now occupied* by me at W.," it is clear that a close of land taken into occupation by the testator after the date of the will will not pass, notwithstanding the 24th section. (*Hutchinson v. Barron*, 6 Hurlst. & Nor. 583.)

In *Hepburn v. Skirving*, 4 Jur. N. S. 651, a bequest of "all the shares which I *now* possess in the Union Bank at C.," was held to pass after-acquired shares: but this seems doubtful.

In *Doe v. Walker*, 12 M. & W. 591, it was held that under a devise of "all the estates of which I *am* seised in the parish of B.," after-acquired lands passed, the word "am" not containing any emphatic reference to present time. (*Lord Lilford v. Powys Keck*, 30 B. 300).¹

¹ In *Castle v. Fox*, L. R. 11 Eq. 553, Malins, V.-C., dissents from the decision in *Cole v. Scott*. He says (p. 554), "The word 'now' does not occur here, and therefore it is not necessary for me to decide in opposition to that case; but I have no hesitation in saying that if the word 'now' had occurred here, I should have come to the same conclusion that I now do and decided in opposition to *Cole v. Scott*."

In *Cole v. Scott* the testator made a distinction between property owned at the time of making his will and property subsequently to be acquired. As to freeholds and copyholds the words were "now vested in me;" but as to leaseholds is added "or shall be vested in me at the time of my death." The words "now owned" or other like words denoting present possession will

(2.) *Specific description*.—The operation of the rule will be excluded by a sufficient particularity in the description of the specific subject of gift, showing that an object in existence at the date of the will was intended. If the thing intended be *individualized* by a special description, as if the gift be of “my *brown* horse,” or “that freehold estate *which I purchased* of Mr. B.” (*Emuss v. Smith*, 2 De G. & Sm. 722), the description shows that it must have been intended to refer to the state of things existing at the date of the will, and not at the death of the testator.

*21] *But the word “my” alone is insufficient to show a contrary intention: for a gift of “my 3 per Cent. Consols,” may mean “the 3 per Cent. Consols which I may possess at my death.” “When a bequest is of that which is generic, of that which may be increased or diminished, then I apprehend the Wills Act requires something more on the face of the will for the purpose of indicating a contrary intention, than the mere circumstance that the subject of the bequest is designated by the pronoun “my.” (Per Wood, V.-C., *Goodlad v. Burnett*, 1 K. & J. 341.)¹

not confine a devise or bequest to property owned at the date of the will, without aid *from the context*: *Wagstaff v. Wagstaff*, L. R. 8 Eq. 230; *Dickinson v. Dickinson*, L. R. 12 Ch. D. 22. The question is whether they were used with the intention of limiting the description, or of merely stating a fact which may be rejected as surplusage, and the latter is the *prima facie* construction: *Garrison v. Garrison*, 5 Dutch. (N. J.) 153; *Roney v. Stiltz*, 5 Whart. 385.

¹ In re Gibson, L. R. 2 Eq. 672.

The same principles are involved in this question of special description as in that of the time of possession. If the testator appears to have intended to make the particulars he refers to, essential parts of his description the devise will be confined to the property so described, otherwise they will be rejected as surplusage. Thus a devise “of all that messuage partly leasehold and partly freehold,” will pass a subsequently purchased reversion in the premises: *Miles v. Miles*, L. R. 1 Eq. 246; and see *Dunlap v. Dunlap*, 74 Me. 402.

A general devise, followed by a particular enumeration, which embraces all the real estate owned by the testator at the date of the devise, will include after-acquired land. Ex parte *Champion*, 1 Busb. Eq. 246; but a devise of “my part” of a tract of land, though at his death the testator owned the whole tract, will pass only the part he owned at the date of the will; *Scaife v. Thomson*, 15 S. C. 337; and a devise of the testator’s undivided interest in the estate of his father will not pass after-acquired real estate: *Sharpe v. Allen*, 5 Lea, 81.

In *Webb v. Byng*, 1 K. & J. 580, the devise was of "my Quendon-Hall estates in Essex;" which was held to be "an arbitrary designation which had acquired a particular meaning in the mind of the testatrix," and for that reason not to include certain small properties acquired after the date of the will, though merely additions to the main subject of the devise. But it would seem that the meaning attached to the term "my Quendon-Hall estates" by the testatrix might well include prospectively such additions as might afterwards be made by her to the subject of the devise, as in the case of any collective bequest, *e. g.*, of "my household goods," or "my furniture."

DEVISES AND BEQUESTS, WHEN OPERATING IN EXECUTION OF
POWERS.

TESTAMENTARY dispositions do not, as might be supposed, operate by force of all powers enabling the testator to make the dispositions in question. If the will does not purport to be in execution of the particular power, or of all powers vested in the testator, it is a rule that (subject to the exception introduced by the 27th section of the Wills Act, hereafter mentioned),—

RULE. Devises and bequests *primâ fucie* do not include property not the testator's own, but over which he has a power of disposition. (Clere's Case, 6 Co. 17, *b*.; Andrews v. Emmot, 2 Bro. C. C. 297; Webb v. Honnor, 1 J. & W. 352; Hougham v. Sandys, 2 Sim. 95.)¹

Thus a gift of "all my real estate" or "all my personal estate," will not include real or personal estate settled on the testator for life, with remainder as he should by deed or will appoint, and in default of appointment for his children.

"To execute a power there must be a direct reference to it, or a clear reference to the subject, or something upon the face of the will or independent of it some circumstance, which shows that the testator could not have made that disposition without having intended to comprehend the subject of his power." (Per Lord Alvanley, 3 Ves. 300.)

"A donee of a power may execute it without referring to it, or taking the slightest notice of it, provided the *intention
*23] to execute it appear. . . . Where, however, the power is

¹ Burleigh v. Clough, 52 N. H. 267; Johnson v. Stanton, 30 Conn. 303; Hollister v. Shaw, 46 id. 248; Wetherill v. Wetherill, 18 Penn. St. 266; Bingham's Appeal, 64 id. 349; Davis v. Vincent, 1 Houst. 426; Mory v. Mitchell, 18 Md. 241; Collier's Will, 40 Mo. 329.

not referred to, the property comprised in it must be mentioned, so as to manifest that the disposition was intended to operate over it; the donee must *do such an act as shows that he has in view the thing* of which he had a power to dispose. (1 Sugd. Pow. 385, 6th ed.)¹

Exception. The Property referred to.—But if the property subject to the power be *sufficiently described*, so that it is clear that the testator had in view the subject of the power, the devise or bequest will operate as an execution of the power.

Thus, in *Re David's Trusts*, 1 Johns. 495, where the description was, "I bequeath to A. all the residue of my property, to be found in the Three and a Half per Cent. Reduced Bank Annuities (now reduced to Three and a Quarter per Cent.), and all other property whatsoever and wheresoever," and the testatrix had no stock of her own at the date of the will, or at any time afterwards, the stock in question, over which the testatrix had a power of appointment, was held to pass.

In *Innis v. Sayer*, 3 Macn. & G. 606, the testatrix having a power of appointment over several sums of stock, but having no stock of her own at the date of the will or at any time afterwards, bequeathed to one charitable institution "1000*l.* in the 3 per Cent. Consols," to another "500*l.* in the 3 per Cent. Consols," etc., and then added, "*the remainder* in the Three per Cents., and three separate sums in the New 3½ per Cents., with 100*l.* a year Long Annuities, and any other property I may die possessed of, I leave to my brothers." It was held that all the legacies were specific gifts out of the stock subject to the power.

In *Lownds v. Lownds*, 1 You. & Jer. 445, the property subject to the power being the sum of 2500*l.* in the funds, the testator by the will directed 500*l.* to be sold out of the funds, and directed "*the* 2000*l.* to remain in the funds:" it was held that the power was executed.

¹ In Massachusetts it is held that a general devise or bequest will operate in execution of a power, if there be nothing to show a contrary intention: *Amory v. Meredith*, 7 Allen 397; *Bangs v. Smith*, 98 Mass. 273; *Willard v. Ware*, 10 Allen 267.

Where a testatrix having a power of appointment over a leasehold estate and certain sums of stock, bequeathed *to A. all the property she possessed at her decease except 50l. of her Bank Stock which she gave to her executors, the will operating as an execution of the power as to the stock was held to execute the power, also as to the leasehold estate. (*Walker v. Mackie*, 4 Russ. 76.) But this case was disapproved of in *Hughes v. Turner*, 3 Myl. & K. 697.

In some cases, however, the language of the whole will taken together, may give to the whole will the character of an appointment under the power. (*Hunloke v. Gell*, 1 Russ. & My. 515; *Churchill v. Dibben*, 1 Sugd. Pow. 407, 6th ed.)

What is not a sufficient Description.—A bequest of a sum of stock of the same description as that subject to the power is not a description of the property subject to the power, so as to show an intention to execute the power, but is a mere general legacy. (*Nannock v. Horton*, 7 Ves. 391.) There the bequest was “I give 200l. 3 per Cent. Consols;” Lord Eldon said, “That sum is so given that it cannot be disputed, that if when he died he had not had any stock, but had other personal estate, that stock must have been purchased for the legatee. It is not specific. It would operate only as a direction to purchase stock, if he died without any stock; and it is very difficult to say, that what would amount to that direction in a will is to be construed into a gift of that which was not his to give, but over which he had a power.” (7 Ves. 399.)¹

¹ Where the testatrix had a power of appointment over certain Three per Cent. Consols, and bequeathed all the money belonging to her in the Three per Cent. Consols or in any other stocks or funds of Great Britain and all other moneys she might die possessed of, and she had no stock at the time of her making her will, or afterwards, except the consols, it was held that the power was executed. In *re Gratwick's Trusts*, L. R. 1 Eq. 177. But in *Mattingley's Trusts*, 2 Jo. & H. 427, where the words of the will were “as to all my money in the funds and all the residue of my personal estate, I bequeath,” &c., and the testator had no money in the funds, except that he had power of appointment over certain consols, it was held the power was not executed. V.-C. Wood held that the test was whether the words would include after-acquired property.

Identity of amount.—And the gift by will of legacies identical in amount with the fund subject to the power, does not in general show an intention to execute the power.

Thus in *Jones v. Tucker*, 2 Mer. 533, where the testatrix having power by will to appoint the sum of 100*l.*, gave “the sum of 100*l.* to A.,” the power was held not to be executed; and an inquiry to show that the testatrix had no property of her own was not allowed.

So in *Davis v. Thorns*, 3 De G. & Sm. 347, where the fund subject to the power was 1000*l.*, and the testator bequeathed legacies amounting together to 1000*l.*, the power was held not to be executed. “According to authority, the circumstances of legacies being identical in *amount with a fund subject to a power, *25] and of the insufficiency of the donee’s own property to answer the bequests given by the will, are not enough to raise more than a conjecture, and therefore not enough to form grounds of judicial determination.” (*Davis v. Thorns*, 3 De G. & Sm. 347.)

These, however, were even sums: if the fund subject to the power were fractional, as (*e. g.*) 1666*l.* 6*s.* 8*d.* 3 per Cent. Consols, and the will contained a bequest of that particular sum, qu.: whether the coincidence in amount might not sufficiently demonstrate the fund subject to the power as being in the contemplation of the testator.¹

2. *Denn v. Roake.*

The rule that devises and bequests do not operate in execution of powers is, however, qualified, as regards real estate, by another rule, viz:—

RULE. . If a testator devise “all his lands,” or “all his lands in A.,” or “all his real estate,” and have at the time of the devise no lands of his own answering to the

¹ In *White v. Hicks*, 33 N. Y. 387, and *Andrews v. Brumfield*, 32 Miss. 108, it was held that an intention to execute a power may be gathered from the condition of the testator’s personal estate at the time of making his will by comparing it with the dispositions made in the will, and the more especially when the will is made *in extremis*.

description, lands over which he had a power only will pass by the devise. *Standen v. Standen*, 2 Ves. jun. 589; *Denn v. Roake* (H. L.), 6 Bing. 475, E. C. L. R. vol. 9.)¹

“If a will contain a devise of all the testator’s lands generally, and he has some lands upon which the will may work by his interest, the law will attribute the will to his interest; and land of which he has only a power to devise will not pass. So if the will be of all his lands in a county or place named; and he has lands of his own therein. On the other hand, if the testator has no lands, or none in the county or place named, upon which the will may work by his interest, there the law will attribute the will to his power, and will infer that he intended to execute his power: because if that be not done, the will will be void, either wholly or so far as respects the county or place named.” (*Denn v. Roake*, 5 B. & C. 732, E. C. L. R. vol. 11.)

Leaseholds.—The rule in *Denn v. Roake* has been held *26] *to apply to bequests of leaseholds for years. (*Grant v. Lynam*, 4 Russ. 292.) Thus if a testator having no leaseholds of his own, but having a power of appointment over leaseholds, bequeaths “all my leasehold property,” the leaseholds subject to the power pass. (*Ib.*)

The rule in *Denn v. Roake* is unaffected by the Wills Act, and applies (as regards special powers of appointment) to wills made or republished on or after January 1, 1838. (*Lake v. Currie*, 2 D. M. & G. 547.) “To hold that cases which before the Statute would have been an execution are not so now, would be contrary to the whole scope of the Act.” (*Ib.*)

Power partially executed.—It has been held that in cases where the will, by the operation of the rule in *Denn v. Roake*, is construed as referring to part of a subject, or to some of many subjects, over which a power of appointment extends, that circumstance is not sufficient alone to cause the will to operate as an execution of the power as to such parts or such subjects as are

¹ *Pepper’s Will*, 1 Pars. Sel. Eq. Ca. (Pa.) 441.

not referred to. (*Lewis v. Llewellyn*, T. & R. 104; *Hughes v. Turner*, 3 My. & K. 666.)¹

In *Lewis v. Llewellyn*, T. & R. 104, the testator having a power of appointment over freehold and copyhold estate, and having freehold estates of his own, but not copyhold, devised all his freehold and copyhold estates. The devise was held to operate as an execution of the power as to the copyholds, but not as to the freeholds.

So in *Napier v. Napier*, 1 Sim. 28, where the testator devised all his lands in nine parishes, having no lands of his own in three of them, it was held that lands over which he had a power of appointment in those three parishes passed by the devise, but that lands subject to the same power in another parish, in which the testator had lands of his own, did not pass by it.

Will of Feme Covert.—It has been contended that as a married woman has no general power of testamentary disposition, any devise or bequest made by her must, upon the principle of *Denn v. Roake*, be construed to pass property over which she had a power of appointment: it being presumed (unless the contrary were shown) that she had no property of her own on which the will could operate. It seems to be established, however, by the cases of *Lovell v. Knight*, 3 Sim. 275, and *Lempriere v. Valpy*, 5 Sim. 108, that a general devise or bequest by a married woman does not stand on a different footing, as regards this question, from other wills: *i. e.*, does not, without more, pass property the subject of a power vested in the testatrix. But in *Shelford v. Acland*, 23 B. 10, Romilly, M. R., was of opinion that a bequest of personal estate by a married woman would operate as an execution of a power, if it were shown that she had no personal estate of her own which she could dispose of by will. Sed qu.: inasmuch as the bequest would operate on property which she might afterwards acquire to her separate use. Perhaps the construction which refers a devise or bequest to a power

¹ But where testatrix specifically devised part of the real estate subject to the power, calling it *her house and land*, and then devised all the residue of her estate of every nature and kind, it was held that the residuary devise operated as an execution of the power as the remainder of the estate: *Blagge v. Miles*, 1 Story's Rep. 454.

vested in the testator, would be somewhat more readily adopted in the case of the will of a *feme covert*, than of other wills.¹

3. *New Law.*

The 27th section of the Wills Act introduces a distinction between *general* powers of appointment, or powers unlimited in respect of the objects to whom an appointment may be made, and *special* powers, or powers limited to a particular class of objects. Special powers are unaffected by the statute; but with respect to general powers, it is enacted that,—

RULE. In wills made or republished on or after Jan. 1, 1838, general devises of real estate, and bequests of personal estate described in a general manner, are construed as including real or personal estate which the testator may have power to appoint *in any manner* he may think proper; unless a contrary intention appear by the will. (Stat. 1 Vict. c. 26, s. 27.)²

“ And be it further enacted, that a general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.”

This section applies to the will of a married woman. (*Bernard v. Minshull*, Johns. 276.)

¹ But see also *Attorney-General v. Wilkinson*, L. R. 2 Eq. 818. In *Bradish v. Gibbs*, 3 Johns. Ch. 523, it was held that a will of a married woman being inoperative unless as an execution of a power, it must be held to operate as an execution thereof.

² Similar statutes have been adopted in New York, North Carolina, Michigan, Wisconsin, Minnesota, and in Ontario, by R. S. O. cap. 106, sec.

*If a power of appointment has already been exercised by deed, but with the reservation of a power of revocation and [28 new appointment, it is clear that this section does not cause a mere general devise or bequest to operate as an exercise of the power of revocation. The power of appointment has been already exercised: what remains is a power to revoke what has been already appointed, and such a power is not within the scope of the section. (*Pomfret v. Perring*, 5 D. M. & G. 775.)

Power to appoint "in any manner" the donee may think proper, in the 27th section, means "*to any objects* the donee may think proper," and not "by any form of execution."

Thus a power to appoint generally *by will* (but not by deed) is within the section. (1 Sugd. Pow. 7th ed. p. 369.) On the other hand, a power to appoint in any manner to *children*, or any other limited class of objects, is not, it appears, within the section. (*Cloves v. Awdry*, 12 B. 604.)

It has been already considered (*sup.* Chap. I.) in what cases a devise or bequest may, under this section, operate as an execution of powers acquired by the testator after the date of the will. (*Stillman v. Weedon*, 16 Sim. 26.)

It is not an objection to the operation of a devise or bequest as an execution of a power under this section, that the property is described as the testator's own. Thus a gift of "property which I am possessed of or entitled to," passes property subject to a power of appointment in the testator. (*Frankcombe v. Hayward*, 9 Jur. 344.)

*The words "constituting A. B. my residuary legatee" [29 of all general powers as regards personal estate. (*Spooner's Trusts*, 2 Sim. N. S. 129.)

Legacies whether an execution of general powers.—It has been held in *Hawthorne v. Shedden*, 3 Sm. & G. 293, that the gift of

29, which operates on all wills made on or after 1st Jan. 1874. In New York the statute applies only to real estate; but in *Bolton v. De Peyster*, 25 Barb. 576, Mitchell, P. J., was of opinion that the courts are bound to apply the same rule to bequests of personal estate. And the same opinion was expressed in *Van Wert v. Benedict*, 1 Bradf. 123; and *Hutton v. Benkard*, 92 N. Y. 295.

general pecuniary legacies is a sufficient execution of a power under this section, so as to make the legacies payable out of any personal estate over which the testator may have a general power of appointment: *sed qu.* It was said, that "general pecuniary legacies with no particular fund indicated for their payment are bequests of personal estate described in a general manner; and, therefore, where the proper assets of the testator are inadequate without resort to personal estate over which the testator had a general power of appointment, general pecuniary legacies are within the operation of the 27th section, and the will must be held to include and extend to the personal estate subject to the power of appointment, so far as necessary to satisfy general pecuniary legacies described in a general manner." (*Ib.*)¹

In *Moss v. Harter*, 2 Sm. & G. 458, a gift of "all my personal estate not otherwise effectually disposed of," was held not to operate as an execution of a general power of appointment, the property being settled, in default of appointment, in trust for certain persons. But *qu.*, inasmuch as the property was the testator's only to the extent of the power of appointment, and to that extent it was *not* disposed of independently of the will.

¹ *Hawthorn v. Shedden*, is approved in *Re Wilkinson*, L. R. 4 Ch. App. 589.

“LANDS,” ETC., WHAT KINDS OF PROPERTY INCLUDED UNDER.

1. *Copyholds.*

SINCE the statute 55 Geo. 3, c. 192, supplying the effect of a surrender to the use of the will, it is a rule that—

RULE. A devise of “lands,” “real estate,” &c., includes copyhold lands as well as freehold. (*Doe d. Clark v. Ludlam*, 7 Bing. 275 (E. C. L. R. vol. 20); Stat. 1 Vict. c. 26, s. 26.)

“Before the Act 55 Geo. 3, c. 192, copyhold property would not have passed under a general residuary devise of real estate, if there had been no surrender to the use of the will. But when the statute has in effect supplied a surrender, the objection can no longer prevail, and that brings the case within the decisions which have determined that an equitable interest in copyholds would pass before the statute, even where there had been no surrender.” (Per Alderson, J., *Doe d. Clark v. Ludlam*, 7 Bing. 283, E. C. L. R. vol. 20.)

2. *Leaseholds.*

RULE. In wills made before Jan. 1, 1838, a devise of “lands,” or “lands and tenements,” or “lands, tenements, and hereditaments” (per Lord Eldon, in *Thompson v. Lawley*, 2 B. & P. 313), does not, *prima facie*, include leaseholds for years, unless at the time of the devise the testator had no freehold lands *answering to the description. (*Rose v. Bartlett*, Cro. Car. 293; [*31 *Thompson v. Lady Lawley*, 2 B. & P. 303.)

“If a man has lands in fee and lands for years, and devises all his lands and tenements, the fee simple lands pass only, and not

the lease for years; but if he has no fee simple, the lease for years passes." (*Rose v. Bartlett*, Cro. Car. 293.)

The rule applies where the devise is of "lands in the parish of A.," or any other limited description.

In *Chapman v. Hart*, 1 Ves. 271, Lord Hardwicke held, that if a testator having freeholds and leaseholds in A., devised all his lands in A. by a will, *attested by two witnesses only*, the fact that the will would be inoperative as regards the freeholds, did not put the devise on the same footing as if the testator had had no freeholds, in which case the leaseholds would have passed; but that the devise was altogether inoperative.

"*Messuages*."—It is not altogether clear whether the rule in *Rose v. Bartlett* extends to other words besides "lands, tenements and hereditaments;" as, for instance, "messuages" and "farms." In *Hartley v. Hurle*, 5 Ves. 540, it was treated as clear that a devise of "all my *messuages*, lands, tenements and hereditaments" was within the rule. But it may perhaps be doubted whether a devise of "messuages," not associated with "lands" or "tenements," would not now (in a will prior to 1838) be held to include leasehold as well as freehold messuages. And this observation applies somewhat more strongly to the word "farms." (*Lane v. Stanhope*, 6 T. R. 345; *Arkell v. Fletcher*, 10 Sim. 299.)

Exceptions. Leaseholds blended with freeholds.—But the rule has not been so applied as to exclude portions of leasehold property, blended in situation and enjoyment with the freeholds, from passing along with the latter under a devise of "lands" or "tenements."

Thus, in *Hobson v. Blackburn*, 1 Myl. & K. 571, where the testator having a freehold house on Ludgate Hill, took a lease *32] for twenty-one years of premises behind, *which he threw into the house, and occupied therewith for the purpose of his trade, the whole was held to pass under a devise of "all my messuage or tenement in Ludgate Hill, with the appurtenances," although the devise was to limitations strictly applicable to freehold property only. So where the leasehold portion was held under a renewable lease from a college, and had been long in the

testator's family, and united in occupation with the freehold land. (*Goodman v. Edwards*, 2 Myl. & K. 759.) So where the leasehold portion was held for the residue of a term of 2000 years, and let with the freehold to one tenant at an entire rent. (*Swift v. Swift*, 1 De G. F. & J. 160.)

And the rule will readily yield to indications from the context of an intention to pass leaseholds; as where the devise was expressed to be "subject to *ground rents* and other outgoings in respect of the said lands," &c. (*Hartley v. Hurle*, 5 Ves. 540.) And from the same case it would appear that a devise of lands, tenements and hereditaments to trustees, their heirs, *executors and administrators*, without more, is sufficient to pass leaseholds for years.

Although the word "real estate" is more strictly appropriated to freeholds than the word "lands," yet in *Swift v. Swift*, 1 De G. F. & J. 160, a devise of all the testator's real estate in A. to trustees "to hold to them and the survivor according to the *respective natures and tenures* thereof," was held to pass leaseholds for years as well as freeholds.

New Law.—The 26th section of the Wills Act reverses the rule in *Rose v. Bartlett*, and enacts that,—

RULE. In wills made or republished on or after Jan. 1, 1838, every general devise of "lands," "lands in A.," &c., *primâ facie* includes leaseholds for years as well as freeholds.* (Stat. 1 Vict. c. 26, s. 26.)¹

* Stat. 1 Vict. c. 26, s. 26. "And be it further enacted, that a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any 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."

¹ This statute has been adopted in Virginia and Kentucky, and there is a similar statute in Ontario, R. S. O. cap. 106, sec. 28, which operates on all wills made on and after Jan. 1, 1874.

*33 *In *Wilson v. Eden*, 5 Exch. 752, 21 L. J. Q. B. 385, a testator by a will made after 1837 devised "all my messuages, lands, tenements and hereditaments . . . and all *other my real estates*." It was held, contrary to Lord Langdale's opinion (11 B. 237), that lands of leasehold tenure passed, the word "real estate" not operating to restrain the extended meaning given by the 26th section to the word "lands."

Meaning of "real estate."—In *Wilson v. Eden* it seems to have been considered that the meaning of the word "real estate" was not enlarged by the 26th section. The word "real estate" seems, independently of the rule in *Rose v. Bartlett*, not to include leaseholds for years, which are personal estate. But leaseholds *may* pass under the word "real estate," in a will prior to 1838 (*Swift v. Swift*, 1 De G. F. & J. 160). And although if a testator before 1838, having lands of inheritance, devised all his real estate to A., and all his personal estate to B., leaseholds would certainly pass by the will to B. and not to A. (*Turner v. Turner*, 21 L. J. Ch. 843), yet if the testator had no interest in land except the leaseholds, it does not seem but that the leaseholds might pass to A. under the denomination of real estate. And this being so, it might perhaps be contended that the 26th section enacting that "any general devise which would describe a leasehold estate if the testator had no freehold estate which could be described by it," shall in every case include leaseholds unless a contrary intention be shown, must cause leaseholds always now to pass by a devise of "real estate." Sed. qu.

3. *Reversionary Interests.*

RULE. A devise of "lands," "real estate," &c., includes reversionary interests of whatever description.

*34] *(*Church v. Mundy*, 15 Ves. 396; *Ford v. Ford*, 6 Hare 486.)¹

Thus, if the testator having the reversion in fee of lands settled on his wife for her life, devises his real estate to his wife for life,

¹ *Drew v. Wakefield*, 54 Me. 297; *Hayden v. Stoughton*, 5 Pick. 538; *McCay v. Hugas*, 6 Watts 347; *Brown v. Boyd*, 9 W. & S. 128; *O'Neale v. Ward*, 3 Har. & McH. 93; and see the next chapter.

with remainder to A. the fact of the devise being to the wife for life does not show an intention to exclude from the operation of the devise (as regards A.) the reversion expectant on the wife's decease in the settled lands. (*Ford v. Ford*, 6 Hare 486.)

"It is now settled, that a reversion in fee will pass under a general devise, unless a clear intention to exclude it be shown, though it is limited in part to *the same uses* to which the particular estate (if I may so call it) is already dedicated." (Per Lord St. Leonards, *Tennent v. Tennent*, 1 Jo. & Lat. 389.)

In *Tennent v. Tennent*, the testator devised Whiteacre to A. for life, with remainder to the issue of A. in tail, leaving the ultimate reversion undisposed of, and devised the residue of his real estate to B. for life, with remainder to A. and his issue in tail. It was held that under the residuary clause, B. took an estate for life in Whiteacre, in remainder after the estates limited to the issue of A.

A devise of the testator's real estate to trustees for a term of years to pay debts and legacies, has been held to include a reversion in fee, vested in the testator, of lands of which the testator was tenant in tail. (*Mostyn v. Champneys*, 1 Bing. N. C. 341, E. C. L. R. vol. 27.)

It follows from the foregoing rule, that a devise of "lands not hereinbefore disposed of," includes any undisposed of interest in lands already partially disposed of by the will. It is further established that—

Chester v. Chester.

RULE. A devise of lands "not settled," includes an unsettled reversion in settled lands. (*Chester v. Chester*, 3 P. Wms. 56; *Glover v. Spendlove*, 4 Bro. C. C. 337; *Jones v. Skinner*, 5 L. J. Ch. N. S. 87.)

Thus, where a testator having two landed estates, one *in settlement, the other not, devised "*my unsettled real estate*," the devise was held to pass not only the unsettled estate, but the unsettled reversion in the settled estate. (*Incorporated Society v. Richards*, 1 D. & War. 285.) "The cases show that where a testator speaks of his property 'not settled,' or 'out of

settlement,' or to that effect, the Court intends him to mean not otherwise disposed of, and does not hold itself concluded by the fact that the property is included in a settlement providing a jointure or otherwise. It construes these words as referring to all property over which, or any part of which, the testator has the absolute dominion." (Ibid.)

4. *Trust and Mortgage Estates.*

RULE. A general devise of "my lands," "my lands in A." "my real estate," &c., includes lands of which the testator was seised as trustee or mortgagee, unless an intention appear to the contrary. (Lord Braybroke *v.* Inskip, 8 Ves. 435; Bainbridge *v.* Lord Ashburton, 2 You. & Col. (Ex.) 347.)¹

"A trust estate will pass by general words in a will, unless it can be collected either from the expressions in the will or from the purposes or objects of the testator, that he did not mean that the legal estate should pass; as, for instance, where the devise is of all the testator's real estates to a trustee in trust to sell and receive the proceeds, or where the estates are given to one for life, with remainders over. There the object of the devise in the one case, and the mode of limitation in the other, are inconsistent with the intention to pass a dry legal estate." (Lindsell *v.* Thacker, 12 Sim. 182.)

Exceptions.—If, however, the disposition made by the will is such as the testator could not intend to make of property not beneficially his, the rule in Lord Braybroke *v.* Inskip will not apply.² Thus,

¹ Richardson *v.* Woodbury, 43 Me. 209; Jackson *v.* Delancy, 13 Johns. 554; Heath *v.* Knapp, 4 Penn. St. 230; Wills *v.* Cooper, 1 Dutch. (N. J.) 161; Re Charles, 4 Chy. Cham. Rep. (U. C.) 19, where trust estates reserved from a residuary clause in the will were held to pass under a second residuary clause containing the words "real and personal estate and effects."

² Where the purposes for which the property is devised are inconsistent with the application thereto of anything of which the testator was not the beneficial owner, it does not pass by the devise. Martin *v.* Laverton, L. R. 9 Eq. 570.

1. *Trust for sale*.—If the property be devised to *trustees in trust for sale, mortgage, and trust estates do not pass. [*36 (Ex parte Marshall, 9 Sim. 555 ; Re Morely, 10 Hare 293.)¹

In *Wall v. Bright*, 1 J. & W. 474, a devise of all the testator's real estate to trustees in trust for sale was held to pass the legal estate in land which the testator had contracted to sell, but the purchase-money, or a considerable part, was unpaid. "If this had been the case of a naked trust, the will would not have passed the estate ; for the testator takes on himself to direct a sale, a conversion of the estate, treating it as his own, in a manner quite incompatible with an intention to give it to another, for the purpose of holding it as he himself held it, as a trustee. But the question is, whether, having entered into a contract to sell his estate, he is thereby put for this purpose in the same situation as a naked trustee. . . . He intended that all his real estate should be converted into money ; then, if the contract is completed, it supersedes the necessity of another sale ; if not, the trustees are to sell. To give to the trustees the legal estate is not inconsistent with this intention ; on the contrary, it is just what he ought to have done to enable them to convey to the purchaser. They are to dispose of the legal estate in the manner directed by the will, except that it differs by being in pursuance of a prior instead of a future sale." (Ibid.)

2. *Devise subject to charge*.—If the property is by the will devised subject to a charge, trust, and mortgage estates do not pass by the devise. "It would be absurd to suppose that he intended an estate to be charged, which he had no power to charge at all." (*Rackham v. Siddall*, 16 Sim. 297.)

As where the testator devised all his real estate, *after payment* of debts, legacies and funeral expenses, to A. (*Roe d. Reade v. Reade*, 8 T. R. 118 ; *Doe d. Roylance v. Lightfoot*, 8 M. & W. 553.) So where the property was devised subject to payment of debts and of an annuity (*Duke of Leeds v. Munday*, 3 Ves. 348) : or "subject and charged with an annuity of 20*l.* to A." (Ex parte **Morgan*, 10 Ves. 101 ; *Rackham v. Siddall*, 16 Sim. 297.) [*37

¹ *Merrit v. Ins. Co.*, 2 Edw. (N. Y.) 549.

3. *Devise to beneficial uses.*—If the property be devised to the separate use of a married woman, trust and mortgage estates will not pass by it. (*Lindsell v. Thacker*, 12 Sim. 178.)¹

But it is settled that a general devise “to A., his heirs and assigns, to and for his and their own use and benefit,” passes trust and mortgage estates. (*Bainbridge v. Lord Ashburton*, 2 Y. & C. (Ex.) 347; *Sharpe v. Sharpe*, 12 Jur. 598.)²

And even where the testator devised all his property to his wife, her heirs, executors, and administrators, for all his estate and interest therein, for her own use and benefit, and to be disposed of by her by deed or will, or otherwise, *as she might think fit*, trust estates were held to pass by the devise. (*Ex parte Shaw*, 8 Sim. 159.)

Devise to successive limitations.—“Complicated limitations” are sufficient to show an intention not to include a dry legal estate in the property devised to such limitations (*Lord Braybroke v. Inship*, 8 Ves. 436.) Thus where there was a general devise to three persons as tenants in common, with a proviso that, in case of the death of any of them under 21, the share of the one so dying should go over to the others by way of executory devise, a trust estate was held not to pass. (*Thirtle v. Vaughan*, 24 L. T. 5, per V.-C. Wood.) And in *Lindsell v. Thacker*, 12 Sim. 182, it was said that the fact of the devise being to one for life, with remainders over, would be sufficient to show an intention not to include trust estates in a general devise.

But it would appear that the fact of the devise being to several persons *as tenants in common*, does not of itself show an intention not to include trust and mortgage estates. (*Thirtle v. Vaughan*, 24 L. T. 5.)³

¹ *Sed contra*, *Heath v. Knapp*, 4 Penn. St. 228.

² *Lewis v. Mathews*, L. R. 2 Eq. 180.

³ But it is a circumstance of considerable weight. *Martin v. Laverton*, L. R. 9 Eq. 568.

A devise to a numerous and unascertained class, will not include trust and mortgage estates. In *re Finney's Estate*, 3 Gif. 465.

Where the devise is to the cestui que trust and a conveyance to him by the trustee would be a dereliction of duty, the presumption will be against an intention to include it. *Wills v. Cooper*, 1 Dutch. (N. J.) 161.

General devise does not pass the beneficial interest in a mortgage.—It seems to be clear that a general devise which passes the legal estate in a mortgage vested in the testator, does not include the beneficial interest in the money secured by the mortgage, which is personal estate, and passes under the general or residuary bequest of *personal estate contained in the will. On the other hand, if a mortgagee in possession devises the mortgaged lands by a specific description, as a devise of “all my lands in the parish of A.,” the testator having no other lands answering to the description, such a devise may well be held to pass the beneficial as well as the legal estate in the mortgaged lands. (*Woodhouse v. Meredith*, 1 Mer. 450; *Burdus v. Dixon*, 4 Jur. N. S. 967.)

The rule that a general devise passes the legal estate in mortgaged lands, assumes that there is no other devise in the will which more properly includes the mortgaged property. But if the testator devises all his lands to A., and all his securities for money to B., no doubt the legal estate in lands of which the testator was mortgagee would pass to B. and not to A. (*Renvoise v. Cooper*, 6 Mad. 371.)

5. *Lands contracted for.*

With respect to lands contracted to be purchased by the testator, it is a rule (which in wills made or republished on or after Jan. 1, 1838, will extend to lands contracted to be purchased after the date of the will), that—

RULE. A general devise of the testator’s lands, &c., includes lands contracted to be purchased by the testator, but not actually conveyed. (*Acherley v. Vernon*, 10 Mod. 518.)¹

“What a party is entitled to he considers as his own. Lands contracted for will pass by a general devise of all the testator’s lands and of all the lands purchased by him, although he had

¹ *Livingstone v. Newkirk*, 3 Johns. Ch. 316; *Ex parte Champion*, 1 Busb. Eq. (N. C.) 248; *Smith v. Jones*, 4 Ham. (Ohio) 121; *Gist v. Robinet*, 3 Bibb (Ky.) 4.

other lands purchased and actually conveyed." (Collison v. Girling, 4 Myl. & Cr. 75.)

Lands contracted to be sold.—Lands which the testator has contracted to *sell*, are lands of which he is a trustee, and the legal estate in them passes, therefore, under a general devise of the testator's lands, unless an intention *appear to the contrary. *39] But the devisee will not be entitled to the purchase-money beneficially (Knollys v. Shepherd, 1 J. & W. 479): though if the particular estate contracted to be sold be *specifically* devised in such a way as to show that the testator intended some beneficial interest in it to pass by the devise, the devisee may, it should seem, be entitled to the interest which the testator had in the estate, *i. e.*, to the purchase-money of it. (Drant v. Vause, 1 Y. & C. C. C. 580.)¹

¹ In Drant v. Vause, there was at the time of the testator's death no absolute and final contract of sale. It was a lease for years, with an option in the lessee to purchase at the end of the term. The option was not exercised until after the testator's death. Emuss v. Smith, 2 De G. & Sm. 735, is a similar case, and Bruce, V.-C., admits that there is a distinction between such a case and one in which there is an absolute contract of sale.

In Ontario a contract to sell land devised operates as a revocation of the devise, so far as any beneficial interest in favor of the devisee by virtue of the devise is concerned; and the devisee takes the legal estate in trust for the purchaser; Ross v. Ross, 20 Grant Ch. (U. C.) 203.

RESIDUARY BEQUESTS AND DEVISES.

1. *Residuary Bequests.*

A GIFT of the residuary personal estate of the testator has a peculiarly extended meaning, and comprises every interest in personal estate, which the will in event does not otherwise dispose of: thus it is a rule that—

RULE. A general residuary bequest carries lapsed and void legacies. (*Cambridge v. Rouse*, 8 Ves. 25; *Leake v. Robinson*, 2 Mer. 392.)¹

“I have always understood that with regard to personal estate, everything which is ill given by the will does fall into the residue; and it must be a very peculiar case indeed, in which there can at once be a residuary clause and a partial intestacy, unless some part of the residue itself be ill given. It is immaterial how it happens that any part of the property is undisposed of,—whether by the death of a legatee, or by the remoteness and consequent illegality of the bequest. Either way

¹ *Drew v. Wakefield*, 54 Me. 296; *Firth v. Denny*, 2 Allen 471; *Crane v. Crane*, 2 Root 487; *Banks v. Phelan*, 4 Barb. 90; *Tindall v. Tindall*, 23 N. J. Eq. 244; *Woolmer's Estate*, 3 Whart. 480; *Helms v. Franciscus*, 2 Bland Ch. 560; *Elcan v. School*, 2 P. & H. (Va.) 68; *Godard v. Wagner*, 2 Strob. Eq. 9; *Swinton v. Eggleston*, 3 Rich. Eq. 204; *Hughes v. Allen*, 31 Ga. 489; *Lewis v. Lusk*, 35 Miss. 422; *Garnet v. Cowles*, 39 Id. 60.

In Connecticut in the Revised Statutes of 1835, there is added to the statute providing that a devise or legacy to any child or grandchild of the testator shall not lapse, if the devisee or legatee leave issue surviving the testator, a direction that “if there be no such issue, at the time of the testator's death, the estate disposed of by such devise shall be considered and treated as intestate estate.” The same provision occurs in a similar statute in Illinois.

it is residue, *i. e.*, something *upon which no other clause of the will effectually operates*. It may in words have been before given; but if not effectually given, it is, legally speaking, undisposed of, and consequently included in the denomination of residue." (*Leake v. Robinson*, 2 Mer. 393.)

"The general rule, that a residuary clause passes a lapsed legacy—that which was intended to be the subject of bounty to another—is founded upon this; not that it *effects, in specie, *41] what the testator intended, for he probably contemplated nothing beyond the particular legacy taking effect, but because the residuary clause is understood to be intended to embrace everything not otherwise effectually given; because, as Sir W. Grant expresses it in *Cambridge v. Rous*, the testator is supposed to give it away from the residuary legatee only for the sake of the particular legatee." (*Easum v. Appleford*, 5 Myl. & Cr. 61.)

A gift of the testator's personal estate "not hereinbefore disposed of" (*Roberts v. Cooke*, 16 Ves. 451), or a gift of "all other my property" (*Bernard v. Minshull*, 1 Johns. 276), is simply a form of residuary bequest, and as such carries lapsed and void legacies.¹

Lapsed, &c., appointments.—In wills made or republished on or after Jan. 1, 1838, a general residuary bequest will include not only property ineffectually attempted to be *bequeathed* by the other dispositions of the will, but also property over which the testator has a general power of appointment, and which he has by the will ineffectually *appointed*. As the fact of property being specifically bequeathed does not show an intention on the part of the testator that it should not pass under the residuary gift if the specific bequest fails, so the fact of property being specifically appointed does not, it has been held, show an intention that the residuary gift should not operate, under the 27th section of the Wills Act, as an execution of the power as to the property specifically appointed, if the specific appointment fails. Thus, if the

¹ A gift of "all the remainder of my property not herein specified, excepting what is herein reserved and bequeathed," was held to pass lapsed legacies. *Nyce's Estate*, 5 W. & S. 260. But in *Hughes v. Allen*, 31 Ga. 491, a bequest of "all other property not heretofore specified," did not pass certain slaves which the testator had illegally ordered to be made free.

testator, in exercise of a general power of appointment, gives 5000*l.* to A., and gives the residue of his personal estate to B., and A. dies in the testator's lifetime, the 5000*l.* appointed to A. will pass under the residuary gift to B. (Spooner's Trusts, 2 Sim. N. S. 129; *Bernard v. Minshull*, 1 Johns. 276.)

Exceptions.—The testator may, however, show an intention to circumscribe and confine the residuary bequest, so as to exclude from it, in every event, *particular property specifically given. (*Att.-Gen. v. Johnstone*, Amb. 577; *Danvers v.* [*42 Dewes, 3 P. W. 401.])¹

But a bequest in the form,—“I give all my personal estate to A., except certain property which I give to B.,” seems to fall within the general rule, so that on failure of the gift to B., the excepted property will fall into the general bequest to A.: the exception out of the gift to A. being considered as made only for the purpose of benefiting B. (*Evans v. Jones*, 2 Coll. C. C. 516; *James v. Irving*, 10 B. 276.) In *Wainman v. Field*, Kay 507, however, where the testator gave all his personal estate to trustees in trust to pay debts and legacies, “*except my leasehold estates, which it is my intention to exonerate from debts and legacies,*”—and bequeathed the leaseholds specifically upon trusts which partially failed; it was held that the leaseholds were excluded altogether from the gift of residue.²

Share of residue which fails.—The most important exception, however, to the comprehensiveness of a general residuary bequest is, that it does not include any part of the residue itself which fails.

“A part of the residue of which the disposition fails will not accrue in augmentation of the remaining parts, as a residue of residue; but instead of resuming the nature of residue, devolves

¹ *Lea v. Brown*, 3 Jones Eq. (N. C.) 148; *Hudson v. Peirce*, 8 Ired. Eq. 128.

² *Lombard v. Boyden*, 5 Allen 251; *Hart v. Marks*, 4 Brad. 162; *Skipwith v. Caball*, 19 Gratt. 786; *Kirkpatrick v. Rogers*, 6 Ired. Eq. 136; *Winston v. Webb*, Phill. Eq. 2; *Silex v. Nelson*, 24 Ga. 90. So too if the testator gives “the small remainder” of his property: *Page v. Young*, L. R. 19 Eq. 501.

as undisposed of. Residue means all of which no effectual disposition is made by the will, *other than the residuary clause*; but when the disposition of the residue itself fails, to the extent to which it fails, the will is inoperative. In the instance of a residue given in moieties, to hold that one moiety lapsing should accrue to the other, would be to hold that a gift of a moiety of the residue shall eventually carry the whole." (*Skrymsher v. Northcote*, 1 Sw. 570.)¹

This is strongly exemplified in *Humble v. Shore*, 7 H. 247, where the testator by will gave one-sixth of the residue of his estate to A., and by codicil revoked the absolute bequest and gave the one-sixth share to A. for life, with a direction that on A.'s death it should *sink into the residue* of the testator's estate and *43] be *disposed of accordingly. It was, notwithstanding, held that the one-sixth share upon A.'s death was undisposed of, and went to the next of kin.²

*Residue of "residue."*³—The comprehensive import of the word residue does not extend to a gift of the *residue* of that residue.

¹ *Kerr v. Dougherty*, 79 N. Y. 327; *Goodwin v. Ingraham*, 29 Hun, 221; *Chadwick v. Chadwick*, 37 N. J. Eq. 71.

² *Sykes v. Sykes*, L. R. 4 Eq. 202; *Garthwait v. Lewis*, 25 N. J. Eq. 351; *Haldeman v. Haldeman*, 40 Penn. St. 29; *Huber's App.*, 80 id. 348; *Skipwith v. Caball*, 19 Gratt. 786; *Ford v. Ford*, 1 Swan (Tenn.) 435; but in a recent case it was held that a share directed to fall into the residue and be paid according to the trusts of the will passed to the other residuary legatees, *Crawshaw v. Crawshaw*, L. R. 14 Ch. D. 817. It has also been held that where it appears from a view of the whole will that the testator intended the residue to be distributed equally among his children, the descendants of a deceased grandchild to take their parent's share, the children of a deceased child will take as a class the whole of their parent's share though the share was bequeathed to them *nominatim* and one of them has died without issue; *Hoppock v. Tucker*, 59 N. Y. 202. In Ohio, by an Act of 1866, intended to prevent lapse in case of the death of a legatee or devisee (being a child or other relation of the testator) leaving issue, it is enacted, that if the legacy or devise be residuary and no issue be left, the same shall go to the other residuary legatee or devisee, if he or she be a child or relative of the testator, unless the will provide differently.

³ Where legacies are given to several legatees and the residue is bequeathed to the same legatees, the residue will not include a lapsed legacy of one of them. *Craighead v. Given*, 10 S. & R. 353; *Lombard v. Boyden*, 5 Allen, 251; *Smith v. Haynes*, 111 Mass. 346.

Thus, if the testator gives £10,000 out of the residue of his personal estate to A., and *the residue* to B., and the bequest to A. fails, the gift to B. will not, it appears, in general carry the £10,000 bequeathed to A., which will therefore be undisposed of. (*Green v. Pertwee*, 5 Hare 249; *Skrymsher v. Northcote*, Sw. 566; *Lloyd v. Lloyd*, 4 B. 231; *Simmons v. Rudall*, 1 Sim. N. S. 115).¹

A gift of the residue of the residue of the testator's personal estate is, in fact, a gift of the residue of a particular fund. If a part of a particular fund be given to one person, and the residue to another, it is a question of intention, not subject to any particular rule, whether the gift of the residue is to be read as a gift of the mere balance of the fund after deducting the amount of the sum previously given out of it, as in the cases of *Page v. Leapingwell*, 18 Ves. 463, and *Easum v. Appleford*, 5 My. & Cr. 56; or a gift of the entire fund subject to the gift previously made out of it, as in *Falkner v. Butler*, Ambl. 514; *Carter v. Taggart*, 16 Sim. 423; and *Re Harries's Trusts*, Johns. 199. In the latter case, if the gift of part fails, the gift of the residue may carry the whole fund; in the former case not so.

Intermediate income.—The comprehensive nature of a general residuary bequest is shown in another respect, viz., that—

RULE. A general residuary bequest, contingent in terms, carries the intermediate income, which is not undisposed of, but accumulates. (*Trevanion v. Vivian*, 2 Ves. sen. 430.)²

Thus, if the testator bequeaths the residue of his personal estate to such son of A. as shall first attain 21, and *A. has no son at the testator's death, the income of the residue does [*14 not go to the next of kin, but accumulates in trust for a son of A. who may come into existence.

The same rule seems to have been extended, in *Bullock v. Stones*, 2 Ves. sen. 521, to a bequest of "all my personal estate

¹ *White v. Fisk*, 22 Conn. 35; *Beekman v. Bonsor*, 23 N. Y. 312.

² *Hodson v. Bective*, 1 Hem. & M. 390.

at A." But with respect to specific bequests generally, the rule appears to be that the intermediate income does not pass to the legatee until the period of vesting. (*Wyndham v. Wyndham*, 3 Bro. C. C. 58; *Shawe v. Cunliffe*, 4 id. 144; *Harris v. Lloyd*, T. & R. 310).¹

2. *Residuary Devises.*

A devise of the residue of the testator's real estate has not the same extended meaning as a bequest of the residuary personal estate; and it is a rule that—

RULE. In wills made before January 1, 1838, a residuary devise of real estate does not include specific devises which lapse. (*Wright v. Horne*, 8 Mod. 255, note c.)²

Void devises.—There is, however, a distinction between devises which are valid in their inception but afterwards lapse by the death of the devisee in the lifetime of the testator, and devises which are void *ab initio*, either from illegality, or by the devisee being dead at the date of the will. And it would appear from *Doe d. Stewart v. Sheffield*, 13 East 527, that a general residuary devise in a will prior to 1838 will include devises void *ab initio*, as being intended to comprise all that the will does not otherwise actually dispose of *at the time of the devise*. Thus, according to *Doe v. Sheffield*, a devise of "all my real estate not hereinbefore disposed of," carries an estate previously devised to a person dead at the date of the will.³

¹ *Kerr v. Bosler*, 62 Penn. St. 187; *Page's App.*, 71 id. 402.

² *Waring v. Waring*, 17 Barb. 556; *Williams v. Neff*, 52 Penn. St. 326; *Yard v. Murray*, 86 id. 113; *Massey's Ap.*, 88 id. 470; *Barton v. King*, 41 Miss. 289; *Cheves v. Haskell*, 10 Rich. Eq. 534; *Gore v. Stevens*, 1 Dana (Ken.) 206; *Lewis v. Patterson*, 13 Grant Ch. (U. C.) 223.

³ The only authority for this distinction in regard to void devises seems to be the dictum of Lord Ellenborough in the case above cited, and it may be considered at least doubtful whether it is correct. The weight of authority seems to favor the doctrine that the residuary devisee can take only what, at the date of the will, was intended for him. *Gibbs v. Rumsey*, 2 Ves. & B. 294; *Durour v. Motteux*, 1 Ves. sen. 320; *Jones v. Mitchell*, 1 Sim. & Stu. 294. The distinction was acknowledged and acted on in *Ferguson v. Hedges*, 1 Harring. (Del.) 528; but has been very generally rejected in other cases in this country. *Greene v. Dennis*, 6 Conn. 304; *Van Kleeck*

New law.—The 25th section of the Wills Act reverses the rule as to lapsed devises, and enacts that—

RULE. In wills made or republished on or after *January 1, 1838, real estate comprised in devises [*45 which fail or are void passes under the residuary devise in the will, unless an intention appear to the contrary. (Stat. 1 Vict. c. 26 s. 25.)

“That unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.” A devise of “all *other* my real estate” (*Cogswell v. Armstrong*, 2 K. & J. 227), or of “my real estate not hereinbefore disposed of” (*Green v. Dunn*, 20 B. 6), is only a form of residuary devise, and as such carries specific devises which lapse.¹

v. Dutch Church, 20 Wend. 469; *Downing v. Marshall*, 23 N. Y. 375; *Lingan v. Carroll*, 3 Har. & McH. (Md.) 333; *Tongue v. Nutwell*, 13 Md. 427; *Lea v. Brown*, 3 Jones Eq. (N. C.) 147.

But in New York it has been held that where an illegal devise is made in trust for certain persons, and the residue is given to the same persons, the land illegally devised falls into the residue. *Tucker v. Tucker*, 1 Seld. 408.

In Massachusetts the rule is that lapsed devises fall into the residue, it being held that the statute which enacts that after-acquired real estate shall pass by devise, takes from residuary devises their specific character and removes all ground of distinction between them and residuary bequests. *Thayer v. Wellington*, 9 Allen 295; *Allen v. White*, 97 Mass. 504. The same opinion was expressed in *Drew v. Wakefield*, 54 Me. 296.

In *Kip v. Van Cortland*, 7 Hill (N. Y.) 348, it was held that a residuary devise includes devises revoked. The will should be construed as though the specific devise was not in it.

¹ Similar statutes have been enacted in Virginia (act taking effect July 1, 1850); North Carolina (act taking effect 8th Feb. 1844); Ontario (act taking effect Jan. 1, 1874); *Fulton v. Fulton*, 24 Grant Ch. (U. C.) 422. In Kentucky it is expressly enacted that, in the absence of a contrary intention appearing in the will, lapsed legacies and devises shall not fall into the residuum; Gen. Stat. 1881, Ch. 113, § 20.

The 25th section applies only to *general* residuary devisees, and does not extend to devises of the residue of particular property, as a devise of "all other the hereditaments" comprised in a certain deed. (*Re Brown*, 1 K. & J. 522.)¹

Intermediate income.—Devises of real estate to take effect at a future period do not, in general, carry the intermediate rents and profits until the period of vesting. (*Genery v. Fitzgerald*, Jac. 468.) But where the real and personal estate are given together, it is the rule that,—

RULE. A gift of the testator's residuary *real and personal* estate (blended), though contingent in terms, carries the intermediate rents and profits of the real estate, as well as the income of the personal estate. (*Stephens v. Stephens*, Forrest. 228; *Genery v. Fitzgerald*, Jac. 468; *Ackers v. Phipps*, 3 Cl. & F. 691.)²

"Thus if the real and personal estate be given to an unborn person, the rents and profits of the real estate *do not
*46] descend to the heir till the birth of the person entitled, but accumulate.

"The general principles are these: When personal estate is given to A. at 21, that will carry the intermediate interest. If a testator gives his estate Blackacre at a future period, that will not carry the intermediate rents and profits. But when he mixes up real and personal estate in the same clause, the question must be, whether he does not show an intention, that the same rule shall operate on both." (Per Lord Eldon, *Genery v. Fitzgerald*, Jac. 470.)

Income of residuary devise alone.—According to Lord Hardwicke, in *Gibson v. Montfort*, 1 Ves. sen. 485, and Lord Brougham, in *Ackers v. Phipps*, 3 Cl. & F. 691, it would seem that a general residuary devise of real estate, not combined with a gift of the residue of the personal estate, would, though contingent in terms,

¹ Nor to devise of "the rest of my freehold hereditaments situate in the parish of A." *Springett v. Jenings*, L. R. 6 Ch. App. 333.

² *Rogers v. Ross*, 4 Johns. Ch. 397; *Brailsford v. Heyward*, 2 Desaus. (S. C.) 31; *Dougherty v. Dougherty*, 2 Strob. Eq. (S. C.) 65.

carry the intermediate rents and profits before the period of vesting. "I am also of opinion, that the gift of a real residue, without blending it with a personal residue, would of itself have the same effect upon another ground, namely, the meaning of residue: still more if, as here, the words 'not otherwise disposed of' are found in the gift; for this shows that the devisee under such gift, is to take all the real estate not otherwise given; and this must exclude the heir, who cannot as such take under any gift." (Per Lord Brougham, *Ackers v. Phipps*, 3 Cl. & F. 691.)¹ But see Appendix I.

Proceeds of real estate not personal estate.—Where real estate is directed by the will to be sold, but the surplus proceeds are not expressly disposed of, it is a rule that,—

RULE. A general or residuary bequest of the testator's personal estate does not, *prima facie*, include the proceeds of real estate directed by the will to be sold. (*Maugham v. Mason*, 1 V. & B. 410.)

"Properly speaking, nothing is the personal estate of a *testator, that was not so at his death. He may certainly [*47 so express himself as to show that something else was intended; but where there is nothing but a direction to sell land, with application of the money to a particular purpose, and a subsequent bequest of the rest and residue of the personal estate, I know of no case in which it has been held that the surplus, after the particular purpose is answered, forms part of the personal estate so as to pass by the residuary bequest." (*Maugham v. Mason*, 1 V. & B. 410.)

But this rule is of course excluded by a direction that the proceeds of the sale of the real estate shall form part of the testator's personal estate.²

¹ It was so held in *Rogers v. Ross*, 4 Johns. Ch. 397.

² *Durour v. Motteux*, 1 Ves. sen. 320.

Gifts of the proceeds of real estate directed to be sold, and gifts of money charged on land, like devises of land, do not upon lapse fall into the residue: *Gravenor v. Hallam*, Amb. 643; *Arnold v. Chapman*, 1 Ves. sen. 108.

Whether a charge which is undisposed of goes to the heir, or sinks into the land on which it is made for the benefit of the devisee, depends upon whether

on the whole will it was intended to be an exception out of the devise of the land, or it was made merely for the purpose of providing for some object, and subject to such purpose the estate was to go to the devisee: *Hephinstall v. Gott*, 2 Johns. & Hem. 450.

A residuary devise or bequest, will include every reversionary interest however remote which is undisposed of by the previous gifts in the will, whether the same be a reversion remaining after an interest created by the will or not: *Brigham v. Shattuck*, 10 Pick. 308; *Floyd v. Carrow*, 88 N. Y. 560; *Cole v. Clayton*, 1 Wash. (Va.) 262; *Arcularius v. Geisesheimer*, 3 Bradf. 73; *Youngs v. Youngs*, 45 N. Y. 258; *Harper v. Blean*, 3 Watts, 471; *Geyer v. Wentzel*, 68 Penn. St. 84; *Harrel v. Haskins*, 2 Dev. & Bat. 480; *Irwin v. Zane*, 15 W. Va. 646; *Allen v. Vanmeter*, 1 Metc. (Ken.) 274; *Swart v. Gregory*, 15 U. C. Q. B. 335.

Thus in a devise upon a condition subsequent, as to a town, on condition that they build a school-house, on nonperformance of the condition the estate goes to the residuary devisee: *Haydon v. Stoughton*, 5 Pick. 538.

But the interest must be one which naturally results from the nature of the devise, and such that the testator may well be supposed to have contemplated when he made his will. Therefore, where the widow refuses to accept a devise made to her in lieu of dower, or where generally the devisee refuses to accept the land devised, it does not go to the residuary devisee but to the heir: *James v. James*, 4 Paige 117; *Waring v. Waring*, 17 Barb. 558.

Exceptions.—The rule will not be applied where upon the whole will, it appears not to have been the intention of the testator. Thus where there is a gift of residue with directions for an immediate distribution, and in another clause a division of some of the reversionary interests is directed to be made upon the death of the devisees to whom the particular estates are given, the other reversionary interests, concerning which no such division is directed, will not pass under the residuary clause: *Howland v. Theo. Seminary*, 3 Sandf. (N. Y.) 96.

So where the application of the rule would be inconsistent with other provisions in the will, it will be excluded; as where an estate was given to the widow for life, and after her death to A. if he should survive her, and if not to such person as he should by will appoint, and the residuary estate was given to A. It was held that the reversion of the estate given to the widow did not pass as residue, since that would make the contingent gift to A. nugatory: *Johnson v. Stanton*, 30 Conn. 301.

In Virginia it has been held, that in the case of a devise without words of limitation (which passed but a life estate), the reversion will not be included in the residuary clause: *M'Kennon v. M'Roberts*, 1 Wash. 109; *Horde v. M'Roberts*, 1 Call 337; *Minor v. Dabney*, 3 Rand. 209. This is contrary however to the ruling in other states: *Jackson v. Wells*, 9 Johns. 222; *Harper v. Blean*, 3 Watts 473.

And also in Virginia, it has been held, that where the residue is given to the same person to whom the life estate is given, the reversion will not be

included: *Phillips v. Melson*, 3 Munf. 76. This doctrine is not accepted in other states: *Arcularius v. Geisenheimer*, 3 Bradf. 73; *Harper v. Blean*, 3 Watts 473; *Norcum v. D'Enoch*, 17 Mo. 115.

A residuary bequest of personal estate with directions that the estate be sold immediately, or with direction for an immediate distribution, will not include reversionary interests: *Glover v. Harris*, 4 Rich. Eq. (S. C.) 31; *Holt v. Hogan*, 5 Jones Eq. (N. C.) 87.

Where residue is given to A. and B., absolutely to A. and contingently to B., A. will not take the interest remaining after B.'s contingent interest; but it will be undisposed of: *Sackett v. Mallory*, 1 Metc. (Mass.) 355; *Vreeland v. Van Horn*, 2 C. E. Green (N. J.) 135.

WORDS DESCRIPTIVE OF PROPERTY.

Securities for Money.

IN order that the legal and beneficial interest in a mortgage may not be separated, it is a convenient rule that—

RULE. A gift of “securities for money,” or “mortgages,” passes the entire benefit of the mortgage security, including the legal estate in the premises subject to the mortgage. (*Renvoize v. Cooper*, 6 Mad. 371; *Re King’s Mortgage*, 5 De G. & Sm. 644; *Knight v. Robinson*, 2 K. & J. 503.)

“I am of opinion that the mortgaged fee will pass to the wife by the gift of mortgages and other securities for money, though coupled with personal property. In substance, money secured by a mortgage in fee is personal property, and a gift of a mortgage security for money is a gift of all the testator’s interest in the money and security, and will therefore pass the fee.” (*Renvoize v. Cooper*, 6 Mad. 371.)

If the mortgage be in fee, the legal fee simple will pass without words of limitation, even in a will prior to 1838. And it is no objection to the legal estate passing, that the gift is of “securities for money and all *other my personal estate*.” (*Knight v. Robinson*, 2 K. & J. 503.)

And the legal estate in a mortgage will pass under the term *49] “securities for money,” although the bequest is *made “subject to payment of debts and legacies.” (*Knight v. Robinson*, 2 K. & J. 503), or in trust for sale (*Ex parte Barber*, 5 Sim. 451); though these expressions would prevent the legal estate from passing under a devise of “lands.”

Money on securities.—It was held by V.-C. Kindersley (Re Cautley, 17 Jur. 124), that a bequest of “money on securities” does not, *prima facie*, pass the legal estate in a mortgage. But it seems that any expressions implying that the legatee of the money secured by the mortgage is to have the power of calling in the mortgage, will be sufficient to cause the legal estate in the mortgage to pass under a gift of “moneys on mortgage,” or “money on securities.” Thus, where the testator directed that his wife should *receive* all moneys on mortgage belonging to him, it was held that the legal estate in fee passed to her. (Doe d. Guest v. Bennett, 6 Exch. 892.) Parke, J., said, in Doe v. Bennett, “It must be assumed that the testator intended the wife to receive the money, and to possess all the powers necessary for the purpose of recovering it; and therefore she is entitled to bring ejectment for that purpose:” and these observations have been approved by the Lords Justices in Re Arrowsmith’s Trusts, 4 Jur. N. S. 1123.

Money.

The word “money” is not unfrequently used, by uneducated persons at all events, to denote the whole of a man’s personal property; but such is not its legal meaning. And although it is usual to speak of “money in the funds,” just as of “money at a banker’s,” yet it is a rule that—

RULE. A gift of the testator’s “money” or “moneys” does not include stock in the public funds. (Hotham v. Sutton. 15 Ves. 327; Lowe v. Thomas, Kay 369, 5 D. M. G. 315).¹

¹ Mann v. Mann, 1 Johns. Ch. 236; Beatty v. Lalor, 2 McCart. Ch. (N. J.) 109; Dabney v. Cottrell, 9 Gratt. 581; Paup v. Sylvester, 22 Iowa 375. Romilly, M. R., in Chapman v. Reynolds, 28 Beav. 222, thought that the fact that the testator had no money to answer to the bequest would be a strong circumstance indicating an intention to include stock.

Where a testator directed “that the income arising from his principal money should be paid” to his wife for the support of herself and the education of his children, and at her death to be divided among them, making no other disposition, and he had but little money, strictly speaking, but a large

*50] Stock in the public funds is in fact only the right to *receive a perpetual annuity, subject to redemption. "An annuity is not, though its fruit is, money." (Per Knight Bruce, L. J., 5 D. M. G. 316.)

In *Lowe v. Thomas*, the will *in extenso* was as follows: "I, A. B., give and bequeath to C. D., the whole of *my money* for his life; at his death to be divided between my two nieces, E. and F. My clothes to be divided likewise between them; my watch and trinkets for my niece, D. I likewise declare that the longest survivor of the above-mentioned nieces is to become possessor of the whole money." The testatrix had little else than two sums of stock: yet it was held that they did not pass by the will.

In *Waite v. Coombes*, 5 De G. & S. 676, a direction to the testator's executors "to take and receive all moneys that may be in my possession or due to me at the time of my decease, and to prosecute for the recovery of the same," was held to pass stock in the funds; but qu. whether this case would now be followed.

Money at a banker's.—But a bequest of the testator's "moneys," though it does not ordinarily pass money in the funds, includes money standing to the testator's account at his banker's, whether on a current account (*Parker v. Marchant*, 1 Phill. 356), or on a deposit account. (*Manning v. Purcell*, 7 D. M. G. 55.)¹

amount of personal property, it was held that personal property of every description passed: *Prichard v. Prichard*, L. R. 11 Eq. 234. A bequest of money will pass the whole personal estate whenever upon a consideration of the whole will and the circumstances of the testator, there appears an intention to that effect: *Morton v. Perry*, 1 Metc. 449; *Smith v. Davis*, 1 Grant's Cas. (Pa.) 158; *Fulkerson v. Chitty*, 4 Jones Eq. (N. C.) 244.

In *Morton v. Perry* the testator expressed in the beginning of his will an intention of disposing of his whole estate. He had but little money on hand at the time of making his will, and he commonly had on hand not more than twenty or thirty dollars. He had at the time of making his will a large amount of promissory notes which would have been undisposed of unless included in the term "money."

¹ In *Beatty v. Lalor*, 2 McCart. 110, it was held that money at a banker's will pass, but not money at a saving fund, that being in the nature of an investment drawing interest and not usually subject to the immediate order of the owner. In *Dabney v. Cottrell*, 9 Gratt. 580, on the other hand, it was held that money in a saving fund would pass.

It seems that stock in the funds may pass under a bequest of "securities for money." (*Bescoby v. Pack*, 1 Sim. & Stu. 500.)¹

Moneys due.—In an old case (*Gilb. Eq. Rep.* 200), it was said that "money" comprehends both money in the possession of the testator, and money due to him; but it seems (*Langdale v. Whitfield*, 4 K. & J. 426) that a bequest of the testator's moneys would not now be held, without aid from the context, to pass moneys due to the testator on security or otherwise. In *Langdale v. Whitfield*, however, a bequest of the residue of the moneys of which the testatrix might at her death be absolutely possessed, was held, upon the whole will, to include moneys due on security or otherwise.²

**Ready Money.*

[*51

RULE. A bequest of the testator's "ready money" includes cash at a banker's on a current account. (*Parker v. Marchant*, 1 Phill. 356; *Manning v. Purcell*, 7 D. M. G. 55.)³

"Everybody speaks of the sum which he has at his banker's as money; 'my money at my banker's,' is a usual mode of expression. And if it is money at the banker's, it is emphatically ready money, because it is placed there for the purpose of being ready when occasion requires." (*Parker v. Marchant*, 1 Phill. 360.)

A bequest of "ready money," however, will not include unreceived dividends on stock in the funds. (*May v. Grave*, 3 De G. & Sm. 462.)

ROGERS v. THOMAS.

"Money" remaining after payment of debts.—The word "money," however, is in one instance considered as being used

¹ A bequest of "securities for money" will not pass shares in a banking company, they being merely an interest in an incorporated partnership. *Ogle v. Knipe*, L. R. 8 Eq. 436.

² A bequest of "moneys and securities for money" will not include a debt unsecured. In *Re Mason's Will*, 34 Beav. 498.

³ For a review of the more important cases involving the definition of the term "ready money" see *Smith v. Burch*, 92 N. Y. 228.

in its most comprehensive meaning, including the whole personal estate of the testator; viz:—

RULE. Where there is no other general residuary bequest, and there is a bequest of the “money” *remaining*, or which may *remain* after payment of the testator’s debts and legacies, or after payment of his debts (*Stocks v. Barré*, Johns. 54), the word “money” is held to comprise the whole residuary personal estate of the testator. (*Rogers v. Thomas*, 2 Keen 8; *Stocks v. Barré*, Johns. 54; *Grosvenor v. Durston*, 25 B. 97.)¹

“In this case the general rule of construction must prevail, viz., that, where there is no other gift of the residue of the testator’s personal estate, and there is a bequest of any “money” which may remain after payment of his debts, the court must construe the word “money” as including the general residue of the *52] *personal estate not specifically bequeathed, and which by law is liable to the payment of his debts.” (*Stocks v. Barré*, Johns. 54.)

Funeral expenses.—The same rule applies where the bequest is of the “money” which may remain after payment of the testator’s funeral expenses. (*Legge v. Asgill*, T. & R. 265, n.; *Willis v. Plaskett*, 4 B. 208.) In *Legge v. Asgill*, the testatrix in the body of the will said, “I believe there will be sufficient money left to pay my funeral expenses;” and in the codicil, “If there is money left unemployed, I desire it may be given in charity.” It was held that in the will, the word “money” must have referred to the general residue, because it was out of the general residue that the funeral expenses must be paid; and that the same word in the codicil must have reference to the same subject.

Legacies.—In *Gosden v. Dotterill*, 1 My. & K. 56, a bequest of “the rest of my money,” following gifts of pecuniary legacies, was held not to carry the general residue. This case, therefore, is an authority against extending the rule in *Rogers v. Thomas* to a bequest after payment of *legacies*; but the reason of the rule

¹ *Smith v. Davis*, 1 Grant’s Cas. (Pa.) 158; *Paul v. Ball*, 31 Tex. 10.

would seem to extend to this case; and *Gosden v. Dotterill* was decided before the rule itself was well established. In *Dowson v. Gaskoin*, 2 Keen 14, the testatrix gave certain special directions respecting her burial (which might perhaps be held equivalent to a direction for payment of funeral expenses), and gave a legacy to her executors, and then bequeathed "whatever remains of money:" and it was held that the latter bequest carried stock.¹

Exceptions.—If the gift of the remainder of the testator's *moneys* be followed by a bequest of "wearing apparel, trinkets, and all other *property* I may die possessed of," the rule is of course excluded, and the word "moneys" cannot have its extended meaning. (*Willis v. Plaskett*, 4 B. 208.)

And where the testator directed his books, plate, and *household furniture to be sold, and after giving a legacy [53 added, "in case there is any money remaining I wish it to be given in charity," the latter words were held not to comprise the general residue, on the ground that the testator was adverting to that which he had directed to be converted into money, and that the words applied only to the residue of the produce of the particular articles directed to be sold, after providing for the payment ordered to be made. (*Ommaney v. Butcher*, T. & R. 260.)

The rule cannot be extended to a bequest of "*ready money*," so as to make a gift of the testator's "*ready money*" remaining after payment of his debts carry the whole personal estate. (*Powell's Trust*, Johns. 49.)

¹ *Gosden v. Dotterill*, is criticized by Sir John Romilly, in *Cowling v. Cowling*, 26 Beav. 452, and *Dawson v. Gaskoin* considered the preferable authority.

"If a person gives the whole of his money to A. B., and afterwards gives specific chattels, it is clear that they are not to be treated as money, and therefore the word 'money' is not to be treated as the whole residuary estate. But if a testator bequeaths specific chattels first, and the residue of his money afterwards it is the converse." (Per Romilly, M. R., in *Montague v. Sandwich*, 33 Beav. 326.)

In *Fulkerson v. Chitty*, 4 Jones Eq. (N. C.) 244, a bequest of the "residue of my moneys" following bequests of pecuniary legacies, was held to pass stock, notes and bonds. But this construction was aided by the context.

“Estate.”

The word “estate” was in the older cases not unfrequently held to be confined to personal estate. In *Woodlam v. Kenworthy*, 9 Ves. 137, Lord Eldon said: “The question whether the words ‘all my estate and effects’ will include a real estate or not, depends upon the context of the will.” But the rule seems to be observed with considerably greater strictness in modern times, that,—

RULE. The word “estate” comprehends both the real and personal estate of the testator. (1 Salk. 236; *Barnes v. Patch*, 8 Ves. 604; *Mayor of Hamilton v. Hodsdon*, 6 Moo. P. C. C. 76.)¹

“The word ‘estate’ is *genus generalissimum*, and includes all things real and personal.” (Per Lord Holt, 1 Salk. 236.)

It was formerly considered that where the word “estate” occurred among words descriptive of personal property only, and the limitations and trusts declared were appropriate only to personal estate, the meaning of “estate” was to be restricted to personal estate. Thus in *Doe d. Spearing v. Buckner*, 6 Term Rep. 610, where the testator gave all the rest of his estate and effects *54] of what nature soever *to A. and B., their *executors* and administrators, in trust to add the interest to the principal so as to accumulate the same, real estate was held not to pass. And this construction was adopted in the recent case of *Coard v. Holderness*, 20 B. 147: while in *Saumarez v. Saumarez*, 4 Myl. & Cr. 331, and *Stokes v. Salomons*, 9 H. 75, although the word “estate” was upon the whole will held to carry real estate, yet the question was considered doubtful by reason of the applicability of the trusts declared to personal estate only.²

¹ *Hunt v. Hunt*, 4 Gray 190; *Jackson v. Housel*, 17 Johns. 281; *Rosetter v. Simmons*, 6 S. & R. 456; *Smith v. Smith*, 17 Gratt. 276; *Sutton v. Wood*, Cam. & Nor. (N. C.) 205; *Andrews v. Brumfield*, 32 Miss. 117; *Morris v. Henderson*, 37 id. 505; *Mumford’s Est.*, Myr. Prob. 133.

² The signification of the word may be restricted by the context, or by being associated with words pertaining peculiarly to personal estate. *Bullard*

Where language of the will applies to personal estate only.—

But the case of *O'Toole v. Browne* (3 E. & B. 572) seems to put an end to this class of exceptions to the rule. In *O'Toole v. Browne* the testator by a will made in 1849, after bequests of legacies and of household goods and furniture, gave "all the rest, residue, and remainder of my goods, chattels, stock in trade, estate, and effects of what nature and kind soever," not therein before bequeathed, to trustees, to hold to them and to their *executors*, administrators, and assigns, in trust to sell, &c., and to assign and convey the said residue of his estate and effects, and the interest, dividends, and produce thereof, to the testator's children on the youngest attaining twenty-one. The testator had *no real estate* at the date of the will: but it was held that after-acquired real estate passed.¹

In *Doe v. Evans*, 9 Ad. & E. 719 (E. C. L. R. vol. 36), and *D'Almaine v. Moseley*, 1 Drew. 629, in both of which cases real estate was held to pass, a distinction was mentioned, that where the word "estate" was associated with other words sufficient to pass the whole personal estate, it would carry real estate, but not otherwise (the trusts declared being applicable to personal estate only): so that a bequest of "estate and effects" would carry real estate, where "estate" alone would not do so. But qu. whether this distinction would now be attended to.²

"Effects."

Notwithstanding some cases inconsistent with the rule, it appears to be settled by authority that,—

v. Goffe, 20 Pick. 257; *Birdsall v. Applegate*, Spenc. (N. J.) 245; *M'Chesney v. Bruce*, 1 Md. 347; *Clark v. Hyman*, 1 Dev. (N. C.) 382.

But some American cases, like the later English, hold that there must be a clear indication of an intention to restrict the meaning of the word. The fact that there has been no previous devise of real estate, or that the words used have been applied in a previous part of the will to personal estate, or that they are accompanied with words descriptive of personal estate merely, is not sufficient to restrain their meaning: *Wheeler v. Dunlap*, 13 B. Mon. 293; *Harper v. Blean*, 8 Watts 474.

¹ *Dobson v. Bowness*, L. R. 5 Eq. 407.

² The distinction is recognized in *Dobson v. Bowness*, L. R. 5 Eq. 407; *Harper v. Blean*, 8 Watts 474.

*55] ***RULE.** The word "effects" is confined to personal estate, and does not include real estate, unless an intention appear to the contrary. (*Doe d. Hick v. Dring*, 2 M. & Sel. 448; *Doe d. Haw v. Earles*, 15 M. & W. 450.)¹

"In *Hogan v. Jackson*, Lord Mansfield certainly considered *effects* as a word of very general and extensive signification, and if his authority stood alone, I should be inclined to think that he considered the word *effects* as sufficient in itself to pass the real estate. But the subsequent cases of *Camfield v. Gilbert* and *Doe v. Lainchbury*, have treated it otherwise, and as applying only to personalty in its primary signification." (Per Bayley, J., in *Doe v. Dring*, 2 M. & Sel. 458.)

"There is no doubt that the meaning of the word 'effects' is, in common parlance, confined to personal things; and it has been judicially decided to bear that meaning, unless the context shows that the testator used it in a more comprehensive sense. This was held by all the Court of King's Bench, in the cases of *Camfield v. Gilbert*, 3 East 510, and of *Doe v. Longlands*, 14 East 370: and although according to the report of the case of *The Marquis of Titchfield v. Horncastle*, 2 Jur. 610, Lord Langdale appears to have thought that the word might originally have been construed to embrace all the effects, real and personal, of a man's industry, he does not intimate any opinion that the decisions ought not to be abided by." (Per Parke, B., in *Doe v. Earles*, 15 M. & W. 456.)

In *Doe d. Hick v. Dring*, 2 M. & Sel. 448, the will in extenso

¹ But in Ontario the word "effects" is considered wide enough to carry real estate unless controlled. The words of the devise were: I further direct that the balance of personal property, consisting of notes and other securities for money, be given to my two sons aforesaid. . . . also that if there be any effects possessed by me at the time of my decease, that the same may be divided equally in value among my grandchildren, share and share alike." The cases in the text and notes were cited, and a later case of *Jones v. Robinson*, L. R. 3 C. P. D. 344, which was distinguished, as the word "personal" was there held to control the word "effects," while in this case it was held otherwise; *Hammill v. Hammill*, 6 Ont. R. 681; affirmed on appeal, 5 C. L. T. 81.

was as follows: "I, A. B., declare this to be my will, by which I give and bequeath to my wife *all and singular my effects of what nature or kind soever*, to her own use and enjoyment during her natural life, and at her death to be equally divided between our surviving children." It was held that real estate could not pass.

But the context may show an intention to include real estate under the words "effects;" as if the testator speaks *of [*56 "my *said effects*," referring to a previous devise of land (Doe v. White, 1 East 33; Den v. Trout, 15 East 394), or direct an annuity to be paid out of his *real* and personal estate by the persons to whom the "effects" are given. (Marquis of Titchfield v. Horncastle, 2 Jur. 610.)

"Goods," "Chattels."

RULE. The word "goods," and equally the word "chattels," *prima facie* comprise the whole personal estate of every description. (Kendall v. Kendall, 4 Russ. 370.)¹

¹ Stuckey v. Stuckey, 1 Hill Ch. (S. C.) 309.

These words will include *choses in action*. Moore v. Moore, 1 Bro. C. C. 127. But a bequest of "goods and chattels" or of "personal property," &c., in a certain place will not include *choses in action*, for they "have no locality otherwise than by drawing the jurisdiction of the ecclesiastical court," per Lord Thurlow: Moore v. Moore, 1 Bro. C. C. 129; Chapman v. Hart, 1 Ves. Sen. 272; Fleming v. Brook, 1 Sch. & Lef. 318; Brooke v. Turner, 7 Sim. 681; Penniman v. French, 17 Pick. (Mass.) 404.

Where a testatrix bequeathed "all her property of whatever nature or kind the same may be, that should be found in her house, except a bond of F. M. in her writing box in said house," this bequest was held not to include a bond and mortgage, and several banker's receipts found in the house, the exception not being sufficiently strong evidence of intention to take it out of the general rule. Fleming v. Brook, 1 Sch. & Lef. 318. Where a testator bequeathed to R. O. K. "my carpet, blankets, and whatever else I may have at his house," it was held that mortgages and a deposit receipt at his house did not pass; Smith v. Knight, 18 Grant Ch. (U. C.) 492.

Nor will a bequest of "personal property" with direction for a sale include bonds, notes, mortgages and other *choses in action*, or money, such property not being ordinarily made a subject of sale. Hunter's Estate, 6 Penn. St. 97; Bredlinger's Appeal, 2 Grant's Ca. 461; German v. German, 27 Penn. St. 116; Alexander v. Alexander, 6 Ired. Eq. 230; Hastings v. Earp, Phill. Eq. (N. C.) 5. But in order to prevent a partial intestacy where there is a

In some cases the nature of the bequest may show that particular species of personal estate could not be intended to pass by it. In *Borton v. Dunbar*, 30 L. J. Ch. 8, where the testator bequeathed the remainder of his "money and *effects*" to be expended in purchasing a suitable present for his godson, it was held that a contingent reversionary interest in stock did not pass: but the case seems one of difficulty.

direction to the executors to sell the whole of the testator's property and out of the proceeds to pay legacies, *choses in action* will be included. *Thorton v. Burch*, 20 Ga. 791.

And a distinction is taken in North Carolina between a bequest that the whole personal property be sold and divided, and a bequest of the proceeds of a sale, holding in the former case that *choses in action* will pass. *Hogan v. Hogan*, 63 N. C. 222.

OBJECTS OF GIFT GENERALLY.

BROWN v. HIGGS.

IF the testator by will leaves the objects of his bounty to be selected by a given person, and no selection is made, either by the death of the person to whom the duty is intrusted or otherwise, it might be argued that there was in event no devise or bequest; but the Court, where a class of objects are pointed out among whom the selection is to be made, carries out the intention of the testator *cyprès*, whether the power be one of selection or distribution: and it is a rule that,—

RULE. If real or personal estate be given to or for the benefit of *such* of certain objects as A. shall appoint, or to or for the benefit of certain objects *in such proportions* as A. shall appoint, and there is no gift in default of appointment:—if the power of selection or distribution be not exercised, the gift is not void for uncertainty, but the property is held divisible among *all* the objects of the power equally. (*Brown v. Higgs*, 4 Ves. 708; 8 Id. 561; *Burrough v. Philcox*, 5 My. & Cr. 72.)¹

Thus if the testator bequeath property to such of his relations as A. shall think most deserving (*Harding v. Glyn*, 1 Atk. 469), or to his widow to divide among his children as she shall think fit

¹ *Varrell v. Wendell*, 20 N. H. 431; *Bull v. Bull*, 8 Conn. 47; *Dominick v. Sayre*, 3 Sandf. S. C. 555; *Robinson v. Allen*, 11 Gratt. 789; *Withers v. Yeadon*, 1 Rich. Eq. 324; *M'Gaughy v. Henry*, 15 B. Monr. 399; *Rogers v. Rogers*, 2 Head. 663; *Carr v. Crain*, 2 Eng. (Ark.) 241.

In New York, Alabama, Michigan, Wisconsin, and Minnesota the rule of *Brown v. Higgs* is established by statute.

(*Grieveson v. Kirsopp*, 2 Keen 653), or for the benefit of the *58] wife and children of *A. in such manner as he shall by will bequeath (*Brown v. Pocock*, 6 Sim. 257), and the power be not exercised, as by the death of the donee of the power or by his declining to exercise it, the Court will divide the property equally among the class of objects mentioned, *per capita*.

"When there appears a general intention in favor of a class, and a particular intention in favor of individuals of a class to be selected by another person, and the particular intention fails, from that selection not being made, the Court will carry into effect the general intention in favor of the class. When such an intention appears, the case arises, as stated by Lord Eldon in *Brown v. Higgs*, of the power being so given as to make it the duty of the donee to execute it; and in such case the Court will not permit the objects of the power to suffer by the negligence or conduct of the donee, but fastens upon the property a trust for their benefit." (*Burrough v. Philcox*, 5 My. & Cr. 92.)

"A bequest to A. or B. is void; but a bequest to A. or B. at the discretion of C. is good, for he may divide it between them. That is the case of this will The executors having their discretion might say to whom the fund should be given, the parents or the children. But the Court has not that discretion, but has only to say what class are to take; and then the distribution must be equal." (*Longmore v. Broom*, 7 Ves. 128.)

Power to appoint to some objects "or" to others.—The rule in *Brown v. Higgs* is applicable, although the language of the power is alternative. Thus if property be bequeathed to the testator's brothers and sisters *or* their children in such shares and proportions and at such times as the trustees shall think fit, in default of appointment the property is divisible among all the children and their parents equally *per capita*. (*Longmore v. Broom*, 7 Ves. 128; *Penny v. Turner*, 2 Phill. 493.) So if the gift be "to such children of A. as B. shall think most deserving, *or* to the children of C." (*Brown v. Higgs*, 8 Ves. 561); or if the gift be "amongst my nephews and nieces *or* their children, either all *59] to one of them or to as many of them *as my surviving child shall think proper." (*Burrough v. Philcox*, 5 My. & Cr. 73.)

Tenancy in common.—It seems that wherever the rule in *Brown v. Higgs* is applied, the objects will take the property among them as tenants in common, and not as joint tenants. This is certainly the case if the power be to divide the property “amongst” or “between” the objects (*Casterton v. Sutherland*, 9 Ves. 445); and in *Re White’s Trusts*, Johns. 656, a gift to “such other of my children or their issues” as A. should appoint, was held in default of appointment, to create a tenancy in common between all the children and issue. In fact any power which enables the donee either to *select* objects, or to fix proportions, seems to contain that reference to plurality of interest among the objects which is sufficient to create a tenancy in common.

Several sets of objects.—The rule has been applied to cases where the power of appointment was among several sets of objects entirely unconnected with each other. In these cases the distribution is, it seems, *per stirpes*, one set of objects taking one-half of the fund, and the other set taking the remainder.

Thus in *Doyle v. Attorney-General*, 4 Vin. Abr. 485, where property was bequeathed to trustees, in trust to dispose of it to such of the testator’s relations of his mother’s side who were most deserving, in such manner as they thought fit, *and* for such charitable uses and purposes as they should also think most proper and convenient, the court directed that one-half of the estate should go to the testator’s relations on the mother’s side, and the other half to charitable uses.

So in *Salisbury v. Denton*, 3 K. & J. 529, where the testator bequeathed property “to be at the disposal of my said wife to apply a *part* to such charitable endowment for the benefit of the poor of Offley as she may prefer, and the *remainder* to be at her disposal among my relations in such proportions as she may direct,” it was held that the property was divisible in equal parts, one of such **parts* to be for charitable purposes, and the other [**60* for the only child of the testator absolutely.

Again in *Fordyce v. Bridges*, 2 Phill. 497, where the testator gave his residuary personal estate to trustees, to invest in the purchase of estates in England *or* Scotland, such estates, if in England, to be settled upon one set of trusts, and if in Scotland

upon another set of trusts; it was held that, the discretionary power having ceased to exist, the unappointed fund was divisible into moieties, one-half to be invested in land in Scotland, and the other half being payable to those entitled under the trusts declared of the English estates.

In *Down v. Worrall*, 1 My. & K. 561, where property was left to trustees to settle *either* for charitable purposes at their discretion *or* for the separate benefit of the testator's sister and her children, the fund was held (no settlement having been made) to be undisposed of; but this case seems not to be consistent with *Doyley v. Attorney-General*, and *Salisbury v. Denton*, there being no difference, as regards the application of the rule, between a bequest to A. *or* B. at the discretion of C., and a bequest to A. *and* B. in such proportions as C. shall appoint. The rule applies equally to both cases.

In *Re Eddowes*, 1 Dr. & Sm. 395, where the testator by will bequeathed his real and personal estate equally among his children, and by a codicil revoked the share of one of his sons, and gave that share to trustees upon trust at their discretion to apply the whole or such part thereof for the benefit of his said son, *or otherwise* to apply the whole or such part thereof in augmentation of the shares of the other children; the power not having been exercised, there was held to be an intestacy as to the share in question. Sed qu. as to this case.

The rule in *Brown v. Higgs*, however, does not apply where there is a mere *permission* to give to certain objects, as if property be given to a married woman for her separate use, with power for her (if she chooses) to bequeath it by will to her husband and children. (*Brook v. Brook*, 3 Sm. & G. 280.)¹

*[61] In *Little v. Neil*, 10 W. R. 592, V.-C. K., property was vested in trustees, with a direction to apply the income for the benefit of such one or more of the wife and children of A. as the trustees should think fit, but any provision made for the wife was to be in the shape of an annuity for her separate use. determinable on the life of her husband; the power not having been exercised, it was held that the fund was divisible equally

¹ *Robinson v. Allen*, 11 Gratt. 785; *Holt v. Hogan*, 5 Jones Eq. 88; *Harlason v. Rodd*, 15 Ga. 148.

among the wife and children of A. the wife taking her share, not in the form of an annuity, but absolutely.

Power exercised in part.—If the power has been partially exercised, the rule in *Brown v. Higgs* applies, and the unappointed part is divisible equally among the objects of the power, without regard to the appointment. (*Maddison v. Andrew*, 1 Ves. sen. 58; *Fordyce v. Bridges*, 2 Phill. 513.)¹

Objects when ascertained.—It would seem that the period for ascertaining the objects to take in default of appointment should be the time when the power ought to have been exercised.² Thus in *Longmore v. Broom*, 7 Ves. 124, where there was an immediate gift to the children of A. as B. should appoint, it was held that the fund vested at the testator's death, and that after-born children could not take.

So in *Re White's Trusts*, Johns. 656, where a sum of 2500*l.* was given to trustees in trust for the testator's son A. for life, with remainder to his children, "but should A. die childless, I confide in the said trustees for applying the said sum of 2500*l.* for the benefit of such other of my children or their issue, as they may think fit," it was held that the children and issue of children living at the death of A. took the fund *per capita*, the trustees having died in the lifetime of A.

If the bequest be to A. for life, with a power of disposition among the testator's relations by deed or will, and A. dies without exercising the power, it is settled that the class to take under the rule in *Brown v. Higgs*, are those who would be the next of kin, according to the Statutes of Distribution, of the testator *at the death of A.*, *and not at the death of the testator (2 Sugd. [*62 Pow. 268, 271, 6th ed.), whether the power be one of selec-

¹ *Foster v. Cautley*, 3 Sm. & Gif. 99; *Russell v. Kennedy*, 66 Penn. St. 252; *Cruse v. M'Kee*, 2 Head 7. But in *Varrell v. Wendell*, 20 N. H. 431, it was held that where a power is given to distribute amongst a certain class, and through a mistaken notion of the extent of the power, the donee appoints to a number of persons, some of whom are, and some are not proper objects of the power, the power is to be considered as wholly unexecuted, and the whole property is to be distributed equally among the objects of the power. *Sed contra*, *Cruse v. M'Kee*, 2 Head 1.

² *Hoey v. Kenny*, 25 Barb. 398; *Rogers v. Rogers*, 2 Head 667.

tion (*Harding v. Glyn*, 1 Atk. 469), or of distribution (*Pope v. Whitcombe*, see *Finch v. Hollingworth*, 21 B. 112).

Where the power is not to arise until a given period.—If the power of appointment is not to arise until a given period, no objects can take, under the rule in *Brown v. Higgs*, who die before that period. Thus, if the gift be to A. for life, and after his decease to his children, as he shall *by will* (only) appoint, children dying in the lifetime of A. are excluded. (*Walsh v. Wallinger*, 2 R. & My. 78; *Kennedy v. Kingston*, 2 J. & W. 431.)

So where the testator devised his real estate to his wife for life, and *after her death* directed that his brother should divide the estate among his children as they should attain twenty-one, and the children all died in the lifetime of the testator's widow, it was held that the estate was in event undisposed of. (*Halfhead v. Shepherd*, 7 W. R. 480.)

GARVEY v. HIBBERT.

It is a convenient rule, to remedy mistakes in the number of legatees intended by the testator, that—

RULE. Where a gift to children describes them as consisting of a specified number, which is less than the number in existence at the date of the will, the Court rejects the specified number on the presumption of mistake, and all the children in existence at the date of the will are held entitled; unless it can be inferred who were the particular children intended. (*Garvey v. Hibbert*, 19 Ves. 124; *Lee v. Pain*, 4 Hare 250.)¹

¹ *Perkins v. Fladgate*, L. R. 14 Eq. 54; *Cleveland v. Carson*, 37 N. J. Eq. 378; *Vernor v. Henry*, 6 Watts 201; *Urie v. Irvine*, 21 Penn. St. 312; *Thompson v. Young*, 25 Md. 459; *Adams v. Logan*, 6 Monr. 177. In *Ruthven v. Ruthven*, 25 Grant Ch. (U. C.) 534, extrinsic evidence was admitted to show that by "the four children" the testator meant "the four daughters" of his brother, who had, in fact, five children, viz., four daughters and a son.

Where a gift is made to a whole class and only some of the class are named, those not named will be included: *Eddels v. Johnson*, 1 Giff. 27; *Tucker v. Boston*, 18 Pick. 166.

Thus if the bequest be of 1000*l.* to the "three" children of A., and A. has at the date of the will four, five, or a larger number of children, all are held entitled.

The rule is the same where the legacy is of a given amount to *each* child, as "to the *three* children of A. *100*l.* each," although the total amount of the gift is increased by the construction adopted. (Garvey v. Hibbert, 19 Ves. 124.)¹ [*63]

The same rule applies to gifts to brothers or sisters (Lee v. Pain, 4 Hare 250), grandchildren (Wrightson v. Calvert, 1 Johns. & H. 250), servants (Sleech v. Thorington, 2 Ves. sen. 561).

"The ground on which the Court has proceeded is, that it is a mere slip in expression; the meaning is, all children, or all servants; and the Court conceiving the intention to be to give to each child so much, strikes out the specified number." (Garvey v. Hibbert, 19 Ves. 126.)

In *Daniell v. Daniell*, 3 De G. & Sm. 337, the testatrix by will gave "to the three children of A. 500*l.* each," A. having then three children, and three only, as the testatrix knew. The testatrix afterwards made three other wills, repeating in each the above bequest in the same words. A. had in the meantime other children born, and at the date of the last will had *nine* children, of the birth of each of whom the testatrix had been regularly informed; it was held, however, that the evidence was not sufficient to negative the claim of the six younger children to share in the bequest, that the rule in *Garvey v. Hibbert* applied, and that each of the nine children was entitled to a legacy of 500*l.*

Again, in *Yeates v. Yeates*, 16 B. 170, where the testator before making his will caused inquiry to be made respecting the

But where the words were "to my four nephews and my niece," naming three nephews and the niece, omitting the only remaining nephew, Romilly, M. R., held that he took nothing, that the word four referred not to the number of nephews, but to the whole number of persons included in the gift: *Glanville v. Glanville*, 33 Beav. 304.

¹ *Spencer v. Ward*, L. R. 9 Eq. 509.

family of A., and was informed, as was then the fact, that A. had seven children, and the testator made his will, giving "to each of the *seven* children now living of A. an annuity of 40*l.* each," but in the meantime, and before the will was made, two more children of A. had been born; it was held that the rule applied, and that all the nine children were entitled to an annuity of 40*l.* each.

But the rule is of course excluded in a case where the testator *64] points out the particular children intended by an *additional description, as by adding, "they live near G.," when only the specified number lived there. (*Wrightson v. Calvert*, 1 Johns. & H. 250.)¹

THETFORD SCHOOL CASE.

It not unfrequently happens that the rents of an estate devised to charitable purposes greatly increase in amount since the time of the devise, and that the will makes no express provision for the employment of the surplus rents. In such cases it is a rule that:—

RULE. If sums amounting together to the whole rents of an estate, at the time of the devise, are given to charitable objects, the objects will take the increased rents in the same proportions, unless an intention appear to the contrary. (*Thetford School Case*, 8 Co. Rep. 130 b; *Attorney-General v. Johnson*, Amb. 190; *Mayor, &c. of Beverly v. Attorney-General*, 6 H. L. C. 310.)

In the *Thetford School Case*, 8 Co. Rep. 130 b, land to the value of 35*l.* a year was devised for the maintenance of a preacher, schoolmaster, and poor people in Thetford: and by the will a special distinction was made, how much the preacher, schoolmaster and poor people should have, amounting in the whole to 35*l.* a year, which was the value of the land at the time of the devise; and afterwards the land increased to be of the value of

¹ Where one or more of the class have already been provided for, and the specified number corresponds with the number unprovided for, the rule will not apply. *Shepard v. Wright*, 5 Jones Eq. (N. C.) 22.

100*l.* a year. It was held "that the revenue of the lands should be employed to increase the several stipends of the persons appointed to be maintained by the devisor."

"There are many cases which have decided, that where it appears on the will itself, what was the yearly value of the estates given to charitable purposes, and the testator has parcelled among the different charities the whole of that yearly rent or value so attributed to the property, any future increase of rents must go to charity. The Court seems to have said, that the testator has himself declared what constitutes the whole of the estate; and *from the circumstance of his knowing what was the then present value of the estate, and devoting it exclusively to [*65 charity, we have inferred an intention on his part, that the whole of the estate should be given to charitable purposes. The doctrine of these cases is neither more nor less than this:—a gift of the rents and profits of an estate is a gift of the estate itself; such a devise as I have just mentioned is a gift of the rents and profits; it is therefore a gift of the estate." (Per Lord Eldon, *Attorney-General v. Skinners' Company*, 2 Russ. 441:.)

"As far as I have read these ancient cases, they state it to depend upon the intention of the donor, and that one way of finding out the intention is, to inquire whether the whole of the annual value of the property was, at the time of the foundation of the charity, distributed among the objects of the charity. If it was, they say that that circumstance is evidence of the donor's intention to give the whole of the increased value to the same objects." (*Attorney-General v. Mayor of Bristol*, 2 J. & W. 313.)

The cases not coming within the rule in the Thetford School Case will fall under two heads:

1. *Where the whole rents are not given.*—First, where the sums given to the various charitable objects do not exhaust the whole annual value of the lands at the time of the devise. (*Attorney-General v. Mayor of Bristol*, 2 J. & W. 294.) If property be given to a corporate body, and certain annual sums are directed to be paid thereout, which are less (by however small an amount) than the annual rents at the time of the devise, the rule does

not apply, and the corporate body will in general be held to take the increased rents for their own benefit.

Thus, in *Attorney-General v. Braznose College*, 2 Cl. & F. 295, where the rent was at the time of the devise 66*l.* 13*s.* 4*d.* a year by the foundation accounts, and the charges upon it amounted to 65*l.* 3*s.* 4*d.* only, the increased rents were held to belong to the College. So, in *Attorney-General v. Trinity College, Cambridge*, 34 B. 383, where the testator devised real estates which he described as “of *the yearly value of fourscore pounds *66] or thereabouts,” to the College, and at the testator’s death the rents exceeded the specific payments to be made thereout by 1*l.* 6*s.* 8*d.*, the College was held entitled to the whole surplus rents.

But even though the whole rents are not distributed among the charitable objects, the will or other instrument *may* show an intention that they shall participate in the increased rents. As in *Mercers’ Company v. Attorney-General*, 2 Bligh, N. S. 165, where a rent of 150*l.* was given by deed upon trust, and the payments to be made amounted to 149*l.* 11*s.* only, the augmented rents were held to belong to the charitable objects: there being a direction that if the rents *fell off*, the various charities should abate in proportion.

General charitable intention.—It is to be observed that, where the whole rents of an estate are not specifically appropriated, but the Court discovers upon the will a general intention to devote the whole to charity, the general charitable intention will be carried out by the Court, and the whole of the increased as well as the original rents will be appropriated by the Court of Chancery to charity. (*Arnold v. Attorney-General*, Show. P. C. 22.)

“If a testator gives all his lands to charitable uses, but not so many as to exhaust the whole value of the land, yet the gift will carry all the rents and profits, in point of application, to charitable purposes.” (*Attorney-General v. Mayor of Bristol*, 2 J. & W. 320.)

So also, “if the testator has manifested a general intention to give to charity, the failure of the particular mode in which the charity is to be effectuated shall not destroy the charity: but, if the substantial intention is charity, the law will substitute another

mode of devoting the property to charitable purposes, although the formal intention as to the mode cannot be accomplished." (*Moggridge v. Thackwell*, 7 Ves. 69)

2. *Where the rents are given, but not wholly to charitable objects.*—Secondly, the rule in the Thetford School Case does not apply, where the whole rents at the time of the devise *are disposed of by the will, but part only of the rents is given to charitable objects, and the remaining part, under the name of surplus or overplus, is given to a corporate body, or some other object not charitable. In such cases the charitable objects have no claim to absorb the *whole* of the increased rents, and the corporate body or other person to whom the surplus rents are given will in general be entitled, after making the specified payments to the charitable objects, to take the whole of the increased rents. (*Mayor, &c., of South Molton v. Attorney-General*, 5 H. L. C. 1 ; *Mayor, &c., of Beverley v. Attorney-General*, 6 id. 310.)¹

It may however be a question in such cases, whether there is to be a proportionate augmentation of the sums devoted to charitable purposes: but such a proportionate distribution of the increased rents will not, it appears, be made without a special intention appearing to that effect. (*Attorney-General v. Skinners' Company*, 2 Russ. 438, 443.) However, where the testator directed lands of the value of 100*l.* a year to be purchased, and gave 96*l.* to charity, and gave "the residue of the said sum, being 4*l.* yearly," to the Drapers' Company for their pains, it was held that all the objects were entitled rateably to the increased rents. (*Attorney-General v. Drapers' Company*, 4 B. 67.)²

¹ *Attorney-General v. Wax Chandlers' Co.*, L. R. 5 Ch App. 503.

² The question is, whether the intention was that the rents should be divided in certain proportions amongst the different objects of the testator's bounty, or that specified sums should be permanently paid to particular objects, and that they should be entitled to nothing more than the payment of the specified sums without abatement and without augmentation. Whether the lands are given in trust exclusively for charitable purposes, or beneficially on condition that specific sums are paid: Per Lord Campbell, *Attorney-General v. Dean of Windsor*, 8 H. L. C. 393-4.

CHILDREN, ETC., WHEN ASCERTAINED.

It might be supposed that a gift to the children of a person simpliciter, would include all the children he might have, whenever coming into existence: but the testator is considered to intend the objects of his bounty to be ascertained at as early a period as possible; and it may be laid down as a general rule (qualified by the other rules which follow in this chapter) that,

*Gifts to Children, &c., as a Class.*¹

RULE. A devise or bequest to the children of A., or of the testator, means, *primâ facie*, the children *in existence at the testator's death*: provided there are such children then in existence. (*Viner v. Francis*, 2 Cox 190; *Mann v. Thompson*, Kay 638.)²

¹ A careful analysis of the law upon this point will be found in an essay entitled "Remainders to Children as a Class," by Walter Murphy, Philadelphia. 1884.

² *Adams v. Spaulding*, 12 Conn. 359; *Miles v. Boyden*, 3 Pick. 216; *Worcester v. Worcester*, 101 Mass. 132; *Gardiner v. Guild*, 106 id. 25; *Collin v. Collin*, 1 Barb. Ch. 636; *Downing v. Marshall*, 23 N. Y. 373; *Chasmar v. Bucken*, 37 N. J. Eq. 415; *Gross' Estate*, 10 Penn. St. 361; *Ingram v. Girard*, 1 Houst. 286; *Benson v. Wright*, 4 Md. Ch. 279; *Shotts v. Poe*, 47 Md. 513; *Meares v. Meares*, 4 Ired. L. 196; *Myers v. Myers*, 2 M'Cord Ch. 214; *Wood v. M'Guire*, 15 Ga. 205; *Walker v. Williamson*, 25 Ga. 554; *Smith v. Ashurst*, 34 Ala. 210. The rule applies also where any of the members of the class, though alive, are incapacitated by alienage from taking under the will: *Downing v. Marshall*, 23 N. Y. 373.

In most, if not in all, of our states, as well as in Ontario, statutes have been passed to prevent lapse in certain devises and bequests, in some cases, to children and to descendants, or to all relations in others, and in others to all persons whatsoever. These statutes, though differing in detail, in general, provide that if such devisee or legatee shall die before the testator,

The rule is the same whether the gift be of an aggregate fund to the class, as 1000*l.* to the children of A., or of a certain sum to each member of the class, as, to the children of A. 100*l.* each. (*Mann v. Thompson*, Kay 638.)

The rule extends to gifts to grandchildren, issue, brothers, nephews, cousins. (*Lee v. Lee*, 1 Dr. & Sm. 85; *Baldwin v. Rogers*, 3 D. M. G. 649.)¹

A gift to *all* the children, or to “all and every” the children of a person, is, for the purpose of this and the following rules, equivalent to a gift to children simpliciter; the words “all and every” not being considered as emphatic.

The rule applies where the gift is to and for the benefit of A. and his children jointly. (*De Witte v. De Witte*, 11 Sim. 41.)

*The rule applies to gifts by way of appointment. [*69 (*Harvey v. Stracey*, 1 Drew. 78.)]

Additional description.—The rule applies, although the class of children entitled may be further limited by an additional description.

leaving issue who shall survive the testator, such issue shall take the estate as the devise or legatee would have done, in case he had survived the testator. If these statutes apply to gifts to classes as well as to individuals they prevent the application of this rule in all cases to which they extend.

This question has been raised in several states, and has been decided in the affirmative in some (*Moore v. Dimond*, 5 R. I. 121; *Yeates v. Gill*, 9 B. Mon. 206; *Jamison v. Hay*, 46 Mo. 552), in others in the negative (*Gross' Estate*, 10 Penn. St. 362; *Young v. Robinson*, 11 Gill & J. 328).

In Kentucky, there is a later statute, which expressly provides that when a devise is made to a class, and one or more of the class shall die before the testator, the share of those so dying shall go to their descendants, if any, or if none to the survivors, unless a different disposition be made: *Renaker v. Lemon*, 1 Duv. 212; *Carson v. Carson*, 1 Metc. (Ky.) 300. Whether this statute extends to the descendants of one who is dead at the date of the will, *quære*: *Dunlap v. Shreve*, 2 Duv. 335.

¹ *Dryden v. Woods*, 29 Grant Ch. (U. C.) 430, was a case of a devise of all the testator's estate, to be sold at the death of his widow and the proceeds equally divided amongst his four daughters and three sons and their children. It was held that all the children and grandchildren who should be in existence at the death of the widow would take concurrently.

Thus, if the gift be "to all the *present born* children of A." (Leigh v. Leigh, 17 B. 605), or to the children of the *late* A., a person dead at the date of the will, those children only who answer the description and who afterwards survived the testator take the whole fund.¹

So if the gift be to A. for life, and after his decease to all and every his children *living at his decease*, and A. dies in the testator's lifetime, the rule applies, and those children of A. who survive the testator take the whole fund. (Lee v. Pain, 4 Hare 250.)

Again, if the gift be "to such of the children of A. as shall attain 21, the sum of 100*l.* each" (Mann v. Thompson, Kay 638), and none have attained 21 at the death of the testator, those only who were in existence at the testator's death and who afterwards attain 21 will be entitled.

So if there be an immediate bequest to such of the children of A. as B. shall appoint, and there are children in existence at the testator's death, the power of appointment is confined to children then in existence. (Paul v. Compton, 8 Ves. 375.)

Exceptions.—If the description is such as to make the gift not one to a class, but to particular persons individually, the rule of course does not apply. As if the gift be "to the children of A., *namely*, B., C., and D." (Bain v. Lescher, 11 Sim. 397),² or "to the brothers and *sister* of A.," A. having several brothers and only one sister at the date of the will. (Havergal v. Harrison, 7 B. 49.) In this case the share of an object predeceasing the testator will lapse.³

¹ A gift to such children of A. as shall be living at the death of B., and B. dies in the testator's lifetime, all the children of A. living at the death of the testator will take though born after the death of B. Carver v. Oakley, 4 Jones Eq. 85.

² Bolton v. Bailey, 26 Grant Ch. (U. C.) 361.

³ Williams v. Neff, 52 Penn. St. 333. In Morse v. Mason, 11 Allen 86, a gift "to the surviving children of A. not knowing their names, they living in M.," was held to be a gift not to a class but to individuals. So in Starling v. Price, 16 Ohio St. 32, where the testator having numerous relations, referred to them as children of their respective parents now living, sometimes

And children born after the testator's death may be admitted under a gift to children as a class, if the intention clearly appear. Thus where the gift was "to all *grandchildren now born or hereafter *to be born during the lifetime of their respective parents*," afterborn objects were admitted. (*Scott v. Lord Scarborough*, 1 B. 154.)

The rule, however is not departed from on slight grounds of inference. Thus, in *Scott v. Harwood*, 5 Madd. 332, the testator devised his real estate to "all and every the children of A.," with a gift over in case "the said children" should die under 21, and directed the rents to be accumulated till the children should attain 21, and divided among such as should attain 21: and the testator gave his residuary personal estate to the children of A., payable at 21. Notwithstanding that children born after the testator's death were thus entitled to share in the personal estate, and the correspondence between the two gifts, it was held that the devise of the real estate was confined to children living at the death of the testator.

Words of futurity.—If words importing futurity be added to the bequest, as if the gift be to the children "born and *to be born*," "begotten and to be begotten," "which A. has or shall

mentioning their number and sometimes not; it was held that the gifts throughout were to individuals and not to classes.

But where the gift is to persons who constitute a class although they are named, yet if on construction of the whole will it appear that the testator regarded them as a class and not as individuals, they will be so considered: *Jackson v. Roberts*, 14 Gray 550; *Stedman v. Priest*, 103 Mass. 293; *Towne v. Weston*, 132 Mass. 513. Thus where in other parts of the will they are clearly regarded as a class, they will be so considered in a clause where they are named: *Schaffer v. Kettel*, 14 Allen 530. In *Springer v. Congleton*, 30 Ga. 977, it seems to be considered a rule, that when a gift is made to a class, the mere enumeration of the persons who compose the class at the date of the will, shall not render it a gift to individuals. The testator used two descriptions supposing them to be consistent. The idea of class was the leading one and shall prevail.

It seems that the naming of some members only of the class, does not take the case out of the rule. Thus in a gift, "to my nephew J. H. and the children of my sister E.," on the death of some of the children of E., J. H. and the survivors take the whole equally between them: *Aspinwall v. Duckworth*, 35 Beav. 307.

have," it is a question whether the additional words have the effect of letting in children born after the testator's death to share in the gift. Where the gift is not immediate, it is settled that the addition of such words does not alter the construction. (*Scott v. Lord Scarborough*, 1 B. 154; *Whitbread v. Lord St. John*, 10 Ves. 152); and it would appear that in the case of an immediate gift also they will generally be considered as intended only to provide for the case of children coming into existence between the date of the will and the testator's death. "If there is a bequest to the children of A., begotten and to be begotten, it has been generally held that the words 'to be begotten' show only that the testator contemplated children to be born after the date of his will and before his death." (*Butler v. Lowe*, 10 Sim. 325.) The authorities for this construction are *Sprackling v. Ranier*, 1 Dick 344; *Butler v. Lowe*, 10 Sim. 325; *Storrs v. Benbow*, 2 Myl. & K. 46; and dicta in *Mann v. Thompson*, Kay 648. On the other hand, in *Deffis v. Goldschmidt*, 1 Mer. 417, a gift to "all children of A. *71] whether now *born or hereafter to be born," and in *Mogg v. Mogg*, 1 Mer. 654, a devise of real estate in trust to pay the rents for the maintenance of children begotten and to be begotten, were held to let in all after-born children; and a similar construction was adopted in *Gooch v. Gooch*, 14 B. 565, see pp. 576, 577, and approved of, see 3 D. M. G. 380, 394. The point is perhaps not entirely settled.¹

If no children at testator's death.—If there are no objects in existence at the death of the testator or period of distribution, the rule has no application, and all children whenever born may be included, unless an intention appear to the contrary. (*Harris v. Lloyd, T. & R.* 210.) Thus, if the bequest be to trustees in trust

¹ In this country it seems to be generally settled that words of futurity will let in after-born children: *Butterfield v. Haskins*, 33 Me. 392; *Yeaton v. Roberts*, 8 Foster 459; *Shinn v. Motley*, 3 Jones Eq. 491; *Bullock v. Bullock*, 2 Dev. Eq. 316; *Napier v. Howard*, 3 Kelley (Ga.) 202. The difficulty which the English cases suggest, that of postponing the distribution, is overcome by taking refunding bonds from those to whom distribution is made.

The use of words of futurity only does not exclude those already in existence: *Almack v. Horn*, 1 Hem. & M. 633. But when the gift is of separate legacies, see *Howland v. Howland*, 11 Gray 469.

to invest, and stand possessed in trust for the children of A., share and share alike, and A. is living but has no children at the testator's death, after-born children will take, and the interest till the birth of a child falls into the residue. (Ib.) But if the property be given over in the event of there being no child in existence when by the terms of the will it should vest in possession (*Godfrey v. Davis*, 6 Ves. 43), or if the devise be a legal contingent remainder which fails by the determination of the particular estate before the birth of a child, after-born children will of course be excluded.

*Gift of Aggregate Fund to Children, &c., as a Class in
Remainder.*

Notwithstanding the preceding rule, "the general wish of the Court is, if it can, to include all children, coming in esse before a determinate share becomes distributal to any one." (2 Madd. 129.) Consequently, where the total amount of the gift is not dependent on the number of children admitted, it is the rule that—

RULE. A devise or bequest of a corpus or aggregate fund to children as a class, where the gift *is not immediate*, vests in all the children in existence at the death of the testator, but so as to open and let in children subsequently coming into existence before *the period [*72 of distribution. (*Devisme v. Mello*, 1 Bro. C. C. 537; *Browne v. Hammond, Johns*. 212 n. (a).)¹

¹ *Moore v. Dimond*, 5 R. I. 129; *Jones' App.* 48 Conn. 60; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 320; *Lane v. Brown*, 20 Hun 382; *Heater v. Van Aukin*, 1 McCart. Ch. 167; *Feit v. Vanatta*, 6 C. E. Green 86; *Ward v. Tomkins*, 30 N. J. Eq. 3; *Pemberton v. Parke*, 5 Binn. 606; *Ross v. Drake*, 37 Penn. St. 375; *Rudebaugh v. Rudebaugh*, 72 id. 271; *Taylor v. Mosher*, 29 Md. 445; *Barnum v. Barnum*, 42 id. 251; *Hamletts v. Hamletts*, 12 Leigh. 350; *Cooper v. Hepburn*, 15 Gratt. 558; *Wessinger v. Hunt*, 9 Rich. Eq. 464; *Walker v. Johnston*, 70 N. C. 576; *Nichols v. Denny*, 37 Miss. 65; *Turner v. Patterson*, 5 Dana 296; *Walters v. Crutcher*, 15 B. Monr. 10; *Richey v. Johnson*, 30 Oh. St. 1; *Goodwin v. Good* 48 Ind.

Thus if real or personal estate be given to A. for life, and after his decease to the children of B., all the children in existence at the testator's death take vested interests, subject to be partially divested in favor of children subsequently coming into existence during the life of A.

So if the gift be to the children of A., to be distributed among them at the end of twenty years from the testator's death, the children living at the testator's

584; *Handberry v. Doolittle*, 38 Ill. 206; *Ferguson v. Stewart*, 22 Grant Ch. (U. C.) 364; *Dryden v. Woods*, 29 id. 430.

In *Bull v. Bull*, 8 Conn. 49, it is held that where the gift vests at the death of testator to be enjoyed in futuro, only those who are in existence at his death can take. *Sed qu.* While in *Dingley v. Dingley*, 5 Mass. 536, it was held that the rule applied to devises of real estate in Massachusetts. In *Emerson v. Cutler*, 14 Pick. 115, it was held that in gifts of personalty, only those living at the period of distributing could take. But this case seems to have been overruled, and the doctrine of that state conformed to the English rule: *Winslow v. Goodwin*, 7 Metc. 375; *Dalton v. Savage*, 9 Id. 37; *Bowditch v. Andrew*, 8 Allen 342; *Hall v. Hall*, 123 Mass. 120; *Hills v. Simonds*, 125 id. 536. In Massachusetts it seems a devise of land to a class will embrace those born after the period of distribution: *Annable v. Patch*, 13 Pick. 363; *Ballard v. Ballard*, 18 id. 44.

A mere direction that, if any of the children die before the period of distribution, their share shall not go to their issue, without any other disposition of it, will not exclude the operation of the rule: *Crosby v. Smith*, 3 Rich. Eq. 244.

In Tennessee, in a gift to a class, those only who are members of the class at the time of distribution can take: *Satterfield v. Mayes*, 11 Humph. 58; *Re Miller's Wills*, 2 Lea, 54; *Parrish v. Groomes*, 1 Tenn. Ch. 581. But any indications of an intention to give to all the members of the class will take a case out of the rule: *e. g.*, "to A. for life, and after her death to her children that she now has or hereafter may have": *Harris v. Alderson*, 4 Sneed 254, and see *Alexander v. Walch*, 3 Head 493. And it is held where the gift, though to a class is not to the class as a unit, but each member takes a several interest, the rule does not apply, and thus reviving to the extent of such gifts, the distinction between joint tenancy and tenancy in common, after it had been practically abolished by statute: *McClung v. McMillan*, 1 Heiskell 655.

A gift "in equal shares among A.'s children and B.'s children, and that A. and B. have the use of their children's portion during their lives, and at their death to their children" is a postponed gift: *Crim v. Knotts*, 4 Rich. Eq. 340.

death take vested interests, subject to open and let in children coming in esse during the twenty years. (*Oppenheim v. Henry*, 10 Hare 441.)

The rule extends to gifts to grandchildren, issue, brothers, nephews, cousins. (*Baldwin v. Rogers*, 3 D. M. G. 649.)

Thus the objects among whom the fund becomes ultimately distributable are the children who may be living at the period of distribution, and the representatives of such as may have died before that period, having survived the testator.

It has been already stated that a gift to "all and every" the children, &c., is equivalent to a gift to children simpliciter, and does not let in objects born after the period of distribution.

The rule applies where the gift is to A. for life, with remainder to B. and C. and their children (jointly). (*Cooke v. Bowen*, 4 Y. & C. 244.)

Powers of appointment.—The rule applies to gifts in the nature of powers, and to gifts in exercise of powers of appointment.

Thus, if the bequest be to A. for life, and after his decease to such of the children of B. as A. shall appoint, A. can only appoint to children born in his lifetime, provided there are such. (*Paul v. Compton*, 8 Ves. 375.)

*Again, if property be settled on A. for life, and after his decease in trust for such persons as B. shall appoint, [*73 and B. by will appoints the property after the death of A. to all and every the children of C., and B. dies in the lifetime of A., the objects to take under the appointment will be the children of C. who may be living at the death of B., and those who may subsequently come into existence during the lifetime of A. (*Harvey v. Stracey*, 1 Drew. 73.)

Separate legacies.—The rule which admits objects born after the testator's death and before the period of distribution to share in the bequest, only applies where the total amount of the gift is independent of the number of objects among whom it is to be divided, and is therefore not increased by the construction adopted. But a gift of a certain sum to *each* of a class of objects at a future

period is confined to those living at the testator's death. Thus whereas, under a gift of £500 to all and every the children of A., payable at 21, children born after the testator's death and before the eldest child attains 21 are included (*see post*), if the gift be of £50 *each* to all and every the children of A., payable at 21, the children living at the testator's death alone are entitled. (*Ringrose v. Bramham*, 2 Cox 384; *Mann v. Thompson*, Kay 638.) The reason given is, that in the latter case, if after-born children were admitted, the distribution of the personal estate of the testator would have to be postponed till it could be ascertained how many legacies of the given amount would be payable.¹

Words of futurity, &c.—Children or other objects born after the period of distribution may of course be included by the effect of express words, as if the bequest, to take effect at a future period, be to “all children born or who shall hereafter be born *during the lifetime of their respective parents.*” (*Scott v. Lord Scarborough*, 1 Beav. 154.)²

But it is settled that words importing futurity, as if the *74] *gift be to “children born or to be born,” “begotten or to be begotten,” &c., do not extend the gift to objects born after the period of distribution. (*Scott v. Lord Scarborough*, 1 B. 154.) In that case it was said (p. 168), “if the testator had expressed himself in terms which show that he contemplated a division of the fund at the end of twenty years from his death: and if he had described the objects to be his grandchildren, or all such grandchildren born or to be born as many as there may be, it would, I think, have followed from the cases which were cited,

¹ In like manner where separate legacies were given to each of the testator's grandchildren, expressly including those born after his death, and the residue was given immediately to his children, it was held that to extend the formation of the residue to the time at which a grandchild could be born, was inconsistent with the gift thereof to the children and the court therefore decreed that grandchildren born after the time of filing a bill for a settlement of the estate could not be admitted, but all born before that time, though after the death of the testator, were admitted: *Howland v. Howland*, 11 Gray 476.

² *Brown v. Williams*, 5 R. I. 318.

that the fund would have vested in and become divisible among the grandchildren answering the description who were living at the end of the term of twenty years; the generality of the expression 'all my grandchildren,' or 'all my grandchildren born or to be born' being by construction, and, as it is said, for convenience, limited to the time of distribution, and the words applying to afterborn children being satisfied by giving the benefit of the bequest to those born after the testator's death and before the period of distribution. But here the gift is to all the grandchildren answering the description who are 'now born or who shall hereafter be born during the lifetime of their respective parents;' and the grandchildren who may be born after the end of twenty years cannot be excluded without striking these words out of the will."

Reversionary interests.—The rule which admits objects born after the testator's death but before the period of distribution, where the gift is not immediate, applies not only to the case where the period of distribution is postponed until the expiration of a life estate created by the testator himself, but to the case where he has only a reversionary interest expectant upon a life estate previously subsisting, and then disposes of the fund to take effect after the death of the tenant for life. (*Walker v. Shore*, 15 Ves. 122; *Harvey v. Stracey*, 1 Drew. 123.) "I think the distinction too thin, that the interest for life is not the gift of the testator himself." (Per Lord Eldon, 15 Ves. 125.) And it does not seem to be necessary that the bequest *should expressly refer to the period of determination of the previously exist- [*75
ing interest.

Gift of a fund, part of which is reversionary.—But if there be an immediate bequest of an aggregate fund, and part of the fund consists of reversions or expectancies, or from any other cause is not immediately distributable, this does not entitle objects born before such portion of the fund actually falls into possession to share in it. (*Hill v. Chapman*, 3 Bro. C. C. 391; *Hagger v. Payne*, 23 B. 474.) "A residue may include reversions or expectancies which may come in hereafter, but this court does not

make separate and distinct classes as each part of the residue comes in, but when once the residue in general becomes distributable, the rights are to be then ascertained and the class determined." (*Hagger v. Payne*, 23 B. 479.) Thus, if the testator bequeaths a particular fund to A. for life, and after his decease directs that it shall fall into the residue, and gives the residue of his estate to the children of A., children born after the testator's death will not be admitted to share in the fund given to A. for life.¹

So the fact that payment of legacies is by law postponed for a year from the testator's death, does not enlarge the class of objects. (*Ib.*)²

If lands be devised to trustees for a term of years, and, subject to the term, to the children of A., the devise to the class is immediate, and children born after the testator's death are not admitted. (*Singleton v. Gilbert*, 1 Cox 68.)

Gift to Children at a Given Age.

In the cases considered under the preceding rule, the shares of all the objects became payable at the same time, and the period of distribution was the same for them all: where the shares become payable at different times, as in the ordinary case of a gift to children at 21 or marriage, the last rule requires to be supplemented by another, viz. that—

RULE. When there is a bequest of an aggregate fund to children as a class, and the *share of each* child is made *76] payable on attaining a given age, or *marriage, the period of distribution is the time when the *first* child becomes entitled to receive his share, and children coming into existence after that period are excluded.

¹ To the contrary, *Annable v. Patch*, 3 Pick. 360; *Britton v. Miller*, 63 N. C. 270.

² But where the testator directs a postponement for one year, it has been held that a child born during that period will be included: *Bailey v. Wagner*, 2 Strob. Eq. 1.

(*Andrews v. Partington*, 3 Bro. C. C. 403; *Whitbread v. Lord St. John*, 10 Ves. 152.)¹

"I have always taken the rule to be as it is stated by Mr. Jarman, viz. that where a legacy is given to the children, or all the children, of A., to be payable at the age of 21, or to Z. for life, and after his decease, to the children of H., to be payable at 21; and it happens that any child in the former case at the death of the testator, and in the latter at the death of Z., has attained 21, so that his or her share would be immediately payable, no subsequently born child will take: and for this reason, viz. that the child who has attained 21 cannot be kept waiting for his share; and if you have once paid it to him, you cannot get it back." (*Gillman v. Daunt*, 3 K. & J. 48.)

The rule applies to gifts to grandchildren (*Iredell v. Iredell*, 25 B. 485), and, it would seem, to all classes of relatives embraced in the preceding rules.

The rule applies equally, whether the vesting or the payment only be postponed to the given age: *e. g.*, whether the gift be to "such children of A. as shall attain 21," or "to the children of A. payable at 21," or "when or as they shall attain 21." (*Gillman v. Daunt*, 3 K. & J. 48.)²

This rule, like the preceding one, applies where the gift is to "all and every the children." And it applies only where the gift is of an aggregate fund, and not to bequests of a certain amount to *each* of the children of a person at a given age—in

¹ *Hubbard v. Lloyd*, 6 Cush. 523; *Tucker v. Bishop*, 16 N. Y. 404; *Heisse v. Markland*, 2 Rawle, 275; *Hawkins v. Everett*, 5 Jones Eq. 44; *Simpson v. Spence*, 5 id. 208; *De Veaux v. De Veaux*, 1 Strob. Eq. 283.

² There seems to be some doubt whether a present gift, in terms with a subsequent direction for postponement of payment will include children born after the death of the testator. *Kevern v. Williams*, 5 Sim. 171; *Richardson v. Raughley*, 1 Houst. (Del.) 568.

In these cases the fact that there was an immediate gift and a postponement of the payment only, was held to confine the gift to those in existence at the testator's death. But no such distinction is noticed in *Gilmore v. Severn*, 1 Bro. C. C. 582; *Andrews v. Partington*, 3 Bro. C. C. 401, or *Hawkins v. Everett*, 5 Jones Eq. 44, in each of which cases the gift and time of payment were distinct.

which case, as already stated, only those in existence at the testator's death are entitled.

Payable at 21, or on death under that age leaving issue.—The rule appears to apply to all cases where the share of each child is made payable on an event personal to him or her. Thus, if the fund be given to the children of A., the share of each to be paid *77] on attaining 21, or on *death under that age leaving issue, and a child dies under 21 leaving issue, before any child has attained 21, no afterborn child can take. (*Barrington v. Tristram*, 6 Ves. 344.)

If the gift be in remainder after a life interest, as a bequest to A. for life and after his decease to the children of B. payable at 21, the period of distribution is the later of the two events to which payment is postponed: thus, if a child attains 21 in the lifetime of A., children born afterwards in A.'s lifetime are admissible; and if at the death of A. no child has attained 21, children born after A.'s death before the first child attains 21 are admissible.¹

Words of futurity, &c.—It is settled that the addition of words of futurity does not prevent the application of the rule, so as to let in children born after the first share has become payable. As if the gift be to "the children of A. born or to be born, as many as there may be" (*Whitbread v. Lord St. John*, 10 Ves. 152); or, "to all my grandchildren whether born in my lifetime or after my death." (*Iredell v. Iredell*, 25 B. 485.)²

But the rule may be excluded by inference from the context. Thus, where a bequest to all the testator's grandchildren who should attain 21 was followed by a power of advancement and maintenance to take effect "whether such grandchildren shall or not have attained the age of 21," and notwithstanding the liability of a "subsequent addition to the class entitled," it was held that the rule was excluded, and that grandchildren born after the eldest had attained 21 were entitled to shares. (*Iredell v. Iredell*, 25 B. 485.)³

¹ *Vanhook v. Rogers*, 3 Murph. (N. C.) 180.

² *Heisse v. Markland*, 2 Rawle 275.

³ *Bateman v. Gray*, L. R. 6 Eq. 215. But in *Gimblett v. Purton*, L. R. 12 Eq. 430, Malins, V.-C., considered the rule evaded by the Master of the

Where the bequest was to A. for life, and after his decease to the *grandchildren* of B. payable at the age of 25, it was held that the class of grandchildren to take was limited to those born in the lifetime of A. (*Kevern v. Williams*, 5 Sim. 172.) Sed qu.

Gift to children when the youngest attains 21.—The [*78 rule is not extended to the case of a gift to children when the shares are made payable on the *youngest* attaining a given age, so as to exclude children born after the youngest for the time being has attained that age. (*Mainwaring v. Beevor*, 8 Hare 44.) The distribution of the eldest child's share being postponed beyond the time when he himself attains the given age, "all the inconvenience is let in, and the eldest may have to wait for an indefinite time, so long as children may continue to be born." (Ib.) All children, whenever born, are therefore admitted in general, when the payment is postponed till the happening of an event personal to the youngest.¹

But the context may of course show, in a particular case, that the testator meant the distribution of the fund to take place when the *youngest for the time being* in esse should attain a given age; as if he speaks of the youngest child attaining 21 *in the lifetime of the parent*: and in such case children born after the period of distribution thus pointed out will be excluded. (*Gooch v. Gooch*, 3 D. M. G. 866.)

Where the interest of a fund was to be applied for the education of all the children, and "on *their* attaining 21," the whole was to be sold and divided equally among them, the words were held to mean "on their *all* attaining 21," and all afterborn children were admitted. (*Armitage v. Williams*, 27 B. 346.)

Rules exemplified.—It will be evident that, under the preceding rules, a slight difference in the form of gift will materially affect the number of children entitled to share in it. Thus:

Rolls in *Bateman v. Gray* and *Iredell v. Iredell*, and declares that even if there were a clause of advancement in the case before him, "similar to that which if found in *Bateman v. Gray*," he "should have declined to follow the decision of the Master of the Rolls in that case, as it tends to throw a doubt upon a rule which is as well settled as any rule of interpretation in the courts." L. R. 12 Eq. 431.

¹ *Fosdick v. Fosdick*, 6 Allen 43; *Handberry v. Doolittle*, 38 Ill. 206.

(1.) Let the bequest be of £1000 to all and every the children of A., with a gift over of the shares of children dying under 21 to the survivors. This bequest will include only children in existence at the testator's death. (*Davidson v. Dallas*, 14 Ves. 576.)

(2.) Let the bequest be of £1000 to all and every the children of A. who shall attain 21. This bequest will include not only the children living at the testator's death, *but all who may
*79] subsequently come into existence before the first child attains 21.

(3.) Let the bequest be, to all and every the children of A. who shall attain 21, 100*l.* each. This bequest will include only children in existence at the testator's death.

Children en Ventre.

In the preceding rules for ascertaining the class of children to take under a bequest, a child *en ventre* at any period, and born in due time afterward, is considered as in existence at that period, and is included in the class as if actually born. "It seems now settled, that an infant *en ventre sa mere* shall be considered, generally speaking, as born for all purposes for his own benefit." (*Doe v. Clarke*, 2 H. Bl. 401.) It is further established that—

RULE. A devise or bequest to children "*born*" or to children "*living*" at a given period, includes a child *en ventre* at that period, and born afterwards. (*Doe v. Clarke*, 2 H. Bl. 399; *Trower v. Butts*, 1 S. & Stu. 181.)¹

"It is now fully settled, that a child *en ventre sa mere* is within the intention of a gift to children *living* at the death of a testator; not because such a child (and especially in the early

¹ *Hall v. Hancock*, 15 Pick. 258; *Hone v. Van Shaick*, 3 Barb. Ch. 508; *Swift v. Duffield*, 5 S. & R. 38; *Simpson v. Spence*, 5 Jones Eq. 208; *Groce v. Rittenberry*, 14 Ga. 234; *Gourley v. Gilbert*, 1 Han. (N. B.) 80.

Since a child *en ventre* is considered as born only when it is for his benefit, when the share he would take under gift made to children in the will is less than he would take under the statutory provision for pretermitted children, he will not be included in the class: *McKnight v. Read*, 1 Whart. 213.

stages of conception) can strictly be considered as answering the description of a child living ; but because the potential existence of such a child places it plainly within the reason and motive of the gift.

“Upon the whole, I am of opinion that, inasmuch as it is adopted as a rule of construction, that a child *en ventre sa mere* is within the intention of a gift to children living at the death of a testator, because plainly within the reason and motive of the gift ; so a child *en ventre sa mere* is to be considered within the intention of a gift to children *born* in the lifetime of a testator, because it is equally within the reason and motive of the gift.” (Trower v. Butts, 1 S. & Stu. 181.)

CHILDREN, ETC., DEFINITIONS OF.

Legitimacy.

It is a strongly established rule of construction, aided by the policy of the law, that—

RULE. A gift to children means *legitimate* children only, unless it appears, from the context or from circumstances, that illegitimate children must have been intended. (*Wilkinson v. Adam*, 1 V. & B. 422.)¹

The same rule applies to gifts to sons, issue, and terms of relationship generally. (*Ib.*)

“The rule cannot be stated too broadly, that the description ‘child,’ ‘son,’ ‘issue,’ &c., every word of that species, must be taken *prima facie* to mean legitimate child, son or issue; but the true question here is, whether it appears by what we call sufficient description or necessary implication, that the testator did mean these illegitimate children.

“The question comes round to this, *whether it is possible to say he could mean*, at the time of making that will, any but illegitimate children.” (Per Lord Eldon, *Wilkinson v. Adam*, 1 V. & B. 461, 468.)

¹ *Paul v. Children*, L. R. 12 Eq. 16; *Hughes v. Knowlton*, 37 Conn. 429; *Collins v. Hoxie*, 9 Paige 88; *Van Voorhis v. Brintnall*, 23 Hun 260; *Heater v. Van Auken*, 1 M’Cart. Ch. 164; *Appel v. Byers*, 98 Penn. St. 479; *Kirkpatrick v. Rogers*, 6 Ire. Eq. 135; *Thompson v. McDonald*, 2 Dev. & Bat. Eq. 479; *Shearman v. Angel*, 1 Bail. Eq. 351; *Ferguson v. Mason*, 2 Sneed 625; *Doe v. Taylor*, 1 Allen (N. B.) 595.

This rule has, of course, no application when the gift is to the children *nominatim*; *Stewart v. Stewart*, 31 N. J. Eq. 398. Legitimated and adopted children are within this rule; *McGunnigle v. McKee*, 67 Penn. St. 41; *Johnson’s App.*, 88 id. 346.

Legitimacy is a question not of reputation, but of fact; and, therefore, a child afterwards discovered to be illegitimate, cannot share in a gift to children, although the child may have passed as legitimate at the date of the will.

And it is clear, as a general rule, that a gift to the *children of A., who has illegitimate children, but no legitimate children at the date of the will, does not let in the illegitimate children; inasmuch as A. may afterwards marry and have legitimate children. [*81]

Nor does a gift to the children of a particular man by a particular woman, who at the date of the will are cohabiting but not married, and have illegitimate children, let in such illegitimate children; inasmuch as the persons in question may afterwards marry and have legitimate children. (*Kenebel v. Scrafton*, 2 East 530.)

The case is the same if the gift be to the children of the testator, or to his children by a particular woman. (*Ib.*) "We may conjecture that he meant illegitimate children, if he did not marry; yet notwithstanding that may be conjectured, the opinion of the Court was, as mine is, that where an unmarried man, describing an unmarried woman as dearly beloved by him, does no more than making a provision for her and children, he must be considered as intending legitimate children." (*Per Lord Eldon*, 1 V. & B. 464.)

Exceptions.—The exceptions to the rule will fall under two heads:—

(1.) *Where the gift is to the children of a person dead at the date of the will.*—If the gift be to the children of A., a person dead at the date of the will, and there are living at the date of the will illegitimate children of A., but no legitimate children, and the facts as to the family of A. and his death were known, or can be presumed to have been known, to the testator, it is necessarily to be inferred that, under the word "children," the illegitimate children of A. were intended, and they will take under the bequest. (*Lord Woodhouselee v. Dalrymple*, 2 Mer. 419; *Gill v. Shelley*, 2 R. & My. 886.)

It is not essential that the gift should be to the children of a

person *described* as dead, if the fact of his death was presumably known to the testator.

In *Re Herbert's Trusts*, 1 Jo. & H. 121, knowledge on the *82] part of the testator was inferred from his having *been intimate with a brother of the deceased; but it was said that knowledge of the state of the family of a relation of the degree of first cousin once removed, will not in general be presumed.

A gift to the children of a married woman 49 years old, who has illegitimate children only, does not admit them (*Re Overhill's Trusts*, 1 Sm. & G. 362); but qu. whether if the woman were known by the testator to be of very advanced age, as seventy, the illegitimate children would not be admitted by necessary inference.

Gift to "children," there being but one legitimate child.—And if the gift be to the *children* of the deceased person (in the plural number), when he has left only *one* legitimate child, and one or more illegitimate children, living at the date of the will—knowledge of the facts on the part of the testator being proved or inferred—inasmuch as the words implying plurality of objects cannot be satisfied without extending the word children to the illegitimate object or objects, the illegitimate child or children may take under the gift together with the legitimate child. (*Gill v. Shelley*, 2 R. & My. 336; *Leigh v. Byron*, 1 Sm. & G. 486.)

So where the gift was to the children of the testator's *nephews* and nieces, and the testator had, at the date of the will, one legitimate nephew only, and had no brother or sister then living, the children of an illegitimate nephew were admitted to share in the bequest. (*Tugwell v. Scott*, 24 B. 141.)

But it is essential that the testator should be presumed cognisant of the facts. In *Hart v. Durand*, 3 Anstr. 684 (see *Gill v. Shelley*, 2 R. & My. 342), the gift was, "to every of the sons and daughters of my late cousin A."; and that cousin having left only one legitimate daughter, and only two illegitimate children, a son and a daughter, it was held that the expression in the will manifested that the testator was ignorant of the actual state of A.'s family, and the illegitimate children were not admitted.

*83] Where the gift was to the daughters of A., who had *died, leaving two illegitimate daughters, one of whom had after-

wards died before the date of the will, and there were no legitimate children, the surviving daughter was held to be entitled, inasmuch as the testator might have been ignorant of the death of one of the daughters, though cognisant of A.'s death, and of his having left the illegitimate children only. (Re Herbert's Trusts, 1 Jo. & H. 121.)

In *Edmunds v. Fessey*, 29 B. 233, the gift was "to each of the sons and daughters of my late cousin A.," who had died leaving two legitimate and one illegitimate sons, and only one daughter, who was illegitimate. It was held a gift to the legitimate sons and to the only daughter, and the illegitimate son was excluded.

In order that illegitimate children may take under a gift to children, they must of course be proved to have been known and reputed as such.

(2.) Even where the gift is to the children of a living person, the context may be sufficiently strong to show that particular illegitimate children, were intended to take under the gift, as *personæ designatæ*.

Thus, "if a gift were made to the children of A., *now living*—if A. had at the date of the will none but illegitimate children, and they had acquired by reputation the character of his children, they would, no doubt, take under the gift." (*Dover v. Alexander*, 2 Hare 282.) In *Beachcroft v. Beachcroft*, 1 Mad. 430, where the gift was "to *my children*, 5000*l.* each: to *the mother* of my children *sicca rupees 6000*," the illegitimate children were held entitled. So in *Hartley v. Tribber*, 16 B. 510, a bequest, contained in a codicil, to A. "for her own and *the children's* benefit," was held to refer to two illegitimate children described by name in a prior codicil.¹

In *Wilkinson v. Adam*, 1 V. & B. 422, a strong case, the testator being married, but having no children by his wife, de-

¹ A gift to A. described as the wife of B. (the supposed marriage between them being illegal, though its illegality was unknown to the testator), and after her death to her children begotten and to be begotten, was a valid gift to the illegitimate children of the illegal union. *Holt v. Sindry*, L. R. 7 Eq. 170; *Crook v. Hill*, L. R. 6 Ch. App. 311; *Gelston v. Shields*, 16 Hun 143.

vised estates to his wife for life, and, *after her decease*, to Ann Lewis, who then lived with him, with remainder to his children by the said Ann Lewis. It* was held that illegitimate children *84] of the testator by Ann Lewis, who had acquired the reputation of his children at the date of the will, were entitled; inasmuch as the testator "being a married man, with a wife who he thought would survive him, providing for another woman to take after the death of his wife, and for children by that woman; it is impossible he could mean anything but illegitimate children." (Per Lord Eldon, 1 V. & B. 468.) But a bequest to the testator's children, there being at the date of the will three legitimate children and one illegitimate, and the income being directed to be applied *in fourths* for their maintenance, was held not to include the illegitimate child. (*Cartwright v. Vawdry*, 5 Ves. 530. See 1 V. & B. 463.)¹

If the will contains a gift to the children of A. *including* B. (an illegitimate child), and there is a subsequent gift to the *said* children of A., of course B. will take under the subsequent gift. But doubtful cases arise where an illegitimate child is expressly included in a bequest to children in one part of the will, and there is a gift to children *simpliciter* (not, to the *said* children), in another part of the will. As if legacies be given to B. (an illegitimate child) and the *other* children of A., and the residue be given to all and every the children of A., is B. entitled to share in the residue? It would seem that unless there is something *necessarily* to couple the two gifts together, the fact of being described as a child elsewhere in the will is not sufficient to entitle the illegitimate object to claim, where not expressly mentioned; and this conclusion is supported by *Bagley v. Mollard*, 1 R. & My. 581; and see *Owen v. Bryant*, 2 D. M. G. 697. On the other hand, in *Meredith v. Farr*, 2 Y. & C. C. C. 525, and *Worts v. Cubitt*, 19 B. 421, illegitimate children were admitted under similar circumstances.

¹ So where a testator had five legitimate children, and two illegitimate, named Ann and Thomas, and gave six shares to his children living at his death, except his son Thomas (for whom he had made a previous provision), it was held that Ann took nothing. *Wells' Estate*, L. R. 6 Eq. 599.

A bequest to A. and B. (illegitimate children) "and every *other* the children" of a person, does not of course include another illegitimate child not expressly named. (*Mortimer v. West*, 3 Russ. 370.)¹

**Grandchildren, &c.*

[*85

Although the word "children" is sometimes used in a loose sense, signifying descendants, it is perfectly settled that—

RULE. A gift to the "children" of a person does not include grandchildren. (*Radcliffe v. Buckley*, 10 Ves. 195; *Pride v. Fooks*, 3 De G. & J. 252.)²

So a gift to "grandchildren" does not include great-grandchildren (*Lord Orford v. Churchill*, 3 V. & B. 59.)

If the gift be to the children of a person dead at the date of the will, who has left grandchildren but no children then living, and if it be proved or inferred that the testator was aware of the facts, a ground is laid for construing children to mean grandchildren or descendants (*Crooke v. Brooking*, 2 Vern. 50); and it was so held in *Berry v. Berry*, 3 Giff. 134. But the fact of the gift being to the children of a person who is living, but has no children at the date of the will, is of course no argument against construing the word in its proper sense. (*Moor v. Raisbeck*, 12 Sim. 123.)³

¹ But in *Gardner v. Heyer*, 2 Paige 11, a testator having three illegitimate daughters and a son, gave a certain sum to this son, naming him, and certain other sums to his *daughters*, and a certain amount per year to the mother of the children by name, it was held the illegitimate daughters took under the gift to daughters; the testator never having been married.

² *Osgood v. Lovering*, 33 Me. 469; *Marsh v. Hague*, 1 Edw. Ch. 186; *Tier v. Pennell*, id. 354; *Home v. Van Shaick*, 3 Comst. 540; *Palmer v. Horn*, 20 Hun 70; *Brokaw v. Peterson*, 2 McCart. Ch. 198; *Feit v. Vanatta*, 6 C. E. Green 85; *Hallowell v. Phipps*, 2 Whart. 380; *Moon v. Stone*, 19 Gratt. 327; *Womack v. Eacker*, Phil. Eq. 161; *Willis v. Jenkins*, 30 Ga. 168; *White v. Rowland*, 67 Ga. 546; *Tucker v. Stites*, 39 Miss. 213; *Sheets v. Grubbs*, 4 Metc. (Ky.) 341.

³ *Hallowell v. Phipps*, 2 Whart. 380; *Marsh v. Hague*, 1 Edw. Ch. 186; *Churchill v. Churchill*, 2 Metc. (Ky.) 469.

The rule will readily yield to any indications of an intention to include more remote descendants (*Prowitt v. Rodman*, 37 N. Y. 42; *Scott v. Nelson*,

Nephew, Niece.

Notwithstanding the derivation of "nephew," from "nepos," a grandchild, it is settled that—

RULE. A gift to "nephews" or "nieces" does not include great-nephews or great-nieces. (*Shelley v. Bryer*, Jac. 207; *Crook v. Whitley*, 7 D. M. G. 490.)¹

Nephews, &c., by marriage.—Nor does the word "nephew" or "niece," include a nephew or niece by marriage, *i. e.*, a nephew or niece of the wife or husband of the testator. (*Smith v. Lidiard*, 3 K. & J. 252.²

*86] And the fact of a great-nephew or great-niece, or *nephew or niece by marriage, being erroneously described in one part of the will as a nephew or niece, does not entitle such person to share in a gift to nephews or nieces in another part of the will. (*Smith v. Lidiard*, 3 K. & J. 252; *Thompson v. Robinson*, 27 B. 486.)

But in *James v. Smith*, 14 Sim. 214, where the testatrix gave legacies to two great-nieces, describing each as "my *niece* A., the *daughter* of my nephew B.," it was held that this was not a mere erroneous description of two individuals, but that the testatrix had

3 Port. (Ala.) 455; *Tipton v. Tipton*, 1 Cold. 255; *Barnitz's Appeal*, 5 Penn. St. 265), as where the word is used interchangeably with other words of more extended meaning in other parts of the will: *Prowitt v. Rodman*, *supra*; *Hughes v. Hughes*, 12 B. Mon. 115; *Dunlap v. Shreve*, 2 Duv. 334; *Houghton v. Kendall*, 7 Allen 75. Or where the gift is to "children except A.," and A. is a grandchild: *Pemberton v. Parke*, 5 Binn. 606; *Dunlap v. Shreve*, 2 Duv. 334. And in *Prowitt v. Rodman*, 37 N. Y. 58, it is stated that in a gift to the children of the first taker living at his death, with gift over for want of such children, the presumption is in favor of the more remote descendants in preference to the donee over. By a statute in Texas, "children" includes descendants in every degree. In Kentucky it is enacted that "children" shall include grandchildren where there are no children and no other construction will give effect to the will. In Alabama, by statute, a power to appoint to children may be exercised in favor of grandchildren.

¹ *Lewis v. Fisher*, 2 Yeates 196.

² *Green's Appeal*, 42 Penn. St. 30.

defined her meaning of the word "niece," so as to show that she included in it a child of a nephew or niece: and under a subsequent gift to "all and every my nephews and nieces," great-nephews as well as great-nieces were admitted to share with nephews and nieces; it being considered that as by the word "nieces" she meant nieces in the second degree, it followed that by the word "nephews" she meant nephews in the same degree.¹

Half-Blood.

Though *Johnson's Dictionary* defines "brother" as "one born of the same father and mother," it is settled, as a point of construction, that—

RULE. A gift to "brothers" or "sisters" includes half-brothers and half-sisters. (*Grieves v. Rawley*, 10 Hare 63.)²

So a gift to "nephews" or "nieces" includes the children of a half-brother or half-sister. (*Ib.*)

Cf. Leviticus, xviii. 9. "Thy sister, the daughter of thy father or the daughter of thy mother."

Cousins.

It is a rule of construction, adopted, it would seem, partly for the sake of convenience, that—

RULE. A gift to "cousins" *prima facie* means only first cousins. (*Stoddart v. Nelson*, 6 D. M. G. 68; *Stevenson v. Abingdon*, 31 B. 305.)

¹ And see *Weeds v. Bristow*, L. R. 2 Eq. 333.

In *Cromer v. Pinckney*, 3 Barb. Ch. 475, there was a bequest to nephews and nieces except A. (who was a great-nephew; and in another part of the will there was a bequest to "the children of my nephew A.") It was held that the bequest to nephews and nieces included great-nephews and great-nieces.

Where the testator never had brother or sister and therefore no nephews and nieces, a bequest to his nephews and nieces will be construed a bequest to the nephews and nieces of his wife. *Hogg v. Cook*, 32 Beav. 641.

² *Shull v. Johnson*, 2 Jones Eq. 202; *Wood v. Mitchell*, 61 How. Pr. 48; *Luce v. Harris*, 79 Penn. St. 432.

*87] **First cousins.*—A gift to “first cousins,” or cousins-german, does not include first cousins once removed (*Sanderson v. Bayley*, 4 My. & Cr. 56); nor are the latter consequently included in a gift to cousins *simpliciter*.

First and second cousins.—But a gift to “all the first and second cousins” of a person is construed as including all cousins within the degree of second cousin, and therefore includes first cousins once removed, and also first cousins twice removed. *Mayott v. Mayott*, 2 Bro. C. C. 125; *Silcox v. Bell*, 1 Sim. & Stu. 301; *Charge v. Goodyear*, 8 Russ. 140.)

Note.—The rule is, in ascertaining the degree of relationship in which one person stands to another, to count up to the common ancestor, and then down again to the person whose relationship is sought; thus the first cousin twice removed is related to the propositus in the same degree as his second cousin, for they are both in the sixth degree.

Issue.

RULE. A gift to “issue,” *primâ facie*, includes descendants of every degree. (*Davenport v. Hanbury*, 3 Ves. 258.)¹

A gift to the issue of A. *simpliciter* creates a joint tenancy: but if the gift be to the issue as tenants in common, they take *per capita*. (*Davenport v. Hanbury*, 3 Ves. 258.)

Issue begotten by A.—It is settled that the addition of the words “*begotten by A.*” to the word issue, does not necessarily restrict issue to the sense of children. (*Evans v. Jones*, 2 Coll. 516.)

Sibley v. Perry.

The generality of the word “issue” is, however, restricted, in a case which frequently arises, by a reference to the parent of the issue in question; for it is an established rule that,—

*88] ***RULE.** Where the “*parent*” of “issue” is spoken of, the word issue is *primâ facie* restricted to chil-

¹ *Hobgen v. Neale*, L. R. 11 Eq. 48.

dren of the parent. (*Sibley v. Perry*, 7 Ves. 522; *Pruen v. Osborne*, 11 Sim. 132.)¹

Thus if the devise or bequest be to the children of A. living at a given period, with a direction that the issue of any child dying before that period shall take their *parent's* share, the gift to issue is confined to grandchildren of A.

And the rule is the same, if the gift be to the children of A. living at a given period, and the issue of such as shall be then dead, such issue to take their *parent's* share; although the gift to issue is distinct from the direction as to taking the share of the parent. (*Smith v. Horsfall*, 25 B. 628; *Maynard v. Wright*, 26 B. 285.)

The rule applies to devises of real estate. (*Bradshaw v. Melling*, 19 B. 417.)

"I have always considered it as settled that, in a will or in a deed, if it is a question whether the word 'issue' shall be taken generally, or in a restricted sense, a direction that the issue shall take only the shares which their parents would have taken if living, must be taken to show that the word 'issue' was used in its restricted sense." (*Pruen v. Osborne*, 11 Sim. 138.)

The rule of course is the same, where the direction is that the issue shall take their "father's or mother's" share. (*Buckle v. Fawcett*, 4 Hare 536.)

Exception.—But the rule will yield to indications of a contrary intention: and there is a manifest distinction between the case where, as in *Sibley v. Perry*, the only gift to the issue is con-

¹ *Barstow v. Goodwin*, 2 Bradf. 416; *Murray v. Bronson*, 1 Demarest 217. Where the gift is "to the issue of A. then living, and the child or children of such of them as shall then be dead," issue means children: *Fairchild v. Bushell*, 32 Beav. 158; so if, after a gift to issue the testator adds "and if but one, then to such only child:" In *re Hopkins' Trusts*, L. R. 9 Ch. D. 131; so also where a gift was to "my wife and my issue" the widow and children of the testator took as tenants in common: *Shaw v. Thomas*, 19 Grant Ch. (U. C.) 489; and under a gift to "G. B. and her children," G. B. and her children were held to take concurrently: *Re Biggar*, 4 C. L. T. 494.

tained in the direction that they shall take the shares which their respective parents would have taken if living, and the more usual case where there is a distinct gift to the issue, followed by a *89] direction that *the issue shall take only a parent's share.

In the latter case the direction as to the share *may* be construed distributively; *e. g.*, that a grandchild shall take a child's share, and a great-grandchild take a grandchild's share. "It is clear that the 'issue' of the 'parent' must mean the children of the parent, but it is not certain, in every case, that the testator has by the word 'parent' meant to signify the first taker, the child in the first instance. (*Ross v. Ross*, 20 B. 649.) Thus, where the gift was to the children of A. and the issue of such as should have died, "the issue, if more than one, to take equally amongst them the share which their parent would have taken, and if but one then to take a *child's* share," with a gift over on general failure of issue of A., the rule was held to be excluded, and a great-grandchild of A. was admitted to take. (*Ross v. Ross*, 20 B. 645.) But this construction of the word parent requires to be aided by the context. (*Id.*)

Family.

The word "family" is of doubtful import, and would anciently have rendered many gifts void for uncertainty. It appears, however, to be established as a convenient rule of construction, in the absence of a contrary intention, that—

RULE. A bequest of personal estate of the "family" of a person *primâ facie* means his children. (*Barnes v. Patch*, 8 Ves. 604; *Gregory v. Smith*, 9 Hare 708; *Re Terry's Will*, 19 B. 580.)¹

¹ *Burt v. Hillyar*, L. R. 14 Eq. 160; *In re Hutchinson*, L. R. 8 Ch. D. 540; *Heck v. Clippenger*, 5 Penn. St. 388; *Whelan v. Reilly*, 3 W. Va. 610; *Stuart v. Stuart*, 18 W. Va. 675; *McDonald v. McDonald*, 34 U. C. Q. B. 369; *Bigelow v. Bigelow*, 19 Grant Ch. (U. C.) 549; *Anderson v. Bell*, 8 Ont. App. 531. It does not, *primâ facie*, include a step-son; *Bates v. Dewson*, 128 Mass. 334. In *Tolson v. Tolson*, 10 Gill & J. 159, a precatory trust in favor of "J. T. and his family," was held void as to his family, these words not being a sufficiently certain description of the persons designed to take.

Thus, a bequest to "A.'s family" does not *prima facie*, include himself or his wife. (*Barnes v. Patch*, 8 Ves. 604.) And a bequest to the "Smith family" is, it seems, equivalent to a gift to the family of Smith, so as to mean his children exclusively. (*Gregory v. Smith*, 9 Hare 711.) A bequest to "the families of Gregory and Gear," creates a joint-tenancy between the children of those persons. (*Id.*)

*So a bequest to "A. and his family" was held to create a joint-tenancy between A. and his children living at the [90 testator's death. (*Parkinson's Trusts*, 1 Sim. N. S. 242.)¹ But see Appendix II.

But the word "family" is extremely flexible, and no strong rule can be laid down concerning it. "Under different circumstances it may mean a man's household, consisting of himself, his wife, children, and servants; it may mean his wife and children, or his children excluding the wife; or, in the absence of wife and children, it may mean his brothers and sisters, or his next of kin; or it may mean the genealogical stock from which he may have sprung. All these applications of the word, and some others, are found in common parlance." (*Blackwell v. Bull*, 1 Keen 181.)²

Family in relation to real estate.—In devises of real estate, the word "family" will generally, it will appear, be construed as equivalent to "heirs" or "heirs of the body." (*Counden v. Clerke*, Hob. 29; *Wright v. Atkyns*, Coop. 122). A devise to A. and his family would, in general, it would appear, give A. an estate tail. (*Lucus v. Goldsmid*, 29 B. 657.)

¹ In *Bowers v. Bowers*, 4 Heisk. 293, it was held that where there was a devise to a woman and her children, and there were children capable of taking at the testator's death, they took jointly with their parent.

² It may include an illegitimate child; *Lambe v. Eames*, L. R. 10 Eq. 267.

DESCRIPTIONS RELATIVE TO SUCCESSION TO PERSONAL ESTATE.

WE must distinguish between four classes of persons who may take the personal estate beneficially by way of succession: 1st. The "next of kin" proper, or nearest blood-relations of the deceased, according to the degrees of the civil law: *e. g.*, the parents and children of the deceased in the first degree, and in default of these the brothers and sisters, grandchildren, and grandparents in the second degree, and so on. 2d. The "next of kin according to the Statutes of Distribution," including those who take by representation to next of kin under those statutes: in this class, children and their representatives take to the exclusion of parents, brothers and sisters and their children to the exclusion of grandparents, &c. (See Stephen's Comm. II. 197, 209, 3d ed.) 3d. The wife, who is a person entitled to a share of the personal estate by virtue of the Statutes of Distribution, but is not in any sense one of the next of kin. 4th. The husband, who succeeds to, or rather appropriates, the personal estate of his wife by virtue of the marital right, but is not a person entitled under the Statutes of Distribution. These distinctions must be borne in mind in considering the rules contained in this chapter.

Bequest to "A. or his heirs."

If the testator gives a legacy to his heir, or to the heir of another person, the proper sense of the word, meaning the heir-
 *92] at-law, is not necessarily to be changed because *the subject of the bequest is personal estate. (*De Beauvoir v. De Beauvoir*, 3 H. L. C. 524; *Mounsey v. Blamire*, 4 Russ. 384.)¹ Where, however, the gift is to the "heirs," by way of substitution for the legatee, in the event of his dying before the period of payment, it is inferred that by the word "heir," the testator

¹ *Gordon v. Small*, 53 Md. 550.

meant such persons as would inherit not the real, but the personal estate; and it is a rule that—

RULE. A bequest of personal estate to “A. or his heirs” is construed as a gift by way of substitution to the heirs, in the event of the death of A. before the period of distribution. (*Gittings v. McDermott*, 2 My. & K. 69; *Doody v. Higgins*, 9 Hare App. 32.)¹

And the word “heirs” is held to mean the persons who would be entitled to the personal estate of A., by virtue of the Statutes of Distribution, if he had died intestate, including therefore a widow, but not including a husband. (*Jacobs v. Jacobs*, 16 B. 557; *Doody v. Higgins*, 2 K. & J. 729; *Re Craven*, 23 B. 333; *Re Porter’s Trusts*, 4 K. & J. 188.)²

¹ *Reiff v. Strite*, 54 Md. 298. A devise was to “heirs,” and the word “heirs” was construed in its popular sense of children in *Paradis v. Campbell*, 6 Ont. 632; and *Scott v. Gohn*, 4 Ont. 457.

² The same is the rule when the bequest is made to the heirs of a person who is dead at the date of the will, as a quasi-substitutional gift: *Newton’s Trusts*, L. R. 4 Eq. 173; *Lord v. Bourne*, 63 Me. 368. In Ontario, on a residuary gift of real and personal estate to the testator’s widow, and on her death, to go to his heirs and next of kin, it was held that the beneficiaries, so described, were to be ascertained at the testator’s death; and that there was a double description of the same persons: *Rees v. Fraser*, 25 Grant Ch. (U. C.) 253.

In this country the meaning of the term “heirs” depends upon the nature of the property; and whether the gift be substitutional or original, a bequest of personalty to the heirs of A. is a gift to those who would be entitled to the personal estate of A. under the Statutes of Distribution: *Houghton v. Kendall*, 7 Allen 76; *Wright v. Trustees*, 1 Hoff. Ch. 212; *Scudder v. Vanarsdale*, 2 Beas. Ch. 109; *Corbitt v. Corbitt*, 1 Jones Eq. 117; *McCabe v. Spruil*, 1 Dev. Eq. 190; *Nelson v. Blue*, 63 N. C. 660; *Evans v. Godbold*, 6 Rich. Eq. 35; *Evans v. Harlee*, 9 Rich. L. 501; *Eddings v. Long*, 10 Ala. 205; *Ferguson v. Stewart*, 14 Ohio 140; *Hascall v. Cox*, 49 Mich. 435; *Clay v. Clay*, 2 Duv. 296; *Ward v. Saunders*, 3 Sneed 391; though *Aspen’s Estate*, 2 Wal. Jr. 442, is to the contrary.

If real and personal estate be given together to “heirs” those who are entitled to the real estate take the personal estate also: *Clarke v. Cordis*, 4 Allen 480; *Loring v. Thorndike*, 5 id. 269; *Rogers v. Brickhouse*, 5 Jones

The heirs take as tenants in common, in the proportions fixed by the statutes. (*Jacobs v. Jacobs*, 16 B. 557; *Re Porter's Trusts*, 4 K. & J. 188.)¹

Eq. 304; *Hackney v. Griffin*, 6 id. 383; *Ireland v. Parmenter*, 48 Mich. 631.

But where personal estate is given to the wife for life, and after her death to the testator's "heirs," since to construe "heirs" as distributees would include the widow, the term is given its strict signification: *Henderson v. Henderson*, 1 Jones L. 221; *Richardson v. Martin*, 55 N. H. 45; *Jones v. Lloyd*, 33 Oh. St. 572; though a different doctrine appears in *Weston v. Weston*, 38 id. 473; *Brown v. Harman*, 73 Ind. 412; or else, as in Ontario, it is held to include all those entitled under the Statutes of Distribution except the widow; *Bateman v. Bateman*, 17 Grant Ch. (U. C.) 227.

An immediate gift to the heirs of A. who is recognized in the will as living is a gift to those persons who would be his heirs if he were dead at the time of the gift: *Conklin v. Conklin*, 3 Sandf. Ch. 67; *Campbell v. Rawdon*, 18 N. Y. 417; *Ward v. Stow*, 2 Dev. Eq. 517; *Bailey v. Patterson*, 3 Rich. Eq. 158; *Williamson v. Williamson*, 18 B. Monr. 370; *Sheppard v. Nabors*, 6 Ala. 636. In Ontario a gift of real and personal estate to the heirs and assigns of A., a person living at the date of the will, was held to be a gift to those children of A. who were living at the testator's death; *Levitt v. Wood*, 17 Grant Ch. (U. C.) 414.

If the gift be postponed the rule fails: *Campbell v. Rawdon*, 18 N. Y. 417; *Reid v. Stuart*, 13 W. Va. 338; *Stuart v. Stuart*, 18 id. 675; *Reinders v. Koppelman*, 68 Mo. 482; unless the "heirs" be referred to as persons already in being, or to come into being during life of A.: *Conklin v. Conklin*, 3 Sandf. Ch. 67; *Woodruff v. Woodruff*, 32 Ga. 360; *Roberts v. Ogbourne*, 37 Ala. 178.

A postponement for the life of a third person and not for the life of the person to whose heirs the gift is made, has been held not to exclude the rule: *Heard v. Horton*, 1 Denio 165; *Knight v. Knight*, 3 Jones Eq. 169; *Simms v. Garrott*, 1 Dev. & Bat. 396; *Ingram v. Smith*, 1 Head 426; *Dove v. Torr*, 128 Mass. 38; *Otty v. Crookshank*, 21 N. Bruns. 169, though *Campbell v. Rawdon* is to the contrary.

In New York where the rule in *Shelley's Case* has been abolished, it has been held in a gift of land to A. with remainder to his heirs, the remainder vests immediately in the heirs apparent, subject to be divested as to any one of them by his dead before A.: *Moore v. Little*, 41 N. Y. 66; *Drake v. Lawrence*, 19 Hun 112.

¹ The same is the rule in direct gifts of personalty to heirs (meaning in this country, distributees): *Tillinghast v. Cook*, 9 Metc. 147; *Dagget v. Slack*, 8 id. 453; *Baskin's App.*, 3 Penn. St. 305; *Freeman v. Knight*, 2 Ired. Eq. 75; *Templeton v. Walker*, 3 Rich. Eq. 543. But where the will

"The first question is, who were the persons intended by the testator to take under the disposition of the residue to 'the following persons or their heirs.' I have looked into the cases which were cited in the argument, and into many other cases upon this point, and I think that the words, 'or their heirs,' must be construed as words of substitution; and that the word 'heirs,' must be construed heirs according to the nature of the property, that is, next of kin, the property being given as money to the persons intended to take." (Per Turner, V.-C., *Doody v. Higgins*, 9 H. App. 35.)

*"It is now well settled that where the word 'heir' occurs in a gift of personal property, and the heir-at-law does not take as *persona designata*, the term 'heir' shall mean not personal representative, but those who for the purposes of succession stand in regard to the personal property of the testator in a position analogous to that in which the heir-at-law would stand in regard to his real property. It has often been said that in such cases the word means next of kin, but in *Doody v. Higgins*, I held it must mean such persons as would have been entitled, under the Statutes of Distribution, to succeed to the personal property of the deceased in case he had died, intestate, including therefore a widow." (Re *Porter's Trusts*, 4 K. & J. 197.) [*93]

"The husband does not take by succession, he is not entitled under the Statutes of Distribution, but by virtue of his marital right—a right distinct from and paramount to the Statutes of Distribution. And under a bequest to a woman, and in the event of her death, to her heirs, taking the word 'heirs' as equivalent to 'the persons who, under the Statutes of Distribution, would be entitled to succeed to her personal property,' her husband would be excluded." (*Doody v. Higgins*, 2 K. & J. 738.)¹

The rule applies whether the gift be immediate, as to A. or his heirs, or in remainder, as to A. for life, and after his decease to

directs the property "to be equally divided," it has been held that the distribution must be *per capita*: *Hackney v. Griffin*, 6 Jones Eq. 384; *Freeman v. Knight*, 2 Ired. Eq. 75; *Scudder v. Vanarsdale*, 2 Beas. Ch. 113; though *Baskin's Appeal*, 3 Penn. St. 305, is to the contrary.

¹ *Wright v. Trustees*, 1 Hoff. Ch. 213. But to the contrary is *Gibbons v. Fairlamb*, 26 Penn. St. 218.

B. or his heirs. And the rule applies if the gift be to several, as to A. and B. or their heirs, or to a class, as to the children of A. or their heirs.

The rule will apply to any form of gift where the heirs are to take expressly by way of substitution for the original legatee; as if the bequest be "to A., and failing him by decease before me to his heirs." *Vaux v. Henderson*, 1 J. & W. 388.)

In *Re Gamboa's Trusts*, 4 K. & J. 756, the bequest was "to the heirs of my late partner A. the sum of 600*l.*, for losses sustained while the business of the house was under my sole control." It was held that the rule applied "having regard to the express motive of the bequest, and that the persons entitled under the Statutes of Distribution, and not the heir-at-law, took the money."

The rule applies to a bequest "to the following persons or their heirs *for ever*, viz., A., B., C., &c." (*Doody v. Higgins*, 9 Hare, App. 32), the words "for ever" being held not to alter the construction. And in *Jacobs v. Jacobs*, 16 B. 557, where the gift was "to A. and B., or to their heirs, in such manner as they might deem proper;" the power of appointment among the heirs not having been exercised, it was held that the rule applied, and that the heirs took in the statutable proportions.

Heirs when ascertained.—As in the case of a bequest to next of kin, next of kin according to the statute, &c., so under a substitutional bequest to the "heirs" of any one, the persons to take are to be ascertained at the death of the propositus whose heirs are spoken of, and not at the period of distribution. (See post, rule in *Gundry v. Pinniger*.) Thus, if the gift be to B. for life, remainder to A. or his heirs, and A. dies in the lifetime of B., the persons to take are those who would be entitled to the personal estate of A. by virtue of the Statutes of Distribution at his death, and not at the death of B.

If the substitutional bequest be to the heirs of A., a person who dies in the testator's lifetime, or who was dead at the date of the will, the persons to take are *prima facie* those who at the testator's death would have been entitled to the personal estate of A., by virtue of the statutes, if he had then died intestate.

(*Vaux v. Henderson*, 1 J. & W. 388; *Re Gamboa's Trusts*, 4 K. & J. 756.) Thus, if A. had died leaving children only, who afterwards died in the testator's lifetime, and grandchildren only of A. were living at the testator's death, the gift would not lapse, but the grandchildren would be entitled. The same rule prevails where the gift is to the next of kin, or next of kin according to the statute. (*Wharton v. Barker*, 4 K. & J. 502.)

*BULLOCK v. DOWNES.

[*95]

A gift to a class of persons, without words of severance, creates a joint-tenancy between them; and it has consequently been contended that under a bequest to "next of kin according to the statute," or to "the persons entitled under the statute," the words of reference to the Statutes of Distribution applied only to determine the objects of the gift, and that the persons having been ascertained by reference to the statute, took as joint-tenants, and not in the statutable shares: but it is now settled as a rule of construction, that—

RULE. A gift to the *persons* who would be entitled to the personal estate of any one by virtue of the Statutes of Distribution is *primâ facie* a gift to them in the *shares* in which they would take under the statutes, and not in joint-tenancy. (*Bullock v. Downes*, 9 H. L. C. 1.)

The rule applies whether the gift be to the persons entitled under the statutes *simpliciter*, or to the persons entitled under the statutes as next of kin (excluding a widow). (*Ib.*)

"Where under a will property is to go to the persons entitled under the Statutes of Distribution, and there is no indication of an intention to exclude the effect of the Statutes of Distribution as to interest as well as persons, that statute must be applied to determine the interest as well as the persons." (Per Lord Brougham in *Bullock v. Downes*, 9 H. L. C. 17.)

"The authorities seem to me to bear out the proposition, in itself as I think perfectly reasonable, and most likely to give effect to the intention of testators, that under a direction to pay

to those entitled under the statute, if no other expression or indication of intention be found as to the interest to be given, reference must be *had to the statute for the measure as well as the objects of the gift." (Per Lord Kingsdown, *id.*, 9 H. L. C. 30.)

In *Bullock v. Downes* the bequest was, in remainder after a life-interest, "in trust for such person or persons *of the blood of me*, as would by virtue of the Statutes of Distribution have become and been then entitled thereto in case I had died intestate:" equivalent to a gift to the next of kin, according to the statute, of the testator at the time of his death.

Reference to intestacy.—The rule in *Bullock v. Downes* will clearly apply where the reference in the terms of the gift is not to the statute, but to an intestacy. Thus, under a bequest to "my next of kin as if I had died intestate," or "to the persons entitled in case of intestacy" to the personal estate of any one, the objects will take in the statutable proportions, and not in joint-tenancy.

It is a further question how far the rule applies to other expressions under which the Statutes of Distribution is referred to to determine the objects, although the words themselves do not refer to the statute: as "relations," and "representatives," where the latter word is held to mean, not executors or administrators, but the persons entitled under the statute. In *Walker v. Marquis of Camden*, 16 Sim. 329, it was held that under a gift to "representatives," meaning the persons entitled under the statute, the objects took as joint-tenants, and not in the statutable shares: but as under a substitutional bequest to "heirs," the objects take in the statutable proportions, though there is no express reference to the statute, it would seem likely that the same principle will be applied to "representative," and that *Walker v. Marquis of Camden*, will be held to have been overruled by *Bullock v. Downes*.

The word "relations" stands on a somewhat different footing, since the word itself has no reference to the course of legal succession, and is only limited to objects within the range of the Statutes of Distribution of necessity, and to prevent the gift *97] being void for uncertainty. *As it has been considered previously to *Bullock v. Downes*, that a bequest to "rela-

tions," *simpliciter*, is not governed by the statute as to the shares, but creates a joint-tenancy (2 Sugd. Pow. 267, 6th ed.; *Tiffin v. Longman*, 15 B. 275), it is possible that the rule may not be extended to this case.

“*Next of Kin.*”

There is an important difference between a gift to “next of kin” *simpliciter*, and a gift to “next of kin according to the statute;” for while both are technical expressions, the latter points expressly to the law of succession *ab intestato*, while the former points only to the law of consanguinity. The law of succession, as established by the Statutes of Distribution, prefers some of the true next of kin to others, as the children to the parents of the *propositus*; and admits some who are not, properly speaking, next of kin, to take by representation along with those who are. And it was formerly supposed that the word “next of kin,” used *simpliciter*, might have acquired by usage a meaning analogous to that of “heir” in immovables, so as to have become synonymous with the expression, “next of kin according to the statute;” but it has been conclusively established as a rule of construction, both with regard to deeds and wills, that the strict meaning of the word is to be preserved, and that—

RULE. A gift to “next of kin,” whether of the testator or another person, means the nearest blood-relations in equal degree to the *propositus*, and is not equivalent to “next of kin according to the Statutes of Distribution.” (*Elmesley v. Young*, 2 My. & K. 780; *Withy v. Mangles*, 4 B. 358; 10 Cl. & F. 215; *Avison v. Simpson*, Johns. 43; *Rooke v. Attorney-General*, 31 B. 313.)¹

Thus, all who are related in equal degree to the *propositus*, as father, mother, and children, take *together as joint tenants (*Withy v. Mangles*); while those [⁹⁸

¹ *Halton v. Foster*, L. R. 3 Ch. 505; *Welsh v. Crater*, 32 N. J. Eq. 177; *Harrison v. Ward*, 5 Jones Eq. 240; *Redmond v. Burroughs*, 63 N. C. 245. In *Rees v. Fraser*, 25 Grant Ch. (U. C.) 253, next of kin was held equivalent to “heirs” with which it was coupled.

who would be entitled under the statute by representation only are excluded. (*Elmesley v. Young.*)

"I think that the appellant has wholly failed in proving that the term next of kin, used *simpliciter*, has by a technical or conventional construction obtained the meaning of 'those who would be entitled, in case of intestacy, under the Statutes of Distribution;' and I am therefore of opinion that these words must be construed in their natural and obvious meaning, of nearest in proximity of blood." (Per Lord Cottenham, in *Withy v. Mangles*, 10 Cl. & F. 253.)

"Although it does appear to me, that the common use which is made of the term 'next of kin,' in connection with the administration and distribution of personal estates in case of intestacy, may occasionally have given rise to a notion that the persons to whom the law gives the succession are legally and for all purposes to be considered as the next of kin, yet this does not appear to be a notion which can be supported in law. The construction given to the term 'next of kin,' with reference to the statute of Car. 2, shows that the next of kin entitled to administration and distribution, are not to be deemed next of kin for all purposes; and I apprehend, that in all other cases, the terms 'next,' or 'nearest of kin,' must be construed according to their simple and obvious meaning, or according to the legal construction of the whole instrument in which they occur." (*Withy v. Mangles*, 4 B. 367.)

It makes no difference in the construction, that the words in question occur (in a marriage settlement) in the ultimate limitation of personal property to the "next of kin" of the intended wife. (*Withy v. Mangles*, 10 Cl. & F. 215.) And the case would be the same, if the ultimate limitation were to the "next of kin" of the settlor or testator.

**Reference to intestacy.*—But an express reference to
*99] the case of intestacy is equivalent to a reference to the statute. Thus a gift "to my next of kin as if I had died intestate," is equivalent to a gift to "my next of kin according to the Statutes of Distribution." (*Garrick v. Lord Camden*, 14 Ves. 372.)

"*Next of kin according to the statute.*"—A gift to "next of kin," with express reference to the Statutes of Distribution, or

to an intestacy, while it excludes those in equal degree whom the statutes postpone, includes those who take under the statutes by *representation* to next of kin, as well as the next of kin themselves. (Garrick v. Lord Camden, 14 Ves. 372.)

Does not include a widow.—But a gift to next of kin, either *simpliciter* or by reference to the statute or to intestacy, does not include a wife, nor *à fortiori* a husband. (Garrick v. Lord Camden, 14 Ves. 372.) “If a husband bequeaths to his next of kin, that *primâ facie* does not include his wife: and it is quite clear that if a married woman, under a power by settlement, bequeaths to her ‘next of kin,’ it would be impossible to hold that under such a will, without more, the husband would take as sole next of kin. On the other hand, it is competent to, and required from, the Court to look through the whole will; and to see whether from the whole an intention is manifested to include the wife among those who are to be taken more strictly as next of kin: a description *primâ facie* excluding her.” (Ib.)¹

GUNDRY v. PINNIGER.

In accordance with the primary meaning of the words, and with the general leaning of the Courts to ascertain the objects of the testator’s bounty as early as possible, it is established as a rule of construction (which has been observed more strictly of late years) that—

RULE. A devise or bequest to “next of kin,” “next *of kin according to the statute,” &c., means the [*100 next of kin *at the death* of the person whose next of kin are spoken of. (Gundry v. Pinniger, 1 D. M. G. 502; Bird v. Luckie, 8 Hare 301; Bullock v. Downes, 9 H. L. C. 1.)²

¹ Storer v. Wheatley, 1 Penn. St. 506; Haraden v. Larrabee, 113 Mass. 430; Luce v. Dunham, 69 N. Y. 36.

² Dove v. Torr, 128 Mass. 38; Minot v. Harris, 132 id. 528; Letchworth’s Appeal, 30 Penn. St. 175; Brent v. Washington, 18 Gratt. 535; Rees v. Fraser, 25 Grant Ch. (U. C.) 253, and in like manner when a testator directs that any portion of his estate shall descend or be distributed according to the laws of the state in which he lives, he must intend the laws that are in force when his will takes effect: Meserve v. Meserve, 63 Mo. 518.

Thus if the gift be to A. for life, and after his decease to the next of kin of the testator, the persons to take as next of kin are to be ascertained at the death of the testator, and not at the death of A.¹

And the rule applies, although the tenant for life be the sole next of kin, or one of the next of kin, at the death of the testator and at the date of the will. Thus, if the gift be to A. for life, and after his decease to the next of kin of the testator, and A. is the sole next of kin at the death, A. takes the property absolutely. (*Holloway v. Holloway*, 5 Ves. 399; *Ware v. Rowland*, 2 Phill. 635; *Lee v. Lee*, 1 Dr. & Sm. 85; *Wharton v. Barker*, 4 K. & J. 498.)²

The rule is the same where the devise is to the heir. Thus, if there be a devise to A. for life, remainder to the right heirs of the testator, and A. is the testator's heir-at-law at his death, A. takes the property absolutely. (*Holloway v. Holloway*, 5 Ves. 399; *Rawlinson v. Wass*, 9 H. 673.)³

"Where the testator gives property to a tenant for life, and after the death of the tenant for life to his next of kin, and there is nothing in the context to qualify, or in the circumstances of the case to exclude, the natural meaning of the testator's words, the next of kin of the testator living at his death will take; and if the tenant for life be such next of kin, either solely or jointly with other persons, he will not on that account only be excluded." (*Say v. Creed*, 5 Hare 587.)

"In the case of a bequest in trust for A. for life, and from and
*101] after his death in trust for a class of persons, *as for example, the testator's next of kin; this is an immediate gift

¹ *Welsh v. Crater*, 32 N. J. Eq. 177.

² *Buzby's Appeal*, 61 Penn. St. 114.

³ And in this country it applies to gifts of personalty to heirs. *Abbott v. Bradstreet*, 3 Allen 587; *Campbell v. Rawdon*, 18 N. Y. 412; *Buzby's Appeal*, 61 Penn. St. 114; *Newkirk v. Hawes*, 5 Jones Eq. 267; *Templeton v. Walker*, 3 Rich. Eq. 543.

to the persons answering the description of the testator's next of kin at his death, subject to the life interest given to A.

"In the case of a bequest in trust for A. for life, and from and after his death in trust for the testator's next of kin, A. being himself the next of kin, or one of the next of kin, there is no reason for holding that A. would be precluded by the gift to him of the life estate from taking under the gift to the next of kin; nor for holding that the next of kin who are to take are those who may be such at the death of A." (*Lee v. Lee*, 1 Dr. & Sm. 86, 92.)

Exceptions.—The language of the will *may* be such as to show that the testator intended the next of kin to be ascertained at the period of distribution; but the later cases are generally adverse to this construction. (See *Bullock v. Downs*, 9 H. L. C. 1.)¹

Words of futurity.—Thus it is settled that words of futurity alone do not exclude the rule: as if the gift be (in remainder after a life interest) to the person or persons who *shall be* the next of kin of the testator, or of A. (*Rayner v. Mowbray*, 3 Bro. C. C. 234; *Holloway v. Holloway*, 5 Ves. 399.)

In *Doe v. Lawson*, 3 East 278, a gift from and after the decease of A., "for and amongst such person and persons as *shall appear* and can be proved to be my next of kin, in such parts and proportions as they would by virtue of the Statutes of Distribution have been entitled to my personal estate if I *had* died intestate," was held to be within the rule.

So in *Cable v. Cable*, 16 B. 507, where the gift was "from and after the decease of A. to become the property of the person or persons who should *then* become entitled to take out administra-

¹ *White v. Springeth*, L. R. 4 Ch. 300.

Where construing the gift to the testator's heir as a gift to those who are his heirs at the time of his death would defeat the object which the testator had in making the gift, the rule will not apply, but it will be construed a gift to those who would be his heirs had he died at the time the gift takes effect. *Sears v. Russell*, 8 Gray 86; *Pinkham v. Blair*, 57 N. H. 226.

In *Evans v. Godbold*, 6 Rich. Eq. 26, a gift to the testator's "surviving heirs" at the death of his widow, was held to mean those who should be at that time his heirs, and therefore included the children of a child of the testator who had died before the widow.

tion, &c., in the proportions pointed out by the statute, in case he *had* died unmarried and intestate," it was held that the next of kin were to be ascertained at the death.

*102] So in *Wheeler v. Addams*, 17 B. 417, where the gift **was* (in remainder after a life interest) "in trust for such person or persons as shall *then* be the next of kin of A., and would have been entitled thereto under the Statutes of Distributions, in case she *had* died unmarried or intestate."

On the other hand, the rule was held to be excluded, and the next of kin to be ascertained at the period of distribution, in *Wharton v. Barker*, 4 K. & J. 483, where the cases were reviewed:—the gift being (in remainder after a life interest) "to the person or persons that shall *then* be considered as my next of kin and personal representative or representatives, agreeable to the order of the Statutes of Distribution." The same construction was adopted in *Long v. Blackall*, 3 Ves. 486, where the gift was to A. for life, and after his decease to the persons who should *then* be the legal representatives of the testator. Other cases, as *Say v. Creed*, 5 Hare 580, and *Clapton v. Bulmer*, 5 Myl. & Cr. 108, where the period of distribution was adopted on grounds of inference from the context, are perhaps of less importance at the present day, the rule being now more strictly followed.

Gift to next of kin of A., who dies in testator's lifetime.—The rule in *Gundry v. Pinniger* must be stated with a qualification, viz.:—where the gift is to the "next of kin," "next of kin according to the statute," &c., of a person who dies in the testator's lifetime, or who is dead at the date of the will:—in this case the objects to take are to be ascertained at the death of the testator, as if the person whose next of kin are spoken of had died *at that time*. (*Philps v. Evans*, 4 De G. & Sm. 188; *Wharton v. Barker*, 4 K. & J. 502.) Thus, if the gift be "to the next of kin of the late A.," and A. has died leaving children, who afterwards die in the testator's lifetime, and at the death of the testator the next of kin of A. are his brothers and sisters, the gift will not lapse, but the brothers and sisters of A. will be entitled. The rule is the same in the case of a substitutional bequest to "heirs." (*Gamboa's Trusts*, 4 K. & J. 756.)

In *Wharton v. Barker*, 4 K. & J. 483, where the gift (in re-

mainder after a life interest) was, as to one moiety, *in trust for the persons who should *then* be considered the next of kin of the testator, and as to the other moiety, "to the persons who shall *then* be considered as the next of kin of my late wife agreeably to the order of the Statutes of Distribution," it was held that the rule was excluded, and that the next of kin both of the testator and of his deceased wife were to be ascertained at the period of distribution. [*103]

"Relations."

The word "relations" *prima facie* extends to all degrees of relationship, however remote: but in order to prevent gifts to the relations of a person from being void for uncertainty, the Courts have adopted the rule (both with regard to real and personal estate) that—

RULE. A devise or bequest to the "relations" of A., or of the testator, is construed to mean the persons who would be entitled under the Statutes of Distributions, either as next of kin or by representation to next of kin. (Rayner *v.* Mowbray, 3 Bro. C. C. 234; Green *v.* Howard, 1 id. 31; Doe d. Thwaites *v.* Over, 1 Taunt. 263.)¹

The rule applies to devises of real estate. (Doe d. Thwaites *v.* Over, 1 Taunt. 263.)²

"Although 'relation' is a word of very vague and general import, yet it has obtained a certain degree of ascertained meaning in the courts where questions of this sort have arisen with respect to personal property; that is, it means those who are entitled to take as relations under the Statutes of Distribution. This rule of interpretation has been adopted to control the more extensive and lax sense of the word. The term then having obtained this construction in courts of equity, I do not see why it

¹ Varrill *v.* Wendell, 20 N. H. 435; Drew *v.* Wakefield, 54 Me. 298; M'Neiledge *v.* Galbraith, 8 S. & R. 45.

² M'Neiledge *v.* Barclay, 11 S. & R. 103.

*104] should not obtain the same construction *in courts of law." (*Doe d. Thwaites v. Over*, 1 Taunt. 269.)

"It is perfectly settled, that a bequest to relations is good. Yet that is very indefinite. It may extend *in infinitum*. In the contest about the founder's kindred, All Souls College contended that it should not be extended beyond the tenth degree. But it was extended to the fourteenth. The Court of Chancery, however, in cases of bequests to 'relations' has, upon grounds of convenience, adopted the rule of the Statute of Distributions; and though, where a power of selection is given, the party may, according to *Harding v. Glyn*, go beyond that rule, it is adhered to, wherever the execution devolves upon the Court." (*Cruwys v. Coleman*, 9 Ves. 323.)

"Relations" in this sense does not, of course, include a wife. (*Green v. Howard*, 1 Bro. C. C. 31.)

A gift to "those related to" a person, is equivalent to a gift to relations (*Raynor v. Mowbray*, 3 Bro. C. C. 234): and a gift to "those of A.'s family," has been held equivalent to a gift to the relations of A. (*Cruwys v. Coleman*, 9 Ves. 319.)

But this rule is only applied when it is necessary to restrict the term "relations" to a definite class: thus, a *charitable* gift to relations, by way of continuing trust, is not confined to those within the statute. (*Attorney-General v. Price*, 17 Ves. 371.)

Power to appoint to relations.—A power to appoint to relations of the testator, or of A., if the power be one of *selection*, authorizes an appointment to relations not within the statute. (*Harding v. Glyn*, 1 Atk. 469.)¹

But if the power be one of *distribution* only, the donee can appoint only to those within the statute. (*Pope v. Whitcombe*, 3 Mer. 689.)

And if there be a power of *selection* among relations, with no gift in default of appointment, and the power be not exercised, those within the statute only will take by implication. (*Harding v. Glyn*, 1 Atk. 469; *Grant v. Lynam*, 4 Russ. 297.)

*105] *Relations take per capita.*—In *Tiffin v. Longman*, 15 B. *275, it was held that the relations take equally *per capita*,

¹ *Varrell v. Wendell*, 20 N. H. 435.

the statute being employed only to define the objects, and not to determine the shares. But it may perhaps be doubted whether (at least in the case of bequests of personal estate) the rule in *Bullock v. Downes*, 9 H. L. C. 1, may be not extended to "relations," as well as to heirs and next of kin according to the statute.

Relations when ascertained.—A gift to relations, whether immediate or in remainder, will in general follow the rule in *Gundry v. Pinniger*, and be ascertained at the death of the person whose relations are spoken of, or at the death of the testator if the person has died in his lifetime. Thus, in *Raynor v. Mowbray*, 3 Bro. C. C. 234, a gift to A. for life, and after his decease "to such persons as *shall be related*" to the testator, was held to vest in the next of kin at the testator's death.

But inasmuch as "relations," in the wide sense, includes all who would come within the description of next of kin at the period of distribution, as well as at the testator's death, the rule in *Gundry v. Pinniger* does not perhaps apply so strictly to a gift to "relations," as to a gift to "next of kin," (*Tiffin v. Longman*, 15 B. 275); and where the gift cannot vest at the testator's death, the period for ascertaining the relations may be postponed. (See, on this point, *Lees v. Massey*, 3 De G. F. & J. 113.)

Thus, where at the death of the tenant for life without issue, the testator directed advertisements to be made for his relations, and gave the property to such as should make their claim within two months from that time, it was held that the class to take were those who would have been the next of kin, according to the statute, of the testator at the period of distribution. (*Tiffin v. Longman*, 15 B. 275.)

Power to appoint to testator's relations.—And where property is given to A. for life, with a power of appointment in favor of the testator's relations, and there is no gift in default of appointment, if the power be not exercised, the gift by implication is to those who would have been the next of kin, according to the *statute, of the testator if he had died at the time of the [*106
cesser of the power by the decease of A., and not the survivors of those persons who were the next of kin of the testator at his death: whether the power be one of selection or dis-

tribution. (2 Sugd. Pow. 270, 6th ed.; Pope *v.* Whitcombe, see Finch *v.* Hollingsworth, 21 B. 112.)

And the donee of the power may appoint to any persons who would have been next of kin according to the statute *at the date of the appointment*, though they were not such at the death: although the power be one of distribution only. (Finch *v.* Hollingsworth, 21 B. 112.)

The same rule would seem to apply, where the power is to appoint to relations, not of the testator, but of another person.

In Ham's Trust, 2 Sim. N. S. 106, the gift was "to the relations of my *late* wife, in such shares and proportions as they *would have been* entitled in case she had died possessed thereof a spinster and intestate." It was held that the gift did not vest in the next of kin of the wife at the death of the testator, but that the shares of such of her next of kin as died in the testator's lifetime lapsed.

Near relations.—A gift to "near relations," is equivalent to relations; *i. e.*, next of kin according to the Statutes of Distribution. (Whitehorne *v.* Harris, 2 Ves. sen. 527.)

Nearest relations.—But a gift to "nearest relations" is equivalent to next of kin *simpliciter*, and excludes those who would take by representation under the statute, but (it would seem) admits all who are in equal degree of consanguinity. (Smith *v.* Campbell, 19 Ves. 400.)¹

"Representatives."

A bequest to the "representatives" of any person is ambiguous; it may either mean those who represent the deceased *legally, i. e.*, his executors or administrators, or those who represent him *beneficially, i. e.* (with respect to *personal estate) the persons *107] entitled by virtue of the Statutes of Distribution. But it is settled by the more recent cases as a rule of construction, that—

RULE. A bequest of personal estate to the "representatives," or "legal" or "personal" or "legal personal repre-

¹ Ennis *v.* Pentz, 3 Bradf. 385.

sentatives" of any one, means, *primâ facie*, executors or administrators. (*Saberton v. Skeels*, 1 R. & My. 587; *Re Crawford's Trusts*, 2 Drew. 230; *King v. Cleaveland*, 4 De G. & J. 477.)¹

Thus if the gift be to A. for life, with remainder as he shall by will appoint, and in default to his "representatives" (*Saberton v. Skeels*, 1 R. & My. 587; *Dixon v. Dixon*, 24 B. 129), or to A. for life with remainder to the children of B. "or their representatives" (*Crawford's Trusts*, 2 Drew. 230; *Hinchcliffe v. Westwood*, 2 De G. & Sm. 216), the property passes to the executors or administrators as part of the assets of the deceased, and not directly to the next of kin: and the addition of the word "legal" or "personal" does not vary the construction.

"I should say, that the conclusion to be drawn from the more modern, not unsupported by some of the earlier cases, is this: that under a gift simply to 'representatives,' 'legal representatives,' 'personal representatives,' and to executors and administrators, the hand to receive the money is that of the person constituted representative by the Ecclesiastical Courts: but that such person will, in the absence of a clear intention to the contrary, take the property as part of the estate of the person whose representative he is, and not beneficially." (*Holloway v. Clarkson*, 2 Hare 523.)

"What is the ordinary and legal meaning of the term 'representatives?' Whom does the law regard as properly representing a deceased person with reference to personal property? Certainly his executors or administrators. They represent his person; they represent him *in respect of his personal estate." [*108 (*Crawford's Trusts*, 2 Drew. 234.)

As in the case of a gift "to the executors of A." *simpliciter*, so under a bequest to "representatives," the executors or administrators take the property in their official capacity, and not beneficially. (*Long v. Watkinson*, 17 B. 471; *Re Seymour's Trusts*, *Johns*. 472.)

¹ *Best's Settlement*, L. R. 18 Eq. 686; *Halsey v. Paterson*, 37 N. J. Eq. 445.

Exceptions.—But the rule is not a strong one, and the words in question may also mean the persons who take under the Statutes of Distribution in case of intestacy. In this sense the word “representatives” is equivalent to “heirs” taking by way of substitution:¹ it includes a widow (*Smith v. Palmer*, 7 Hare 225), but not a husband (*King v. Cleaveland*, 4 De G. & J. 477.)²

Share and share alike.—Thus where the gift is followed by a direction that the representatives are to take “share and share alike” (*Smith v. Palmer*, 7 Hare 225), or “*per stirpes* and not *per capita*” (*Atherton v. Crowther*, 19 B. 448), it is clear that the primary meaning of the word is excluded. And if the gift be to the children of A. living at a given period, and the representatives of such as shall be then dead, *share and share alike*, it seems that the latter words will be held to apply to the representatives, as well as to the first takers, the children (*King v. Cleaveland*, 4 De G. & J. 477): though *Price v. Strange*, 6 Madd. 159, is *contrà*.

So where the gift was “unto and *equally amongst* my personal representatives” (*Holloway v. Radcliffe*, 23 B. 169), or “to and *amongst*” the representatives (*Baines v. Ottey*, 1 My. & K. 465.)³

So where a sum of money was given to A. in trust to pay the income to *his wife* for life, and at her decease to pay the trust-moneys as she should by will appoint, and in default to her *per-*

¹ In *Stockdale v. Nicholson*, L. R. 4 Eq. 359, where the cases are reviewed, the gift was to the “next personal representatives,” and it was held that the word “next” took the case out of the rule.

² *Watson v. Bonney*, 2 Sandf. S. C. 417. But in *Brent v. Washington*, 18 Gratt. 535, in a gift to “representatives according to the Statutes of Distribution,” it was held that the husband took, though not a distributee under the statute. “If we hold the husband entitled, we give the property to the party who is substantially distributee, though not so under the statute. If we give it to the children, we give it to those who could not take under the statute or otherwise, and construe the words not in their literal sense, but as meaning those who would have represented their mother under the statute, if she had not been a married woman.”

³ *Thompson v. Young*, 25 Md. 450; *Johnson v. Johnson*, 12 Rich. Eq. 260. In the latter case the Court incline to the opinion that the *primâ facie* meaning of the words should be distributees.

sonal representatives, it was held that the husband was excluded. (Robinson v. Smith, 6 Sim. 47.)

In *Walter v. Makin*, 6 Sim. 148, it was held that, there being a gift to the executors of A. in one part of the *will, a [*109 gift to his legal representatives in another part could not have the same meaning : sed qu.

Immediate gift to A. or his representatives.—In *Re Crawford's Trusts*, 2 Drew, 234, it was said that, although a gift to A. or his representatives in remainder after a life interest means, *primâ facie*, executors or administrators; yet that where the gift or legacy to A. or his representatives is immediate, without any prior life estate, the primary meaning of the word “representative” is excluded; a distinction founded on the cases of *Bridge v. Abbot*, 3 Bro. C. C. 224, and *Cotton v. Cotton*, 2 Beav. 67. “In such event the legatee could not under any construction which could be put on the words ‘legal representatives,’ derive any advantage from the bequest. . . . And, therefore, it is highly improbable that the testator should intend that, if the intended legatee should die in his lifetime, the legacy should go to his executors or administrators as part of the legatee’s assets, perhaps to benefit no one but the legatee’s creditors. And this improbability is such as to furnish sufficient evidence, where the gift to A. or his legal representatives is immediate, of the testator’s intention to use the term ‘representatives’ not in its ordinary legal sense, but as designating the persons who by virtue of the Statute of Distributions would be entitled to A.’s personal estate, if he had died intestate.” (*Crawford’s Trusts*, 2 Drew. 242.)¹

But qu. how far *Bridge v. Abbot*, and *Cotton v. Cotton* are law at the present day.

Whether the representatives take in the statutable proportions.—In *Walker v. Marquis of Camden*, 16 Sim. 329, it was held that where the word “representatives” is used to designate the persons taking the personal estate beneficially, and words of severance are not added, the representatives take as joint tenants and not in the statutable proportions. But this case would seem to be contrary to the rule laid down in *Bullock v. Downes*, 9 H. L. C. 1;

¹ *Brockaw v. Hudson*, 27 N. J. Eq. 135.

and under a similar gift to "heirs" the statutable proportions are held to be implied. (*Supra*, gifts to "A. or his heirs.")¹

*110] *Rules compared.*—It may be observed that the expressions considered in this chapter fall into three classes, corresponding to the ideas of *succession*, of *statutory kinship*, and of *consanguinity*.

Thus (1.) "Heirs" taking by substitution, and "representatives" taking beneficially, include all who *succeed* to the personal estate of the deceased, but exclude the husband, who does not succeed, but appropriates.

(2.) "Relations" and "next to kin according to the statute" include all who take under the Statutes of Distribution except the wife, who is not of kin to the deceased.

(3.) "Next of kin" and "nearest relations" include all the nearest blood relations in equal degree, but exclude those who take only by reference to the statute.

It would seem that in all expressions falling under (1) and (2), the statutory proportions ought to be implied, in the absence of any expression indicating a contrary intention.

¹ In *Thompson v. Young*, 25 Md. 461, it is held that they take in statutable proportions, unless the will indicates an intention to make a different distribution.

JOINT TENANCY, ETC.

ALTHOUGH it was once doubted whether there could be a joint tenancy of a legacy or residue (see per Lord Eldon, *Crooke v. De Vandes*, 9 Ves. 204), it has long been settled that—

RULE. A devise or bequest to several persons *nominatim*, or to a class, without more, creates a joint tenancy.¹

¹ *Wescott v. Cady*, 5 Johns Ch. 334. This rule has been abolished as regards devises of real estate, by statute, and it is enacted that a devise to two or more shall create a tenancy in common, unless an intention to create a joint tenancy be expressly declared or manifestly appear in the will, in Maine (by an Act of March 15, 1821) R. S. 1871, Ch. 73, § 7; New Hampshire (by the Revised Statutes of Dec. 23, 1842) Gen. Laws 1878, Ch. 136, § 14; Vermont (by an Act of Oct. 20, 1797) R. S. 1880, § 1917; Massachusetts (by an Act of 1785) Pub. Stat. 1882, Ch. 126, § 5; Rhode Island, Pub. Stat. 1882, p. 441, § 1; New York (by the Revised Statutes of 1830) R. S. 1875, part 2, Ch. 1, tit. 2, § 44; New Jersey (by an Act of Feb. 4, 1812) R. S. 1877, p. 167, pl. 78; Delaware (by an Act of Feb. 16, 1816) Rev. Code 1874, § 1720; Maryland (by an Act of 1822) Rev. Code 1878, Art. 45, § 3; Indiana (by the Revised Statutes of 1852) R. S. 1881, § 2922; Illinois (by the Revised Statutes of 1845) R. S. 1883, § 279; Michigan (by an Act of Sept. 1, 1838) Howell's Ann. Stat. 1882, § 5560; Wisconsin (by Revised Statutes taking effect July 1, 1839) R. S. 1878, § 2068; Minnesota, Stats. at Large, 1873, Ch. 32, § 44; Iowa (by an Act March 2, 1821) McL. Ann. Stat. 1880, § 1939; Missouri (by an Act of March 25, 1845) R. S. 1879, § 3949; Arkansas (by an Act of Nov. 30, 1837); Dakota, Rev. Civ. Code, 1883, § 753; Oregon, Gen. Laws 1872, p. 516, § 9; California (by an Act of April 27, 1855) Civ. Code 1872, § 1350; Ontario (Act taking effect July 1, 1834), R. S. O., cap. 105, sec. 11.

Survivorship in joint tenancy has never existed in Connecticut: *Phelps v. Jesson*, 1 Root 48, and it has been abolished by statute in Pennsylvania (by an Act of March 31, 1812); Virginia (by an Act of Nov. 28, 1786) Code 1873, tit. 33, Ch. 112, § 18; West Virginia, R. S. 1879, Ch. 82, § 18; North Carolina (by an Act of April 19, 1784) R. S. 1873, Ch. 42, § 2; Georgia (by an Act of Dec. 17, 1828) Code 1882, § 2300; Texas, R. S.

The rule applies to gifts to children, issue, next of kin, &c.

But the rule does not apply to expressions which contain a reference to the Statutes of Distributions, as "heirs," "next of kin according to the statute," &c. (*Supra*, rule in *Bullock v. Downes*, 9 H. L. C. 1.)

The rule applies to gifts to a class, although the interests of members of the class vest at different times. Thus, under a bequest to A. for life, with remainder to the children of B., the children *in esse* at the death of the testator take the whole interest given to the class as joint tenants, and as more children come into *esse* during the life of A. they take as joint tenants also. (*McGregor v. McGregor*, 1 De G. F. & J. 63; *Kenworthy v. Ward*, 11 Hare 196.) A devise or bequest in this respect follows the analogy of a conveyance to uses, and not of a feoffment at common law, in which the fact of the estates vesting at different times prevents the creation of a joint tenancy.

But it seems that in devises and bequests it is necessary that

1879, § 1655; Florida (by an Act of Nov. 17, 1829); Alabama (by an Act of 1818) Code 1876, § 2191; Mississippi, Rev. Code 1880, § 1197; Kentucky (by an Act of Jan. 1, 1797) Gen. Stat. 1881, Ch. 63, § 13; Tennessee (by an Act of 1784) Compiled Stat. 1871, § 2010; Colorado, Gen. Stat. 1883, § 1832; Oregon, Gen. Laws 1872, p. 589, § 38. In South Carolina (by Acts of 1734 and 1791), Gen. Stat. 1882, § 1851, survivorship is abolished between joint tenants where the tenants are seised and possessed of the estate: *Herbemont v. Thomas*, Cheves Ch. 23.

The first class of these statutes applies only to devises of real estate, and bequests of personal estate are still subject to the rule in the text: *Decamp v. Hall*, 42 Vt. 485; *Emerson v. Cutler*, 14 Pick. 116; *Putnam v. Putnam*, 4 Bradf. 309; *Stoutenburgh v. Moore*, 37 N. J. Eq. 63.

The statutes of Rhode Island, Virginia and Kentucky, expressly include devises to husband and wife. In Vermont, Massachusetts, Indiana, Wisconsin, Michigan and Minnesota, such devises have been expressly excepted from the operation of the statutes, and in other states where no mention is made of such devises, it has been held that they are not within the operation of the statutes: *Thomas v. De Baum*, 1 McCart. 40.

In Vermont, Massachusetts, Pennsylvania, Indiana, Illinois, Kentucky, Michigan, Wisconsin and Minnesota, devises in trust are expressly excluded by the statutes from their operation.

the interests of all the joint tenants should be *the same, [*112 and that there cannot be a joint tenancy between a class, some of the members of which have vested and others contingent interests. Therefore under a bequest to A. for life, with remainder to the children of B., if the interests of the children are not to vest until a given age, *e. g.*, 21, the children will take as tenants in common, although if the interests vested at birth they would take as joint tenants. (*Woodgate v. Unwin*, 4 Sim. 129; see *McGregor v. McGregor*, 1 De G. F. & J. 63; *Kenworthy v. Ward*, 11 Hare 196.)¹

If lands be devised to two men, or two women, "and the heirs of their bodies," inasmuch as the devisees cannot have common heirs of the body, the devisees take joint estates for life with several inheritances in tail. (Co. Lit. 184 a.)

And if the devise be to two men, or two women, "their heirs and assigns," the devisees take several remainders in fee. (*Forrest v. Whiteway*, 3 Exch. 367.)

The same construction is adopted, wherever the devisees are in contemplation of law incapable of having issue *inter se*, as if the devise be to two men and one woman or to a man and his sister or aunt. (Co. Lit. 184 a.)

Words of severance.—The rule is excluded by any words which import *distinctness* or *plurality* of interest among the objects of the gift.

Thus if the gift be to several, or to a class, "equally," or "between" or "among" them, or if the "share" of any one is spoken of, a tenancy in common is created.²

"*Respective.*"—A gift to several persons "respectively" creates a tenancy in common.

¹ *Weyman v. Ringold*, 1 Bradf. 43; *Putnam v. Putnam*, 4 id. 309.

² *Westcott v. Cady*, 5 Johns. Ch. 348; *Vreeland v. Van Ryper*, 2 C. E. Green 134; *Mason v. The Church*, 27 N. J. Eq. 47; *Martin v. Smith*, 5 Binney 18; *Evans v. Brittain*, 3 S. & R. 137; *Gilpin v. Hollingsworth*, 3 Md. 194; *Dunn v. Bryan*, 38 Ga. 160; *Fisher v. Anderson*, 4 Can. S. C. 406.

In Louisiana a legacy to two persons "to be divided equally between them" is conjoint, and if only one of the legatees survives the testator, he is entitled, by accretion, to the whole: *Mackie v. Story*, 3 Otto 589.

Thus, under a gift to the testator's brothers and sisters "or their executors or administrators *respectively*," the brothers and sisters take as tenants in common. (Moore's Settlement, 10 W. R. 315.)

But under a gift to a class, with a direction that the share of a legatee dying before the period of distribution shall go "to his or *113] her children respectively," although *the primary legatees take as tenants in common, the children of each legatee take *inter se* as joint tenants. (Hodgson's Trusts, 1 K. & J. 178.)

In *Re Tiverton Market Act*, 20 B. 374, it was held that under a devise "to the children of A. and the heirs of their bodies respectively," the children take as tenants in common in tail; but that under a devise "to the children of A. and the heirs of their respective bodies," the children take as joint tenants for life with several inheritances in tail.

Gifts to Children per Capita.

RULE. Under a devise or bequest to the children of A. and of B. as tenants in common, *prima facie* the children take *per capita*, not *per stirpes*. (*Lady Lincoln v. Pelham*, 10 Ves. 166.)¹

The rule is the same where the gift is to A. and the children of B. (*Butler v. Stratton*, 3 Bro. C. C. 367.)²

¹ *Farmer v. Kimball*, 46 N. H. 439; *Balcolm v. Haynes*, 14 Allen 205; *Hill v. Bowers*, 120 Mass. 135; *Collins v. Hoxie*, 9 Paige 89; *Verplanck's Will*, 91 N. Y. 439; *Thornton v. Roberts*, 30 N. J. Eq. 473; *Gest v. Way*, 2 Whart. 451; *Walker v. Dunshee*, 38 Penn. St. 439; *Maddox v. State*, 4 Har. & Johns. 541; *Benson v. Wright*, 4 Md. Ch. 278; *Crow v. Crow*, 1 Leigh. 77; *Barksdale v. Macbeth*, 7 Rich. Eq. 132; *Walters v. Crutcher*, 15 B. Monr. 10; *Brown v. Brown*, 6 Bush 648; *Malone v. Majors*, 8 Humph. 579; *Bradley v. Wilson*, 13 Grant Ch. (U. C.) 642; *Sunter v. Johnson*, 22 id. 249; *Luig v. Smith*, 25 id. 246; *Dryden v. Woods*, 29 id. 430; *Anderson v. Bell*, 8 Ont. App. 531; *Chadbourne v. Chadbourne*, 9 Ont. Pr. R. 317.

² *Bunner v. Storm*, 1 Sandf. Ch. 362; *Fisher v. Skillman*, 3 C. E. Green 231; *Macknet v. Macknet*, 24 N. J. Eq. 277; *Burnet v. Burnet*, 30 id. 595; *Cheeves v. Bull*, 1 Jones Eq. 237; *Dupont v. Hutchinson*, 10 Rich. Eq. 2; *Brittain v. Carson*, 46 Md. 186; *Feemster v. Good*, 12 S. C. 573; *Smith v. Ashurst*, 34 Ala. 208; *Scott v. Terry*, 37 Miss. 64; *Pitney v. Brown*, 44 Ill. 365.

"The cases of *Barnes v. Patch*, 8 Ves. 604; *Lady Lincoln v. Pelham*, 10 Ves. 166; and *Rickabe v. Garwood*, 8 Beav. 579, decide that a fund is to be distributed *per capita* and not *per stirpes*, when it is directed to be paid on a particular event, in such cases as the following: namely, where a fund is to be divided between the families of my brother L. and my sister E.; where one-fourth of a residue is to be paid to the younger children of N., and one other fourth part to or among the younger children of S.; where a legacy is to be paid between and amongst the children of P. and the children of R. In all these instances the court has determined that the distribution is *per capita* and not *per stirpes*." (*Abrey v. Newman*, 16 B. 433.)

Gift to the children of A. and B.—According to *Lugar v. Harman*, 1 Cox 250, and a dictum in *Peacock v. Stockford*, 3 D. M. & G. 78, a gift to or in trust for "the *children of A. and B." must be read as a gift to B. and not to his children [*114 on account of the non-repetition of the word "of," before the word B. But although it may be more idiomatic to speak of "the children of A. and of B.," it may perhaps be doubted whether usage requires the repetition of the particle. And in the cases of *Mason v. Baker*, 2 K. & J. 567, and *Re Davies' Will*, 7 Jur. N. S. 118, this distinction was disregarded, and a gift to "the children of A. and B." was held to mean the children of B. as well as of A.¹

If the gift be "in trust for the benefit of the children of A. and of B.," of course the children of B. and not B. himself are entitled. (*Peacock v. Stockford*, 3 D. M. & G. 73.)

Exceptions.—Where the bequest is to A. and B. *as tenants in common* for life, with remainder to their children, it would seem that the rule should not apply, and that the children should take the share of their respective parents *per stirpes*.²

¹ *Lugar v. Harman* was followed in *Stummvoll v. Hales*, 34 Beav. 124. To ascertain the meaning the Court must look at the circumstances of each case and the position in which the parties are placed. See *Waller v. Forsythe*, Phil. Eq. (N. C.) 353; *Ingram v. Smith*, 1 Head 425. The context and the nature of the previous dispositions in the will may easily lead to a contrary interpretation: *Adams v. Adams*, 2 Jones Eq. 217.

² *Jackson v. Luquere*, 5 Cowen 229; *Crim v. Knotts*, 4 Rich. Eq. 347; *Stoutenburgh v. Moore*, 37 N. J. Eq. 63.

Thus in *Arrow v. Mellish*, 1 De G. & Sm. 355, where the gift was "to my three nieces, viz., A., B. and C., to be by them equally divided, share and share alike, and at their deaths to go equally share and share alike to their children," it was held that the children took *per stirpes*.

So in *Turner v. Whittaker*, 23 B. 196, where the gift was, "at the death of A. I desire that the annuity held by her shall be equally divided between my sons B. and C., but not the principal; that I bequeath to their children, to be equally divided among them at the death of my sons B. and C."

But on the other hand, in *Smith v. Streatfield*, 1 Mer. 359, the gift being "one half of the interest to be paid to A., the other half of the interest to be paid to B., during the term of their natural lives; and as their lives drop and expire, I direct that the principal and interest be reserved, and be equally divided among their children, when they shall severally attain twenty-one," it was held that the children took *per capita*.

*115] *And in *Abrey v. Newman*, 16 B. 431, where the gift was "all the above-named property to be equally divided between A and his wife, and B. and his wife, for their lives, after which to be equally divided between their children (*that is to say*) *the children of A. and B. above named*," it was held that the latter words imported distribution *per capita*.

If the gift be to A. and B. *as joint tenants* for life, with remainder to their children, the reason of *Arrow v. Mellish* of course does not apply, and the children will take *per capita*. (*Stevenson v. Gullan*, 18 B. 590.)¹

¹ Where there is anything in the will which indicates an intention to distribute *per stirpes*, it will, of course be followed: Thus, in a gift to the issue of A. and of B., in equal shares, if more than one of such *respective* issue, the word "respective" makes it a gift to separate classes: *Davis v. Bennett*, 4 De G. F. & J. 327. Where the children in the contemplation of the testator stand in the place of their parents (*Henderson v. Wormack*, 6 Ired. Eq. 487; *Barksdale v. Macbeth*, 7 Rich. Eq. 132; *Connor v. Waring*, 52 Md. 724); where when previously mentioned in the will the children are treated as separate classes (*Gilliam v. Underwood*, 3 Jones Eq. 100; *Lockhart v. Lockhart*, id. 206; *Pardue v. Given*, 1 Jones Eq. 312; *Walker v. Griffin*, 11 Wheat. 375; *Ferrer v. Pyne*, 18 Hun 411; *Vincent v. Newhouse*, 83 N. Y. 505); where separate words of limitation are annexed to the gift to

Gift to Husband and Wife.

It is a rule of construction (which certainly does not in all cases accord with the probable intention); that—

each class, to the children of A. and their heirs, and to the children of B. and their heirs (*Alder v. Beall*, 11 Gill & Johns. 123); where the word "and" is repeated between each class, as to the children of A. *and* the children of B. *and* the children of C. (*Fissel's Appeal*, 27 Penn. St. 57; *Risk's Appeal*, 52 id. 273); in all these cases the distribution is *per stirpes*.

Where the classes are designated as the "*heirs*" of A. and of B., since that term involves the idea of representation of a stock they take *per stirpes*: *Bassett v. Granger*, 100 Mass. 349; *Roome v. Counter*, 1 Halst. 113; *Fissel's Appeal*, 27 Penn. St. 57; *Harris' Est.* 74 id. 452. In North Carolina, however, it is held that the use of this word, though a circumstance of weight is not of itself sufficient to form an exception to the rule: *Roper v. Roper*, 5 Jones Eq. 19; *Harris v. Philpot*, 5 Ired. Eq. 328; but if it be a devise of real estate, the word heirs has its technical meaning, and they take *per stirpes*: *Grandy v. Sawyer*, Phill. Eq. 9. If the gift be to the "*next of kin*" of A. and B. they take *per stirpes*: *Cooper v. Cannon*, id. 83. In *Ingram v. Smith*, 1 Head 427, a gift "to be equally divided between the heirs of A. and B.," was held a gift *per capita*; and see *Everitt v. Carman*, 4 Redf. 341.

If the gift be to those persons who would take the estate in case of intestacy, though not so named, the distribution will be *primâ facie per stirpes* if such would be the distribution under the intestate laws. The Statutes of Distribution govern in all cases where there is no will, and where there is one, and the testator's intention is in doubt the statute is a safe guide: *Lyon v. Acker*, 33 Conn. 224; *Raymond v. Hillhouse*, 45 id. 467; *Heath v. Bancroft*, 49 id. 220; *Lelaud v. Adams*, 12 Allen 287; *Fisher v. Skillman*, 3 C. E. Green 236; *Fissel's Appeal*, 27 Penn. St. 58; *Minter's Appeal* 40 id. 115; *Risk's Appeal*, 52 id. 271; *Lackland v. Downing*, 11 B. Monr. 34; *Gerrish v. Hinman*, 8 Or. 348. But in North and South Carolina it is held that though such a distribution would be more natural, yet the court will not adopt it without aid from the context, but they will lay hold of very slight circumstances in aid of such construction: *Wessenger v. Hunt*, 9 Rich. Eq. 471; *Martin v. Gould*, 2 Dev. Eq. 306.

It has been held that the words "equally to be divided" do not affect the construction, since they may apply to a division among the classes as readily as to a division among the individuals: *Risk's Appeal*, 52 Penn. St. 273; but in *Kean v. Roe*, 2 Harring. (Del.) 118, it was held that their effect was to cause a division *per capita*. The words "share and share alike," perhaps point more decidedly to a distribution *per capita*: *Lee v. Lee*, 39 Barb. 173.

RULE. Where there is a devise or bequest to a husband and wife and one or more other persons, *primâ facie* the husband and wife take as one person, and take only one share. (Co. Lit. s. 291; Re Wylde, 2 D. M. G. 724.)

Thus if the gift be to husband and wife and A., the husband and wife take one moiety, and A. the other moiety.¹

The rule applies whether the gift be in joint tenancy or tenancy in common, and whether of real or personal estate. (Re Wylde, 2 D. M. & G. 724.)

"If a joint-estate be made of land to a husband and wife and to a third person, in this case the husband and wife have in law, in their right, but the moiety. And the cause is, for that husband and wife are but one person in law.

"In the same manner it is, where an estate is made to the husband and wife and to two other men; in this case the husband and wife have but the third part, and the other two men the other two parts." (Co. Lit. sect. 291.)

*116 "Thus where the bequest was of 700*l.* "unto and amongst John Collins and Catherine his wife and William Lea, in equal shares and proportions," W. Lea was held to take a moiety of the 700*l.*, although in another part of the will the testator gave to John Collins 200*l.*, to Catherine Collins 200*l.*, and to W. Lea 200*l.*, separately. (Re Wylde, 2 D. M. & G. 724.)

So where the bequest was "to A. his wife and children 3000*l.*," and there were two children living at the decease of the testator, the legatees were held to take as joint tenants in thirds, viz., the husband and wife one, and the two children each of them one. (Gordon v. Whieldon, 11 B. 170.)

It is of course immaterial whether the husband and wife are described as such in the bequest, or not.

¹ Compare Ireland v. Ireland, 18 Hun 362; the cases on this point are collected in the note to See v. Zabriskie, 28 N. J. Eq. 422.

Exception.—But the rule is held not to apply where the gift is to A. (husband), *and* (wife), the word “and” implying that the husband wife are to take as two persons.¹

Thus where the gift was, “All the residue of my property I leave equally between my brother T. Warrington, my sister A. Van Cortlandt, my nephew W. H. Warrington, *and* Emma his wife, their heirs and assigns,” it was held that the residue was divisible into fourths, and that the husband and wife each took one of them. (*Warrington v. Warrington*, 2 Hare 54.)

“*Sole*” and *separate Use*.^a

In order to create a gift to the separate use of a woman, an intention must appear to exclude the husband, or to exclude all persons including the husband, from participating in the gift; and it is a rule that—

RULE. A gift to or for the “*sole*” use or benefit of a woman means *primâ facie, separate use*. (*Adamson v. Armitage*, 19 Ves. 416; *Ex parte Ray*, 1 Mad. [*117 *199; *Lindsell v. Thacker*, 12 Sim. 178; *Ex parte Killick*, 8 Mont. D. & De G. 480.)

As if the bequest be “to my wife for her sole use for ever.” (*Lindsell v. Thacker*, 12 Sim. 178), or to A. “solely and for her own use and benefit during her life.” (*Inglefield v. Coghlan*, 2 Coll. 247.)

“Taking the words ‘sole use’ by themselves, they must have the same meaning as ‘separate use’: omitting the word sole, the property would go to the husband; but I am not at liberty to reject that word. ‘Sole’ means solely here—for her sole benefit. It is an emphatic and operative word. I admit that a husband’s marital right cannot be taken away but by a clear intention; but here I think the intention is clear. The Master of the Rolls has decided on the effect of these words in the case of *Adamson v.*

^a But see note, p. 118.

¹ *Hilton v. Bender*, 69 N. Y. 75.

Armitage, and that they pass a separate estate." (Ex parte Ray, 1 Mad. 207.)

The word "sole" has this effect, although the donee is a single woman at the time of the bequest. (Adamson v. Armitage, 19 Ves. 416; Ex parte Killick, 3 Mont. D. & De G. 480.)

In Massey v. Parker, 2 My. & K. 174, however, a direction that the fund should be "under the sole control" of the legatees was held to refer to and exclude only the control of their mother, and not to create a separate estate.¹

"Own" not separate use.—It is settled that the word "own" has not the same force as "sole," and that a gift to a married woman "for her own use and benefit" does not exclude the husband. (Wills v. Sayers, 4 Mad. 409; Roberts v. Spicer, 5 Mad. 491.)

But where the bequest was to a woman "for her own use and at her own disposal," it was held that the latter words created a separate estate, showing an intention to give her that power of disposition which the law does not give her. (Prichard v. Ames, T. & R. 222.)

¹ Where this was a gift to H., "her heirs, executors, administrators and assigns, for her and their sole and absolute use and benefit," it was held that since the word "sole" was applied to her heirs, executors, etc., it could not have been used in the sense of separate: Lewis v. Matthews, L. R. 2 Eq. 177.

In Massey v. Brown, L. R. 4 H. L. Cas. 288, it is said that "sole" is not a technical word, has not a certain definite meaning attached to it which throws upon the person who contests that meaning the necessity of showing by implication that it is not used in its strict and technical sense. That Adamson v. Armitage, and Ex parte Killick, and kindred cases, were decided not upon the efficacy of the word "sole" itself, but because upon construction of the whole will, it appeared that word was used in the sense of separate.

The same view seems to have been taken of the effect of this word in Smith v. Wells, 7 Metc. (Mass.) 243; and of the word "only:" in Thrash v. Hardy, 31 Ga. 205.

"Sole" will not mean "separate" use when used for males and females alike, and when used convertibly with "only:" Huckabee v. Andrews, 34 Ala. 650

In Pennsylvania a gift for a married woman's "own use" will create a separate use: Jamison v. Brady, 6 S. & R. 466. The same meaning was given to the word, when aided by other circumstances, in Freeman v. Flood, 16 Ga. 532.

"*Proper*" equivalent "*to own*."—It has been decided by *Tyler v. Lake*, 2 R. & My. 183, and followed in **Blacklow v. Laws*, 2 Hare 49, that the word "*proper*" is [118 merely equivalent to "*own*," and that a direction to "pay into the *proper* hands" of a married woman "for her *proper* use and benefit," is not sufficient to create a separate estate. But the decision is contrary to the opinion of Sir J. Wigram. (See 2 Hare 53.)¹

A gift to a woman "independently of any other person" (*Margetts v. Barringer*, 7 Sim. 482), or with a direction that her receipt shall be a sufficient discharge (*Lee v. Priaulx*, 3 Bro. C. C. 381), or that she shall receive the rents herself, "whether married or single" (*Goulder v. Camn*, 12 G. F. & J. 146), is sufficient to create a separate estate.

Absolute.—It would appear that a gift to a woman "*absolutely*," or "*for her own absolute use*," is not alone sufficient to exclude the husband. (*Rycroft v. Christy*, 3 Beav. 238; *Shewell v. Dwarris*, Johns. 172.) But where the bequest was, in case the husband and wife should not be living together, as to one half for the wife *absolutely*, and as to the other half for the husband, it was held that the bequest was to the separate use of the wife. (*Shewell v. Dwarris*, Johns. 172.)²

NOTE.—In *Gilbert v. Lewis*, 1 N. R. 111, it was said by Westbury, C., that the word "*sole*" does not of itself create a separate use, in a gift to a woman who is discovert, or to the widow of the testator. This dictum throws some doubt on the rule; which however has, it is conceived, been generally considered as settled by the decisions. In *Ex parte Killick*, 3 Mont. D. & De G. 487, Knight Bruce, V. C., said "I apprehend it is clear, that when property is given to a woman, whether married or unmarried, 'for her own *sole* use and benefit,' it is vested in her for her separate use, free from the control of the marital right."

¹ "*Own proper use*" was held to create a separate estate in *Snyder v. Snyder*, 10 Penn. St. 423.

² *Johnson v. Johnson*, 32 Ala. 639.

GIFTS, ETC., WITHOUT WORDS OF LIMITATION.

Occupation.

OCCUPATION, in the legal sense, denotes possession or ownership, not the act of inhabiting: hence it is a rule that—

RULE. "Occupy" does not, *prima facie*, mean *personally* occupy. Thus a devise of the "use and occupation" of a house to A. passes an estate for life, not subject to the condition of residence. (*Rex v. Inhabitants of Eatington*, 4 T. R. 177; *Whittome v. Lamb*, 12 M. & W. 813; *Rabbeth v. Squire*, 4 De G. & J. 406.)¹

In *Rex v. Inhabitants of Eatington*, 4 T. R. 177, a cottage was conveyed in fee, with a proviso that it should be lawful for the vendor "to live, inhabit, dwell in, and *occupy* the said cottage with the appurtenances, as he has done and now does, during the term of his natural life:" it was held that a life estate was reserved to the vendor. "The word 'occupy' in the proviso, is extremely material, to show that the deed must have this operation: for it is a reservation of the thing itself, of the whole estate. For a license to occupy an estate for a particular time is a lease of the whole estate for that time." (4 T. R. 182.)

In *Rabbeth v. Squire*, 4 De G. & J. 406, the devise was that A. and B. should have the "joint use and occupation" of certain

¹ *Garland v. Garland*, 73 Me. 97; *Beekman v. Hudson*, 20 Wend. 53; *Tobias v. Cohn*, 36 N. Y. 363; *Pardue v. Givens*, 1 Jones Eq. 307; *Law's Succession*, 31 La. Ann. 456. The word "control" has a similar effect: *Hogan v. Hogan*, 44 Mich. 147. "Allowed to live on," or "to have the privilege to live on," land for life, gives a life estate: *Fulton v. Cummings*, 34 U. C. Q. B. 331; *Bartels v. Bartels*, 42 id. 22.

lands, with a proviso that if either *A. or B. should *decline* *120] such use and occupation, the other should have the whole use and occupation thereof. It was held that no condition was annexed requiring personal occupation.

“Rents and Profits.”

RULE. A devise of the “rents and profits” of land is equivalent to a devise of the land itself. (*Doe d. Goldin v. Lakeman*, 2 B. & Ad. 30, E. C. L. R. vol. 22.)¹

Thus if the testator directs the “rents and profits” of his lands to be divided among his three daughters in equal proportions, till A. returns from Rome, the daughters take an estate of freehold as tenants in common. (*Doe v. Lakeman*, 2 B. & Ad. 30, E. C. L. R. vol. 22.)

A devise of “rents and profits” to A. without words of limitation, in a will prior to 1838, of course passes only an estate for life. But in a will made or republished on or after Jan. 1, 1838, a devise of the “rents and profits” of land will, it would appear, by force of the 28th section of the Wills Act, pass the fee simple of the land.

In *Stewart v. Garnett*, 3 Sim. 398, a devise (in a will prior to 1838) of “the rents and profits of an *estate* called I.” in moieties, was held to carry the fee simple by force of the word “estate.”

¹ *Earl v. Rowe*, 35 Me. 419; *Craig v. Craig*, 3 Barb. Ch. 94; *Chapman v. Nichols*, 61 How. Pr. 275; *Anderson v. Greble*, 1 Ash. 138; *France's Est.*, 75 Penn. St. 220; *Den v. Manners*, 1 Spencer 144; *Smith v. Dunwoody*, 19 Ga. 237; *Baker v. Scott*, 62 Ill. 86. The same may be said of a devise of the “income” of land: *Reed v. Reed*, 9 Mass. 372; *Sampson v. Randall*, 72 Me. 109; or of the “rentals,” *Crawford v. Lundy*, 23 Grant Ch. (U. C.) 244, and “worldly estate” includes the whole interest of the testator in land: *Town v. Borden*, 1 Ont. 327.

In *Boyle v. Parker*, 3 Md. Ch. 45, it is said that a devise of “rents and profits” does not *ex vi termini* pass the land, but only furnishes evidence of an intention that it shall pass, and if upon the face of the will a different intention is manifested, that evidence is rebutted. To the same effect is *Collier v. Grimesey*, 36 Oh. St. 17. So a gift of “all the proceeds” of a farm for life followed by a devise over of the fee passes a life estate in the farm, *Brennan v. Munro*, 6 U. C. Q. B. O. S. 92.

Trust to raise and pay out of "Rents and Profits."

As a gift of the rents and profits of land is equivalent to a gift of the land itself, so a direction to raise money out of the rents and profits of land may be considered equivalent to a direction to raise out of the land itself, unless the will contains something to show that by "rents and profits" the testator meant *annual* rents and profits only. And it appears to be settled as a rule of construction, that—

RULE. A trust to raise and pay money out of the "rents and profits" of land is sufficient to create a charge on the *121] *corpus* of the land, where the purposes *of the trust require it: unless the context shows that "rents and profits" means only "*annual* rents and profits." (Trafford *v.* Ashton, 1 P. W. 415; Allan *v.* Backhouse, 2 Ves. & B. 64; Bootle *v.* Blundell, 1 Meriv. 232; Wilson *v.* Halliley, 1 Russ. & My. 590.)¹

"In general, where money is directed to be raised by rents and profits, unless there are other words to restrain the meaning, and to confine them to the receipt of the rents and profits when they accrue, the Court in order to obtain the end which the party intended by raising the money, has by the liberal construction of these words, taken them to amount to a direction to sell; and as a devise of the rents and profits will at law pass the lands, the raising by rents and profits is the same as raising by sale." (Per Lord Hardwicke, Green *v.* Belchier, 1 Atk. 506.)

"I have understood it to be a settled rule, that where a term is created for the purpose of raising money out of the rents and profits, if the trusts of the will require that a gross sum should be raised, the expression 'rents and profits' will not confine the power to the mere annual rents, but the trustees are to raise it

¹ But in *Delancy v. Van Aulen*, 84 N. Y. 16, after an extended review of the cases, it is held that this rule is now relaxed, and that the courts may exercise their judgment and enforce what appears to them the testator's primary intention.

out of the estate itself, by sale or mortgage." (Per Lord Eldon, *Boottle v. Blundell*, 1 Mer. 232.)

Thus, where lands were devised to trustees, in trust out of the rents and profits to pay debts and legacies (*Lingon v. Foley*, 2 Ch. Cas. 205), or where a term of ninety-nine years was limited to trustees, in trust out of the rents and profits to raise portions for daughters to be paid as soon as conveniently might be (*Traf-ford v. Ashton*, 1 P. W. 415), the charge has been decreed to be raised by sale or mortgage.

So in *Allan v. Backhouse*, 2 V. & B. 64, a direction to raise and pay the fines and expenses attending renewals of leases out of the rents and profits of the testator's lands was held to authorize a sale, it being necessary *when the renewals took place *122] that a gross sum should be paid immediately.

So in *Boottle v. Blundell*, 1 Mer. 193, a devise to trustees for a term of 500 years in trust out of the rents and profits of the said premises to pay the testator's debts and also all such annuities or legacies as were thereafter mentioned, was considered by Lord Eldon to bear the same construction, it being clear that the legacies were to be paid immediately.

In *Wilson v. Halliley*, 1 R. & My. 590, the testator directed his trustees to convert his personal estate, and out of the moneys so to arise, and the rents, issues, and profits of his real estates, to pay a legacy of 50*l.* and an annuity of 100*l.*, and the testator's funeral expenses and debts. It was held that "inasmuch as debts can be immediately claimed, to the extent of this purpose, if necessary, a sale or mortgage might certainly be made." The testator then directed the trustees to raise and levy out of the rents and profits of his real estate the sum of 5850*l.*, which he apportioned among legatees: and devised the real estate, "subject to the receipt of the rents and profits" by his trustees for the purposes aforesaid. It was held upon the whole will that the purposes of the latter trust were to be satisfied out of the annual rents and profits only, the immediate payment of the money not being required.

In *Small v. Wing*, 5 Bro. P. C. Toml. 66, the direction was that the testator's debts and a sum of 1000*l.* to be paid to his daughter should be raised out of the rents and profits of his real

estate, and the rents and profits were not to be received by the devisees till the charge was raised, but were to be received by the trustees and *paid over* to the daughter: and until the charge was raised the trustees were directed to *let* the premises for the purpose of raising and paying the debts and the sum of 1000*l*. The context was held to show that the charges were to be raised only out of the *annual* rents and profits.

*123] In *Heneage v. Lord Andover*, 3 Y. & J. 860, a term of *500 years was limited to trustees in trust out of the rents and profits to raise sums of 500*l*., 700*l*., and 1000*l*., to be paid *as soon as might be*, to raise and pay certain annuities, and the testator's debts; and to pay over the residue and overplus of the net rents and profits to the devisees in remainder. It was held that the charge was confined to the annual rents and profits: but qu. how far this case is consistent with what was said in *Bootle v. Blundell*, 1 Mer. 232.

Annuity payable out of rents and profits.—In *Phillips v. Gutteridge*, 11 W. R. 21,¹ it was laid down by Westbury, C., that a direction to pay an annuity out of the rents and profits of land is sufficient to constitute the annuity a charge on the corpus of the land; unless the context shows an intention to preserve the corpus, in any event, intact for those in remainder.²

Unlimited Gift of Income.

A gift of personal estate without words of limitation is sufficient to pass the absolute interest. But it might be supposed that a bequest of the *income* or annual produce of a fund, as opposed to a bequest of the fund itself, would be confined to the life of the donee, in the absence of a contrary intention: the rule, however, is otherwise, and it is settled that—

¹ Reported 3 De G. J. & S. 332.

² In the question whether an annuity is a charge on the corpus or not, there is first a distinction between cases in which the fund out of which the annuity is payable is made part of the residue, and those in which the fund is specifically given over after the death of the annuitants: *Baker v. Baker*, 6 H. L. C. 625; *Perkins v. Cooke*, 2 Johns. & Hem. 393. And in the cases of a specific gift over, a distinction is next made between a simple gift over of the fund after the death of the annuitant, and a gift over after the satisfaction of the annuity, or subject to the annuity: *Birch v. Sherrat*, L. R. 2 Ch. App. 644.

RULE. A bequest of the income of personal estate, without limit as to time, is equivalent to a gift of the principal.¹

Thus a bequest of the interests, dividends, or annual produce of 1000*l.* stock to A. *simpliciter*, is a gift to A. of the capital sum of 1000*l.* stock. (*Elton v. Sheppard*, 1 Bro. C. C. 532; *Haig v. Swiney*, 1 Sim. & Stu. 487; *Blann v. Bell*, 2 D. M. & G. 775.)

Primâ facie a gift of the produce of a fund is a gift of that produce in perpetuity; and is consequently a gift *of the fund itself, unless there is something upon the face of the will to show that such was not the intention." (*Adamson v. Armitage*, 19 Ves. 418.)

The rule applies whether the income of the fund be given directly, or through the intervention of trustees. (*Haig v. Swiney*, 1 Sim. & Stu. 487.)

Thus where the testator directed his trustees to lay out and invest the residue of his estate in the public funds, and to pay and apply the dividends and interest arising from the same to A. and B. equally between them as tenants in common, it was held that A. or B. could file a bill for the absolute transfer of a moiety of the residue. (*Page v. Leapingwell*, 18 Ves. 463.)

Direction to pay dividends, &c., to separate use of a married woman.—It is settled that the rule applies to a bequest of personal estate to trustees, in trust to pay the dividends or interest to A., a married woman, for her sole and separate use, with a direction that her receipt alone shall be a discharge for the same: so that A. becomes entitled, to her separate use, to the capital of the fund. (*Elton v. Sheppard*, 1 Bro. C. C. 532; *Haig v. Swiney*, 1 Sim. & Stu. 487; *Humphrey v. Humphrey*, 1 Sim. N. S. 536.)

Where the interest of a fund is given to A. for life, and after his decease to B. indefinitely, the rule applies, and B. takes the fund absolutely, subject to A.'s life interest. (*Clough v. Wynne*, 2 Madd. 188.)

¹ *Fox v. Carr*, 16 Hun, 566; *Gulick v. Gulick*, 27 N. J. Eq. 498; *McMichael v. Hunt*, 85 N. C. 344.

But where the testator directed the dividends of stock to be equally divided between A. and B. *and the survivor*, it was held that the rule was excluded, and that the survivor was entitled for life only. (*Blann v. Bell*, 2 D. M. G. 775.) Cranworth, L. J., said: "What is the survivor to take? Why only the same thing as the deceased co-legatee. She stands in her place as to her half, and takes only the same interest as she did, namely, a life interest." (Ib. p. 781.)

In *Jennings v. Baily*, 17 B. 118, the testatrix directed her executors to pay to or permit A. to receive the dividends, interest, *125] and produce of her personal estate; and "from and after the death of A." the testatrix gave some pecuniary legacies. It was held that the rule applied, and that A. took the personal estate absolutely, subject to payment of the legacies.

Annuity, whether perpetual.

The question whether an annuity given by will is perpetual or for life only, depends mainly on the distinction between a simple gift of an annuity, and the gift of the produce of a fund without limit as to time. Where there is no reference to the fund out of which the annuity is to come, it is the rule that—

RULE. A bequest of an annuity, not existing before, to A., *simpliciter*, is *prima facie* for life only. (*Savery v. Dyer*, Amb. 139; *Blewett v. Roberts*, Cr. & Ph. 274.)¹

The rule is unaffected by the Wills Act. (*Nichols v. Hawkes*, 10 Hare 342.)

"If one gives by will an annuity, not existing before, to A., A. shall have it only for life." (*Savery v. Dyer*, Amb. 140.)

"An annuity may be perpetual, or for life, or for any period of years; but in the ordinary acceptation of the term used, if it should be said that a testator had left another an annuity of 100*l.* per annum, no doubt would occur of the gift being an annuity for the life of the donee. It is the gift of an annual sum of 100*l.*; that is, of as many sums of 100*l.* as the donee shall live years." (*Blewitt v. Roberts*, Cr. & Ph. 280.)

¹ *Morgan v. Pope*, 7 Cold. 547; *Bates v. Barry*, 125 Mass. 83.

But where a personal annuity was given to A. during the life of B., and A. died in the lifetime of B., it was held that the annuity did not expire, but went to the executor of A. (*Savery v. Dyer*, Amb. 139.)¹

The exceptions to the rule will fall under two heads:

First, where the bequest is in effect a gift of the *produce of a fund*, the case is assimilated to that of a gift of the income of a fund without limit as to time, and the *annuity will be [*1:6 perpetual. "To make an annuity, created by will, perpetual, there must be express words in the will so describing it, or the testator must by some language in the will indicate an intention to that effect. The most common indication is a direction by the testator to segregate and appropriate a portion of his property, from the interest or profits of which the annuity is to be paid. Where this is done, the annuity when mentioned in the will represents the corpus so appropriated, and the corpus passing by the bequest of the annuity, the annuity may be said to be perpetual." (*Lett v. Randall*, 2 De G. F. & J. 392.)

As, if the gift be of "200*l.* a year, *being part of* the moneys I have in Bank security" (*Rawlings v. Jennings*, 13 Ves. 39), or a bequest of "120*l.* per annum, *that is to say*, the interest of 4000*l.* of my 3 per cent. consols." (*Stretch v. Watkins*, 1 Mad. 253.)

But in *Wilson v. Maddison* (2 Y. & C. C. C. 372), a direction that 30*l.* a year "*from* the interest of the testator's property in the Bank of England," should be paid for the maintenance of certain legatees, was held to be an annuity *charged upon* the stock, not an annuity *part of* the stock, and consequently not to be perpetual.

In *Hill v. Potts*, 2 Jo. & H. 634, a gift as follows: "I give and bequeath to A. all my property, landed and personal, *except* 500*l.* a year, which I give and bequeath to B.," was held a gift to B. of the corpus sufficient to produce that income.

In *Stokes v. Heron*, 12 Cl. & F. 161, perpetual annuities were held to be given by these words:—"my will is that what-

¹ In *Little's App.*, 81 Penn. St. 190, this principle was applied to a gift of one-third of the income arising from investments in personal securities producing a certain and regular return.

ever I may die possessed of, together with any property my wife may be in any way entitled to, *shall produce* to my wife an annuity of 100*l.* per annum, to each of my daughters 100*l.* per annum for themselves and their children, to my wife's mother an addition to any property she may possess so as to make up to her during her life an annuity of 100*l.* per annum, the said annuities after the decease of my wife and her mother to be equally divided *127] among my three children. . . . *All the rest and residue of my property I give to my son A."¹

On the other hand, in *Let v. Randall*, 2 De G. F. & J. 381, under a devise of the testator's real and personal estate to trustees in trust to make up to his wife 1200*l.* per annum, including what she was entitled to under her father's will, and after her decease the said sum of 1200*l.* to be equally divided among all and every his children then living, the annuities were held to be limited to the lives of the widow and children, no appropriation being contemplated to form the corpus of the annuity.

Although the bequest be of the produce of a fund, the gift as a whole may of course show that the income of the fund is given for life only. Thus in *Innes v. Mitchell*, 9 Ves. 212, where the gift was of 200*l.* per annum to A. for the use of herself and children, with a direction to the executors to invest 5000*l.* in the funds *in lieu thereof*, as soon as convenient, "for her and their use, and to the longest liver of her and her children, subject to an equal division of the interest while more than one of them are alive," it was held that the annuity determined with the life of the survivor of the children.

Annuity to be purchased in the funds.—It is settled that a gift by way of a direction to purchase an annuity for a person in the funds, government securities, etc., amounts to a gift of the corpus of stock sufficient to produce the annuity, and is not to be construed as a direction to buy a government annuity for the life of the person. (*Kerr v. Middlesex Hospital*, 2 D. M. & G. 576; *Ross v. Borer*, 2 Jo. & H. 469.) "Where a particular fund is to be purchased to produce an annuity, the annuitant is entitled (in the absence of any contrary direction) to the particular fund so purchased and set apart." (*Ross v. Borer*, 2 Jo. & H. 472.)

¹ *Bent v. Cullen*, L. R. 6 Ch. App. 237.

"The word 'funds,' in common parlance, and according to its natural import, means the funds of England, the British funds. If, however, a man buys a life annuity of the government, he does not buy an annuity in the British funds, but an annuity payable out of the *Consolidated Fund. Now the Consolidated Fund is money raised by the authority of Par- [*128
liament to pay the British funds themselves." (*Kerr v. Middlesex Hospital*, 2 D. M. & G. 588.)

In *Kerr v. Middlesex Hospital*, 3 D. M. & G. 576, the bequest was, "I desire that my executrix shall purchase annuities for each of my two sisters, viz., A. and B., of 100*l.* a year each, the said annuities to be purchased in the British Funds." In *Ross v. Borer*, 2 Jo. & H. 469, the bequest was, "I direct my executors to purchase an annuity in government securities to the amount of 50*l.* a year for my servant A., in consideration of her faithful services, the annuity to commence from the day of my decease." In both cases the annuities were held to be perpetual.

Secondly:—Where an annuity is given to A. for life, and after his decease to B., the fact that the annuity extends beyond the life of the first taker is not alone sufficient to render it perpetual. Thus where the annuity was given to A. for life, but if he should die leaving a child, the annuity was to be *continued* for the child's use and benefit, it was held that the child of A. took for life only. (*Yates v. Maddan*, 3 Mac. & G. 532.) So where the annuity was given to A. for life, and after his decease the said annuity was to be equally divided between B., C., and D., or the survivors or survivor of them, it was held that the legatees in remainder took annuities only for their respective lives. (*Blewitt v. Roberts*, Cr. & Ph. 274.)

But where an annuity is given for life with remainder over, the context not unfrequently leads to the inference that a perpetual annuity is intended. "In *Stokes v. Heron*, Lord Cottenham alluded to two principles on which annuities given indefinitely have been held to be perpetual: the one is, that a gift of the produce of a fund, whether particular or residuary, without limit as to time, is a gift of the fund itself; the other is, that where the

testator speaks of an annuity which he gives to a person for life, *129] as if it were in existence after the death of such *person, irrespective of any words added for the purpose of continuing its existence for the benefit of another person, there the annuity given indefinitely to such other person is a perpetual annuity." (Per Lord Truro, *Yeates v. Maddan*, 3 Mac. & G. 540.)

Thus, where the gift was "to A. 50*l.* a year for her and her children: and after her decease *the money* to each of them at 21," the annuity was held perpetual. (*Potter v. Baker*, 13 B. 273.)

So where the annuity was given to A. for life, and if he should have children, to be equally divided between them, but if A. should die without issue, then the annuity was to be given to B. and *his heirs forever*, the children of A. were held to take the annuity absolutely. (*Robinson v. Hunt*, 4 B. 450.)

In *Pawson v. Pawson*, 19 B. 146, the testator gave to A. an annuity of 60*l.* a year out of his bank stock, and directed that the annuity should not be sold till after the death of A. and his wife, nor until their youngest child should attain twenty-one: it was held that the annuity was perpetual.

In *Hedges v. Harpur*, 3 De G. & J. 129, an annuity was given to each of the testator's daughters, and, after their respective decease, to their children respectively, share and share alike, with a direction that if any or either of the daughters should die without issue, the annuity should cease and fall into the residue: it was held that the annuities were perpetual, the latter direction importing that the annuity was not to cease unless the daughter died without issue, and also that it was to fall into the residue, if at all, as an entire fund.

So, in *Manserge v. Campbell*, 3 De G. & J. 232, where the annuity was given to A. for life, and after her decease to her children as tenants in common, with a direction that on the youngest child attaining twenty-one, *the said annuity* should be sold, and the proceeds divided among the children: the annuity was held perpetual, inasmuch as if the children took for life only, there being no survivorship between them, the sale would be of so many separate annuities.

DEVICES WITHOUT WORDS OF LIMITATION.

1. OLD LAW.

IN wills made before Jan. 1st, 1838,

RULE. A devise of lands to A., *simpliciter*, confers an estate for life only, unless an intention appear to the contrary.¹

The rule is the same where the devise is of "lands, tenements, and hereditaments." (*Hopewell v. Ackland*, 1 Salk. 239.)²

The rule extends to a devise of manors, farms, rents, tithes, or any kind of hereditament.

"Generally speaking, no common person has the smallest idea of any difference between giving a person a house and a quantity of land. Common sense alone would never teach a man the difference; but the distinction, which is now clearly established, is this: if the words of the testator denote only a description of the specific estate or land devised, in that case, if no words of limitation are added, the devisee has only an estate for life. But if the words denote the quantum of interest or property that the testator has

¹ *Clark v. Boorman*, 18 Wall. 493; *Lummas v. Mitchell*, 34 N. H. 45; *Van Alstyne v. Spraker*, 13 Wend. 582; *Wright v. Denn*, 10 Wheat. 204; *Clayton v. Clayton*, 3 Binn. 483; *Conoway v. Piper*, 3 Harring. (Del.) 482; *Beall v. Holmes*, 6 Har. & Johns. 207; *Preston v. Evans*, 56 Md. 476; *Jones v. Bramlett*, 1 Scam. 276; *Doe d. Ford v. Bell*, 6 U. C. Q. B. 527; *Hamilton v. Dennis*, 12 Grant Ch. (U. C.) 325. In Connecticut this rule has never been in force: *Holmes v. Williams*, 1 Root 341; *Hungerford v. Anderson*, 4 Day 371.

² *Wright v. Denn*, 10 Wheat. 238.

in the lands devised, then the whole extent of such interest passes by the gift to the devisee." (*Hogan v. Jackson*, Cowp. 306.)

In *Pocock v. Bishop of Lincoln*, 3 Brod. & B. 27 (E. C. L. R. vol. 7), a devise to A. of "the perpetual *advowson* of H., and my manor of S., and all my lands in N." was held to pass the *advowson* for life only, although the devisee was then the actual incumbent.

*131] *A devise of lands to A. *and his assigns* (in a will prior to 1838) passes only an estate for life. (Co. Lit. 96.)

But any words implying that more than a life estate is intended are sufficient to cause the fee to pass by an indefinite devise.

Thus a devise of lands to A. *for ever* passes the fee. (Co. Lit. 96.)

So a devise to A., his executors or administrators, passes the fee. (*Rose v. Hill*, 3 Burr. 1881.)

So if lands be given to be at the disposition of a person (*Leon*. 156), or to be kept in the name and family of the devisee (*Doe d. Wood v. Wood*, 1 B. & Ald. 518), the fee simple may be held to pass.

If lands be given to A. for life, and after his decease to be equally *divided* between B. and C., it has been held that B. and C. take the fee simple, on the ground that the corpus of the land is to be divided between them. (*Oates v. Brydon*, 3 Burr. 1895.)¹

¹ *Wyatt v. Sadler*, 1 Munf. 537; but on the other hand see *Bool v. Mix*, 17 Wend. 127; *Lippen v. Eldred*, 2 Barb. 131; *Edwards v. Bishop*, 4 Comst. 62; *Clayton v. Clayton*, 3 Binn. 483. In Ontario, under the old law, a residuary devise touching the testator's worldly estate, to be equally divided among five children, followed by a specific devise to J. K., was construed to give J. K. a life estate in the specific land, remainder in fee to the five children: *Doe d. Ford v. Bell*, 6 U. C. Q. B. 527.

In many of the states of this country before the passage of the statutes abolishing this rule, it was held that whenever an intention of disposing of the fee could by any fair inference be drawn from the will, the operation of the rule would be excluded, and very slight circumstances would be laid hold of as indicating such an intention. (*Lummas v. Mitchell*, 34 N. H. 46; *Cleveland v. Spilman*, 25 Ind. 99.) Thus where a devise was made without words of limitation but with an intention to pass the fee evinced by the use of the word estate or by its being subject to a charge, and then another devise was made in a similar manner but without any such attendant circumstance, the latter devise would pass the fee: *Cook v. Holmes*, 11 Mass. 532;

“Estate.”

The word “estate” is, properly speaking, ambiguous: it may either mean the land itself, or the testator’s interest in it; but the Courts, in order to remedy to some extent the mischief caused by the preceding rule, requiring words of limitation to pass the fee, have leant strongly towards considering the word “estate” as conveying the absolute interest: and it is a rule, observed more strictly in recent times, that—

RULE. In wills made before Jan. 1st, 1838,

The word “estate” is sufficient to pass the fee simple

Neide v. Neide, 4 Rawle 82; *Guthrie v. Guthrie*, 1 Call 7; *Pattison v. Thompson*, 7 Ind. 282. The fact that the testator had previously devised an estate and expressly limited it for life, and then made a devise without words of limitation which included the reversion of the life estate, was held a sufficient indication of an intention to pass the fee: *French v. McIlhenny*, 2 Binn. 13. Where the general purpose of the testator in making the devise, either expressed or gathered by implication, cannot be carried out without giving the devisee a fee, the fee will pass: *Baker v. Bridge*, 12 Pick. 31. The existence of a residuary bequest of personalty and the absence of a residuary devise, the coupling of a devise with a general bequest, and the fact that the devise is in remainder after a life estate, are circumstances, the cumulated effect of which is to pass the fee: *Charter v. Otis*, 41 Barb. 529; *Harris v. Slaght*, 46 id. 502.

In Massachusetts it is held that a devise after a life estate (especially to a son) will pass the fee: *Plimpton v. Plimpton*, 12 Cush. 463. The contrary was held in New York in *Olmstead v. Harvey*, 1 Barb. 112. In *Hall v. Dickinson*, 1 Grant’s Cases 240, and *Butler v. Little*, 3 Greenl. 241, such a devise passed the fee, when made to an heir, with an expressed intention of excluding the other heirs.

The fact that real and personal estate are given together by the same clause and in the same words, has been held entitled to great weight if not conclusive in this country upon the question of an intention to pass the fee: *Packard v. Packard*, 16 Pick. 193; *Crossman v. Field*, 119 Mass 170; *Landon v. Moore*, 45 Conn. 422; *Charter v. Otis*, 41 Barb. 531; *Morrison v. Semple*, 6 Binn. 98; *Johnson v. Morton*, 10 Penn. St. 249; *Weidman v. Maish*, 16 id. 511; *Johnson v. Johnson*, 1 Munf. 552; *Cleveland v. Spilman*, 25 Ind. 100; *Leiter v. Sheppard*, 85 Ill. 247; *Murfitt v. Jessop*, 94 id. 158; and in Ontario, *Hurd v. Levis*, 19 U. C. Q. B. 41; *Hicks v. Snider*, 44 id. 486; *Town v. Borden*, 1 Ont. 327.

of land, although accompanied by words of locality or occupation.¹

The rule is the same where the word is "estates," in the plural.

Thus a devise of the testator's *estates* in the occupation of A. in the parish of B. to C., without more, passes the fee simple. (*White v. Coram*, 3 K. & J. 652.)

*132] *So where the devise was of "all my *estate*, lands, &c., known by the name of the Coalyard, in the parish of St. Giles, London," the fee was held to pass. (*Roe d. Child v. Wright*, 7 East 259.)²

"It is established, by a long course of decisions, that the word 'estate,' or 'estates,' used in the operative part of the will, passes not only the corpus of the property, but all the interest of the testator in it, unless controlled by the context; and that super-added words of local description more applicable to the corpus of the property, indicating its situation, or the nature of its occupation, do not prevent it from passing the whole interest. Nor do words apparently explanatory of the meaning of the term inserted in the devise itself: as where the testator leaves his real estate, *that is*, his lands and buildings situate at A. (*Denn v. Hood*, 7 Taunt. 35, E. C. L. R. vol. 2); or his freehold estate *consisting of* 30 acres of land (*Gardner v. Harding*, 3 Moore 565); or where the testator after devising dwelling-houses to one for life (with a minute description), all *which estates* he devised after his death to another. (*Randall v. Tuchin*, 6 Taunt. 410, E. C. L. R. vol. 1.) The courts have extended the meaning of the word, in order to effectuate what it may always be presumed

¹ *Forsaith v. Clark*, 1 Foster 423; *Hart v. White*, 26 Vt. 267; *Leland v. Adams*, 9 Gray 174; *Arnold v. Lincoln*, 8 R. I. 384; *Jackson v. Merrill*, 6 Johns. 191; *Bradstreet v. Clarke*, 12 Wend 660; *Denn v. Bowne*, 3 Harr. 210; *Donovan v. Donovan*, 4 Harring. 177; *Beall v. Holmes*, 6 Har. & Johns. 208; *McCabe v. McCabe*, 22 U. C. Q. B. 378.

In *Smith v. Berry*, 8 Ohio 367, a devise of "all my lands" was held to pass the fee.

² *Lambert v. Paine*, 3 Cranch 97.

that it was the intention of the testator to have done." (Doe d. Burton v. White, 1 Exch. 534.)

The rule would seem to apply equally, whether the devise be of "my estate called A.," or of "*an* estate called A.," although, in Doe d. Lean v. Lean, 1 Q. B. 229 (E. C. L. R. vol. 41), this difference of expression was commented on.

"*Estate*" must be an operative word.—But the rule does not apply unless the word "*estate*" is an *operative* word, occurring in the gift itself. If the testator devise lands to A., *simpliciter*, and afterwards refer to the same lands as "*the said estate*," this does not carry the fee to A. "Where the word '*estates*' is not used in the operative part of the devise itself, but is introduced into another part of the will referring to it, we find no decision or dictum authorizing us to construe it as having the effect *of [133 extending the meaning of the operative clause, whether prior or subsequent, and to read the will as if the testator had said '*by the devise of lands in another clause I mean to give all my interest in those lands.*'" (Doe d. Burton v. White, 1 Exch. 535.)¹

Thus, if the testator devise his *estate* called A. to B. for life, and after his death devise the same *lands*, or the same *hereditaments* to C., C. takes for life only. (Doe d. Norris v. Tucker, 3 B. & Ad. 473 (E. C. L. R. vol. 23); Vick v. Sueter, 3 Ell. & Bl. 219, E. C. L. R. vol. 77.)

But, on the other hand, if the testator devise his *lands*, at A. to B. for life, and after his death devise the *said estates* to C., C. takes the fee simple. (Roe v. Bacon, 4 M. & Selw. 366; Uthwatt v. Bryant, 6 Taunt. 317, E. C. L. R. vol. 2.)

And if the gift be "I devise my *estates* at A. to B. for life, and after his death to C., C. takes the fee simple. (Randall v. Tuchin, 6 Taunt. 410, E. C. L. R. vol. 2.)

Where the gift was, "I devise *an* estate called L. to A. for life, and after his death I devise *the same* to B.," it was held that B.

¹ Yet in Leland v. Adams, 9 Gray 171, where the words were "I devise all my lands in C. to A. This *estate* was the property of G., and I now devise it as a token of my respect," &c., it was held that by reason of the use of the word "*estate*" the fee passed.

took for life only. (*Doe d. Lean v. Lean*, 1 Q. B. 229, E. C. L. R. vol. 41.) Sed qu.

Where the testator devised an *estate* to A., except a certain *house* which he devised to B., it was held that B. took the fee simple in the house devised to him, by necessary intendment. (*Doe d. Knott v. Lawton*, 4 Bing. N. C. 455, E. C. L. R. vol. 33.)

Effects.—Where the word “effects” is used in the sense of real estate, it passes the fee; thus a devise of “all my effects real and personal” passes the fee simple of lands. (*Lord Torrington v. Bowman*, 22 L. J. Ch. 236.)¹

It is clear that the word “property” passes the fee simple. (*Nicholls v. Butcher*, 18 Ves. 193.)²

In *Stewart v. Garnett*, 3 Sim. 398, it was held that a devise of the “rents and profits” of an *estate* to A., *simpliciter*, passes the fee simple by force of the word *estate*.

Moiety, share, &c.—If the testator devise one moiety of lands to A., and the other moiety of the lands to B., *A. and *134]. B. will of course take life estate only in their respective moieties, as if the devise had been of the entire lands to one of them.

But if the testator, having only a moiety or share of lands, devises *his moiety* or *his share* of the lands, it is settled that the fee simple passes without words of limitation. (*Doe d. Atkinson v. Fawcett*, 3 C. B. 274 (E. C. L. R. vol. 54); *Paris v. Miller*,

¹ *Ferguson v. Zeph*, 4 Wash. C. C. 645; *Hammill v. Hammill*, 6 Ont. 681.

² *Fogg v. Clark*, 1 N. H. 163; *Laing v. Barbour*, 119 Mass. 523; *Jackson v. Housel*, 17 Johns. 282; *Foster v. Stewart*, 18 Penn. St. 23; *Mayo v. Carrington*, 4 Call 476; *Niles v. Gray*, 12 Ohio St. 328; *Piatt v. Sinton*, 37 id. 353; *Bigelow v. Bigelow*, 19 Grant Ch. (U. C.) 549; but it is otherwise with the phrase “property, money and effects;” *Brawley v. Collins*, 88 N. C. 605. In Ontario, a devise and bequest of all the testator’s “goods, property [*biens*—the will was in the French language] real and personal” passed the fee in land: *Sanders v. Janette*, 3 U. C. C. P. 292.

In Ohio it is held that the words “lands,” “plantation,” “farm,” &c., are descriptive as well of the quantity of interest as of the subject: *Smith v. Berry*, 8 Ohio 367; *Thompson v. Hoop*, 6 Ohio St. 488.

But where a testator, after giving personalty in a will making no allusion to real estate, disposes of all his “other property” real estate does not pass: *Newell v. Toles*, 17 Hun, 76.

5 M. & Selw. 408.) In *Paris v. Miller*, *Ellenborough, C. J.*, said: "This is not the devise of a portion which the devisor has carved out of the entirety; it existed in her as it is devised. . . . It appears to me that the word *share* passes the fee." (P. 410.)¹

A devise of "my *share* in the New River Company" has been held to confer an estate for life only, the word being there used in its technical sense. (*Skin. 339.*)

Charges.

The effect of a charge in enlarging an indefinite devise is fully settled by authority, and it is the rule that—

RULE. In wills made before Jan. 1st, 1838,

An indefinite devise is enlarged to a fee simple by the imposition of a charge, however small, on the *person* of the devisee, or on the *quantum* of interest devised to him; but not if the devise is merely *subject* to a charge. (*Doe d. Stevens v. Snelling*, 5 East 87; *Doe d. Sams v. Garlick*, 14 M. & W. 698; *Burton v. Powers*, 3 K. & J. 170.)²

Thus, a devise of lands to A., he paying 10*l.* to B., passes the fee simple; but a devise of lands to A. subject to a charge of 10*l.*, passes only an estate for life.³

¹ A devise of "my right" (*Newkerk v. Newkerk*, 2 Caines 351), in certain lands, or "my part" (*Peppard v. Deal*, 9 Penn. St. 142), or "my portion" (*Hallowell v. Phipps*, 2 Whart. 383), will pass the fee. So will a devise of "my late purchase" (*Neide v. Neide*, 4 Rawle 81), or "all I have," "everything" (*Chamberlain v. Owings*, 30 Md. 453), or "my undivided half" (*Waterman v. Greene*, 12 R. I. 483).

² *Wait v. Belding*, 24 Pick. 139; *Fearing v. Swift*, 97 Mass. 413; *King v. Cole*, 6 R. I. 587; *Spraker v. Van Alstyne*, 18 Wend. 205; *Harden v. Hays*, 9 Penn. St. 155; *Glenn v. Spry*, 5 Md. 117; *Gibson v. Hertton*, 5 Har. & Johns. 180; *Renwick v. Smith*, 11 S. C. 294; *Wharton v. Morague*, 62 Ala. 201; *Johnson v. Johnson*, 98 Ill. 564; *Doe d. Humberstone v. Thomas*, 3 U. C. K. B. O. S. 516; *Dixon v. Dixon*, 14 U. C. Q. B. 275; *Smith v. Holmes*, id. 572; *Chisholm v. Macdonnell*, 1 N. Sc. Dec. 137.

³ *Van Dyke v. Emmons*, 34 N. Y. 186; *Mesick v. New*, 3 Seld. 165; *Wright v. Denn*, 10 Wheat. 231; *Gardner v. Gardner*, 3 Mason 209; *Scott v. Alexander*, 2 Houst. 241; *McRee v. Means*, 34 Ala. 377; *Doe v. Horter*,

So a devise of "all that my house, &c., to A., whom I name sole executrix, she paying my debts and funeral charges," passes the fee. (*Dolten v. Hewen*, 6 Mad. 9.) But a devise of a farm and premises to A., "subject to the payment out of the aforesaid *135] premises" of several *sums of 50*l.*, gives an estate for life only. (*Burton v. Powers*, 3 K. & J. 170.)

"The distinction which runs through the cases seems to be this, that if an estate in land be given *after payment* of debts or legacies, it is of no consequence for this purpose whether the devisee take the estate for life or in fee; for the land will be charged into whatever hands it may pass, and the purposes of the devisor will equally be answered. But where an indefinite estate is given to a person in lands, and that *person* is charged with the payment of debts or legacies, he must take a fee; for otherwise, if he only take for life, and pay the charges, and die soon after, he may be a loser, which the devisor could never have intended. It is the same thing if such indefinite estate be given to one, and the debts are to be paid *out of the estate* given to the devisee, he must there also take the fee; for otherwise the *estate* may not be sufficient to pay the debts." (Per Lawrence, J., *Doe d. Stevens v. Snelling*, 5 East 96.)

"In any case, where a payment is to be made out of the interest given to the devisee, so that it is a charge upon the estate devised to him, that estate is to be measured by the possible, not the probable, amount of the charge, and if it may require the fee simple to provide for it, the fee simple is considered to pass to the devisee.

"There is another class of cases, of which *Denn v. Mellor*, 2 B. & P. 247, is the principal authority, where the gift is to the devisee "after" satisfaction of some previous legacy, and there the devisee takes nothing until the legacy is satisfied: . . . consequently it cannot be inferred in any way, that the charge is to be paid out of the estate given to the devisee, it being in fact

7 Blackf. 489. But in Pennsylvania (*Wolbert v. Lucas*, 10 Penn. St. 73), it is said that the acceptance by the devisee of the land charged makes him personally liable, and therefore he takes the fee.

paramount thereto ; and therefore his estate cannot be enlarged by any implication arising from such charge." (Burton v. Powers, 3 K. & J. 172.)

In Doe v. Richards, 3 T. R. 356, a devise of lands, "my legacies and funeral expenses being *thereout* paid," was held to mean "being paid out of the interest of the *devisee," and [*136 therefore to carry the fee : but this case is doubtful.¹

A devise of lands to A., he paying a sum of money to B. when B. shall attain twenty-one, carries the fee simple, although the payment to B. is contingent. (Doe v. Phillips, 3 B. & Ad. 753 (E. C. L. R. vol. 23) ; Abrams v. Windshup, 3 Russ. 350.)

Devise to A., he paying an annuity.—If lands be devised to A., he paying thereout 20s. a year to B., the annuity to B. is not restricted by implication to the lifetime of A. ; but A. takes the fee simple, and the annuity continues during the life of B. (Badely v. Leppingwell, 3 Burr. 1533 ; Goodright v. Stocker, 5 T. R. 13.)²

In Matthews v. Windross, 2 K. & J. 406, the testator devised to A. "the Dove Close, also the Blake Close, also the house he now lives in ;" and afterwards bequeathed to B. the sum of 10l. a year to be paid out of the Dove Close by A. It was held that A., though taking the fee simple in the Dove Close, took the remaining property for life only.

Gift over on Death under Age.

A gift over in the event of the devisee dying under age is also held to show an intention to give the fee simple : and it is a rule that—

RULE. In wills made before Jan. 1st, 1838,

If lands be devised to A. indefinitely, with a gift over in the event of A. dying under twenty-one, A., if he attains that age, takes the fee simple. (Frogmorton v.

¹ Mesick v. New, 3 Selden 167.

² King v. Cole, 6 R. I. 588.

Holyday, 3 Burr. 1618; Doe d. Wright v. Cundall, 9 East 400; Burke v. Annis, 11 Hare 232.)¹

"If he should die under twenty-one, there is a devise over to the three daughters of the testatrix. This shows her intention to give a fee. For if he lived to twenty-one, he might then dispose of it himself: if he died before, he could not; and then she disposes of it.

*[137] "If John was barely to take an estate for life, the time of his death must be immaterial to the devise over. But limiting it over only on the contingency of his dying in his minority, shows that she intended to give him an absolute estate in fee, which he might dispose of when he came of age; and unless he lived to be of age (when he might dispose of it) she meant it should go to her daughters." (Per Lord Mansfield, *Frogmorton v. Holyday*, 3 Burr. 1623.)

The rule extends to the case, where the gift over is in the event of death under eighteen (*Doe v. Coleman*, 6 Price 179); or, it should seem, under any other age.

Death under age without issue.—The rule applies, where there is a devise to A. indefinitely, with a gift over in the event of A. dying under age and *without issue*: and the words importing failure of issue are restrained to failure of issue at the death of A. Thus, if lands be devised to the children of A. as tenants in common, with a gift over of the share of any child dying under age and without leaving issue to the survivors, the children take estates in fee, with executory devises over, in the event of their dying under twenty-one without leaving issue at the time of their respective deaths. (*Toovey v. Bassett*, 10 East 460.)²

¹ *Cassell v. Cooke*, 8 S. & R. 288; *Packard v. Packard*, 16 Pick. 193; *Gray v. Winkler*, 4 Jones Eq. 314. The rule was not noticed in *Belt v. Belt*, 4 Har. & McH. 80.

The rule of *Frogmorton v. Holyday* has been extended to a gift to the members of a class living at a certain time, and the children or issue of such members of the class as should then be dead, the children to take the share their parents would have taken if living: *In re Harrison's Estate*, L. R. 5 Ch. App. 412.

² *Lippitt v. Hopkins*, 1 Gall. C. C. 454. The rule applies also to a gift over in case of death without children: *Richardson v. Noyes*, 2 Mass. 61; *Hooper v. Bradbury*, 133 id. 303.

Challenger v. Sheppard.

If, in a will prior to 1838, lands be devised unto and to the use of trustees and their heirs in trust for A. indefinitely, the estate of A. is not enlarged to a fee simple, because the estate taken by the trustees is (see next chapter) co-extensive only with the trust to be performed, and is therefore limited to an estate during the life of A. But if the other purposes of the trust require the whole legal fee simple to be in the trustees, the equitable estate of A. is enlarged accordingly: and it is a rule that—

RULE. In wills made before January 1st, 1838,

If lands be devised to trustees in trust for A. indefinitely, and the purposes of the trust require the [*138 whole legal fee to be in the trustees, A. takes the beneficial interest in fee. (*Challenger v. Sheppard*, 8 T. R. 597, marginal note; *Knight v. Selby*, 3 Man. & G. 92 (E. C. L. R. vol. 42); *Moore v. Cleghorn*, 12 Jur. 591, per Lord Cottenham; *Smith v. Smith*, 31 L. J. C. P. 25.)

Thus, if the devise be to trustees in trust to pay the testator's debts, and subject thereto in trust for A., A. takes an equitable estate in fee simple.

“The defendants relied on the cases of *Challenger v. Sheppard*, *Knight v. Selby*, and *Moore v. Cleghorn*, and contended, and rightly contended, we think, that these authorities establish the general rule, that whenever an estate *in fee* is devised to trustees in trust, without any limitation of the estate of the *cestui que trust*, the latter takes the beneficial interest in fee; because, in such cases, everything which the trustees take is given for the benefit of the devisees, and there is therefore no resulting trust for the heir.” (*Smith v. Smith*, 31 L. J. C. P. 27.)

In *Smith v. Smith* the testator devised his real and personal estate to trustees in trust *after* payment of his debts, &c., to pay the rents to A. for life, and proceeded, “then I give my close or piece of land called Whiteacre to B.” It was held that the

trustees took the legal fee under the charge of debts, and therefore that the devise of Whiteacre to B. passed the fee simple.

But it must first be made out that the whole fee is vested in the trustees. In *Doe d. Kimber v. Cafe*, 7 Exch. 675, the devise was to trustees and their heirs in trust to pay the rents to A. for life, and after her death to apply the rents during the minority of her children for their benefit; and on the youngest attaining twenty-one the testator devised the lands to the children indefinitely:—it was held that the estate of the trustees was limited to the life of A. and minority of her children, and consequently, that the children took estates for life only.¹

¹ In *Loveacre v. Blight*, 1 Cowp. 352, Lord Mansfield held that the words "freely to be possessed and enjoyed" accompanying a devise of land, meant free from all limitations, and therefore would pass the fee. But the contrary has since been held in England: *Goodright v. Barron*, 11 East. 220; *Lloyd v. Jackson*, L. R. 1 Q. B. 579. These later authorities have been followed in *Wright v. Denn*, 10 Wheat. 241; *Wheaton v. Andress*, 23 Wend. 453; and recognized, but not followed, in *Hurd v. Levis*, 19 U. C. Q. B. 41; but the doctrine of Lord Mansfield has been adopted in *Campbell v. Carsen*, 12 S. & R. 56; and *Markille v. Ragland*, 77 Ill. 98.

A devise without words of limitation, if accompanied with a power to dispose of the fee, will pass the fee: *Shaw v. Hussey*, 41 Me. 498; *Cummings v. Shaw*, 108 Mass. 159; *Helmer v. Shoemaker*, 22 Wend. 139; *Bradstreet v. Clarke*, 12 id. 662; *Den v. Humphreys*, 1 Harr. 27; *Borden v. Downey*, 35 N. J. L. 74; 36 id. 460; *M'Cullough v. Gilmore*, 11 Penn. St. 373; *Dillin v. Wright*, 73 id. 177; *Bass v. Bass*, 78 N. C. 374; *Benkert v. Jacoby*, 36 Iowa 273. So a devise to one with power in another to dispose of the fee for his benefit: *Den v. Humphreys*, 1 Harr. 25.

In England, it is held that an introductory clause expressing an intention of disposing of the whole estate will have no effect on the quantity of interest which may pass by the subsequent devisees: *Doe v. Allen*, 8 Term Rep. 497; *Goodright d. Drewry v. Barron*, 11 East 220. In Ontario, it is held that such a clause, though not of itself decisive, is not to be ignored: *Hurd v. Levis*, 19 U. C. Q. B. 41.

The English doctrine has been adopted in some of our states: *Jackson v. Harris*, 8 Johns. 145; *Vanderzee v. Vanderzee*, 36 N. Y. 232; *Dodd v. Dodd*, 2 Houst. 76; *Beall v. Holmes*, 6 Har. & Johns. 209. Though in New York it was held that the combined effect of such an introductory clause, and the absence of a residuary clause of realty, though there was one of personalty, was to pass the fee (*Charter v. Otis*, 41 Barb. 525; *Provoost v. Colyer*, 62 N. Y. 545; *Lyman v. Lyman*, 22 Hun, 261; *Lent v. Lent*,

*II. NEW LAW.

[*139]

The preceding rules are destroyed or rendered unnecessary by the 28th section of the Wills Act, which enacts that—

RULE. In wills made or republished on or after January 1st, 1838,

A devise of lands, &c., without words of limitation, passes the fee simple, unless an intention appear to the contrary.

Stat. 1 Vict. c. 26, s. 28. "That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will."

This section applies only to devises of previously existing estates or interests, and not to the devise of an estate created by the will. (*Nichols v. Hawkes*, 10 Hare 342.) Thus a devise of a rent-charge vested in the testator, without words of limitation, passes the fee simple: but a devise of a rent charge, not existing before to a person indefinitely, confers only an estate for life. (*Ib.*)¹

24 id. 436), herein differing from the English authorities: *Denn v. Gaskin*, 2 Cowp. 657.

In other states considerable weight is given to such a clause; it will pass a fee when aided by other expressions, indicative of a similar intent: *Fogg v. Clark*, 1 N. H. 166; or when connected with the devising clause of the will by words which show that the devise is made in pursuance of the intention expressed in the introductory clause: *Doe v. Harter*, 7 Blackf. 409; or even without such aid it has been considered of itself sufficient to enlarge the estate devised, if there be no residuary devise: *Den v. Allaire*, *Spencer* 8; *Schrivver v. Myer*, 19 Penn. St. 89; *Wood v. Hills*, id. 515; *Shinn v. Holmes*, 25 id. 142; *Davies v. Miller*, 1 Call 127; *Watson v. Powell*, 3 id. 306; *Doe d. Hunberstone v. Thomas*, 3 U. C. K. B. O. S. 516; *Brooke v. McCaul*, 22 U. C. Q. B. 9.

¹ Similar statutes have been adopted in most of the states of this country. The statute of Maine went into effect April, 1857, R. S. 1871, Ch. 74, § 16; *Baldwin v. Bean*, 59 Me. 481; New Hampshire, Jan. 1, 1823, Gen. Laws,

1878, Ch. 193, § 4; Vermont, July 1, 1810, R. S. 1880, § 2041; Massachusetts, April 30, 1836, Pub. Stat. 1882, Ch. 127, § 24; New York, Jan. 1, 1830, R. S. 1875, part 2, Ch. 6, tit. 1, § 7; *Rosebloom v. Rosebloom*, 81 N. Y. 356; New Jersey, Aug. 26, 1784, R. S. 1877, p. 300, pl. 13; Pennsylvania, April 8, 1833, *Geyer v. Wentzel*, 68 Penn. St. 84; Willard's Estate, id. 327; Delaware, Jan. 1, 1853, Rev. Code 1874, § 1667; Maryland in the year 1825, Rev. Code 1878, Art. 49, § 8; *Fairfax v. Brown*, 60 Md. 50; Virginia, Jan. 1, 1787, Code 1873, tit. 33, Ch. 112, § 8; West Virginia, R. S. 1879, ch. 82, § 8; North Carolina, June 2, 1784; South Carolina, Dec. 17, 1824, Gen. Stat. 1882, § 1861 (but was held to be merely in affirmation of the common law in that State: *Peyton v. Smith*, 4 McCord 476); Georgia, Dec. 21, 1821, Code ed. 1882, § 2248; Alabama in the year 1812, Code 1876, § 2278; Mississippi, June 13, 1822, Rev. Code 1880, § 1189; Ohio, Oct. 1, 1840, R. S. 1880, § 5970; Indiana, 1843, R. S. 1881, § 2567; *Chase v. Salisbury*, 73 Ind. 506; *McMahon v. Newcomer*, 82 id. 565; Illinois, Sept. 10, 1845, R. S. 1883, 281; Kentucky, Jan. 1, 1797, Gen. Stat. 1881, Ch. 63, § 7; Tennessee, April, 1784, Compiled Stat. 1871, § 2006; *King v. Miller*, 11 Lea 633; Michigan, Sept. 1, 1838, How. Ann. Stat. 1882, § 5786; *Weir v. Mich. Stove Co.*, 44 Mich. 509; *Waldron v. Waldron*, 45 id. 354; Wisconsin, Jan. 1, 1850, R. S. 1878, § 2278; *Pierce's Est.*, 56 Wisc. 560; Minnesota (Stats. at Large, 1873, Ch. 35, § 2); Missouri, March 25, 1845, R. S. 1879, § 4004; Colorado (Gen. Stat. 1883, § 204); Oregon (Gen. Laws, 1872, p. 791, § 29); Dakota (Rev. Civ. Code, 1883, § 732); California, April 10, 1850, Civ. Code, 1872, § 1329; Nevada (Comp. Laws, 1873, § 830); Nebraska (Comp. Stat. 1881, Ch. 23, § 124); Ontario, March 6, 1834; *Doe d. Helliwell v. Hugill*, 6 U. C. Q. B. O. S. 241; *Little v. Billings*, 27 Grant Ch. (U. C.) 353; *Doe d. Ford v. Bell*, 6 U. C. Q. B. 527. A similar statute is found in the Revised Statutes of Kansas of March 2, 1868 (Comp. Laws, 1879, § 6166), though it is probably older in date, and in the Public Statutes of Rhode Island (1882) p. 471, § 5.

The contrary intention which prevents the operation of the new rule need not be expressly declared, it may be gathered from a comparison of the different provisions of the will: *Fay v. Fay*, 1 Cush. 102; *Gravenor v. Watkins*, L. R. 6 C. P. 500; *Brown v. Merrill*, 131 Mass. 324.

In Maryland it is held, where the intention is to give the rents and profits only and not the land, the act does not apply: *Boyle v. Parker*, 3 Md. Ch. 45.

ESTATES OF TRUSTEES.

TWO questions may arise respecting the nature and quality of the estate taken by trustees under a devise to them: 1st. What is the quantum of *estate and interest*, beneficial as well as legal, vested in the trustees for the active purposes (if any) of the trusts reposed in them: and, 2d, What becomes of the *legal estate* (if any) remaining after the active purposes of trusts are satisfied; does it remain in the trustees, or pass from them to the *cestuis que trust*; in other words, are the estates of the persons beneficially interested equitable or legal? These questions may to some extent be considered separately.

I. As to the quantum of estate or interest taken by the trustees for the active purposes of the trust.

The distinction between paying the rents and profits to a person and permitting him to receive them is considered to mark the difference between an active and passive trust: and it is a rule that—

RULE. A devise of real estate to a trustee, in trust to *pay* the rents and profits to A., vests the legal estate in the trustee.

But a devise to a trustee, in trust to *permit* A. to receive the rents and profits, vests the legal estate in A. (*Doe d. Leicester v. Biggs*, 2 Taunt. 109; *Doe v. Bolton*, 11 Ad. & Ell. 188 (E. C. L. R. vol. 39); *Barker v. Greenwood*, 4 M. & W. 421.)¹

¹ *Keating v. Smith*, 5 Cush. 234; *Sparhawk v. Cloon*, 125 Mass. 263; *Leggett v. Perkins*, 2 Comst. 305; *Ware v. Richardson*, 3 Md. 508.

In Pennsylvania this distinction is not recognized, and to support a trust as active, it is necessary that there should be some lawful purpose to be sub-

*[141] "It is now clearly settled, that where an estate is limited to trustees, and the words used are "in trust to pay to" a specified person the rents and profits of the land, there the trustees take the legal estate; because they must receive, before they can make the required payments; but where the words are "in trust to permit and suffer A. B. to take the rents and profits," there the use is divested out of them, and executed in the party, the purposes of the trust not requiring that the legal estate should remain in them." (Per Parke, J., *Barker v. Greenwood*, 4 M. & W. 429.)

A devise in trust to pay unto *or else* permit and suffer A. to receive the rents and profits, vests the legal estate in A., and not in the trustee. (*Doe d. Leicester v. Biggs*, 2 Taunt. 109.)

But a devise to trustees, in trust to permit A. to receive the *net* or *clear* rents and profits, vests the legal estate in the trustees; it being presumed that the trustees are to receive the *gross* rents, and after payment of outgoings to hand over the net rents to the person entitled. (*Barker v. Greenwood*, 4 M. & W. 421; *White v. Parker*, 1 Bing. N. C. 573, E. C. L. R. vol. 27.)

So if the trustees are directed to pay taxes and repairs (*Shapland v. Smith*, 1 Bro. C. C. 75), or to pay all outgoings, to repair and to let the premises (*White v. Parker*, 1 Bing. N. C. 573, E. C. L. R. vol. 27), they take the legal estate.

And where the devise was to trustees in trust to permit the testator's widow to receive the rents and profits, and it was declared that her receipt for the rents *with the approbation* of the trustees should be good, it was held that the legal estate was in the trustees. (*Gregory v. Henderson*, 4 Taunt. 772.)

Trust for separate use.—Wherever the beneficial interest is given to the separate use of a married woman, the trustees are

served by it. If the whole beneficial interest is in the *cestui que trust*, without restrictions as to the enjoyment of it, it will be considered as executed, notwithstanding that it is a trust to receive and pay over: *Rife v. Geyer*, 59 Penn. St. 396; *Ogden's Appeal*, 69 or 70 id.; 29 Leg. Int. 165.

In Ohio there is no statute of uses (*Helpfenstine v. Garrard*, 70 Ohio 275), and in Virginia the statute does not extend to devises. (*Bass v. Scott*, 2 Leigh 358; *Jones v. Tatum*, 19 Gratt. 732.) In these states therefore it is in the discretion of the court to direct the trustee to convey the legal title wherever it is deemed proper that it should be done.

held to take the legal estate for her protection. Thus, a devise to trustees in trust to *permit* A. to receive the rents and profits for her separate use, vests the legal estate in the trustee. (*Harton v. Harton*, 7 T. R. 652.)¹

**Indefinite terms of years.*—"It has been often deter-
mined that in devises to trustees it is not necessary that [142
the word 'heirs' should be inserted to carry the fee at law; for, if the purposes of the trust cannot be satisfied without having a fee, courts of law will so construe it." (Per Lord Hardwicke, 1 Ves. sen. 491.) Thus, a devise (in a will prior to 1838) unto and to the use of A. in trust for B. and his heirs, gives A. the whole legal fee simple.

In some cases, however, a devise to trustees in trust out of the *annual* rents and profits to pay debts or to raise a sum of money, was held to give the trustees, not the fee simple, but an estate for an uncertain term of years, sufficient to raise and pay the required amount; a construction based on the authority of *Cor-dall's Case*, Cro. El. 316. Thus, in *Doe d. White v. Simpson*, 5 East 162, a devise to trustees in trust out of the annual rents and profits to pay several annuities and a sum of 800*l.*, with a devise over after such payment, was held to give the trustees an estate only for the lives of the annuitants, together with a term of years sufficient to raise the 800*l.* And in *Ackland v. Lutley*, 9 Ad. & El. 879 (E. C. L. R. vol. 36), 2 M. & Gr. 937, a devise to trustees in trust to pay a debt and legacies, to be paid as soon as the clear rents and profits would admit, was considered to vest in the trustees no more than a chattel interest, determinable when the debt and legacies were paid. But it seems probable that in similar cases (even in wills prior to 1838) the trustees would now be held to take the fee simple, and that the construction giving an uncertain term of years to trustees would not now be followed.

And, with respect to wills made or republished on or after January 1st, 1838, section 30 of the Wills Act enacts, that in no case are trustees to take an indefinite term of years for the purposes of the trust.

¹ *Ayer v. Ayer*, 16 Pick. 330; *Stacy v. Rice*, 27 Penn. St. 81; *Ware v. Richardson*, 3 Md. 508; *Escheater v. Smith*, 4 McCord 456.

Stat. 1 Vict. c 26, s. 30. "That, where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple, or other the whole *estate or interest* which the testator had power to dispose of by *will in such real estate, *148] unless a *definite* term of years, absolute or determinable, or an estate of freehold, shall thereby be given him, expressly or by implication."

The meaning of this section is, that any devise, under which before the passing of the Act a trustee would have been held to take an indefinite or uncertain term of years, shall now be construed to pass the fee.

II. As regards the disposition of so much of the legal estate as is not required to be vested in the trustees for the active purposes of the trusts.

This question frequently arises in relation to the operation of the rule in *Shelley's Case*. Thus, if lands be devised to trustees and their heirs, in trust to pay the rents and profits to A. for life, and after his decease in trust for the *heirs male of the body* of A., the question arises whether the remainder to the heirs male of the body of A. is an *equitable* remainder, in which case it will operate in conjunction with the equitable life estate of A. to vest in A. an estate in tail male, or a *legal* remainder, in which case the heir male of the body will take by purchase: and this question depends on another, viz., whether the whole legal fee simple is vested in the trustees, or only an estate during the life of A., commensurate with the active purposes of the trust.

It is settled that, in such a case, the legal estate or use executed in the trustees is, in the absence of a contrary intention, limited by implication to the life of A., and the remainders over are legal remainders; it being established, as a rule of construction (qualified, however, as regards wills made or republished since 1837, by the operation of the 31st section of the Wills Act hereafter mentioned), that,—

RULE. Where real estate is devised to trustees, although with words of inheritance, *prima facie*, the trustees

take only so much of the legal estate as the purposes of the trust require. (*Doe d. Player v. *Nicholls*, 1 B. & C. 336 (E. C. L. R. vol. 8); *Watson v. Pearson*, 2 Exch. 581; *Blagrove v. Blagrove*, 4 Exch. 550.)¹ [*144]

Thus, if lands be devised to trustees and their heirs, in trust to pay the rents and profits to A. for life, and after his decease in trust for B., the trustees take the legal estate only during the life of A., and the estate of B. is legal and not equitable.

So if the devise be to trustees and their heirs, in trust to permit A. to receive the rents and profits for life, and after his decease in trust for B., the trustees take no estate.

So if (in a will prior to 1838) lands be devised to trustees and their heirs, in trust to apply the rents and profits during the minority of A. for his benefit, and when A. shall attain the age of twenty-one, in trust for A. and his heirs, the trustees take the legal estate only during the minority of A. (*Doe d. Player v. Nicholls*, 1 B. & C. 336, E. C. L. R. vol. 8.)

And if the devise be to trustees in trust to pay the rents to A. for life, and afterwards to apply the rents for the maintenance of the children of A. during their minority, and when the youngest child shall attain twenty-one, in trust for the children of A. in fee, the estate of the trustees is limited to the life of A. and the minority of the children. (*Doe v. Cafe*, 7 Exch. 675.)

“It may be laid down, as a general rule, that where an estate is devised to trustees for particular purposes, the legal estate is vested in them as long as the execution of the trust requires it, and no longer, and therefore, as soon as the trusts are satisfied, it will vest in the person beneficially entitled to it.” (*Doe v. Nicholls*, 1 B. & C. 336, E. C. L. R. vol. 8.)

“It is conceded on both sides, that the rule laid down by this Court in the case of *Watson v. Pearson* is perfectly correct, viz.,

¹ *Thurston v. Thurston*, 6 R. I. 299; *Steady v. Rice*, 27 Penn. St. 81; *Bacon's Appeal*, 57 id. 504; *Rogers v. Marker*, 12 Heisk. 645.

that 'where the purposes of the trust on which an estate is *145] devised to trustees are such as not *to require a fee in them; as, for instance, where the trust is to pay annuities, or to pay over rents and profits to a party for life; there, if subject to the specified trusts, the estate is given over, the parties taking under such devise over have been held to take legal estates; the estate given to the trustees (even when given with words of inheritance) having been in such cases taken to have been meant to be co-extensive only with the trusts to be performed.'

"Those cases, however, in which it is laid down that the Courts look solely to the trust to be performed, even where there are words of inheritance, must be read with this qualification, that due effect is to be given to the language of the will, unless we can collect from the context an intention to give a more limited estate." (*Blagrove v. Blagrove*, 4 Exch. 550.)

Contrary intention.—The rule may of course be excluded by a clear intention to vest the legal estate in the trustees, irrespective of any active trusts reposed in them.

Thus, if lands be devised unto and *to the use of* A. and his heirs in trust for B. and his heirs, the fee simple of the use is executed in A., and B. takes only an equitable estate. (*Doe v. Field*, 2 B. & Ad. 564, E. C. L. R. vol. 24.)

So, if copyhold lands (which are not within the Statute of Uses) be devised to A. and his heirs in trust for B. and his heirs, A. takes the legal estate. And in *Houston v. Hughes*, 6 B. & Cr. 403, it was considered that, under a devise of freehold *and* copyhold lands to A. and his heirs in trust for B. and his heirs, the circumstance that A. took the legal estate in the copyholds was an argument in favor of his taking the legal estate in the freeholds.

But even where, as in the above cases, an unequivocal intention appears to vest the legal estate in the trustees in the first instance, yet, if, after a particular estate, there be a gift in remainder by way of *direct devise*, the estate of the trustees may be restricted by implication to the continuance of the particular estate. As if the gift be, "I devise Whiteacre unto and *to the*

use of A. and his *heirs in trust for B. during his life, [*146 and after his decease *I devise* Whiteacre to C.”¹

So, in *Doe d. Woodcock v. Barthrop*, 5 Taunt. 382 (E. C. L. R. vol. 1), where *copyhold* lands were devised to A. and his heirs in trust for the separate use of B. for life, and subject thereto the testator *devised* the premises to such uses as B. should appoint; it was held that the legal estate in the trustee was limited by implication to the life of B.

Trusts to preserve contingent remainders.—The rule applies to limitations to trustees in trust to preserve contingent remainders. Thus, if lands be devised to A. for life, with remainder to trustees and their heirs in trust to preserve contingent remainders, with remainder to the first and other sons of A. in tail, and there are no other contingent remainders subsequently limited, the estate of the trustees, though not expressly limited to the life of A., will be restricted to that period by implication, since the purposes of the trust cannot continue longer: and the remainders over will be legal and not equitable.

If, however, there were among the subsequent limitations contingent remainders which would not necessarily vest (if at all) during the life of A., the estate of the trustees would of course not be restricted to that period.

And it seems that if the lands be devised to A. for life, with remainder to trustees and their heirs in trust to preserve contingent remainders, with remainder to the first and other sons of A. in tail, with remainder to such persons and for such estates as A. *should appoint*, the trustees would be held to take the legal fee simple, inasmuch as A., in execution of the power of appointment, might introduce contingent remainders which would require protection. (Per Lord Kenyon, *Doe v. Hicks*, 7 T. R. 437; *Venables v. Morris*, Id.)

The application of the rule which restricts the estate of the trustees to preserve contingent remainders, to the period during which the remainders would require such protection, is not excluded by the fact, that the result of the estate of the trustees

¹ *Doe v. Driscoll*, 4 Allen (N. B.) 176.

*147] being so restricted is to prevent *the supposed contingent remainders from taking effect as such, which they would have done if the estate of the trustees had not been restricted. Thus, if lands be devised to A. for life, with remainder to trustees and their heirs in trust to preserve contingent remainders, with remainder to the heirs male of the body of A., or to the issue of A., the estate of the trustees will be limited to the life of A., although the result is that the remainder to the heirs of the body or issue of A., being a legal remainder, will vest in A. himself, under the rule of Shelley's Case, whereas if the trustees took the fee simple it would have taken effect as a contingent remainder. (*Nash v. Coates*, 3 B. & Ad. 839 (E. C. L. R. vol. 23); *Haddelsey v. Adams*, 22 B. 266.)

If lands be devised to trustees upon trusts not requiring the legal fee to vest in them, and there is no trust expressly declared to preserve contingent remainders, it would appear that the circumstance of contingent remainders being found among the limitations of the beneficial interest is not sufficient ground for holding the trustees to take the legal estate in order to preserve such contingent remainders. (See per Parke, J., *Barker v. Greenwood*, 4 M. & W. 421.)

Recurring trusts.—The general rule is subject to an exception, established by the case of *Harton v. Harton*, 7 T. R. 652, viz., that where there are recurring trusts which require the legal estate to be in the trustees, with intervening limitations which, taken alone, would vest the legal estate in the persons beneficially entitled, and there is *no repetition*, before each of the recurring trusts, of the gift of the legal estate to the trustees, the legal estate is held to be in the trustees throughout, and the intermediate estates are equitable and not legal.

Thus, if the devise be to trustees and their heirs in trust for the *separate use* of A. for life, with remainder in trust for the heirs of the body of A., with remainder in trust for the separate use of B. for life, with remainder in trust for the heirs of the body *148] of B., inasmuch as the *trusts for separate use require the legal estate to be in the trustees, the legal estate is held to be in them throughout, and the limitation to the heirs of the body of A., being an equitable remainder, vests in A. an estate

tail under the rule in Shelley's Case; whereas if the limitation to the separate use of B. had been omitted, the legal estate in the trustees would have stopped at the death of A., and the limitation to the heirs of the body of A., being a legal estate, would have taken effect as a contingent remainder. (*Harton v. Harton*, 7 T. R. 652; *Hawkins v. Luscombe*, 2 Sw. 391, per Lord Eldon; *Brown v. Whiteway*, 8 Hare 145; *Toller v. Atwood*, 15 Q. B. 929, E. C. L. R. vol. 69.)

In *Toller v. Atwood*, 15 Q. B. 929 (E. C. L. R. vol. 69), it was doubted whether in such a case the legal estate in the trustees would extend beyond the *last* trust for the separate use of a *feme covert*; in other words, whether the limitation to the heirs of the body of B., in the case supposed, if followed by no other limitation requiring the legal estate to be in the trustees, would be equitable or legal.

In *Brown v. Whiteway*, 8 Hare 145, the devise was to trustees in trust to pay the rents to A. for life, with remainder in trust to and for the use of B. for life, with remainder in trust to and for the use of such persons, &c., as B. should appoint, with remainder in trust for the *separate use* of C. for life, with remainder in trust to and for the use of the *heirs of the body* of C., with vested remainders over not requiring a legal estate in the trustees: it was held that C. took an equitable estate tail, the legal estate being in the trustees throughout: but *qu.* whether the trustees were held to take the fee in order to preserve contingent remainders which might be created under the power of appointment, or solely by reason of the limitation to the separate use of C.

Trusts to raise money, &c.—The rule which restricts the estate taken by trustees to the quantity necessary for the performance of the trusts was formerly pushed to a great length, by the adoption of the inconvenient constructions *of an *indefinite* [*149 *term of years*, and a *determinable fee*.

Indefinite term of years.—First, where the estate was limited to trustees *simpliciter*, or to trustees and their executors or administrators, upon trust out of the *annual* rents and profits (only) to raise a given sum of money, pay debts or legacies, &c., with a direct devise over of the beneficial interest: it was held that the

trustees took the legal estate only for an uncertain term of years sufficient to raise the required sum, and that the estates of the devisees in remainder were legal estates. The cases in which this construction was adopted are *Doe v. Simpson*, 5 East 162, where the devise was to trustees and their executors in trust out of the rents and profits and arrears due to pay certain persons 800*l.*: *Ackland v. Lutley*, 9 Ad. & Ell. 879, (E. C. L. R. vol. 36); a devise to trustees in trust to let the premises, and out of the rents to pay a debt and legacies, to be paid as soon as the clear rents would admit, with a devise over from and after payment of the debts and legacies; and *Hardson v. Williamson*, 1 Keen 33, a devise to trustees and their executors in trust to let, and apply the rents in payment of mortgage debts, till the whole should be paid by gradual receipt of the rents, with a devise over after the debts should have been paid.

These cases have not been overruled, but the construction which gives an *uncertain* term of years has often been disapproved of, and it is scarcely probable that it would now be adopted, even in a will made before 1838. The 30th section of the Wills Act has abolished it, as regards wills made subsequently.

Determinable fee.—Secondly, where the devise was to trustees and *their heirs*, in trust to pay debts or to raise a sum of money, with limitations over, it was considered that the trustees might take the fee simple only until the money required had been raised, and when it should have been raised without a sale, that the legal fee in the trustees would determine, and the devisees over take legal estates. Thus, in *Glover v. Monckton*, 3 Bing. 13 (E. C. L. R. vol. 11), where the devise was to trustees and their heirs in *150] trust to raise *7000*l.*, with limitations over, it was held that the trustees took the fee simple *until the 7000*l.* should have been raised.*

But the construction which would give to the trustees in such cases a determinable fee has been negatived by the cases of *Doe d. Davies v. Davies*, 1 Q. B. 430 (E. C. L. R. vol. 41), and *Blaggrave v. Blaggrave*, 4 Exch. 550. In *Doe v. Davies*, the devise was to trustees and their heirs in trust for several persons successively for life, with remainder *to the use of* the trustees in trust to preserve, &c., with remainder over; and upon further

trust by mortgage or demise, or out of the rents and profits, to raise 80*l.*, to be applied in payment of the testator's debts: it was held that the trustees took the legal fee, not determinable upon the raising of the 80*l.* Patteson, J., said (p. 438): "If the devise be for purposes which are to last only for a *certain* time, the use of the word *heirs* will not give a fee; the devise will be cut down to the time necessary for those purposes. But if a fee be given in terms, with trusts which by their nature extend over an *indefinite* time, it is not so: if no particular time can be fixed at which the trusts shall end, the estate cannot be cut down. Here the trustees are to raise 80*l.* by mortgage or demise of the real estate, or from the rents and profits, or by such other ways and means as they shall think fit. It is not said when the sum is to be raised and paid; and if they can deal with the legal estate in part for this purpose, and we cannot say what part, they must have the whole." And these remarks were approved by Lord Campbell in *Poad v. Watson*, 6 Ell. & Bl. 615 (E. C. L. R. vol. 88).

In *Blagrove v. Blagrove*, 4 Exch. 550, the devise was to the trustees and their heirs, in trust out of the rents and profits to pay a jointure of 700*l.* and certain annuities, and to raise 10,000*l.*, with power, if the personal estate should be insufficient to pay debts and legacies, to raise the deficiency by mortgage of the real estate; and subject thereto in trust to pay the rents to A. for life, and after his decease to stand *seised* of the estates "to the *uses* following, viz., to the use of B. for life, [*151 &c.:" it *was held that the trustees took the whole legal fee simple, and that the estates in remainder were equitable, inasmuch as no *certain* period could be fixed at which the legal estate should go over from the trustees—notwithstanding the manifest intent of the testator that the devisees in remainder should take legal estates.

These cases appear to establish that, even in a will made before 1838, a devise to trustees in trust to pay debts or legacies, or to raise a sum of money, vests in them the legal fee simple, and not an estate determinable whenever the purposes of the trust shall have been satisfied.

In *Poad v. Watson*, 6 Ell. & Bl. 618, Exch. Ch. (E. C. L.

R. vol. 88), the devise was to trustees upon trusts requiring the legal estate to continue in them only during the lives of certain persons; but the will gave to the trustees a power of reimbursement *out of the premises devised to them*. The trustees having mortgaged the property devised for a term of years to secure 300*l.* due to them on the trust account, it was held that the term was well created, the trustees either taking the fee simple or a power to mortgage.

Trusts for payment of debts.—It may be considered as settled that, in wills made as well before as since 1838, a devise to trustees in trust to pay the testator's debts vests in them the absolute legal fee.

But, on the other hand, a mere *charge* of debts on the lands devised, the trustees not being directed to pay the debts, does not enlarge the estate of the trustees.* (Kenrick v. Lord Beaucherk, 3 B. & P. 178.)

*In Smith v. Smith, 11 C. B. N. S. 121 (E. C. L. R. *152] vol. 103), the testator by a will made before 1838, devised all his real estate to trustees "in trust to and for the uses thereafter mentioned, that is to say, *after payment* of my debts," &c., the testator devised Whiteacre to A. B. without words of limitation; it was held that the words "*after payment of debts*" vested the legal fee in the trustees, and that A. B. took an *equitable* estate in fee in Whiteacre, and not a *legal* estate for life only.

In Spence v. Spence, 10 W. R. 605, C. P.¹ the testator, after

* It does not appear that the 14th and 16th sections of the Act of 22 & 23 Vict. c. 35 (Property and Trustees Relief Amendment Act), will have any effect on the construction of the estates taken by trustees under a devise to them. The 14th section enacts that where the testator shall have charged real estate with debts, legacies, or the raising of a sum of money, and "shall have devised the estate so charged to any trustee or trustees *for the whole of his estate or interest therein*," the trustees shall have power to raise the money by sale or mortgage. The 16th section enacts that if the testator having created such a charge shall *not* have devised the estate "in such terms as that his whole estate or interest therein shall have become *vested* in any trustee or trustees," the executors shall have the like power of raising the money. The question, what estate the trustees take, appears to be left untouched by these sections.

¹ Reported 12 Com. B. N. S. (E. C. L. R. vol. 104) 199.

directing his debts to be paid *by his executors*, devised his real estate to trustees in trust to pay the rents to A. for life, and after his decease in trust for the right heirs of A., and appointed the trustees to be executors; it was held that the trustees took the whole legal estate, and therefore that A. had an equitable estate in fee. The will was subsequent to 1837, but as the rents and profits were given to A. *for life*, the 31st section of the Wills Act had no influence on the question.

The strongest case, however, on this point is *Creton v. Creton*, 8 Sm. & G. 386, where it was held that under a devise to trustees in trust to pay the rents to A. for life, with remainder in trust for B. in fee, a direction that the testator's debts should be paid (without saying by whom) at the beginning of the will, *the trustees being also executors*, was sufficient to vest in the trustees the whole legal fee.

But, of course, a direction to the executors and trustees to pay the testator's debts will not give the trustees the legal fee, where there is an express limitation of the estate to be taken by them; as if the devise be to trustees *expressly* during the life of A. in trust for him, with remainder to B. in fee simple. (*Doe v. Claridge*, 6 C. B. 641, E. C. L. R. vol. 60.)

And a direction that executors *shall sell* lands for payment of debts, unaccompanied by a devise to them, confers only a power and not an estate. (1 Sugd. Pow. 128, 6th ed.; *Doe v. Shotter*, 8 Ad. & Ell. 905, E. C. L. R. vol. 35.)¹

**Trust to pay annuities.*—In wills made before Janu- [*158
ary 1, 1838, a devise to trustees and their heirs in trust
to pay an annuity out of the *annual* rents and profits only, and
subject thereto in trust for A. in fee, the annuity not being a
charge on the *corpus* of the land, vests the legal estate in the
trustees only during the life of the annuitant. (*Doe v. Simpson*,
5 East 162; *Adams v. Adams*, 6 Q. B. 860, E. C. L. R. vol. 51.)

And if the trust be to pay several annuities, the trustees take the legal estate only for the lives of the respective annuitants. (*Doe v. Simpson*, 5 East 162.)

¹ But such a construction is subject to the control of other parts of the will: *Young v. Elliott*, 23 U. C. Q. B. 420; *Dowling v. Power*, 5 U. C. C. P. 480.

But, if the annuity be a charge on the *corpus* of the land, as if lands be devised to trustees in trust to pay *thereout* an annuity to A., and subject thereto in trust for B., the trustees take the fee simple. (*Fenwick v. Potts*, 8 D. M. G. 506.)

And it is to be remembered, that a direction to pay an annuity out of rents and profits *may* create a charge on the *corpus*, the words "rents and profits" not being restricted to annual rents and profits. (*Phillips v. Gutteridge*, 3 De G. J. S. 332.)

Powers of sale, leasing, &c.—Where a devise to trustees upon trusts which, standing alone, would not vest in them the whole legal estate, is followed by a power to sell, lease or mortgage, not limited to the period of continuance of the active trusts, the trustees are held to take the whole legal fee, and not a mere limited estate with a superadded power of sale or leasing. (*Doe d. Cadogan v. Ewart*, 7 Ad. & E. 636 (E. C. L. R. vol. 34); *Watson v. Pearson*, 2 Exch. 581.) Thus, if the devise be to trustees and their heirs upon trust to pay the rents to A. for life, and after his decease to apply the rents for the maintenance of his children during their minority, and when the children attain twenty-one, upon trust for them in fee, and a general power of sale is given to the trustees, they take the whole legal fee simple, and not an estate limited to the life of A. and the minority of his children. (*Watson v. Pearson*, 2 Exch. 581.) Parke J., said (*Ib.* p. 593):

*154] "The general rule is, that where an estate is given to trustees, all the trusts which they are to perform must, *primâ facie* at least, be performed by them by virtue and in respect of the estate vested in them. Here the interest devised is in terms at least an interest in fee simple. One of the duties imposed on the trustees is, if they should deem it expedient, to sell the estate. This they can only do by exercising the dominion over the fee simple; and in such a case, even without words of inheritance, there would be strong reason for holding that they were intended to take the fee. But it is not necessary here to go that length. The fee is in terms devised to them; and it would be a very strained and artificial construction to hold, first, that the natural meaning of the words is to be cut down, because they would give an estate more extensive than the trust requires; and then, when the trust does in fact require the fee simple, to hold

that that must be supplied by way of power, defeating the estate of the subsequent devisees, and not out of the interest of the trustees."¹

The strongest case of this kind is *Rackham v. Siddall*, 1 Mac. & G. 607, where a devise to trustees and their heirs expressly to the use of A. for life, with remainder to the use of the trustees in trust to preserve, &c., with remainders over, with a general power of sale reserved to the trustees, was held to vest in them the fee, and not a mere power.

Powers of leasing.—Similarly a devise to trustees, followed by a general power of leasing, vests in them the fee simple. (*Doe v. Willan*, 2 B. & Ald. 84; *Doe v. Walbank*, 2 B. & Ad. 554 (E. C. L. R. vol. 22); *Riley v. Garnett*, 3 De G. & Sm. 629.)²

But, if the power to sell or lease be restricted by implication to the period during which the active trusts are to continue, the trustees will not take the fee. Thus, in *Doe v. Cafe*, 7 Exch. 675, under a devise to trustees in trust to pay the rents to A. for life, with a trust for maintenance during the minority of his children, with remainder to the children at twenty-one, a power of leasing the estate for twenty-one years was held to be [*155 *exercisable only during the life of A. and the minority of the children, and the remainders over were held to be legal estates.

And in *Doe v. Harris*, 2 D. & Ry. 36, a power to the trustees to lease for seven years, and to sell *at any time* after the death of the testator, was similarly held to be restricted to the minorities of the *cestuis que trust*, and not to imply that the legal estate was to continue in the trustees after that period.

Trusts to convey, &c.—If the devise be to trustees in trust to pay the rents and profits to A. for life, and after his death to convey the estate to B., the trustees of course take the fee simple. (*Doe d. Shelley v. Edlin*, 4 Ad. & E. 582, E. C. L. R. vol. 31.)³

But under a devise to trustees in trust to permit A. to receive the rents for life, and after his decease to convey to B., it has

¹ *Killam v. Allen*, 52 Barb. 606; *Cleaveland v. Hallet*, 6 Cush. 404.

² *Deering v. Adams*, 37 Me. 269; *Pearce v. Savage*, 45 id. 98.

³ *Sears v. Russell*, 8 Gray 89. But the contrary was held in Pennsylvania: *Bacon's Appeal*, 57 Penn. St. 512; *Westcott v. Edmunds*, 68 id. 36.

been held that the trustees take the fee simple in remainder only, and that the estate of A. is legal. (*Doe d. Noble v. Bolton*, 11 Ad. & E. 188, E. C. L. R. vol. 39.)

In *Ward v. Burbury*, 18 B. 190, the devise was to trustees and their heirs, in trust to sell and divide the proceeds among the children of A., but if A. should die without issue, in trust to pay the rents and profits for the maintenance of B. during his minority, with a devise of the estate to B. on attaining twenty-one. A. having died without issue, it was held that the estate of the trustees ceased, and the legal estate vested in B. on his attaining twenty-one.

New Law.—The general rule above considered, that the legal estate vested in trustees is limited to the amount necessary for the performance of the active trusts reposed in them, is somewhat, though not greatly, modified by the 31st section of the Wills Act, which enacts that,—

RULE. In wills made or republished on or after January 1st, 1838,

“Where any real estate shall be devised to a trustee, without any express limitation of the estate *to be
 *156] 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.” (Stat. 1 Vict. c. 26, s. 31.)¹

Sections 30 and 31 compared.—The 30th and 31st sections of the Wills Act have been described as obscure and even conflict-

¹ There is a similar statute in Ontario; R. S. O. cap. 106, sec. 33.

ing: their meaning, however, will be apprehended by observing, that the 30th section, which speaks of a devise passing "the fee simple or other the whole *estate or interest* of the testator," relates to the quantity of estate to be taken by a trustee for the purposes of the trust; while the 31st section, which declares that a devise shall vest in trustees "the fee simple or other the whole *legal estate*" in the premises devised, relates to the disposition of the legal estate not required for the purposes of the trust. The 30th section enacts that in no case shall trustees or executors be held, for the purposes of the trust, to take an indefinite term of years: the 31st section enacts that where the estate of the trustees is not expressly limited, they shall in all cases take either an estate determinable on the life of a person taking a beneficial life interest in the property, or the absolute *legal estate* in fee simple.

Effect of the 31st section.—The 31st section seems to have been chiefly aimed at the doctrine, now (as before observed) abandoned, of a determinable fee. Its operation in other respects will be as follows:—

1st. The ordinary case of a devise to trustees in trust *to pay the rents and profits to A. for life, and after his decease in trust for B. and his heirs, is left unaltered: the legal estate will still vest in B. after the death of A. [*157.]

So, in the case of a devise to A. for life, with remainder to trustees and their heirs in trust to preserve contingent remainders, with remainder to the first and other sons of A. in tail, with vested remainders over: the estate of the trustees to preserve will still be restricted by implication to the life of A.

2dly. Trusts to pay annuities will be altered. A devise to trustees in trust to pay an annuity to A. for life, and subject thereto in trust for B., will now vest in the trustees the whole legal fee simple, and not an estate during the life of the annuitant, although the annuity be payable out of the *annual* rents and profits only.

3dly. Trusts during minority will present a difference. If the devise be to trustees in trust to apply the rents and profits for the maintenance of A. during his minority, and when A. attains twenty-one in trust for A. *during his life*, with remainders over, the legal estate will still as before vest in A. on his attaining

twenty-one, inasmuch as the beneficial interest is given to him for life, and the purposes of the trust cannot continue longer.

But if the devise be (after the trust during minority) in trust for A. on his attaining twenty-one, *in fee* or in tail, and not for life only, the section will apply, and the whole legal estate will remain in the trustees, so that the estate of A. will be equitable only.

It may be a question whether, if the trusts declared are to pay the rents and profits to *several* persons (not to one only) successively for life, with remainders over, the legal estate will vest in the trustees in fee simple or for the lives of the respective persons taking beneficial life interests.

The section appears to apply to every case where there is no *express* limitation of the estate to be taken by the trustee, although the gifts over to the persons beneficially entitled may be in the form of a *direct devise* to them. Thus, if the gift be,

*158] "I devise Whiteacre to A. and his *heirs in trust to apply the rents and profits during the minority of B. for his benefit, and when B. attains twenty-one *I devise* Whiteacre to B.," it would appear that the trustees must, notwithstanding the latter words, take the fee by force of the 31st section.

Devise by implication.—If property be given to the separate use of a married woman, a direction that certain persons shall be *trustees* for her is sufficient to vest in them the legal estate in the property. (Ex parte Wynch, 5 D. M. G. 188.)¹

If there is a devise by will to trustees, and by a codicil the appointment of trustees is revoked and other trustees substituted, this is sufficient to vest the estate in the new trustees. (Re Turner, 2 De G. F. & J. 527.)

¹ Walker v. Whiting, 23 Pick. 313; Fay v. Taft, 12 Cush. 448.

Where rents and profits of land are devised, and there appears an intention that they shall be received by the devisee through the medium of certain persons, *e. g.*, executors, the latter take the legal estate: Craig v. Craig, 3 Barb. Ch. 94.

Where there is no devise made, except on the happening of a future event, and certain duties and powers respecting the estate are in the meanwhile imposed upon others, a devise of the legal estate to the latter will be implied: Deering v. Adams, 37 Me. 270.

But where the duties imposed can be discharged by virtue of a naked power, no devise will be implied, especially if the trust would be illegal: Tucker v. Tucker, 1 Seld. 408; Martin v. Martin, 43 Barb. 184.

PRECATORY TRUSTS.

IF a testator expresses a wish only with respect to the application of property, without imposing a command or creating a trust, it is probable that in most cases he intends to leave the parties at liberty to carry out his wishes or not, as they may think fit: or at least to impose only a moral, and not a legal obligation. The Courts, however, lean to the construction which regards the testator's wishes as meant to be imperative on those to whom they are addressed: and it is a rule that,—

RULE. The expression of a wish or desire on the part of the testator, accompanying a devise or bequest, that a particular application will be made of the property, is *primâ facie* considered as obligatory, and creates a trust, unless an intention appear to the contrary. (*Malin v. Keighley*, 2 Ves. 333; *Knight v. Boughton*, 11 Cl. & F. 513; *Knight v. Knight*, 3 B. 148; *Briggs v. Penny*, 3 Mac. & G. 546; *Cary v. Cary*, 2 Sch. & Lef. 189.)

Thus, “if a testator gives 1000*l.* to A. B., desiring, wishing, recommending, or hoping, that A. B. will at his death give the same sum or any certain part of it to C. D., it is considered that C. D. is an object of the testator's bounty, and A. B. is a trustee for him.” (*Knight v. Knight*, 3 B. 173.)¹

¹ The English doctrine on this subject has been adopted in some of the American states: *Cole v. Littlefield*, 35 Me. 445; *Erickson v. Willard*, 1 N. H. 229; *Van Amee v. Jackson*, 35 Vt. 177; *Warner v. Bates*, 98 Mass. 274; *Dominick v. Sayre*, 3 Sandf. S. C. 560; *Negroes v. Plummer*, 17 Md. 176; *Handley v. Wrightson*, 60 Md. 198; *Reed v. Reed*, 3 Ind. 313;

*160] "I will lay down the rule as broad as this; where-
 *any person gives property, and points out the object, the
 property, and the way in which it shall go, that does create a

Harrisons v. Harrison, 2 Gratt. 13; Ingram v. Fraley, 29 Ga. 553; Brunson v. Hunter, 2 Hill Ch. 490; Lucus v. Lockhart, 10 Sm. & M. 470.

It is acknowledged, however, in England, that the application of this rule defeats as often, perhaps, as it gives effect to the intention of the testator (Meredith v. Heneage, 1 Sim. 551); and in some of our states the rule is reversed, and it is held, that words expressive of wish and desire are not *primâ facie* imperative: Gilbert v. Chapin, 19 Conn. 346; Van Duyne v. Van Duyne, 1 M'Cart. 405; Pennock's Estate, 20 Penn. St. 268; Burt v. Herron, 66 id. 402; Batchelor v. Macon, 69 N. C. 545; McNeely v. McNeely, 82 id. 183; Lesone v. Witte, 5 S. C. 450; Lines v. Darden, 5 Fla. 74; Ellis v. Ellis, 15 Ala. 300; McRee v. Means, 34 id. 364; Hunt v. Hunt, 11 Nev. 442; Molk's Est. Myr. Prob. 212.

A hope or wish may be imperative "if addressed to an executor or trustee, the trust being created, or if coupled with other expressions indicating a clear intention that they shall operate as a command. But standing alone, and addressed to a legatee, to whom the property is given, in terms importing an absolute gift, they are not imperative:" Van Duyne v. Van Duyne, 1 M'Cart. 405; Hess v. Singler, 114 Mass. 57; but see Bliven v. Seymore, 88 N. Y. 469.

"Words expressive of desire, recommendation and confidence are not words of technical, but of common parlance, and are not *primâ facie* sufficient to convert a devise or bequest into a trust. They may amount to a declaration of trust when it appears, from other parts of the will, that the testator intended not to commit the estate to the devisee or legatee, or the ultimate disposal of it to his kindness, justice, or discretion:" Pennock's Estate, 20 Penn. St. 268. But when addressed to an executor such words are imperative: Burt v. Herron, 66 id. 402.

The word "will" has an imperative force, and is not to be classed amongst precatory words: McRee v. Means, 34 Ala. 364; and the word "wish" may be used imperatively in the same sense: Fox's App., 99 Penn. St. 382; or "desire" in the sense of "will:" Moross v. McAllister, 26 U. C. Q. B. 368.

In Ontario, the words of a testator intimating a request, wish or desire are sufficient, when plain and unequivocal, to create a trust, provided there be certainty of the gift and of the object to be benefited: Baby v. Miller, 2 U. C. K. B. O. S. 101; 1 E. & A. (U. C.) 218; Finlay v. Fellowes, 14 Grant Ch. (U. C.) 66. But a devise to the testator's wife "for her own use and disposal, trusting that she will make such disposition thereof as shall be just and proper among my children," was held to be an absolute devise to the widow: Nelles v. Elliot, 25 Grant Ch. (U. C.) 829.

trust, unless he shows clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it. The word 'recommend' proves desire, and does not prove discretion. If a testator shows his desire that a thing shall be done, unless there are plain express words or necessary implication that he does not mean to take away the discretion, but intends to leave it to be defeated, the party shall be considered as acting under a trust. I will not criticise upon the words. 'Recommend' is a request and more. If I request a man to do anything, I recommend it; and *vice versâ*." (Per Lord Alvanley, *Malim v. Keighley*, 2 Ves. jun. 335.)

In *Briggs v. Penny*, 3 Mac. & G. 554, Truro, L. C., said: "I conceive the rule of construction to be, that words accompanying a gift or bequest, expressive of confidence or belief, or desire or hope, that a particular application will be made of such bequest, will be deemed to import a trust *upon these conditions*, first, that they are so used as to exclude all option or discretion on the party who is to act, as to his acting according to them or not; secondly, the subject must be certain; and thirdly, the objects expressed must not be too vague or indefinite to be enforced." But this formula is perhaps not strictly accurate: for the rule is, not that a trust is created, if the expression used exclude discretion (which is of course), but that precatory expressions *shall primâ facie*, be considered to exclude discretion; and a precatory trust may be created, as will appear, though the quantum of interest to be taken under it be uncertain, or the objects of it unascertained.

Examples.—Thus a trust has been held to be created by the following expressions:—

Recommend.—Where the gift was, "I bequeath to my daughter A. the sum of 10,000*l.*, and I *recommend* to my said daughter and her husband that they do forthwith settle and assure the said sum of 10,000*l.*, together also *with such sum of money *[161 of his own as the said (husband) shall choose, for the benefit of my said daughter A. and her children:" it was held that a trust was created as to the 10,000*l.*, whether the husband settled anything besides or not: and therefore that the gift did not lapse by the death of A. in the testator's lifetime. (*Ford v. Fowler*,

3 B. 146.) So, where the gift was, "The whole of my property to be given to my sister, to be hers independent of any husband: and I earnestly *recommend* her to take such measures as she may deem best for making it sure that whatever she may inherit under this my will may go at her decease to her children." (*Cholmondeley v. Cholmondeley*, 14 Sim. 590.)

Request.—"And it is my dying *request* to the said A., that if he shall die without issue living at his death, the said A. do dispose of what fortune he shall receive under this my will to and among the descendants of my late aunt B., in such manner and proportions as he shall think proper." (*Pierson v. Garnet*, 2 Bro. C. C. 38, 226.) "I appoint the said property as follows, viz., the whole to my husband absolutely; but it is my *request* to him that after reserving for his own use the sum of 2000*l.*, he will make such disposition of the remainder by will or settlement as he may deem most desirable to carry out my wishes often expressed to him." (*Bernard v. Minshull*, Johns. 276.)¹

Desire.—"And it is my absolute *desire* that my sister A. bequeaths at her own death to those of her own family what she has in her power to dispose of that was mine, provided they behave well to her." (*Cruwys v. Colman*, 9 Ves. 319.)²

Entreat.—"The property of the said stock and the free disposal thereof, *save the prayer* hereinafter contained, to be to the survivor of A. and B. . . . convinced of the high sense of honor, the probity and affection of my son-in-law A., I *entreat* him, &c." (*Prevost v. Clarke*, 2 Mad. 458.)³

Advise.—"I give to A. all my real and personal property and appoint him my sole executor, and after my death do *advise* him *162] to settle it upon himself and his issue *male by his present wife, and for want of such issue on E. and his issue male, &c." (*Parker v. Bolton*, 5 L. J. N. S. Ch. 98.)

Confidence.—So, where the gift was "I desire and bequeath all my estate and effects to my wife, her heirs, executors, or

¹ *Finlay v. Fellows*, 14 Grant Ch. (U. C.) 66.

² So also with the words "wish and desire:" *Baby v. Miller*, U. C. K. B. O. S. 101; 1 E. & A. (U. C.) 218.

³ The same effect has been given the word "beg:" *Corbet v. Corbet*, Ir. R., 7 Eq. 456; or "dying wish," *Godfrey v. Godfrey*, 11 W. R. 554.

administrators, to and for her *sole use* and benefit, in full *confidence* that she my said wife will in every respect appropriate and apply the same unto and for the benefit of all my children," the widow was held to take a life interest only, with a power of appointment among the children. (*Wace v. Mallard*, 21 L. J. Ch. 355.) So, in *Gully v. Cregoe*, 24 B. 185, under a gift to the widow, "as to and for her own sole use and benefit for ever, feeling assured and having every confidence that she will hereafter dispose of the same fairly and equitably amongst my two daughters and their children," the same construction was adopted.¹

Trusting.—So, a bequest of stock to A., "*trusting* that he will preserve the same so that after his decease it may go and be equally divided among his four children." (*Baker v. Mosley*, 12 Jur. 740.)

Not doubting.—So, a devise to A., "*not doubting*, in case he should have no children, but that he will dispose and give my said real estate to the female descendants of B., in such part or parts and in such manner as he shall think fit, in preference to any descendants in his own female line." (*Parsons v. Baker*, 18 Ves. 476.)

Well knowing.—"I bequeath the same to A., her executors, administrators, and assigns, *well knowing* that she will make a good use and dispose of it in accordance with my views and wishes." (*Briggs v. Penny*, 3 Mac. & G. 546.)

Hoping.—The word "*hoping*" is sufficient to create a precatory trust. (*Harland v. Trigg*, 1 Bro. C. C. 142.)

Power to appoint.—In *Brook v. Brook*, 3 Sm. & G. 280, a devise to a married women for her separate use, "*with power* for her to appoint the same to her husband and children in such way and in such proportions as she may think fit:" and in *Howorth v. Dewell*, 29 B. 18, a *devise to the widow with *power* [*163 for her to appoint the same to the testator's childrer for such estates, &c., as she should in her discretion see most fitting and proper: were held not to create a precatory trust. Sed qu.

Contrary intention.—If the expression of the testator's desire is accompanied by other words, showing clearly that he did not

¹ So where the expression was "firm conviction:" *Barnes v. Grant*, 26 L. J. Ch. 92.

intend the wish to be imperative, but that having expressed it he meant to leave it to the legatee to act thereon or not at his discretion, no trust will be created.¹

As in *Meredith v. Heneage*, 1 Sim. 542; 10 Price 306, H. L., where the testator, after *entreating* his wife to settle such part of his real estate as she should think fit in a certain manner (which was held not to create a trust by reason of the uncertainty of subject) devised all his estate to her "unfettered and unlimited, in full *confidence* and with the firmest persuasion" that she would devise the whole to such of the testator's heirs as she should think fit: it was held that no trust was created. So, where the words were, "I trust to the *liberality* of my successors to reward any other of my old servants and tenants, and to their *justice* in continuing the estate in the male succession." (*Knight v. Boughton*, 11 Cl. & F. 513.) So, where the gift was to the testator's wife "to and for her own absolute use, benefit, and disposal, . . . and whereas I have hereby manifested abundant proof of entire confidence in my said wife by thus giving her the *sovereign control* over the whole of my property for her sole use and benefit, . . . but nevertheless I earnestly conjure her, &c." (*Winch v. Brutton*, 14 Sim. 379.)²

In *Johnston v. Rowlands*, 2 De G. & Sm. 356, a gift to the wife of 2000*l.* "to be disposed of by her will in *such way as she shall think proper*, but I recommend her to dispose of one-half thereof to her own relations, and the other half amongst such of my relations as she shall think proper," was held not to create a trust.

In *Wace v. Mallard*, 21 L. J. Ch. 355, and *Gulley v. Cregoe*, *164] 24 B. 185, it was held that under a gift to A. for **her sole use and benefit*, in confidence that she will dispose thereof

¹ In the construction of the words, "I desire that the said W. should at his discretion appropriate," &c., it was held that the discretion related not to the performance of the duty, but to the manner of its performance: *Erickson v. Willard*, 1 N. H. 229.

² See *Easton v. Watts*, L. R. 4 Eq. 151; *Harper v. Phelps*, 21 Conn. 269.

In like manner from the context it may appear that the words "in trust" were not intended to create a technical trust: *Freedley's Appeal*, 60 Penn. St. 344.

at her decease among her children, A. takes the beneficial interest for life only, and the words "for her sole use and benefit" do not negative the creation of a trust in remainder.

But where the bequest was to A. for her sole use, &c., in confidence that she will dispose thereof for the joint benefit of *herself* and her children, it was considered that no precatory trust was raised. (*Webb v. Wools*, 2 Sim. N. S. 267.)

Uncertainty of amount.—"The indefinite nature and quantum of the subject, and the indefinite nature of the objects, are always used by the Court as evidence that the mind of the testator was not to create a trust." (Per Lord Eldon, *Morice v. Bishop of Durham*, 10 Ves. 586.)

Thus where a gift is made to a person, "not doubting but that she will dispose of *what shall be left* at her death to our two grandchildren." (*Wynne v. Hawkins*, 1 Bro. C. C. 179), or with a request that the legatee will give "*what shall be remaining*" (*Green v. Marsden*, 1 Drew. 647), or that he will give "*the bulk of my said residuary estate*" (*Palmer v. Simmonds*, 2 Drew. 221), or, "what money or property *she may have saved* out of the income hereinbefore given her" (*Cowman v. Harrison*, 10 Hare 234): it has been held that no precatory trust is raised.¹

In *Lechmere v. Lavie*, 2 My. & K. 197, the words "if they die single of course they will leave *what they have* among their brothers and sisters," were held not to mean the property taken under the bequest, but any property the legatees might possess at their death; and therefore no trust was held to be created. But, in *Horwood v. West*, 1 S. & St. 387, where the bequest was to the testator's wife, relying on her to settle for her separate use, in case of her second marriage, "whatever she should possess herself of" by virtue of his will, with a recommendation to her to dispose of by will in a certain manner "what she should die pos-

¹ *Pennock's Estate*, 20 Penn. St. 268; *Lines v. Darden*, 5 Fla. 73. In *Gilbert v. Chapin*, 19 Conn. 346, it was held that an uncertainty as to the proportions in which the parties are to take was sufficient to take the case out of the rule, if it were to be considered the law of that state.

*165] sessed of" under the will, it *was held that the recommendation was not confined to what, if anything, happened to remain undisposed of at her death, but extended to the whole property, and that a valid trust was created.

Again, it has been held that no precatory trust was created by the following expressions:—"recommending to her and not doubting but that she will *consider* my near relations, should she survive me" (*Sale v. Moore*, 1 Sim. 584): trusting that her affections would induce her to make our said daughter her principal heir" (*Hoy v. Master*, 6 Sim. 568): "well knowing that he will discharge the trust reposed in him by *remembering* my children" (*Bardswell v. Bardswell*, 9 Sim. 319): "having full confidence in her *sufficient and judicious provision* for my dear children." (*Fox v. Fox*, 27 B. 301.)

Trusts for maintenance, &c.—But a trust may be created, although the quantum of interest to be taken under it may be indefinite. "Whatever difficulties might originally have been supposed to exist in the way of a court of equity enforcing a trust, the extent of which was unascertained, the cases appear clearly to decide that a court of equity can measure the extent of interest which an adult as well as an infant takes under a trust for his support, maintenance, advancement, provision, or other like indefinite expression, applicable to a fund larger, confessedly, than the party entitled to the support, maintenance, or advancement can claim, and some interest in which is given to another person." (Per Wigram, V.-C., *Thorp v. Owen*, 2 Hare 610.)

And a trust for maintenance, &c., may be created by precatory words. Thus, in *Foley v. Parry*, 2 My. & K. 138, the words, "and it is my particular wish and request that my dear wife and A. will superintend and take care of the education of B., so as to fit him for any respectable profession or employment," were held to create a charge on the interest taken by the testator's widow under the will.

A gift to A., to be disposed of for the benefit of herself and *166] her children, gives the children an interest in the *fund; and as between A. and her children she is either a trustee with a large discretion as to the application of the fund, or has a power in favor of the children subject to a life interest in herself.

(*Crockett v. Crockett*, 2 Phill. 558; *Raikes v. Ward*, 1 Hare 445; *Woods v. Woods*, 1 My. & Cr. 401.)¹

But a gift to A., *to enable* her to maintain or provide for her children is an absolute legacy to A., with the motive only pointed out. (*Thorp v. Owen*, 2 Hare 610; *Benson v. Whittam*, 5 Sim. 22.)²

Where the interest of a fund is given to a parent, *to be applied* for or towards the maintenance or education of children, the principal of the fund being given to the children in remainder, the parent is in general entitled to receive the income subject to no account, provided he discharges the duty of maintaining and educating the children. (*Browne v. Paull*, 1 Sim. N. S. 92; *Costabadie v. Costabadie*, 6 Hare 410; *Byne v. Blackburn*, 26 B. 41.)³

And in *Hammond v. Neame*, 1 Sw. 55, the parent was held entitled to receive the income, although there was no child.

Uncertainty of objects.—In *Harland v. Trigg*, 1 Bro. C. C. 142, a gift to A. “hoping he will continue them in the family,” was held not to create a trust on account of uncertainty in the object. But in *Wright v. Atkyns*, Coop. 111, a devise to A. “in full confidence that after her decease she will devise the property to my family,” was considered by Lord Eldon sufficient to raise a trust.⁴

In *Reeves v. Baker*, 18 B. 372, a devise to A. in fee, “being

¹ A gift to A. “for her benefit and support, and the support of my son J.” creates a trust as to one-half the property for the support of J.: *Loring v. Loring*, 100 Mass. 340; *Clark v. Jacobs*, 56 How. Pr. (N. Y.) 519.

² *Mason v. Sadler*, 6 Jones Eq. 150; *Davis v. Bansum*, 10 Heisk. 308.

³ In *Cole v. Littlefield*, 35 Me. 445, it was held that a gift to A. “for her own and her children’s support,” created a trust, and A might be *called to account* for the purpose of correcting any waste, extravagant expenditure or misapplication of the income.

⁴ In *Tolson v. Tolson*, 10 Gill. & J. 159, a gift to A. with a “request to take care of B. and his family,” was held invalid for uncertainty, so far as B.’s family were concerned. In *Harper v. Phelps*, 21 Conn. 259, where the bequest was to A. “for the support of herself and her nephews and nieces, whom she has now under her care, and such other persons as she may request to be members of her family, it was held that the objects were too uncertain to raise a trust.

fully satisfied that she will dispose of the same fairly and equitably to our united relatives," was held not to create a trust: but *qu.* as to this case, and the somewhat similar one of *Williams v. Williams*, 1 Sim. N. S. 358.

A precatory trust may be created, although the object of it may be undefined. "Vagueness in the object will unquestionably furnish reason for holding that no trust was intended, yet *167] this may be countervailed by other *considerations which show that a trust was intended, while at the same time such trust is not sufficiently certain to be valid and effectual; and it is not necessary to exclude the legatee from a beneficial interest that there should be a valid or effectual trust; it is only necessary that it should clearly appear that a trust was intended." (*Briggs v. Penny*, 3 Mac. & G. 556.) Thus, if the gift be to A. "well knowing that she will dispose of the same in accordance with my views and wishes," these words are sufficient to create a trust, although the views and wishes of the testator may never have been made known, or might if known be too vague and indefinite to be enforced. (*Briggs v. Penny*, 3 Mac. & G. 546; *Bernard v. Minshull*, Johns. 276.)

CONSIDERABLE favor seems to have been anciently shown to the common-law heir, even in questions of construction. Hence, perhaps, several of the following rules, including this, that—

Heir of Customary Lands.

RULE. If customary lands be devised to the heir or heirs of any person, without an estate in the ancestor, *prima facie*, the common-law heir takes, and not the customary heir.¹

Thus, if gavelkind lands be devised to the heirs of A., who dies leaving several sons, the eldest alone takes the fee simple. (Co. Lit. 10 a; Robinson on Gavelkind 156; Thorp v. Owen, 2 Sm. & G. 90.

“As if lands of the nature of gavelkind be given to B. and his heirs, having issue divers sons, all his sons after his decease shall inherit; but if a lease for life be made, remainder to the right heirs of B., and B. dieth, his eldest son only shall inherit, for he only to take by purchase is right heir by the common law.” (Co. Lit. 10 a.)

In Thorp v. Owen, 2 Sm. & G. 90, the rule was applied to a devise of customary land to the heirs male of A., i. e., heirs male of the body of A.

In Roberts v. Dixwell, 1 Atk. 607, a devise of gavelkind lands

¹ Tylee v. Deal, 19 Grant Ch. (U. C.) 601. This case arose upon a will made in England, concerning land in England and Upper Canada. It was dated before the Canadian act abolishing primogeniture was passed. The Court held that “right heirs” meant the common-law heir.

*169] by way of executory trust, to be settled on the *heirs of the body of A. was executed by a settlement on the first and other sons of A. *successively* in tail.

Devise to testator's heir.—In *Sladen v. Sladen*, 2 Jo. & H. 369, it was doubted whether the rule applies to the case of a devise of customary lands to the right heirs of the testator, inasmuch as the heir would (before the Act 3 & 4 W. 4, c. 106) have taken by descent and not by purchase. But *qu.* whether there be any distinction; for if the common-law heir takes by virtue of the rule, he does not take by descent.

But where gavelkind freeholds and leaseholds (mixed) were devised to the right heirs of the testator, the common-law heir was held to take. (1b.)

HEIR MALE OF THE BODY.

Doctrine of "Very Heir."

It is laid down by Lord Coke (Co. Lit. 246), that under a devise to the heirs male (or female) of the body of any person without an estate in the ancestor, the person to take as heir male of the body by *purchase* must be heir *general* of the body, or very heir. In other words, the expression "heir male of the body," so far as it designated the person to take an estate by *purchase* under the devise in question, was considered by Lord Coke to mean *the heir general of the body being a male*, and not, as it more properly does mean, *the person who would have inherited an estate in tail male from the ancestor*; or, to adopt Lord Cottenham's language in *Chambers v. Taylor*, 2 My. & Cr. 385, such persons as would be heir, if males only were capable of being heirs, and of transmitting descent. Thus, according to Lord Coke's rule, the expression "heir male of the body," designating a person to take by *purchase*, had no reference to the course of descent of an estate in tail male, but pointed at and described the heir general of the body, with the superadded qualification of being of the male sex. It followed, that the person thus designated could take, if very heir and a *male, although not
 *170] claiming through males only. (Co. Lit. 256; per Bosanquet, J., *Doe v. Perratt*, 10 Bing. 216, E. C. L. R. vol. 25.)

Lord Coke's rule has now been (at least as regards estates tail) altogether abolished, and it is settled in accordance with the natural construction of the words, that—

RULE. Under a devise to "heirs male of the body" of any person, the heir male of the body taking by purchase need not be heir general. (*Wills v. Palmer*, 5 Burr. 2615; *Goodtitle v. Burtenshaw*, *Fearne C. R. App.* 570; *Doe d. Angell v. Angell*, 9 Q. B. 328, *E. C. L. R.* vol. 58.)

Thus, if the devise be to the heirs male of the body of A., who has died leaving a younger son and a daughter of a deceased eldest son, the younger son will take an estate in tail male by virtue of the devise, although the granddaughter is heir.

The same rule would apply to a devise to heirs female of the body.

The new rule applies to a devise to "heirs male," where these words are taken to mean "heirs male of the body."

Thus, in *Doe d. Angell v. Angell*, 9 Q. B. 328 (*E. C. L. R.* vol. 58), a devise "to the male heirs, if any such there be, of W. A. and their male heirs for ever," was held to vest in a person as purchaser who was heir male of the body of W. A., but not heir general.

Lord Coke's rule, how far abolished.—In *Wrightson v. Macaulay*, 14 M. & W. 214, Parke, J., said that Lord Coke's rule had been broken in upon only as regards estates tail. But it would seem that the old rule would not now be applied to any case where the expression "heirs male of the body" is used; thus, under a devise to the heir male of the body of A. and the heirs of such heir male, it is conceived that the person claiming by purchase, as heir male of the body, an estate in fee simple under the devise, need not be heir general; and consequently *that [171 he must claim through males. If there were any case in which the expression "heir male" should be held *not* to mean "heir male of the body," the old rule might perhaps still apply, and the words be construed to mean the heir general, being a male.

Of course under a devise to "the right heirs of A., being of the name of B.," no person could claim as purchaser who was not

heir general of A., as well as of the name of B. (Wrightson v. Macaulay, 14 M. & W. 214.)

Heir male of the body must claim through males.—It seems to be a necessary consequence of the rule above stated, that the person claiming as *purchaser* under the description of heir male of the body, as well as those claiming by descent, must convey his descent entirely through males.

According to Lord Coke's rule this was not necessary; for the words "heir male of the body" being taken to mean "heir general of the body, being a male" if the person claiming satisfied the latter conditions, there was nothing in the expression to require that he should be heir of the body by descent through males. Lord Coke says, "If A. hath issue a daughter and dieth, and the son hath issue a daughter and dieth, and a lease for life is made, remainder to the heirs female of the body of A., in this case the daughter of A. shall not take *causa quod supra*" [*i. e.*, because not heir general]; "*but* albeit the daughter of the son maketh her conveyance by a male, she shall take an estate tail by purchase, for she is heir and a female." (Co. Lit. 256.) The latter part of this passage appears, like the former part, to be no longer the law. Now that the words "heir male of the body" are held to mean the person who would have inherited an estate in tail male from the ancestor, although not heir general, the condition of claiming through males is necessarily introduced.

Males Claiming through Males.

*172] The case of an heir male of the body taking by *purchase is thus brought into conformity with the general rule of construction, that—

RULE. "Heirs male of the body," or "issue male," mean descendants *in the male line* only, *i. e.*, males claiming through males. (Co. Lit. 25 a; Bernal v. Bernal, 3 My. & Cr. 559; Lywood v. Kimber, 29 B. 38.)¹

¹ The contrary was held concerning "issue male" in Beckam v. De Saussure, 9 Rich. L. 531.

In *Lywood v. Kimber*, 29 B. 38, a sum of stock was given to five persons for life, and after their deaths to their issue male; and it was held that males claiming through females were not entitled.

In *Bernal v. Bernal*, 3 My. & Cr. 559, the rule was applied to a gift (in a Dutch will) to the "male descendants" of a person. Lord Cottenham said (p. 581), "To entitle any one to claim, he must show that he is one of the favored class; that is, one of the class of male descendants. A male descended from a female of the family would undoubtedly answer the description, as he would be a descendant and a male; but he would not be one of the class of male descendants. Such would be the ordinary acceptance of the terms. In speaking of a man and his male descendants, as a class, no one would conceive the son of a female descendant as included, and such is the construction which our law has put upon the words, as 'issue male,' which is, in fact, the same thing as male descendants."

So, a gift to "the eldest *male lineal* descendant of A." has been held inapplicable to a male claiming through females. (*Oddie v. Woodford*, 3 My. & Cr. 584; 7 H. L. C. 429.)

The rule of course applies to a devise to "heirs male," where these words mean "heirs male of the body." (*Doe v. Angell*, 9 Q. B. 328, E. C. L. R. vol. 58.)

But a gift to "all the issue, male and female," of A. would no doubt include males claiming through females, and females claiming through males. So, a devise to A. and the heirs male or female of his body, confers an estate in tail general. (Co. Lit. 256.)

*"Heirs Male."

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The expression "heirs male" is, properly speaking, unknown to the law. In a deed, a limitation to A. and his heirs male confers an estate in fee, the word "male" being rejected as repugnant (Co. Lit. 27 a); but with respect to devises it is a rule that—

RULE. "Heirs male," in a will, as words of limitation, are construed to mean "heirs male of the body."

Thus a devise to A. and his heirs male, or to A. for life, with remainder to his right heirs male for ever, vests in A. an estate in tail male. (Co. Lit. 27 a; Doe d. Lindsey v. Colyear, 11 East 548.)

It would appear that the rule extends to every devise to "heirs male," although there be no estate limited to the ancestor. Thus, in Lord Ossulston's Case, 3 Salk. 336, a devise to the right heirs male of the testator, and in Doe d. Angell v. Angell, 9 Q. B. 328, a devise to the heirs male of A. and their heirs male, was held to vest an estate in tail male in the heir male of the body as purchaser.

And in Doe d. Winter v. Perratt, 10 Bing. 204 (E. C. L. R. vol. 58), Taunton, J., laid down generally that, "in a will, the words heir male of A. mean heir male of the body of A." But *qu.* whether this has been expressly decided with respect to "heir male" in the singular. Under a devise, as in Archer's Case, 1 Rep. 66, to the next heir male of A. and the heirs male of the body of such next heir male, it might perhaps still be contended that the words "heir male" did not mean "heir male of the body," but "the heir general, being a male." But *qu.*¹

Heir male must claim through males.—Wherever heir male is held to mean heir male of the body, the two preceding rules of course apply, and the heir male, although claiming by purchase, need not be heir general, but, *on the other hand, must
*174] claim through males. If, however, there be any case in which the words heir male do not mean heir male of the body, it would appear that they must mean "the heir general, being a male," in accordance with Lord Coke's rule; and it would follow that the condition of claiming through males only would cease to be implied.

¹ In Cuffee v. Milk, 10 Metc. 366, it is held, that the expression "heir male" creates an estate tail. But in Dennett v. Dennett, 43 N. H. 499, a devise to A., "and to descend from him to his oldest male heir," was held not to create a fee simple; and see McIntyre v. Ramsey, 23 Penn St. 317.

ARCHER'S CASE.

A devise to A. for life with remainder to the heir, or heir male, of his body, without words of inheritance superadded, creates an estate tail in A. (*White v. Collins*, 1 Com. Rep. 389; *Chambers v. Taylor*, 2 Myl. & Cr. 387); but where words of limitation are added to a devise to the heir male (in the singular) it is a rule that—

RULE. Under a devise to A. for life with remainder to the *heir male of his body* and the heirs male of the body of such heir male, A. takes an estate for life only, and the heir male of his body takes an estate in tail male as purchaser. (*Archer's Case*, 1 Rep. 66; *Willis v. Hiscox*, 4 Myl. & Cr. 197.)¹

So, if the devise be to A. for life with remainder to the heir male of his body and the heirs, or heirs of the body, of such heir male, A. takes for life only, and the heir male of his body takes an estate in remainder in fee or in tail. (*Willis v. Hiscox*, 4 Myl. & Cr. 197; *Chamberlayne v. Chamberlayne*, 6 E. & B. 625, E. C. L. R. vol. 88.)²

The rule applies where the devise is to A. for life with remainder to his *heir male* and the heirs male of the body, or heirs, of such heir male. (*Archer's Case*, 1 Rep. 66.) Whether in this case the words "heir male" are equivalent to "heir male of the body," or designate the heir general, being a male, *qu.*

In *Chamberlayne v. Chamberlayne*, 6 E. & B. 625 (E. C. L. R. vol. 88), the rule was applied to a devise to A., to "hold to him and *the heir male of his body and the heirs and as- signs of such heir male," although no express estate for life was limited to A. [*175

¹ *McKay v. Annand*, 1 Old (N. Sc.) 247.

² *Canedy v. Haskins*, 13 Metc. 389; *Brownell v. Brownell*, 10 R. I. 509. But if there is a gift over on failure of male heirs, or in default of male heir, the rule is excluded: *Malcolm v. Malcolm*, 3 Cush. 472; *Osborn v. Shrieve*, 3 Mason 391.

The rule applies to the words "issue male" as well as "heir male": *Wells v. Ritter*, 3 Whart. 208.

"HEIRS," MEANING HEIRS OF THE BODY.

There would seem to have been in early times a disposition to restrain the meaning of "heirs" to heirs of the body on not very strong grounds, and several rules of construction are directed to this point. The first is that—

Heirs Lawfully Begotten.

RULE. A devise of real estate to A. and his *heirs lawfully begotten* confers only an estate tail, "heirs" being construed heirs of the body. (Co. Lit. 206, n. 2; Nanfan v. Legh, 7 Taunt. 85 (E. C. L. R. vol. 2); Good v. Good, 7 Ell. & Bl. 295, E. C. L. R. vol. 90.)¹

"The devisor has clearly used apt words for giving an estate tail, by limiting the land to a man and his heirs lawfully begotten." (Per Lord Campbell, Good v. Good, 7 Ell. & Bl. 295, E. C. L. R. vol. 90.)

But a devise to A. and his *lawful heirs* passes an estate in fee. (Simpson v. Ashworth, 6 B. 412; Mathews v. Gardiner, 17 B. 254.)

Secondly, the restriction of heirs to heirs of the body is effected in the following case, viz:—

Gift over on failure of Issue.

RULE. A devise of real estate to A. and his *heirs*, followed by a limitation over to take effect on a *general* failure *at any time* of issue or heirs of the body of A., vests in A. only an estate tail: the word "heirs" being

¹ Hall v. Vandegrift, 3 Binn. 374; Ray v. Gould, 15 U. C. Q. B. 131. In Maryland that these words confer an estate tail, only when there is a gift over on failure of heirs: Pratt v. Flamer, 5 Har. & Johns. 10; but when there is no gift over it has been held that these words pass a fee simple: Paddison v. Oldham, 1 Har. & McH. 336. No such distinction is observable in the English authorities. A devise to A. "and to the heirs of his body lawfully to be begotten," gives A. an estate tail: Trust and Loan Co. v. Fraser, 18 Grant Ch. (U. C.) 19.

construed to mean heirs of the body. *(Doe d. Ellis v. Ellis, 9 East 382; Biss v. Smith, 2 H. & N. 105; Greenwood v. Verdon, 1 K. & J. 74.)¹ [*176

The rule is the same, where the devise is to A., his heirs and assigns, for ever.² (Ib.)

Thus, if (in a will made before January 1, 1838,) the devise be to A., his heirs and assigns, but if A. shall die without leaving issue, to B. in fee, A. takes only an estate tail.

But the rule does not apply if the gift over be to take effect on failure of issue of A. *within a limited period*, or on failure of a *particular class* of issue only. In the latter cases the word "heirs" is not restrained from its original meaning, but the gift over takes effect as an executory devise after an estate in fee.³

Thus, if the devise be to A. and his heirs, but if A. die *under twenty-one* without issue, then to B., A. takes the fee simple, subject to an executory devise over. (Eastman v. Baker, 1 Taunt. 179.)

And the construction is the same, if the devise be to A. and his heirs, with a gift over if A. die without issue, *or* under the age of twenty-one, the word "or" being construed "and" by the rule in Fairfield v. Morgan. (Ib.)

So, if the devise be to A. and his heirs, with a gift over if A. should die without issue *in the lifetime of B.*, A. takes the fee simple with an executory devise over. (Pells v. Brown, Cro. Jac. 590.) So, where the devise was to A. in fee, with a gift over on the death of A. without issue to the *then surviving legatees*, A. was held to take the fee, the gift over being restrained to a

¹ Fisk v. Keene, 35 Me. 350; Hawley v. Northampton, 8 Mass. 3; Eichelberger v. Barnitz, 9 Watts 447; Hoxton v. Archer, 3 Gill & Johns. 199; Den v. Wood, Cam. & Nor. 202; Ray v. Gould, 15 U. C. Q. B. 131.

The same rule applies in case of a gift over in default of child or children, these words being construed to mean issue: Thomason v. Anderson, 4 Leigh. 118; Hill v. Hill, 74 Penn. St. 173.

² Doe d. Anderson v. Hamilton, 8 U. C. Q. B. 302.

³ The cases in which failure of issue is construed to be definite are discussed in the next chapter.

failure of issue before the death of the last surviving legatee. (*Greenwood v. Verdon*, 1 K. & J. 74.)

Again, where the devise was to the children of A. and their heirs, with a gift over on failure of issue of A., the children of A. were held to take the fee simple, the word "issue" in the gift over being restrained to mean children. (*Goodright v. Dunham*, Doug. 264.)¹

*177] * *Wills made since 1837*.—The rule will have little application to wills made or republished on or after January 1st, 1838, inasmuch as by the 29th section of the Wills Act, the expressions "die without issue," &c., are *prima facie* restricted to failure of issue *at the death* of the person, and therefore cannot have the effect of restraining "heirs" to mean heirs of the body.

But it may be perhaps doubted whether the expressions "on failure of issue" or "in default of issue" are within the 29th section. If not, then in the case of a devise to A. and his heirs, with a gift over *on failure* of issue of A., the rule will still apply, and A. will take an estate tail.

Thirdly, the word "heirs" is restrained to heirs of the body by force of a gift over in the following cases, viz :—

Gift over on Failure of Heirs.

RULE. If real estate be devised to B. on failure of *heirs* of A., and B. is capable of being heir to A., the word "heirs" is construed to mean heirs of the body, since otherwise the devise to B. could never come into operation. (*Webb v. Hearing*, 3 Lev. 70; *Fearne C. R.* 467; *Nottingham v. Jennings*, 1 P. Wms. 23; *Harris v. Davis*, 1 Coll. 423.)²

¹ *De Haas v. Bunn*, 2 Penn. St. 337.

² *Williams v. McCall*, 12 Conn. 328; *Burnet v. Denniston*, 5 Johns. Ch. 42; *Braden v. Cannon*, 24 Penn. St. 168; *Berg v. Anderson*, 72 id. 87; *Hill v. Burrow*, 3 Call 342; *Gable v. Ellender*, 53 Md. 311; *Hardy v. Wilcox*, 58 id. 180; *Den v. Armfield*, 8 Ired. L. 25; *Deboe v. Lowen*, 8 B. Mon. 616; *Cowan v. Wells*, 5 Lea 682; *Goodell v. Hibbard*, 32 Mich. 47; *Iler v. Elliott*, 32 U. C. Q. B. 434; *Jardine v. Wilson*, id. 498; *Tyrwhitt v. Dewson*, 28 Grant Ch. (U. C.) 112.

Where a devise is made to two, and in the same clause a devise over in case of either dying without heirs, is made to one who is capable of being

Thus, by the operation of this and the preceding rule, if lands be devised to A., a son of the testator, and his *heirs*, and on failure of heirs of A., to the right heirs of the testator, A. takes an estate tail only. (*Nottingham v. Jennings*, 1 P. Wms. 23.)

But if B. be not capable of inheriting land from A., the meaning of the word "*heirs*" will not be restricted. Thus where, under the old law of descent (before 3 & 4 Will. 4, c. 106), the testator devised to his son A. and his heirs, but if he died without heirs then to his son B., and B. was *half-brother* to A., A. was held to take the fee simple. (*Tillburgh v. Barbut*, 1 Ves. sen. 89.)

**Gift over to several, including an heir.*—The rule would seem to apply where the gift over is to several [*178 persons, and any of them is capable of being heir to the first devisee. In *Harris v. Davis*, 1 Coll. 423, the rule was applied where the devise over was to nine persons, eight of whom were in the course of descent from the first devisee.

"NECESSARY" IMPLICATION.

Gift to Heir after the Death of A.

A gift of real estate to the heir after the death of a particular person is considered *necessarily* to imply, not so much an intention to benefit that person, as an intention to exclude the heir during his life, which can only be effected by implying a life estate to the person in question: hence it is a rule that—

RULE. If real estate be devised after the death of A. to B., the heir-at-law of the testator, and the will contains

heir to one of the first devisees but not to the other, the word heirs will be construed to mean heirs of body as to each devisee: *Bundy v. Bundy*, 38 N. Y. 410.

If a devise is made to A. and his heirs with a gift over upon his death without heirs within a limited period, there is no necessity for construing the word heirs to mean "*heirs of his body*" in both instances. The word as used in the gift over will be so construed, while as used in the limitation of the estate of the first taker it will retain its full signification, the devise being equivalent to a devise to A. and his heirs, with a gift over on a definite failure of issue: *Doebler's Appeal*, 64 Penn. St. 9.

no disposition of the property during the life of A., A. takes an estate for life by implication: but if B. is not the heir-at-law, A. takes no estate. (*Rex v. Inhabitants of Ringstead*, 9 B. & C. 218 (E. C. L. R. vol. 17); *Aspinwall v. Petvin*, 1 S. & Stu. 544; *Stevens v. Hale*, 2 Dr. & Sm. 22.)¹

And a bequest of personal estate similarly, after the death of A., to the person or persons who would be entitled in case of intestacy, gives A. a life interest by implication. (*Stevens v. Hale*, 2 Dr. & Sm. 22; *Cranley v. Dixon*, 23 B. 512.)²

"If a testator gives to his heir after the death of A., he plainly means that his heir should not take during the life of A.; and having named no other person to take during the life of A., it is necessarily to be implied that he means A. to take during his own *179] life. But if the *testator gives to a stranger after the death of A., it does not plainly and necessarily appear from thence that he means that his heir should not take during the life of A." (*Aspinwall v. Petvin*, 1 S. & Stu. 544.)³

"The same principle has been extended to the case of personalty; and it may be considered as now settled, that if there is a bequest of personalty, whether of a particular portion or the whole residue, after the death of A. to the person or persons who is or are the next of kin of the testator, A. takes a life estate by implication, upon a ground similar to that which applies in the case of real estate." (*Stevens v. Hale*, 2 Dr. & Sm. 22)

¹ *Kelley v. Stinson*, 8 Blackf. 390.

² *Dale v. Dale*, 13 Penn. St. 446. But in North Carolina it has been held that the rule does not extend to a bequest of personal estate: *White v. Green*, 1 Ired. Eq. 45; *Hastings v. Earp*, Phill. Eq. 7.

³ *McCoury v. Leek*, 1 McCart. 72; *Doughty v. Stillwell*, 1 Bradf. 310. In *McCoury v. Leek*, Chancellor Green was of opinion that in a bequest of personalty to B. on the death of A., there was an implied bequest to A. for life, if otherwise there would be an intestacy, and this reasoning is admitted also in *Dale v. Dale*, 13 Penn. St. 448.

Where the will contains a residuary devise or bequest, which will embrace the undisposed of interest during the life of A., the rule of course has no application.

Devise to one of several co-heirs.—The principle of the rule does not seem to apply where the gift over is to one only of several co-heirs, or to the heir jointly with other persons: and it appears that the rule will not be extended to such cases. (*Barnet v. Barnet*, 29 B. 239; *Rex v. Inhabitants of Ringstead*, 9 B. & Cr. 228 (E. C. L. R. vol. 17), where *Hutton v. Simpson*, 2 Vern. 723, is commented on.)

Heirship, when to be considered.—It would seem clear, on principle, that the devisee over must be heir-at-law *at the death* of the testator, in order that the implication may arise: but the point is not expressly decided.¹

Distributive construction.—If a particular estate be devised to A. for life, and after the death of A. the same *together with* other property, is devised to B., it is a question of construction, not subject to any particular rule, whether the words are to be read distributively, so as to give an immediate estate to B. in the property not devised to A. for life (*Cook v. Gerrard*, 1 Saund. 183; *Doe v. Brazier*, 5 B. & Ald. 64, E. C. L. R. vol. 7); or whether the devise to B. is altogether postponed until the death of A., so that the rule will apply, and A. take a life estate or not, according as B. is or not the heir-at-law. (*Rex v. Inhabitants of Ringstead*, 9 B. & Cr. 218, E. C. L. R. vol. 17.)²

A gift to B. after the death of A. *may*, by force of the [*180 *context give a life interest to A. although not the heir-at-law or next of kin. (*Roe v. Somerset*, 5 Burr. 2608; *Blackwell v. Bull*, 1 Keen 176.) In *Blackwell v. Bull*, the testator, after desiring that his business should be carried on for the benefit of his family, devised all his property in trust that, *at his*

¹ But where the gift on the death of A. was to his brothers and sisters, if living, and if dead to his nephews and nieces; it was held that A. took a life estate by implication. V.-C. Stuart in this case doubts whether it is a settled rule, that the implication does not arise from a mere postponement without regard to the nature of the gift over: *Humphreys v. Humphreys*, L. R. 4 Eq. 475.

² *Rathbone v. Dyckman*, 3 Paige 9.

wife's decease, the whole should be divided among his children. It was held that, upon the whole will, the widow took a life interest by implication in the real and personal estate not engaged in the testator's business.

Devise to A. "or" his Heirs.

If personal estate be given to A. or his heirs, the word "heirs" is read as a word not of limitation but of substitution, so as to prevent a lapse; but in the case of real estate, if the substitutional construction were adopted, the result would be (in a will prior to 1838) to give to A. only an estate for life: hence the rule as to real estate is different, viz:—

RULE. A devise of real estate to "A. or his heirs" gives to A. an estate in fee, the word "or" being read "and." (Read v. Snell, 2 Atk. 645, per Lord Hardwicke.)¹

So, a devise to "A. or his heirs of his body" gives to A. an estate tail. (Harris v. Davis, 1 Coll. 416; Greenway v. Greenway, 2 De G. F. & J. 128.)

It would appear, therefore, that a devise to A. or his heirs, or heirs of the body, would lapse by the death of A. in the testator's lifetime.

¹ Sloan v. Hanse, 2 Rawle 28; Brasher v. March, 15 Ohio St. 112. But where a testator devised to his six sons by name, all his real estate, "to be equally divided among them or their heirs," and two of his sons were known to him to be dead at the date of the will, it was held that the gift was substitutional, and the heirs of the two then dead, took under the devise. "This construction may not be favored by common law authorities, but seems to be justified by common sense:" per Perkins, J., Taylor v. Conner, 7 Ind. 119. A similar construction has been put on a devise to a class after a life estate "and to their heirs for ever:" Flournoy v. Flournoy, 1 Bush 515.

The Wills Act renders this rule unnecessary; Wingfield v. Wingfield, L. R. 9 Ch. D. 658; and such a devise would perhaps be now held substitutional.

ESTATES TAIL, ETC.

ESTATE TAIL CY PRES.

IF property be given by will to a person unborn at the death of the testator for life, with remainder to his issue as purchasers, the limitations to the issue are beyond the limits of perpetuity; but the Courts, in a particular case, carry out the intention of the testator *cy pres*, and it is a rule that—

RULE. If real estate be devised to A. for life, with remainder to his first and other sons successively in tail, with remainder to his daughters as tenants in common in tail, with cross remainders between them, and A. is unborn at the death of the testator, the limitations to his children being void for remoteness, A. is held to take an estate tail, to effect as far as may be the intention. (*Humberston v. Humberston*, 1 P. Wms. 332; *Mony-penny v. Dering*, 16 M. & W. 418; 2 De G. M. & G. 145; *Vanderplank v. King*, 3 Hare 1.)¹

And if the devise be similarly to A. (the unborn person) for life, with remainder to his first and other sons in tail male, A. is held to take an estate in tail male. (Ib.)

¹ *Parfit v. Humber*, L. R. 4 Eq. 443; *Allyn v. Mather*, 9 Conn. 114; *Gibson v. M'Neeley*, 11 Ohio St. 131.

A gift over upon failure of the issue of the first taker, prevents the necessity of applying the doctrine of *cy pres*: *Malcolm v. Malcolm*, 3 Cush. 472.

In *St Armour v. Rivard*, 2 Mich. 294, the Court refuse to apply the doctrine to a gift of successive life estates, and doubt whether the rule would be adopted in any form in that state.

The same rule applies to a devise by way of appointment under a power where A. is, but his children are not, objects of the power. (Ib.)

*182] *"The doctrine of cy pres, in reference to questions of perpetuity, arises where a testator gives real estate to an unborn person for life, with remainder to the first and other sons of such person in tail male, or with remainder to the first and other sons of such person in tail general, with remainder to the daughters as tenants in common in tail, with cross remainders amongst them. In such a case the course of succession designated by the testator is one allowed by law; but the direction that the first taker should take for life only, with remainder to his children as purchasers, is illegal, as tending to a perpetuity. .

. . . Such a devise has therefore been held to give an estate in tail male or in tail, as the case may be, to the first taker. By these means the estate, if left as it were to itself, will go in the precise course marked out by the testator, though it will be (contrary to what he intended) liable to be diverted from that course by the act of the first taker." (*Monypenny v. Dering*, 16 M. & W. 428.)

Where the limitations are as above stated, it does not appear to be essential to the application of the rule, that there should be a gift over on failure of issue, or issue male, of A.

Again, if there were no express limitation of cross remainders in tail among the daughters, yet if there were a gift over on failure of issue of A., cross remainders would be implied, and the rule would therefore apply.

The rule of cy pres may be applied to some only of a class of children, leaving the estates of other members of the class unaffected by it. Thus, where the devise was to the children of A., a living person, for their lives as tenants in common, with remainder after their respective deaths to their children respectively, and the heirs of their bodies, with cross remainders amongst them, it was held that children of A., born in the testator's lifetime, took estates for life only, with remainders to their children, while children of A., born after the testator's death, took estates tail cy pres. (*Vanderplank v. King*, 3 Hare 1.)

The rule applies, although the estate for life limited to *the first taker be for her separate use. (*Pitt v. Jackson*, [*183 2 Bro. C. C. 51.]

Rule, as extended by Pitt v. Jackson.—In one instance the rule is held to apply, although the effect is to alter the course of devolution of the estate; viz., where the devise is to A. (the unborn person) for life, with remainder to his children as *tenants in common* in tail, with remainder over, A. takes an estate tail, the tenancy in common being rejected. (*Pitt v. Jackson*, 2 Bro. C. C. 51; see *Smith v. Lord Camelford*, 2 Ves. jun. 698; *Vanderplank v. King*, 3 Hare 1; *Monypenny v. Dering*, 2 De G. M. & G. 173.)

But the rule will not be applied where the effect would be to give estates to persons whom the testator did not intend to include in the line of devolution at all. Thus, if the devise be to A. (the unborn person) for life, with remainder to his *first* son (only) in tail male, no estate being limited to the second and other sons of A., A. cannot be held to take by virtue of the rule an estate in tail male. (*Monypenny v. Dering*, 2 De G. M. & G. 145.)

The rule does not apply where the devise is to A. (the unborn person) for life, with remainder to his children in *fee simple*. (*Bristow v. Warde*, 2 Ves. jun. 336; *Hale v. Pew*, 25 B. 335.)

The rule does not apply to a bequest of personal estate. (*Routledge v. Dorril*, 2 Ves. jun. 365.) How far it would apply to a gift of real and personal estate (blended) seems uncertain. (*Boughton v. James*, 1 Coll. 44.)

WORDS OF LIMITATION.

Heirs of the Body.

Perhaps the strongest of all rules of construction is that which defines the meaning of "heirs of the body," when used in devises of real estate. Not only are the words highly technical, implying both an unlimited series of objects and a fixed order of succession, but it would be difficult, in most cases, to find any secondary meaning for them which could carry out any probable intention on the *part of the testator. It has therefore [*184 become by degrees established as an inflexible rule. where

the testator has not *explained* the words in question as having been used in some other sense, that—

RULE. In devises of real estate, the words “heirs of the body,” following a gift to the ancestor, are words of limitation, and create an estate tail:—notwithstanding the addition of other inconsistent words or expressions. (*Jesson v. Wright*, 2 Bligh. 1 ; *Poole v. Poole*, 3 B. & P. 620; *Fetherstone v. Fetherstone*, 3 Cl. & F. 67; *Jordan v. Adams*, 9 C. B. N. S. 483, E. C. L. R. vol. 99.)¹

Thus, a devise to A. *for life* and after his decease to the heirs of his body, *share and share alike* as tenants in common, vests in A. an estate tail. (*Jesson v. Wright*, 2 Bligh. 1.)²

¹ *Kennedy v. Kennedy*, 5 Dutch. 186 ; *Horne v. Lyeth*, 4 Har. & Johns. 431 ; *King v. Utley*, 85 N. C. 59.

² *Quick v. Quick*, 6 C. E. Green 13 ; *Curtis v. Longstreth*, 44 Penn. St. 302 ; *Clarke v. Smith*, 49 Md. 106 ; *Ross v. Toms*, 4 Dev. L. 376.

In many of the American states the rule in *Shelley's Case* has been abolished by statute, and a gift to A. for life, with remainder to his heirs, heirs of his body, or issue, is but an estate for life in A. and the heirs, heirs of body, &c., take as purchasers. These states are as follows: New Hampshire (Rev. Statute of 1842) Gen. Laws 1878, Ch. 193, § 5 ; Massachusetts (by an Act of 1791) Pub. Stat. 1882, Ch. 126, § 4 ; Connecticut, Gen. Stat. 1875, p. 352 ; New York (by the Revised Statutes, taking effect Jan. 1. 1830) R. S. 1875, part 2, Ch. 1, tit. 2, § 29 ; New Jersey (by an Act of April 16, 1846) R. S. 1877, p. 299, pl. 10 ; Virginia, Code 1873, tit. 33, Ch. 112, § 11 ; West Virginia, R. S. 1879, Ch. 82, § 11 ; Alabama (by the Code, taking effect January, 1853), Code 1876, § 2183 ; *Dean v. Hart*, 62 Ala. 308 ; Michigan (by Revised Statutes, taking effect March 1, 1847), How. Ann. Stat. 1882, § 5544 ; Wisconsin (Revised Statutes of 1849), R. S. 1878, § 2052 ; Minnesota, Stats. at Large 1873, Ch. 32, § 44 ; Kentucky (by Act, taking effect July 1, 1852), Gen. Stat. 1881, Ch. 63, § 10 ; Tennessee, Compiled Stat. 1871, § 2008 ; *Williams v. Williams*, 10 Heisk. 566 ; Mississippi (Rev. Code 1880, § 1201) ; Missouri (R. S. 1879, § 4003) ; Oregon (Gen. Laws 1872, p. 790, § 28) ; Dakota (Rev. Civ. Code 1883, § 738) ; California (Civ. Code 1872, § 1335).

In Maine (Act of 1821), R. S. 1871, Ch. 73, § 6 ; Ohio (Act taking effect October 1, 1840) R. S. 1880, § 5968 ; *Carter v. Reddish*, 32 Oh. St. 1 ; and Kansas (Comp. Laws 1879, § 6164), the terms of the statutes seem

So, a devise to A. for life, with remainder to his heirs, or to the heirs male of his body, vests in A. an estate in fee or in tail male.¹

"I take the effect of the authorities on this subject clearly to be, that when land is devised to a man for life, with remainder to his heirs or the heirs of his body—no incident superadded to the estate for life, however clearly showing that an estate for life

to include only gifts in remainder to heirs, the words being "and after his death to his heirs in fee, or by words to that effect."

In Vermont, it has been held that the rule in *Shelley's Case* is to be regarded as of no special force in that state, except as a rule of construction and intention; and therefore, where there is a clear intention that the first taker shall have a life estate only, that intention shall prevail, and the heirs shall take as purchasers: *Smith v. Hastings*, 29 Vt. 240. The same was held, also, in a late case in Maine, as the rule in that state apart from the statute: *Hamilton v. Wentworth*, 58 Me. 101; and see to the same effect *King v. Beck*, 15 Ohio 559.

In Rhode Island the rule is so modified that a devise for life to any person and to the children or issue generally of such devisee, in fee simple, will not vest a fee tail in such devisee, but an estate for life only, and the remainder vests at his decease in his children or issue generally according to the will: Pub. Stat. 1882, p. 471, § 2.

In *Truman v. White*, 14 B. Monr. 570, it was doubted whether the rule in *Shelley's Case* was in force in Kentucky.

In Mississippi, in the Act of June 19th, 1822, abolishing estates tail, there is a proviso to the effect that estates may be limited to a succession of donees in being, with remainder to the right heirs of the remainderman, and it has been held, that the effect of this proviso is to abolish the rule in *Shelley's Case* as to devises of real estate, and in all limitations to heirs in remainder, the heirs take as purchasers unless it plainly appear to have been the intention of the testator to specify a class of persons to take in succession from generation to generation, in their character as heirs of the ancestor: *Powell v. Brandon*, 24 Miss. 366; *Hampton v. Rather*, 30 Miss. 193.

The rule in *Shelley's Case* prevails unrestricted by statutory modifications in Pennsylvania, and a full analysis of the cases may be found in "The Rule in *Shelley's Case* in Pennsylvania," by Joseph P. Gross.

¹ The words, "heirs of body," are words of limitation, and as such they create an estate tail in the first taker, which cannot be cut down, even by the clearest expression of a desire that it shall be a life estate only: per Black, J., *Bender v. Fleurie*, 2 Grant 347; *M'Feely v. Moore*, 5 Ohio 464; *King v. Beck*, 12 id. 390; *Cooper v. Coursey*, 2 Cold. 416; *Fraser v. Clune*, 2 Mich. 81.

merely, and not an estate of inheritance, was intended to be given to the first donee; nor any modification of the estate given to the heirs, however plainly inconsistent with an estate of inheritance; nor any declaration, however express or emphatic, of the devisor; can be allowed, either by inference or by the force of express direction, to qualify or abridge the estate in fee or in tail, as the case may be, into which, upon a gift to a man for life, with remainder to his heirs, or the heirs of his body, the law inexorably converts the entire devise in favor of the ancestor." (Per Cockburn, C. J., *Jordan v. Adams*, 9 C. B. N. S. 497, E. C. L. R. vol. 99.)

"Neither an intent manifested by the testator to give only an *185] estate for life, nor the interposition of trustees to *preserve contingent remainders, nor mere words of condition describing the order in which the devisees are to take, nor the introduction of powers of jointuring or of liberty to commit waste, are of themselves sufficient to vary the technical sense of the words used." (*Poole v. Poole*, 3 B. & P. 627.)¹

So, on the other side, with reference to the estate to the heirs, although the devisor may have annexed to it incidents wholly inconsistent with an estate by descent, as that the heirs shall take according to the appointment of the ancestor, or that the heirs shall take as tenants in common, or share and share alike, or without regard to seniority of age, . . . no inference arising from such provisions can be allowed to prevail against the rule of law." (Per Cockburn, C. J., 9 C. B. N. S. 498, E. C. L. R. vol. 99.)²

In *Jesson v. Wright*, 2 Bligh 1, the devise was to A. for life, and after his decease to the heirs of his body in such shares and proportions as A. should appoint, and in default to the heirs of his body, share and share alike as tenants in common, and if but one child, the whole to such only child: it was held that A. took an estate tail.

Words of limitation and distribution.—It is entirely settled, at the present day, that words implying that the heirs are to take

¹ Doeblers Appeal, 64 Penn. St. 17.

² *Dodson v. Ball*, 60 Penn. St. 493; *Ball v. Payne*, 6 Rand. 73.

distributively or together, and not successively (as, if the devise be to the heirs of the body, share and share alike as tenants in common), do not exclude the rule, but are rejected as repugnant. (*Jesson v. Wright*, 2 Bligh 1; *Mills v. Seward*, 1 Jo. & H. 733; *Grimson v. Downing*, 4 Drew. 125.)¹

Words of limitation superadded.—The effect of words of limitation superadded to the gift to the heirs of the body, is not perhaps so conclusively settled.² It was formerly held (1) that if the words of limitation were such as to change the course of descent (as, if the devise were to A. for life, with remainder to the heirs of his body and the heirs *male* of their bodies), the heirs of the body took by purchase (*Shelley's Case*, 1 Rep. 95 b.); and (2) that words of limitation to *the heirs general [*186 of heirs of the body, coupled with words of distribution, and without a gift over on failure of issue of the ancestor, were sufficient to explain "heirs of the body," as meaning children: so that under a devise to A. for life, with remainder to the heirs of his body, their *heirs and assigns*, share and share alike, the children of A. took in fee as purchasers. (*Doe v. Laming*, 2 Burr. 1100; *Right v. Creber*, 5 B. & C. 866, E. C. L. R. vol. 11.)³

But, though these cases have not been expressly overruled, it is, on the other hand, now settled by authority (1) that a devise to A. for life, with remainder to the heirs *male* of his body, their heirs and assigns, with a gift over on failure of male issue, does not exclude the rule (*Wright v. Pearson*, Fearn C. R. 126; *Nash v. Coates*, 3 B. & Ad. 839, E. C. L. R. vol. 23); and (2) that the rule is not excluded by words of limitation to the heirs

¹ *Cooper v. Cooper*, 6 R. I. 261; *Quick v. Quick*, 6 C. E. Green 13; *Curtis v. Longstreth*, 44 Penn. St. 302; *Moore v. Brooks*, 12 Gratt. 135; *Ross v. Toms*, 4 Dev. 376.

² It is now settled by recent decisions in England and Pennsylvania, *infra*, p. 195, note.

³ *Haliburton v. Haliburton*, 2 Oldr. (N. Sc.) 247. In *Prescott v. Prescott*, 10 B. Mon. 56, *Doe v. Laming* and kindred cases are followed and words of distribution, &c., are held to exclude the rule, especially where there is a clear intention to give but a life estate. *Jesson v. Wright* is cited, but the Court express a determination to adhere to the older authorities. And so *Myers v. Anderson*, 1 Strobb. Eq. 346; *Lillibridge v. Ross*, 31 Ga. 730.

general of heirs of the body, coupled with words of distribution, there being a gift over on failure of issue of the ancestor. (*Mills v. Seward*, 1 Jo. & H. 733; *Measure v. Gee*, 5 B. & Ald. 910 (E. C. L. R. vol. 7). See, also, *Toller v. Attwood*, 15 Q. B. 929, E. C. L. R. vol. 69.)

Upon the whole it is conceived that, as the rule now stands, words of limitation (whether general or special) will in future be held to have no more effect than words of distribution in excluding the operation of the rule. (See *Mills v. Seward*, 1 Jo. & H. 733.) Thus a devise to A. for life, with remainder to the heirs of his body, share and share alike, their heirs and assigns (or, heirs male), would vest in A. an estate tail, the inconsistent words being rejected as repugnant.¹

¹ The later English authorities have been very generally adopted in the United States: *Moore v. Brooks*, 12 Gratt. 135; *Carter v. McMichael*, 10 S. & R. 429; *Folk v. Whitley*, 8 Ired. 133.

A devise to A. for life and after her death to the heirs of her body and to their heirs and assigns, with a gift over on the death of A. without issue surviving her, is within the rule: *Manchester v. Durfee*, 5 R. I. 549. And so a devise to A. for life and to the male heirs of his body and their descendants, with a gift over on the death of A. without such male heirs of his body or their descendants living at the time of his death: *Jillson v. Wilcox*, 7 R. I. 515. So a devise to A. and the lawful heirs of his body and their heirs and assigns, without any limitation over: *Buxton v. Uxbridge*, 10 Metc. 87; *Brown v. Lyon*, 2 Seld. 419. So a devise to A. for life, remainder to the heirs male of his body and the heirs and assigns of such male heirs or heir, and for want of such heirs male, over: *Carter v. McMichael*, 10 S. & R. 429; *George v. Morgan*, 16 Penn. St. 95; *Folk v. Whitley*, 8 Ired. 133; and without limitation over; *Coon v. Rice*, 7 id. 217.

But in *Tanner v. Livingston*, 12 Wend. 83 (decided in 1834), the older English cases are followed. This case is explained in *Schoonmaker v. Sheely*, 3 Denio 489, as follows: The gift was to the heirs male and their heirs. The statute had abolished entails, and primogeniture had also been abolished. The object of the testator was to give the estate to sons or male descendants, and the superadded words of limitation to the heirs general clearly showed that the testator could not have intended to limit an estate to any persons which would at common law have been an estate tail. In *Brant v. Gelston*, 2 Johns. Cas. 384, a devise to A. for life and after his death to the heirs of his body and his, her or their heirs and assigns for ever, equally to be divided between them share and share alike, was held to be within the rule. This was a deed made before estates tail were abolished.

Words of explanation.—But if the testator himself *explain* the words in question in a secondary sense, as by saying in effect “by heirs of the body—I mean first and other sons,” &c., the rule is excluded.

As where the devise was “to A. and his heirs lawfully begotten, *that is to say*, to his first, second and other sons successively, and the heirs of their bodies.” (*Lowe v. Davies*, 2 Lord Raym. 1561.) So, where the devise was “to the heirs male of the body of A., the elder of *such *sons* and the heirs male of his [187 body being preferred to the younger of such sons and the heirs male of their bodies, and for default of such issue to the daughters of the body of A.,” &c. (*Goodtitle v. Herring*, 1 East 264.)

So, where the devise was to four persons as tenants in common for life, with remainder as to the share of each to his children in strict settlement, a limitation over on failure of issue of any of the four to the survivors “and the heirs of their bodies *in manner aforesaid*,” was held to be explained by the preceding limitations, and not to create an estate tail. (*Doe d. Woodall v. Woodall*, 3 C. B. 349, E. C. L. R. vol. 54.)

In *Jordan v. Adams*, 9 C. B. N. S. 483, Ex. Ch. (E. C. L. R. vol. 99), where the devise was to A. for life, with remainder to the heirs male of his body for their lives, “in such proportions as the said A., *their father*, should appoint,” it was held by a majority of judges that “heirs male of the body” were explained to mean sons only.

Expressions which imply that children are included among heirs of the body, but not that heirs of the body are confined to children, do not exclude the rule. Thus a devise to the heirs of the body, “and if *but one child*, the whole to such only child,” is within the rule. (*Jesson v. Wright*, 2 Bligh 1.) *Gummoe v. Howes*, 28 B. 184, seems inconsistent with this.¹

¹ In a devise to A. for life, remainder to the heirs of his body, C. B., son of said A., excepted, the latter clause, excluded the rule: *Blake v. Stone*, 27 Vt 475.

Where the heirs are referred to as persons already in existence, the rule does not apply; as in a gift to the heirs of the body of A., the said A. to have the use and enjoyment of the property during his life: *Roberts v.*

But in *North v. Martin*, 6 Sim. 266, the expression "and if more children than one, equally to be divided among them," following the gift to the heirs of the body, was held to imply that heirs of the body meant only children.

Executory trusts.—The rule which gives to "heirs of the body" their technical meaning is not so inflexibly applied to directions to settle lands by way of executory trust. (*Papillon v. Voice*, 2 P. Wms. 471; *Fearne C. R.* 145; *Jervoise v. Duke of Northumberland*, 1 J. & W. 539.) "Where there is an executory trust, where the testator has directed something to be done, and has not himself, according to the sense in which the Court uses these words, *188] completed the devise in question, the Court has *been in the habit of looking to see what was his intention; and if what he has done amounts to an imperfection, with respect to the execution of that intention, the Court inquires what it is itself to do, and it will mould what remains to be done so as to carry that intention into execution. (Per Lord Eldon, 1 J. & W. 570.)

Thus, although a direction to settle lands on A. and the heirs of his body, *simpliciter*, would probably make A. tenant in tail (*Seale v. Seale*, 1 P. W. 290); yet, if the testator show an intention that the first taker should not be made tenant in tail (as, if the direction be to settle and assure lands, as counsel should advise, to the use of A. *for life*, and after his decease on the heirs of his body), the Court would direct a conveyance to uses in strict settlement. (*Bastard v. Proby*, 2 Cox 6.)¹

Ogbourne, 37 Ala. 175. So, a gift to A. for life, for her support and for the support of the heirs of her body begotten, and after her death to the heirs of her body begotten, does not come within the rule: *Powell v. Glenn*, 21 Ala. 458; nor does a limitation to A. for life, remainder to his heirs, "born and to be born;" *Woodruff v. Woodruff*, 32 Ga. 358.

Where there is only a *loan* to A. for life, which implies not the title, but the use, the estates are considered as not of the same nature, and the rule does not apply: *Loving v. Hunter*, 8 Yerg. 4; *Settle v. Settle*, 10 Humph. 474; *Vaden v. Hance*, 1 Head 301.

¹ *Wood v. Burnham*, 6 Paige 513; *Edmundson v. Dyson*, 2 Kelly 307.

Heirs of the Body—Personal Estate.

It has sometimes been laid down that whatever words in a devise of real estate would create an estate tail, confer the absolute interest in personal estate. This, however, is too large a proposition: the word "issue," for instance, receives a different construction, according as the subject of the gift is real or personal estate (as will appear subsequently); as regards the technical words "heirs of the body," however, the statement is perhaps correct; it is at all events the rule that—

RULE. A bequest of personal estate or chattels real to A. and the heirs of his body, or to A. for life, and after his decease to the heirs of his body, vests the property in A. absolutely. (*Earl of Chatham v. Tothill*, 7 Bro. P. C. 453; *Elton v. Eason*, 19 Ves. 73; *Williams v. Lewis*, 6 H. L. C. 1013.)¹

So, a bequest to A. and the heirs *male* of his body, or to A. for life, and after his decease to the heirs male of his body, is an absolute gift to A. (*Ib.*; *Britton v. Twining*, 3 Mer. 176.)

*" It is clearly settled, that a bequest of personal property to a man for life, and afterwards to the heirs of his body, is an absolute bequest to the first taker. Whatever disposition *would amount to* an estate tail in land, gives the whole interest in personal property; which is incapable of being entailed." (*Elton v. Eason*, 19 Ves. 78.)

In *Williams v. Lewis*, 6 H. L. C. 1013, under a bequest of leaseholds in trust to permit A. to receive the rents for life, with remainder to his heirs male and the heirs male of their bodies, and in default of issue over, the rule was applied, and A. held entitled absolutely.²

¹ *Horne v. Lyeth*, 4 Har. & Johns. 431; *Floyd v. Thompson*, 4 Dev. & Bat. 478; *Donnell v. Mateer*, 5 Ired. Eq. 7; *Myers v. Pickett*, 1 Hill Ch. 35; *Choice v. Marshall*, 1 Kelly 97; *Childers v. Childers*, 21 Ga. 377; *Machen v. Machen*, 15 Ala. 373; *King v. King*, 12 Ohio 390.

² So a bequest to A. for life, remainder to the heirs of his body and their heirs, is an absolute estate in A.: *Coon v. Rice*, 7 Ired. 217. Words of dis-

The context, however, may *explain* the meaning of "heirs of the body" to be confined to children. (*Symers v. Jobson*, 16 Sim. 267.)¹

ISSUE.

Real Estate.

The effect of the word "issue" in devises of real estate, as a word of limitation or of purchase, has been much controverted. "Issue" is less technical than "heirs of the body," inasmuch as it points out the objects, *viz.*, all generations of descendants, but not the manner in which they are to take, *i. e.*, by descent as heirs. In the important case of *Roddy v. Fitzgerald*, 6 H. L. C. 823, the *ratio decidendi* of the Lords shows the disposition of the Courts now to be, to place "issue" as nearly on a level with the technical words "heirs of the body" as the course of previous decisions will admit: and although it was formerly said that "issue" was *either* a word of purchase or limitation, as would best answer the intent of the devisor (*Doe v. Collis*, 4 T. R. 294),² it is now firmly established as a rule of construction, that—

tribution do not affect the application of the rule: *Ewing v. Standerfer*, 18 Ala. 400.

But in North Carolina it has been held that words of distribution, "manifesting an intention that the legatees shall take distributively, and as purchasers, not in succession, but all at the same time," especially when followed by a gift over in case of death "without surviving child or children" will, in a gift of personal property, take the case out of the rule. *Jesson v. Wright* is considered applicable to real estate only: *Allen v. Pass*, 4 Dev. & Bat. 77; *Swain v. Rascoe*, 3 Ired. 200; *Lilliard v. Reynolds*, *id.* 366. In a gift of personalty to A. for life and after her death to the heirs of her body, their executors, administrators, or assigns, it has been held that the heirs of the body take as purchasers: *Bradley v. Mosby*, 3 Call 56.

In South Carolina and Georgia it has been held that in a gift of personalty to A. and the heirs of his body, a gift over in event of the death of A. without heirs of his body, or issue living at his death, takes the case out of the rule, and the heirs of his body take as purchasers: *Nix v. Ray*, 5 Rich. 423; *Carlton v. Carlton*, 10 Ga. 496; *Jones v. Jones*, 20 *id.* 701.

¹ *Re Jeaffreson's Trusts*, L. R. 2 Eq. 279.

² In accordance with the doctrine of *Doe v. Collis* are *Wells v. Ritter*, 3 Whart. 217; *Taylor v. Taylor*, 63 Penn. St. 483; *Hill v. Hill*, 74 *id.* 173; *Chelton v. Henderson*, 9 Gill 436; *Shreve v. Shreve*, 43 Md. 382; *Timanus v. Dugan*, 46 *id.* 402; *Stump v. Jordan*, 58 *id.* 619.

RULE. In devises of real estate, "issue" is *prima facie* a word of limitation, and equivalent to "heirs of the body." (Roe d. Dodson v. Grew, Wilm 272; Roddy v. Fitzgerald, 6 H. L. C. 823; Woodhouse v. Herrick, 1 K. & J. 352.)¹

*Thus, a devise to A. and his issue, or to A. for life, and after his decease to his issue, vests in A. an estate tail. (Roddy v. Fitzgerald, 6 H. L. C. 823.)²

"The word issue is *ex vi termini nomen collectivum* and takes in all issue to the utmost of the family, as far as heirs of the body could do." (Per Rainsford, J., Warman v. Seaman, Finch 282.)

In *Harrison v. Harrison*, 7 M. & Gr. 938 (E. C. L. R. vol. 49), the testator devised his "estates" to his children as tenants in common, with remainder to their issue as tenants in common, with no gift over: the words importing distribution among the issue being held (apparently) to mean distribution *per stirpes* only, it was held that the children took as tenants in common in tail. The case is thus an authority that under a devise to A. for life, with remainder to his issue, if neither words of limitation nor of distribution be annexed to the gift to the issue, A. takes an estate tail, although there be no gift over on failure of his issue, and although the issue be capable of taking the fee as purchasers: as they would be in every case where the will is subsequent to 1837.³

Words of distribution rejected.—And if, in a will made before 1838, lands be devised to A. for life, with remainder to his issue *share and share alike* as tenants in common, or with other words implying that the issue are to take concurrently, and there is a gift over on failure of issue of A., inasmuch as the issue, if taking

¹ *Kingsland v. Rapelye*, 3 Edw. Ch. 6; *Angle v. Brosius*, 43 Penn. St. 189; *Wynne v. Wynne*, 9 Heisk. 308.

² *Rancel v. Creswell*, 30 Penn. St. 158; *Buist v. Dawes*, 4 Strobh. Eq. 47.

³ *Kingsland v. Rapelye*, 3 Edw. Ch. 8. "Offspring" is synonymous with issue, and a devise to A. for life remainder to his offspring creates an estate tail: *Allen v. Markle*, 36 Penn. St. 117; *Bramble v. Billups*, 4 Leigh 90.

by purchase, would take for life only, the words implying distribution are rejected, and A. is held to take an estate tail, in order to carry out the general intention that all the issue should take. (*Doe v. Applin*, 4 T. R. 82; *Kavanagh v. Morland*, Kay 16; *Roddy v. Fitzgerald*, 6 H. L. C. 823; *Woodhouse v. Herrick*, 1 K. & J. 352.)

And, in such a case, there is no authority for the construction which would give to the issue estates for life by purchase, with *191] an estate tail *in remainder* only to the *parent by implication. (*Roddy v. Fitzgerald*, 6 H. L. C. 823; see *per Crompton, J.*, p. 859.)

In *Roddy v. Fitzgerald*, 8 H. L. C. 823, lands were devised to A. for life, and after his decease to his issue in such manner, shares, and proportions as A. shall appoint, and in default of appointment to his issue *equally* if more than one, and if only one *child* to said child, with a gift over on failure of issue of A. It was held that, there being an express devise to the issue in default of appointment, the estates for life which the issue would take, if taking by purchase, could not be enlarged by implication from the terms of the power, and therefore A. was held to take an estate tail: the words "if only one child," &c., not being held to vary the construction.

In *Doe v. Rucastle*, 8 C. B. 876 (E. C. L. R. vol. 54), the devise was of lands to A. for life with remainder to his issue, if more than one *equally* amongst them, with a gift over if A. should die without issue *living at his death*: and A. was held to take an estate tail.

Whether, in the case of there being words of distribution annexed to the gift to issue, but the issue not being capable of taking the fee, the first taker would be held to take an estate tail, *if there were no gift over*, or whether the issue would take estates for life by purchase, *qu.*?

Where, however, there are words of distribution, and the issue can take the fee as purchasers, the rule is different, although there be a gift over on failure of issue of the first taker: as will appear subsequently.

Issue taking by Purchase.

Notwithstanding that, as before observed, the dispositions of the courts now is to place "issue" as nearly as may be on a level with "heirs of the body," yet the cases, of which *Lees v. Mosley*, 1 Y. & C. 589, is the leading authority, establish a marked distinction between the two expressions, showing that a less demonstrative context will suffice, in certain cases, to convert "issue" into a word of purchase, than to alter the meaning of the technical words "heirs of the body."¹ Words of distribution are insufficient to alter the meaning of "heirs of the body" (*Jesson v. Wright*, 2 Bligh 1); but words of distribution and of limitation, annexed to a devise to issue, suffice to show an intention that the issue should take by purchase: it being a rule that—

Lees v. Mosley.

RULE. "Where there is a devise to one for life, with remainder to his issue *as tenants in common*, with a limitation to the *heirs general* of the issue, the issue take as purchasers in fee." (Per Parke, J., *Slater v. Dangerfield*, 15 M. & W. 273; *Lees v. Mosley*, 1 Y. & C. 589; *Greenwood v. Rothwell*, 5 Man. & G. 628 (E. C. L. R. vol. 44); 6 Beav. 492.)²

The rule, that words of limitation and distribution (together) convert "issue" into a word of purchase, applies, although there be gift over, in the event of the first taker dying without issue,

¹ In *Chelton v. Henderson*, 9 Gill 482; *Tongue v. Nutwell*, 13 Md. 416, it is held that where there is a clearly expressed intention to create an estate for life only in the first devise, the issue will take as purchasers; and in the latter case it was so held notwithstanding a gift over upon an indefinite failure of issue.

In South Carolina the rule of *Nix v. Ray* is followed in gifts to issue, and if there be a gift over on a definite failure of issue the issue take as purchasers: *Williams v. Caston*, 1 Strobb. 130; *Buist v. Dawes*, 4 Rich. Eq. 421; *Simons v. Bryce*, 10 S. C. 354.

² *Powell v. Board of Missions*, 49 Penn. St. 54; *Robins v. Quinliven*, 70 id. 333. In *New York, Kingsland v. Rapelye*, 3 Edw. Ch. 1, is directly contrary to this rule.

or without leaving issue: and the gift over takes effect as an alternative contingent remainder, in the event of there being no issue to take the fee as purchasers. (*Golder v. Crop*, 5 Jur. N. S. 252; *Lees v. Mosley*, 1 Y. & C. 589; *Kavanagh v. Morland*, Kay 16.) "I have always considered that where an estate is given to the ancestor, and there is a direction that it is afterwards to go to the issue of his body, and the mode in which the issue are to take is specified, with words added giving them the absolute interest, then the ancestor takes an estate for life and not an estate tail, although there is a devise over in the event of the ancestor not having (*qu.* leaving?) any issue." (Per Romilly, M. R., 5 Jur. N. S. 252.)

It would appear that the rule should apply, and the issue take by purchase, wherever there are words of limitation inconsistent with an estate tail in the ancestor, added to words of distribution. As, if the devise were to A. for life, remainder to his issue and *193] their heirs *male* as *tenants in common, the issue should, it would seem, take estates by purchase in tail male.

And in *Parker v. Clarke*, 6 D. M. G. 106, under a devise to several in equal shares and the survivors and survivor for life, with remainder to their issue as tenants in common and the *heirs of their bodies*, with cross remainders in tail between the issue, it was held that the issue took as purchasers.

Words of distribution alone.—The principle of *Lees v. Mosley* has been extended further; and the law appears to be, that where there is a devise to one for life and after his decease to his issue, with words of distribution (as, to the issue, "share and share alike as tenants in common," "equally to be divided among them," &c.) annexed to the gift to the issue, but without super-added words of limitation; yet, if the issue taking by purchase can take the fee by the terms of the devise, the issue take by purchase, words of distribution alone being held to control the meaning of "issue," though ineffectual with respect to the more highly technical words "heirs of the body." This doctrine, founded on *Hockley v. Mawbey*, 3 Bro. C. C. 82, was expressly laid down in *Montgomery v. Montgomery*, 3 Jo. & Lat. 47, and *Crozier v. Crozier*, 3 D. & War. 373, by Lord St. Leonards, and

recognized as valid in *Kavanagh v. Morland*, Kay 16, and in the opinions of the judges in *Roddy v. Fitzgerald*, 6 H. L. C. 823; and was not impugned by the Lords who decided the latter case.¹

Thus if the devise be of an "estate," or of the testator's "part" of lands to one for life, with remainder to his issue, or issue male, share and share alike (*Montgomery v. Montgomery*, 3 Jo. & Lat. 47), or if the devise be to A. for life, with remainder to his issue, to be divided amongst them as A. should appoint, subject to the payment of an annuity by the persons becoming entitled under the devise (*Crozier v. Crozier*, 3 D. & War. 373), the issue take a constructive fee simple as purchasers. So if the devise be to A. for life, with remainder to his issue as tenants in common, with a gift over in the event of the *issue dying [*194 under twenty-one (*Doe v. Burnsall*, 6 T. R. 30), the issue taking the fee by force of the gift over, take as purchasers.

And the case is the same, although there be a gift over in the event of the ancestor dying without issue; the gift over being construed as an alternative contingent remainder, to take effect in the event of there being no issue to take the fee by purchase under the gift to them. (*Montgomery v. Montgomery*, 3 Jo. & Lat. 47; *Kavanagh v. Morland*, Kay 16.) "If there be a gift to the issue, and a limitation in the will with reference to them, which has the effect of giving them the fee simple, then if there be a gift over in case of dying without issue, the gift over affords no evidence of intention to justify the application of the rule in *Shelley's Case*, because the fee was in the issue, and the words "dying without issue," are consequently held to mean only such issue as were before mentioned, as in the cases of *Hockley v. Mawbey*, 1 Ves. jr. 142; and *Leeming v. Sherratt*, 2 Hare 14. But it must first be made out that the fee is in the issue as purchasers." (*Kavanagh v. Morland*, Kay 16.)

Words of distribution referred to first takers.—But where the devise is, not to one, but to several, *as tenants in common* for life, with remainder to their issue "as tenants in common," or "equally to be divided," the words of distribution *may* be referred

¹ The doctrine of *Montgomery v. Montgomery*, was approved in *Bradley v. Cartwright*, L. R. 2 C. P. 521; *Symmes v. Moulton*, 120 Mass. 343.

to the first takers, so as to import distribution among the issue *per stirpes* only; and thus the first takers may be held to take estates tail as tenants in common, although the issue might be capable of taking the fee as purchasers. (*Tate v. Clarke*, 1 B. 100; *Harrison v. Harrison*, 7 M. & Gr. 938, E. C. L. R. vol. 49.)

Wills since 1837.—The result of the doctrine of *Montgomery v. Montgomery* will be, as regards wills made or republished on or after January 1, 1838, that under a devise to A. for life, and after his decease to his issue as tenants in common, A. will take for life only, and his issue born in his lifetime will take the fee simple in remainder, notwithstanding a gift over on failure of issue of A.¹

*195] *Words of limitation only.*—Whether, under a devise to *A for life, and after his decease to his issue, words of limitation alone, superadded to the gift to issue, without words implying that the issue are to take concurrently, are sufficient to convert “issue” into a word of purchase, is not yet completely settled.²

¹ This was expressly decided in North Carolina in respect to their statute of 1784: *Ward v. Jones*, 5 Ired. Eq. 400.

² The question suggested in the text is no longer doubtful. In the very recent case in Pennsylvania of *Carroll v. Burns*, 15 Weekly Notes of Cases (Phila.) 553, the devise was: “all the rest, residue, and remainder of my estate, real and personal, I devise and bequeath unto my said three daughters, to have and to hold to them during their natural lives, and after their death then to the lawful issue of my said three daughters and the heirs and assigns of such issue,” and the court held that as the devise was within the rule in *Shelley's Case* the daughters took an estate tail which under the Act of April 27, 1855, was converted into a fee simple. “The rule is unquestioned,” said Trunkey, J., delivering the opinion of the court “that *primâ facie* in a will the word issue means ‘heirs of the body,’ and will be construed as a word of limitation, unless there be explanatory words showing it was used in a restricted sense. It is urged that the word ‘such,’ with the form of expression where used, is sufficient to show that by ‘issue’ the testatrix meant children. There is no other explanatory word. . . . The clause . . . is the equivalent of ‘issue and their heirs.’ Technical words, or words of a definite meaning, must be construed according to their legal or definite effect unless from other inconsistent words in the will, it be clear that they are used in some other definite sense. Applying the legal rules of interpretation the intendment of this devise is plain. A long current

It is clear that if the words of limitation do not enlarge the course of descent, as if the devise be to A. for life, with remainder to his issue and the heirs of their bodies, or to his issue male and the heirs male of their bodies, there is no ground for excluding the ordinary rule, and A. will take an estate in tail or in tail male. (*Roe v. Grew*, *Wilmot* 272.) And it would appear to

of decisions in England and in this Commonwealth, has established and continued in force a rule as follows: 'When the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, that always in such cases the heirs are words of limitation of the estate, and not words of purchase.' The rule operates to give the ancestor an estate for life in the first instance, and by force of the devise to his heirs, general or special, the inheritance also, by conferring the remainder on him as the stock from which alone they can inherit, and the source from which alone inheritable blood can spring. . . . Perhaps the testatrix intended to give a life estate to her daughters, and the remainder in fee to their children; but she has used words which definitely vest in her daughters an estate tail, and the courts are not at liberty to wrest them so that they may mean anything else."

A note to the above case by Joseph P. Gross, author of "The Rule in *Shelley's Case* in Pennsylvania," contains the following reference to a very recent English case where the same principle prevailed.

"In *Williams v. Williams*, 33 *Weekly Reporter*, 118 (not yet reported in the *Law Reports*), the Chancery Division of the High Court of Justice of England held that in a devise, made in 1860, the mere addition of a limitation to the heirs, executors, administrators, and assigns of the issue will not prevent the word 'issue' from operating as a word of limitation to give an estate tail. The limitations in that case are almost identical with those in *Carroll v. Burns*, viz., 'to be equally divided to and amongst my said six nephews, share and share alike, and their issue after them, to and for their heirs, executors, administrators, and assigns.' The question was whether the word 'issue' was a word of limitation or of purchase. Chitty, J., said: 'The word "issue" is *primâ facie* a word of limitation, which can be turned into a word of purchase more easily than the word "heir," but the mere addition of words of limitation is not sufficient to turn it into a word of purchase. . . . I think that, on the true construction of this will, the word "issue" is a word of limitation, and that, treating the disposition as a whole, I must reject the words "heirs, executors, administrators and assigns," and hold that there is an estate tail in the six nephews. I am compelled to say there is an estate tail or an estate in fee simple, and I think that the words "their issue after them," must have some effect given to them. I see no other way of dealing with them than by saying that they are governing words, and, consequently, the six nephews take an estate tail general.'"

be immaterial, whether there be or not a gift over on failure of issue of A.

Again, a devise to A. for life, with remainder to his issue and their heirs, or heirs and assigns, followed by a gift over on failure of issue of A., vests in A. an estate tail; the limitation to the heirs general of the issue being restrained to heirs of the body by force of the gift over, so as to reduce the devise to one to A. for life with remainder to his issue and the heirs of their bodies. (*Frank v. Stovin*, 3 East 348; *Denn v. Puckey*, 5 T. R. 299; *Franklin v. Lay*, 6 Madd. 258.)¹

But under a devise to A. for life, with remainder to his issue and their heirs, *without* a gift over on failure of issue of A., it has been laid down by Lord St. Leonards in *Montgomery v. Montgomery*, 3 Jo. & Lat. 47, that the words of limitation exclude the rule, and that the issue take by purchase. This appears to rest on the authority of *Doe d. Cooper v. Collis*, 4 T. R. 294, where an estate was devised in moieties, viz., one moiety to A. and his heirs, and the other moiety to B. for life, and after his decease to his issue and their heirs; and it was held that the issue took by purchase. In this case the devise of the other moiety strongly favored the construction.

On the other hand, in *Parker v. Clarke*, 6 D. M. G. 109, Lord Cranworth, C., said, "I quite agree with the general rule which has been advanced in the argument, that where the gift is to one *196] for life, and after his death *to the issue of his body and the heirs of such issue for ever, there by the addition of words of limitation, the testator is merely using words which are idle, and which shall not prevail to convert the word 'issue' into a word of purchase." And considering the disposition shown in *Roddy v. Fitzgerald*, 6 H. L. C. 823, to put a devise to "issue" more nearly on a level with "heirs of the body," it may perhaps be doubted whether *Montgomery v. Montgomery* is, on this point, an authority at the present day.²

¹ *Paxson v. Lefferts*, 3 Rawle 59; *Kleppner v. Laverty*, 70 Penn St. 70; *Carroll v. Burns*, 15 W. N. C. (Pa.) 553, *supra*; *Taylor v. Taylor*, 63 Penn. St. 484; *Gonzales v. Barton*, 45 Ind. 295.

² In South Carolina, in a devise to A. for life, remainder to his issue *for ever*, it is held that the words "for ever" being equivalent to a limitation in

Words of explanation.—The word “issue” may, of course, like “heirs of the body,” be converted into a word of purchase by words of *explanation*; as if the devise be to A. for life, with remainder to his issue male, “the eldest of *such sons* always to be preferred before the youngest,” &c. (*Mandeville v. Lackey*, 3 Ridg. P. C. 352.) But the expression, “and if *but one child*, the whole to said child,” following a devise to issue, does not imply that “issue” is confined to children. (*Roddy v. Fitzgerald*, 8 H. L. C. 823.)¹

But where *personal* estate was given to the issue of A., “and if only one child, then to such one child,” it was held that “issue” was confined to children. (*Carter v. Bentall*, 2 B. 551.)

Executory trusts.—The rule which construes “issue” as a word of limitation in devises does not apply so strictly to a direction to settle lands by way of executory trusts. Thus, if land be directed to be settled on A. for life, with remainder to his issue, A. will be held to take for life only. (*Meure v. Meure*, 2 Atk. 265; *Lord Glenorchy v. Bosville*, Cas. t. Talb. 3.) So if the direction be to settle on A. and his issue male by his present wife. (*Parker v. Bolton*, 5 L. J. Ch. N. S. 98.) And in *Hadwen v. Hadwen*, 23 B. 551, under a direction to purchase lands to be settled on A. for life, “and then divided among his issue if any,” the children of A. were held to take as tenants in common in tail, with cross remainders.

fee to the issue, they take as purchasers: *Myers v. Anderson*, 1 Strobh. Eq. 344; *M'Lure v. Young*, 3 Rich. Eq. 376.

In North Carolina (*Ward v. Jones*, 5 Ired. Eq. 405), it is held that the Act of 1784 converting estates tail into estates in fee simple, has the effect of putting devises and bequests on the same footing in respect to the construction of gifts to A. for life, with remainder to the heirs of his body, his issue, &c.; so that any words which in a bequest of personalty would be construed words of purchase, will be so construed in a devise of realty made since that act. And in South Carolina, the fact that estates tail have never existed has been held to the same effect on the construction of such devises. *Buist v. Dawes*, 4 Rich. Eq. 423.

¹ The expression, “such issue to inherit their mother's rights,” confines the meaning of the word issue to children, and they therefore take as purchasers: *Taylor v. Taylor*, 63 Penn. St. 484. The same effect has been given to the phrase “issue or children:” *Hill v. Hill*, 74 Penn. St. 178.

*[197] *"Issue" in relation to personal estate.*—The rule that "issue" is *prima facie* a word of limitation, does not extend to bequests of personal estate. (*Knight v. Ellis*, 2 Bro. C. C. 570; *Ex parte Wynch*, 5 D. M. G. 188.) If it be clear that the testator intended to make such a disposition of personal estate as would in the case of real estate amount to an estate tail, the first taker will take the absolute interest; but it is not the case that every expression which would create an estate tail in real estate, will be held to indicate the same intention in the case of personal estate. On this point *Ex parte Wynch* establishes a distinction with respect to "issue," similar to that in *Forth v. Chapman*, 1 P. Wms. 668, with respect to "die without leaving issue."

Thus if personal estate or chattels real be given to A. for life, and after his decease to his issue, A. takes for life only, and the issue take in remainder: although there be a gift over on failure of issue of A. (*Knight v. Ellis*, 2 Bro. C. C. 570; *Ex parte Wynch*, 5 D. M. G. 188; *Goldney v. Crabb*, 19 B. 338.)¹

Bequest to A. and his issue.—And although it was formerly held that a bequest of personal estate to A. and his issue was an absolute gift to A. (*Parkin v. Knight*, 15 Sim. 83), it would appear that this construction would not now be adopted, even though, as was the case in *Parkin v. Knight* (but as was also the case in *Forth v. Chapman*), real and personal estate be given together by the same words. A gift of real estate to A. and his issue of course confers an estate tail; but a bequest of personal estate to A. and his issue would seem to be governed by the same rules (so far as the gift to issue is concerned) as a bequest to the issue of A. *simpliciter*. Thus, if the gift be immediate, A. and his issue (if any) living at the testator's death would take in joint-tenancy; and if the gift be deferred, issue subsequently born before the period of distribution would be admitted along with them; and if no issue had come into existence before the period

¹ *Myers's Appeal*, 49 Penn. St. 111; *McGarry v. Thompson*, 29 Grant Ch. (U. C.) 287, where the rule was recognized but the circumstances did not call for its application. But *Moore v. Paul*, 7 Rich. Eq. 358, is contrary to the rule stated in the text. Chancellor Durgan considers *Knight v. Ellis* as overruled by *Attorney-General v. Bright*, 2 Keen 57, which, however, is denied in *Ex parte Wynch*.

of distribution, A. would take the whole. But slight circumstances would probably be *held to show an intention that the issue should take in remainder, after a life interest in the parent¹ [*198]

WILD'S CASE.

Children.

Although "children" is not properly a word of limitation, it may be used as such, if the intention appear; but the presumption is against its being so used, except in the particular case following, viz:—

RULE. A devise of real estate to A. *and his children*, A. having no children at the time of the devise, vests in A. an estate tail: "children" being construed as a word of limitation. (Wild's Case, 6 Rep. 17; see *Webb v. Byng*, 2 K. & J. 669.)²

¹ If there be a gift over in the event of A. dying without issue living at his death, the issue will take as purchasers in remainder after the death of A. *Henry v. Means*, 2 Hill (S. C.) 328; *Cleveland v. Havens*, 2 Beas. 101.

² *Nightingale v. Burrell*, 15 Pick. 104; *Wheatland v. Dodge*, 10 Mete. 502; *Parkman v. Bowdoin*, 1 Sumn. 359; *Seibert v. Wise*, 70 Penn. St. 147; *Hilliary v. Hilliary*, 26 Md. 275; *Stump v. Jordan*, 54 id. 619; *Miller v. Hart*, 12 Ga. 359; *Gillespie v. Schuman*, 62 id. 252; *Biggs v. McCarty*, 86 Md. 352. "Children" was held to mean immediate offspring in *Paradis v. Campbell*, 6 Ont. 635.

Lord Cranworth in *Byng v. Byng*, 10 H. L. C. 178, says, "I have qualified the rule as stated by Lord Coke by introducing the words '*primâ facie*:' and it is clear that in acting on the rule in both its branches, the Courts have always considered themselves at liberty to disregard it where an adherence to it would defeat the intention of the testator as collected from other passages in the will." And in *Greive v. Greive*, L. R. 4 Eq. 180, where there was a devise of a house after a life estate in the sister of the testatrix, to two nieces and their children, a direction that the furniture should go with the house, was held a sufficient reason for not giving estates tail.

The fact that there is at the time of the devise, a child of A. *en ventre sa mere*, does not take the case out of the rule: *Roper v. Roper*, L. R. 3 C. P. 32.

Even though there be children at the time of the devise, if there is a gift over upon the death of A. without children, A. takes an estate tail; since

The rule does not apply to bequests of personal estate. (*Audsley v. Horn*, 1 De G. F. & J. 226.

The time of the devise appears to mean the date of the will, and not the death of the testator. (*Buffar v. Bradford*, 2 Atk. 220.)

"*Children*" a word of limitation.—But a devise to A. and his children *may* create an estate tail, although there be children at the date of the will. Thus in *Webb v. Byng*, 2 K. & J. 669, affd. 10 H. L. C. 171, where the testator devised "to A. and her children all my Quendon-Hall estates in E., provided *she* takes the name of Cranmer and arms, and her children, with my mansion house, furniture, &c., as heir-looms," A. was held to take an estate tail, the intention to preserve the estates in one body being apparent.

A devise to A. and "his children for ever," or to A. and "his children in succession" (*Earl of Tyrone v. Marquis of Waterford*, 1 De G. F. & J. 613), will create an estate tail.¹

the intent is manifest that the children should take not with, but after the parent: *Nightingale v. Burrell*, 15 Pick. 114; *Wheatland v. Dodge*, 10 Metc. 502.

Words of limitation and distribution exclude the rule, and in such case the parent takes a life estate with remainder to the children: *Sisson v. Seabury*, 1 Sumn. 242, *Nebinger v. Upp*, 13 S. & R. 68; *Hill v. Thomas*, 11 S. C. 346; *Tippin v. Coleman*, 59 Miss. 641.

In *Carr v. Estill*, 16 B. Mon. 309, the Court refused to follow the rule in *Wild's Case*, holding that in this country where estates tail have been abolished, and where the same precision and particularity are not observed in the creation of remainders as in England, the reasons for the rule fail, and the more reasonable and natural construction is to give a life estate to the parent with remainder to the children. The rule has never been followed in Tennessee: *Turner v. Ivie*, 5 Heisk. 222.

¹ *Roper v. Roper*, L. R. 3 C. P. 32.

A devise "to A., to her and her children," creates an estate tail in A. although there be children at the time of the devise: *Merrymans v. Merrymans*, 5 Munf. 440; *Lachland v. Downing*, 11 B. Mon. 33.

Jones v. Jones, 2 Beas. 236, and *Hadleman v. Hadleman*, 40 Penn. St. 29, are instances of the word "children" being construed a word of limitation.

The same construction was given to a somewhat similar devise of realty, in *Jackson v. Coggin*, 29 Ga. 403.

So even the word "son" may be a word of limitation (Robinson v. Robinson, 1 Burr. 38)—"to such son as he should have lawfully to be begotten"—or the word "heir," in the singular. (Co. Lit. 9 b, n. (4)).

**Bequest to A. and his children.*¹—A bequest of personal estate to A. and his children, or a similar devise of real estate not within the rule in Wild's Case, is *prima facie* a gift to the parent and children concurrently, and being a gift to a class is subject to the same rules as a gift to the children of A. (Crockett v. Crockett, 2 Phill. 553; Webb v. Byng, 2 K. & J. 669; De Witte v. De Witte, 11 Sim. 41; Gordon v. Whieldon, 11 B. 170.)²

Thus, if the gift be immediate, A. and his children (if any) living at the death of the testator will take as joint tenants: and if no children at that period, A. will take the whole. (Mason v. Clarke, 17 B. 130.) If the gift be deferred, A. will take jointly with his children living at the testator's death, and with those subsequently born before the period of distribution (Cunningham v. Murray, 1 De G. & S. 366); and if no such children, A. will take the whole. (Read v. Willis, 1 Coll. 86.) Again, if A. predeceased the testator, the gift would not lapse, but his children would be entitled.

¹ But see Appendix II.

² Hunt v. Satterwhite, 85 N. C. 73; Dryden v. Woods, 29 Grant Ch. (U. C.) 430; Re Biggar, 4 C. L. T. 494. See Nimmo v. Stewart, 21 Ala. 690; Biggs v. McCarty, 86 Ind. 352. But in Vanzant v. Morris, 25 Ala. 285, it was held that bequests of personalty as well as devises of realty come within the rule of Wild's Case, and a bequest to A. and his children, if A. has no children, is an absolute gift to A. But where the gift is not immediate, the application of the rule is not necessary, and the children, if there be any when the gift takes effect, take jointly with their parent. And see also Echols v. Jordan, 39 Ala. 24; and in North Carolina, Jenkins v. Hall, 4 Jones Eq. 338.

A gift of personalty to A. and her children for ever creates an absolute estate in A. But any appearance of an intention that the children shall take in remainder, *e. g.*, to A. and her children if she leaves any at her death, will exclude the rule: Shearman v. Angel, 1 Bail. Eq. 357; Dougherty v. Dougherty, 2 Strobb. Eq. 63.

But slight circumstances are sufficient to show an intention that the children should not take jointly with the parent. (*Crockett v. Crockett*, 2 Phill. 553.)¹

Thus where the bequest was to A. and his children "to be secured for their use," the latter words were held to refer to the shares of the children only, and they were held to take in remainder, so as to admit all after-born children. (*Vaughan v. Marquis of Headfort*, 10 Sim. 639.)² So where the gift, partly immediate and partly deferred, was to A. and her children, with a direction and other persons should be *trustees* of the sum for them. (*Morse v. Morse*, 2 Sim. 485.)

But in *De Witte v. De Witte*, 11 Sim. 41, a bequest of the residue to trustees in trust to sell and to stand possessed of the proceeds in trust for the sole use of A. and her children, independently of her husband, and her receipts alone to be a sufficient discharge, was held to be a gift to A. (for her separate use) and her children jointly.

*200] In *Audsley v. Horn*, 1 De G. F. & J. 226, under a bequest to A. for life, and at her death to her daughter B. and B.'s children, B. was held to take for life only with remainder to her children. *Sed qu.*

Gift over on Failure of Issue.

It has been already shown that a gift over to take effect on a general failure of issue, following a devise to one and his heirs, or heirs and assigns, restrains the previous devise to an estate tail. It is further the rule that—

¹ *Bridges v. Wilkins*, 3 Jones Eq. 342; *Faribault v. Taylor*, 5 id. 219. In a bequest "to A. and her children, heirs of her body," it was held that the addition of the words "heirs of her body" indicated that the children were not to take until after the death of their mother, and it was therefore a bequest to A. for life, with remainder to her children who should survive her: *Goss v. Eberhart*, 29 Ga. 546.

In *Furlow v. Merrill*, 23 Ala. 705, where the bequest was "to A. entirely for her benefit and her children," and A. was unmarried at the time the will was made and when it took effect, it was held that it was a gift to A. for life, with remainder to her children.

² *Noe v. Miller*, 31 N. J. Eq. 234.

RULE. A devise of real estate to A for life, or to A indefinitely, followed by a gift over on *general* failure of his issue, vests in A. an estate tail. (*Blackborn v. Edgley*, 1 P. W. 600; *Machell v. Weeding*, 8 Sim. 4.)¹

“I consider it to be a settled point, that whether an estate be given in fee, or for life, or generally without any particular limit as to its duration, if it be followed by a devise over in case of the devisee dying without issue” [*i. e.* in a will prior to 1837, where these words import a general failure of issue], “the devisee will take an estate tail.” (*Machell v. Weeding*, 8 Sim. 7.)

But, in a will since 1837, a devise to a person indefinitely, with a gift over on his death without issue, will confer an estate in fee simple with an executory devise over on death without issue living at the death: and a devise for life, with the like gift over, will confer only an estate for life.

Estate tail in remainder.—In some cases (*Parr v. Swindels*, 4 Russ. 283, *Doe v. Halley*, 8 T. R. 5; *Doe v. Gallini*, 3 Ad. & E. 340, E. C. L. R. vol. 30), under a devise to A for life, with remainder to his children for life or in tail, with a gift over on failure of issue of the parent, A. has been held to take an estate tail by implication from the gift over, in *remainder* after the estates limited to his *children; the doctrine of these [*201 cases, however, is not, perhaps, likely to be extended.

Personal estate.—A bequest of personal estate to A., with a gift over on a general failure of his issue, vests the property in A. absolutely, the gift over being void for remoteness.

Implication of Cross-remainders.

A gift over on a failure of issue generally has also the effect of creating an estate by implication in the following case, viz:—

¹ *Hayward v. Howe*, 12 Gray 49; *Hudson v. Wadsworth*, 8 Conn. 358; *Willis v. Bucher*, 3 Wash. C. C. 369; *Ridgeley v. Bond*, 18 Md. 434; *Sanders v. Hyatt*, 1 Hawks 247; *Addison v. Addison*, 9 Rich. Eq. 58; *Re Babcock*, 9 Grant Ch. (U. C.) 427.

RULE. If real estate be devised to several or to a class as tenants in common in tail, with an limitation over on failure of issue of *all* the devisees, cross-remainders in tail are, *primâ facie*, to be implied amongst them. (Anon., Dyer 303 b.; Doe d. Gorges *v.* Webb, 1 Taunt. 234; Vanderplank *v.* King, 3 Hare 1; Atkinson *v.* Barton, 3 De G. J. & F.)¹

Thus, if the devise be to the daughters of A. and the heirs or respective heirs of their bodies, as tenants in common, and in default of such issue over, cross-remainders in tail will be implied among the daughters (Doe *v.* Webb, 1 Taunt. 234; Levesey *v.* Harding, 1 R. & My. 636.)

In Doe *v.* Burville, 2 East 47, n., the implication was sustained, though the gift over was introduced only by the words “*remainder to,*” &c.

The circumstance of cross-remainders being expressly limited between the devisees in certain events, does not necessarily show that cross-remainders are not to be implied in other events (Atkinson *v.* Barton, 3 De G. F. & J.); although it may in some cases do so. (Rabbeth *v.* Squire, 4 De G. & J. 406.)

Thus where the devise was to several as tenants in common for life, with remainder as to the share of each to his children in tail, *202] with remainder to the survivors of *such* *children in tail, with a limitation over on failure of issue of the first devisees, it was held that cross-remainders were expressly limited only between the children of each devisee, but that cross-remain-

¹ Taffee *v.* Conner, 10 H. L. C. 64; Allen *v.* Trustees, 102 Mass. 262; Hungerford *v.* Anderson, 4 Day 372; Rodney *v.* Burtin, 4 Harring. 183; Heron *v.* Walsh, 3 Grant Ch. (U. C.) 606; Travers *v.* Gustine, 20 id. 106; Ray *v.* Gould, 15 U. C. Q. B. 131. In Simpson *v.* Coon, 4 S. & R. 368, the court refused to apply the rule to a devise over on failure of heirs of two devisees, “or ere one of them,” C. J. Gibson dissenting.

Where the devise was to three and the heirs of their bodies respectively, and in default of such issue *of any* of them over, it was held that the remainder over did not take effect until the failure of all the issue of each of them, and cross-remainders were therefore implied: Powell *v.* Howells, L. R. 3 Q. B. 654.

ders in tail were to be implied between the several *sets* of children. (*Atkinson v. Barton*, 3 De G. F. & J. 339.)¹

Cross-remainders for life implied.—Similarly, where real estate is devised to several or to a class as tenants in common for life, with a gift over on the decease of *all* the devisees or on the decease of the survivor, cross-remainders for life, may be implied among them. (*Ashley v. Ashley*, 6 Sim. 358; *Vanderplank v. King*, 3 Hare 1.)²

And where the devise was to the children of A. as tenants in common for life, with remainder to their children in tail, and with a gift over on failure of issue of A., and some of the children of A. were held to take estates tail by the rule of *cy pres*, it was held that the inequality thus created in the estates of the children, some being tenants for life, and others in tail, was no objection to the implication of cross-remainders among them. (*Vanderplank v. King*, 3 Hare 1.)

Bequests of personal estate.—And if *personal* estate be given to several, or to a class, as tenants in common for life, with a gift over on the death of all, or on the death of the survivor, cross-limitations for life may be implied among them. (*Pearce v. Edmeades*, 3 Y. & C. 246; *Malcolm v. Martin*, 3 Bro. C. C. 50; *Begley v. Cook*, 3 Drew. 662.)³ This seems a better construc-

¹ *Atkinson v. Barton*, was reversed in the House of Lords (10 H. L. C. 313), but upon grounds not affecting the positions in law taken by Justice Turner.

² *Dow v. Doyle*, 103 Mass. 489; *Turner v. Fowler*, 10 Watts 325; *Kerr v. Vernor*, 66 Penn. St. 326. This rule was not observed in *Bulkley v. Bulkley*, 1 Root 78.

³ *Wood v. Draycott*, 2 N. R. 55; *Loring v. Coolidge*, 99 Mass. 191.

But the limitation may be such that each takes an interest in his share for the life of the longest liver, as where an annuity is given to several as tenants in common during their joint lives, or the life of the longest liver, or survivor of them, in which case the shares of those dying during that period go to their personal representative: *Bryan v. Twigg*, L. R. 3 Ch. App. 183.

No implication of cross-remainders can arise from a devise in fee, or an absolute bequest of personalty with gift over in the event of all dying without issue living at death, or under twenty-one, or the like: *Weyman v. Ringold*, 1 Bradf. 46; *Fenby v. Johnson*, 21 Md. 106; *Picot v. Armistead*, 2 Ired. Eq. 226. "Cross-remainders are implied amongst tenants in tail, to

tion than to reject the words importing tenancy in common, as suggested in *Armstrong v. Eldrige*, 3 Bro. C. C. 215, and *Pearson v. Cranswick*, 31 B. 624.

"*Surviving*" read as "*other*."—Where there is a gift to several, or to a class, as tenants in common in tail, with remainder as the share of each of the "survivors" or "surviving" devisees in tail, with a limitation over on failure of issue of *all* the devisees, the words "survivor" or "surviving" will be construed as "other," so as to create cross-remainders among the devisees by express limitation; either in a deed or will. (Doe v. Wainwright, 5 T. R. 427; *Cole v. Sewell*, 2 H. L. C. 186; *Smith v. Osborne*, 6 H. L. C. 375.)¹

Although in other cases "surviving" may be read as "other" if the case require it (*Wilmot v. Wilmot*, 8 Ves. 10), the later authorities are adverse to this construction. Thus, if personal estate be given to several, or to a class, as tenants in common, either for life or absolutely, with a gift over of the shares of those dying without issue to the *survivors*, but without a gift over on

prevent a chasm in the limitations, inasmuch as some of the estates tail might expire, while the ulterior devise could not take effect until the failure of *all*. But in cases of limitations in fee of real estate and of absolute estates in personal property, the gift vesting in the persons to whom the testator has given his whole estate, upon their death it will vest in their legal representatives, and thus a chasm cannot occur, while the ultimate devise is awaiting the contingency upon which it is to take effect:" *Fenby v. Johnson*, 21 Md. 111.

¹ *Hurry v. Morgan*, L. R. 3 Eq. 152; *Re Thorp's Estate*, 1 De G. J. & S. 453; *Badger v. Gregory*, L. R. 8 Eq. 78; *Pond v. Bergh*, 10 L'aire 140; *Clark v. Baker*, 3 S. & R. 470; *Shaw v. Hoard*, 18 Ohio St. 227; *Lillibridge v. Addie*, 1 Mason 240.

Where the gift over is upon the death of any members of one class to the survivors of another class, "survivors" cannot be read "others," as where a gift is made to the testator's sons and daughters, and upon the death of any of his *daughters* without children, her or their share "to the survivors of them my said sons and daughters:" *De Garagnol v. Liardet*, 32 Beav. 608.

If the ultimate gift over is in the event of all dying without issue living at death, the necessity of construing "survivors" as "others" ceases; for on the death of any one leaving issue at death, the ultimate gift over is defeated: *Skinner v. Lamb*, 3 Ired. L. 155; *Turner v. Withers*, 23 Md. 42.

"Remaining" is not *prima facie* equivalent to "surviving." It means "other:" *Kingsland v. Leonard*, 65 How. Pr. 7.

failure of issue of all: the word "survivor" will be construed strictly. (*Milsom v. Awdry*, 5 Ves. 465; *Crowder v. Stone*, 3 Russ. 217; *Re Corbett's Will*, Johns. 591.)¹

But in this case the gift over on dying without issue would probably (even in a will prior to 1838) be restrained by force of the word "survivor" to a failure of issue at the death of each legatee. (*Hughes v. Sayer*, 1 P. W. 534. See next chapter.)

FAIRFIELD *v.* MORGAN.

"*Or*" read as "*And*."

It is an ancient rule of construction (the principle of which, however, would not be extended at the present day),² to avoid dis-inheriting issue, that—

RULE. If real estate be devised to A. in fee simple with a limitation over in the event of A. dying under twenty-one *or* without issue, the word "or" will be read "and," and the gift over will be construed to take effect only in the event of A. dying under twenty-one *and* without issue.

¹ *Re Usticke*, 35 Beav. 338; *Clason v. Clason*, 18 Wend. 369; *Guernsey v. Guernsey*, 36 N. Y. 267; *Cooper v. Townsend*, 1 Spenc. 366; *Widrig v. Finster*, 18 Hun. 237; *Dooling v. Hobbs*, 5 Harring. 405; *Turner v. Withers*, 28 Md. 18; *Spruill v. Moore*, 5 Ired. Eq. 284; *Lowry v. O'Bryan*, 4 Rich. Eq. 262; *Deboe v. Lowen*, 8 B. Monr. 616; *Duryea v. Duryea*, 85 Ill. 41.

Where however the main purpose of the testator seems to have been to make an equal distribution of his estate among his children and to secure it to his descendants, it has been held that survivors will be construed "others" with a gift over on the failure of the issue of all: *Harris v. Berry*, 7 Bush 114; *Minot v. Taylor*, 129 Mass. 160; *Wylie v. Lockwood*, 20 Hun. 377.

In Pennsylvania, in a devise to several as tenants in common, with gift over to the survivors in case of the death of any without issue, "survivors" will be read "others," although there be no gift over on the failure of the issue of all: *Lapsley v. Lapsley*, 9 Penn. St. 130; *Lewis' Appeal*, 18 Penn. St. 318.

² *Grey v. Pearson*, 6 H. L. C. 61; *Coates v. Hart*, 32 Beav. 349; *Reed v. Braithwaite*, L. R. 11 Eq. 514; *Toothman v. Barrett*, 14 W. Va. 301; *Robertson v. Johnson*, 24 Ga. 103; *Harwell v. Benson*, 8 Lea 344.

(*Soulle v. Gerard*, Cro. Eliz. 525; *Fairfield v. Morgan*, 2 B. & P. N. R. 38; *Right v. Day*, 16 East 69; *Eastman v. Baker*, 1 Taunt. 174.)¹

“A multitude of decisions have established, that the disjunctive word ‘or’ in a devise of this kind is to be construed as the *204] copulative ‘and,’ to avoid the mischief *which would otherwise happen, of carrying over the estate if the first devisee died under the age of twenty-one, though he had left issue; when it was the apparent intention of the devisor that both events should happen, the dying under twenty-one, *and* without issue, before the estate should go over. Then at the age of twenty-one, the testator contemplated that the devisee would take the fee, and consequently the power of disposing of the estate in what way he pleased; the testator leaving it to the devisee, after his attaining

¹ *Sayward v. Sayward*, 7 Greenl. 210; *Ray v. Enslin*, 2 Mass. 554; *Carpenter v. Heard*, 14 Pick 449; *Arnold v. Buffum*, 2 Mason 208; *Jackson v. Blanstram*, 6 Johns. 54; *Roome v. Phillips*, 24 N. Y. 469; *Holcombe v. Lake*, 1 Dutch. 605; *Doebler's Appeal*, 64 Penn. St. 14; *Dallam v. Dallam*, 7 Har. & Johns. 239; *Watkins v. Sears*, 3 Gill 492; *Neal v. Cosden*, 34 Md. 422; *Carpenter v. Boulden*, 48 id. 122; *Burton v. Conigland*, 82 N. C. 99; *Brewer v. Opie*, 1 Call 212; *Dickenson v. Jordan*, 1 Murph. 380; *Fennell v. Ford*, 30 Ga. 707; *Grimball v. Patton*, 70 Ala. 626; *Messie v. Jordan*, 1 Lea 646; *Ward v. Barrows*, 2 Ohio St. 247; *Kendig v. Smith*, 39 Ill. 300; *Doe d. Forsyth v. Quackenbush*, 10 U. C. Q. B. 148; *Farrell v. Farrell*, 26 id. 652; *Forsyth v. Galt*, 21 U. C. C. P. 408; 22 id. 115; *Re Babcock*, 9 Grant Ch. (U. C.) 427. And so in a devise to A. provided he attain twenty-one *and* has issue, “and” will be read, “or:” *Sayward v. Sayward*, 7 Greenl. 210.

The rule applies although the devisee is over the age specified at the date of the will: *China v. White*, 5 Rich. Eq. 426; *Hauer v. Shitz*, 2 Binn. 545.

If the devise be “to A., and if he should die before he attain the age of twenty-one, or without lawful heir, *in either case*” over, “or” cannot be read as “and:” *Brook v. Croxton*, 2 Gratt. 597; Compare *Van Pretres v. Cole*, 73 Mo. 39. But where the gift over was, if A. die before he attain the age of twenty-one years, unmarried, or without lawful issue, then or *in either case* to B., it was construed so as to read if A. should die under twenty-one *and* unmarried, or under twenty-one and without issue: *Scott v. Price*, 2 S. & R. 59.

The rule applies to a gift over in case A. die under twenty-one or unmarried: *Roome v. Phillips*, 24 N. Y. 468; *Hunt v. Hunt*, 11 Metc. 88.

twenty-one, to make what provision he pleased for his issue, if he had any: but only providing in the event of the devisee dying before twenty-one, that the estate should not go over from the issue." (Right v. Day, 16 East 69.)

The rule applies where the gift over is in the event of the devisee dying under any other age (as twenty-five), or without issue (Fairfield v. Morgan, 2 B. & P. N. R. 38): and where the gift over is in the event of death under the given age or without issue *living at the death*. (Ib.)

The rule applies where the devise to A. is of a constructive fee simple only (in a will prior to 1838), as if the devise be of an "estate" or subject to a payment by the devisee. (Fairfield v. Morgan, 2 B. & P. N. R. 38.) And inasmuch as a devise to A. indefinitely, with a gift over on his death under a given age without issue, confers a constructive fee simple, it would appear that the rule applies where the devise is to A. *simpliciter*, in wills as well before as after 1837.¹

But if the devise be to A. for life only, the rule would not apply.

And the rule does not apply where the devise to A. is of an estate tail. (Mortimer v. Hartley, 6 Exch. 47.)²

In Johnson v. Simcox, 7 H. & N. 344, Ex. Ch., the devise was to B. if A. (the heir-at-law of the testator) should die under twenty-one *or* without issue, but in case A. should have issue, to A. and his heirs: it was held that the rule applied, and that A. took the fee simple *by descent*, to the exclusion of B., although A. (having attained twenty-one) died without issue.³

¹ Shands v. Rogers, 7 Rich. Eq. 422; Chew v. Weems, 1 Har. & McH. 463. But the rule will be more readily overcome by the context in such a case: Parker v. Parker, 5 Metc. 134.

² It is held in New Jersey that it does: Holcomb v. Lake, 1 Dutch. 611. In South Carolina where the statute *de donis* was never in force, the rule applies to a devise of a fee conditional: Ward v. Waller, 2 Spear 786.

³ Estates tail have been entirely abolished and converted into fees simple in New Hampshire (by Statutes of 1789: Jewel v. Warner, 35 N. H.); Virginia (by Act Oct. 7, 1776); Code 1873, tit. 33, Ch. 112 § 9; West Virginia, R. S. 1879, Ch. 82, § 9; North Carolina (by an Act of June 2, 1784); R. S. 1873, Ch. 42, § 1; Georgia, see Code, ed. 1882, 2250; Florida (Act Nov. 17, 1829); Alabama (Act of 1812); Code 1876, § 2179; Mississippi (Act of 13th June, 1822), Rev. Code 1880, § 1190; Kentucky, Gen. Stat.

1881, Ch. 63, § 8; Tennessee (Act of 1784) Compiled Stat. 1871, § 2007; Indiana (Rev. Stat. 1852, R. S. 1881, § 2958; Michigan (by an Act of 1820) How. Ann. Stat. 1882, § 5519; and Iowa (by an Act of Mar. 2, 1821); Dakota (Rev. Civ. Code 1883, § 220).

In *Jordan v. Roach*, 32 Miss. 616, it was stated that the statute *De Donis* was never in force in Mississippi. Nor was it ever in force in South Carolina (*Murrell v. Matthews*, 2 Bay 397), a devise to one and the heirs of his body, there creating a fee conditional at common law. See *Jones v. Pestell*; State Rep. (Harper) 92; *Edwards v. Barksdale*, 2 Hill Ch 184; *Barsdale v. Gawrage*, 3 Rich. Eq. 271.

All devises made in Pennsylvania after 27th April, 1855; in Georgia after 21st December, 1823; in Ohio after June 1, 1812, R. S. 1880, § 4200; which would otherwise create a fee tail, shall, by virtue of the statute, pass an estate in fee simple. In Wisconsin (by an Act taking effect July 4, 1839), R. S. 1878, § 2028; and in Minnesota (by an Act of 1856), Stats. at Large 1873, Ch. 32, § 3; all estates tail vesting in possession after the respective acts took effect shall be estates in fee simple, though probably such has been the law of Wisconsin since 1836. In Vermont (by Revised Statutes, taking effect July 1, 1840), R. S. 1880, § 1916; Connecticut (by an Act of 1784), Gen. Stat. 1875, p. 352; Rhode Island (by an Act of July 1, 1857) Pub. Stat. 1882, p. 471, § 2; *Wilcox v. Heywood*, 13 R. I. 196; New Jersey (by an Act of April 16, 1846), R. S. 1877, p. 299, pl. 11; Illinois (R. S. 1883, 279); Missouri (by an Act of March 25, 1845), R. S. 1879, § 3941; *Thompson v. Craig*, 64 Mo. 312; estates tail are to be construed as estates for life in the first taker, with remainder in fee to his children, or the person who shall be tenant in tail at his death.

“*Die without Issue.*”—*Old Law.*

IN the case of a devise of an estate tail, followed by a limitation over in the event of the devisee *dying without issue*, it is a beneficial and liberal construction to hold that the gift over should take effect by way of remainder on the estate tail, not only if the devisee died without issue living at his death, but also in case of a failure of issue occurring at a later period, in which case the devisee could not, strictly speaking, be said to have *died* without issue. Such was probably the origin of the following rule of construction: a rule which, though beneficial in the case above supposed, became subversive of the intention when applied generally, and most of all when applied to bequests of personal estate, where it had the effect of rendering the gift over void for remoteness, as limited upon a general failure of issue; viz., that—

RULE. In wills made before January 1, 1838,

The words “die without issue” are construed to mean the death of the person spoken of and failure of his issue at the time of his death *or at any time afterwards*; unless the context shows the meaning to be confined to a failure of issue at the time of his death. (8 Co. 86; *Beauclerk v. Dormer*, 2 Atk. 313; *Candy v. Campbell*, 2 Cl. & F. 421.)¹

¹ *Hall v. Chaffee*, 14 N. H. 219; *Pinkham v. Blair*, 57 N. H. 226; *Hall v. Priest*, 5 Gray 18; *Dart v. Dart*, 7 Conn. 251; *Burrough v. Foster*, 6 R. I. 584; *Arnold v. Brown*, 7 id. 188; *Lillibridge v. Adie*, 1 Mason 224; *Jackson v. Billinger*, 18 Johns. 368; *Den v. Small*, 1 Spencer 151; *Coe v. De Witt*, 22 Hun 428; *Eichelberger v. Barnitz*, 9 Watts 447; *Gast v. Baer*, 62 Penn. St. 37; *Greenawalt v. Greenawalt*, 71 id. 483; *Hollett v. Pope*, 3

*206] "The rule applies both to real and personal estate. (8 Co. 86; *Beauclerk v. Dormer*, 2 Atk. 313; *Candy v. Campbell*, 2 Cl. & F. 421.)¹

Thus if real estate be devised to A. and his heirs, or to A. for life, or to A. indefinitely, with a limitation over in the event of A. dying without issue, A. takes an estate tail with remainder over (heirs being construed heirs of the body).

So if personal estate be given to A., with a limitation over in the event of A. dying without issue, A. takes the absolute interest, the gift over being void for remoteness.²

Harring. 542; *Newton v. Griffith*, 1 Har. & Gill. 111; *Davis v. Abbott*, 3 Md. 18; *Dickson v. Satterfield*, 53 id. 317; *Norton v. Tipp*, 1 Speers 250; *Kirk v. Ferguson*, 6 Cold. 479; *Mangum v. Piester*, 16 S. C. 316; *Little v. Billings*, 27 Grant Ch. (U. C.) 353.

In Connecticut, however, the words are construed to mean *primâ facie*, "die without issue living at death:" *Hudson v. Wadsworth*, 8 Conn. 359; *Bullock v. Seymour*, 33 Conn. 290. They will nevertheless have the effect of enlarging an estate for life, or an indefinite devise to an estate tail, which is in that state an estate for life in the first donee with remainder in fee to his issue living at his death: *Hudson v. Wadsworth*, 8 Conn. 358. But a limitation on death without issue after a devise of an express fee, is an executory devise on death without issue living at death. *Ibid.*

The English rule is rejected also in Ohio and Kentucky, and it is there held that the words "die without children," "die without issue or heirs of the body," are to be interpreted in their plain sense and referred to the time of death, unless the contrary intention is plainly expressed in the will, or is necessary to carry out its undoubted purposes: *Parish v. Ferris*, 6 Ohio St. 563; *Daniel v. Thompson*, 14 B. Monr. 663; *Sale v. Crutchfield*, 8 Bush 632. In Georgia the inclination of the courts is to reject the rule, or at least to lay hold of slight expressions to exclude its operation: *Harris v. Smith*, 16 Ga. 548; *Griswold v. Greer*, 18 id. 550.

¹ *Hall v. Priest*, 6 Gray 22; *Moffatt v. Strong*, 10 Johns. 14; *Smith's Appeal*, 23 Penn. St. 9; *Mengel's Appeal*, 61 id. 238; *Davidge v. Chaney*, 4 Har. & M'H. 393; *Usilton v. Usilton*, 3 Md. Ch. 36; *Cox v. Buck*, 5 Rich. 604; *M'Graw v. Davenport*, 6 Port. 327; *Randolph v. Wendel*, 4 Sneed. 647; *Chism v. Williams*, 29 Mo. 299; *Moody v. Walker*, 3 Ark. 147.

² In Pennsylvania the words "die without issue" import a definite failure of issue at the death of the person whose issue is spoken of: *Eachus' App.*, 91 Penn. St. 105.

The words "die without *having* issue," are equivalent to "die without issue." (Lee's Case, 1 Leon. 335; Cole v. Goble, 13 C. B. 445, E. C. L. R. vol. 76.)¹

The rule applies of course where the expression is "die without issue *male*," &c.

Die without children.—A devise over of real estate on death without children is within the rule, "children" being read as equivalent to "issue."

Thus a devise to A., but if A. die without children, over, vests in A. an estate tail. (Raggett v. Beatty, 5 Bing. 243.) So under a devise to A. and his heirs (Doe v. Webber, 1 B. & Ald. 713), or to A. and his heirs and assigns (Parker v. Birks, 1 K. & J. 156), with a gift over in the event of A. dying without children, A. takes an estate tail.²

Death under a given age without issue.—The rule does not apply where the gift over is on death *under a given age* without issue. Thus a devise to A., or to A. and his heirs, with a gift over if A. die under twenty-one without issue, vests in A. an estate in fee with an executory devise over in the event of a failure of issue at his death, and not an estate tail (Toovey v. Bassett, 10 East 460); and the same would be the case if the gift over

¹ Vaughan v. Dickes, 20 Penn. St. 509; Newton v. Griffith, 1 Har. & Gill 111; Davidson v. Davidson, 1 Hawks 163.

² Richardson v. Noyes, 2 Mass. 61; Thomason v. Anderson, 4 Leigh 118. But the rule does not apply to a gift over in case of death "without child or children:" Sherman v. Sherman, 3 Barb. 385.

In some states, estates tail being abolished, it is held that the rule does not extend to the words "die without children:" Thomason v. Anderson, 4 Leigh 118; Matthis v. Hammond, 6 Rich. Eq. 402; Morgan v. Morgan, 5 Day 517.

The rule is not applicable to bequests of personalty with gift over on death without children: Bedford's Appeal, 40 Penn. St. 18; Brammet v. Barber, 2 Hill 543. But where there was a gift of real and personal estate to A. for life, with gift over in case of his death "without leaving any child or children or their descendants," it was held that the gift over was upon an indefinite failure of issue in order to carry out the manifest intention that the issue should take, by raising an estate tail by implication: Addison v. Addison, 9 Rich. Eq. 58.

were on death under twenty-one or without issue, by the rule in *Fairfield v. Morgan*.¹

*207] *Exceptions.*—But the words “die without issue” may be restrained by the context (in wills prior to 1838) to mean a failure of issue *at the death* of the person, and not an indefinite failure of his issue. This construction is adopted (where the words in question follow a devise of real estate in fee simple, or a bequest of personal estate absolutely) in the following cases, viz:—

First, where the gift over is expressly to take effect on the death of the person.—Thus, if real estate be devised to A. and his heirs, and if A. die without issue, the property is devised to B. *upon the death of A.*, the latter words restrain the gift over to a failure of issue at the death, and A. takes an estate in fee with an executory devise over, and not an estate tail. (*Doe d. King v. Frost*, 3 B. & Ald. 546 (E. C. L. R. vol. 5); *Ex parte Davies*, 2 Sim. N. S. 114; *Parker v. Birks*, 1 K. & J. 156.)²

And the case is the same if the devise be to A. in terms which are sufficient to give a *constructive* (though not an *express*) fee

¹ *Ray v. Enslin*, 2 Mass. 554; *Jones v. Sothoron*, 10 Gill. & Johns. 188; *Dallam v. Dallam*, 7 Har. & Johns. 221.

² *Jones v. Jones*, 20 Ga. 701. The same construction is given where the property is devised to B. *after* the death of A.: *Downing v. Wherrin*, 19 N. H. 9; *Theological Seminary v. Kellog*, 16 N. Y. 84; *Attwell v. Barney*, Dudley 207.

The operation of the rule is excluded whenever, by the provisions or terms of the will, it appears to have been intended that the ultimate devise should take effect at the death of the first taker: *Eaton v. Straw*, 18 N. H. 321; as where the gift is of “what estate A. shall leave:” *Ide v. Ide*, 5 Mass. 503; or where it is directed that “if A. have no issue to heir her estate, she shall have the use of the premises during her life only:” *Hall v. Chaffee*, 14 N. H. 216; *Pinkham v. Blair*, 57 N. H. 226.

In some cases it has been held, that if the devise over is, “if A. die without issue, *then* and in that case” to B., “then” is to be construed an adverb of time and refers to the death of A.: *Deihl v. King*, 6 S. & R. 32; *Harris v. Smith*, 16 Ga. 550; *Griswold v. Greer*, 18 Ga. 550. In each of these cases, however, this construction was favored by the context. This construction was rejected in *Thomas v. Mann*, 3 Har. & Johns. 238; *Royall v. Eppes*, 2 Munf. 479; *Chism v. Williams*, 29 Mo. 296.

simple : as if the devise be to A., he paying 50*l.*, with a gift over if A. die without issue, to take effect on the death of A. (*Blinston v. Warburton*, 2 K. & J. 400.)

But if the gift to the first taker be such as, standing alone, would confer only an estate for life or an estate tail, the restricted construction will not be adopted : but the first taker will be held to take an estate tail, in order to give an interest in the property to his issue. (*Blinston v. Warburton*, 2 K. & J. 400 ; *Ex parte Davies*, 2 Sim. N. S. 114.) Thus, if the devise be to A., or to A. for life, or to A. and the heirs of his body, with a gift over if A. die without issue, the restricted construction will not be adopted, although the gift over be expressly to take effect on the death of A. (Ib.)¹

Personal estate.—Again, if personal estate be given to A., with a gift over, if A. die without issue, *upon the death of A.* the restricted construction will be adopted, and the gift over will take effect as an executory bequest on failure of issue at the death. (*Pinbury v. Elkin*, 1 P. W. 563 ; **Wilkinson v. South*, 7 T. R. 555.) So, if the bequest be to A. and the heirs of his body, with the like gift over, the restricted construction will be adopted. (*Wilkinson v. South*, 7 T. R. 555.)

Gift over subject to payments to be made at the death, &c.—The principle of the above cases of *Doe v. Frost* and *Pinbury v. Elkin* applies wherever the gift over on death without issue, following a devise of real estate in fee or a bequest of personal estate absolutely, is subject to conditions showing that it is to take effect, if at all, on the death of the first taker, and not after an indefinite failure of his issue.

Thus, in *Blinston v. Warburton*, 2 K. & J. 400, where real estate was devised to A. in fee, but in case A. should die without issue, then to B. in fee, “in consideration that he pays to C. the sum of 250*l.* within twelve months after the decease of A.,” the restricted construction was adopted.

So in *Nichols v. Hooper*, 1 P. W. 197, where lands were devised to A. for life, with remainder to B., his heirs and assigns, and if B. should die without issue, then a gift of 200*l.* to be paid

¹ *Riggs v. Sally*, 3 Shep. 408 ; *Hellem v. Severs*, 24 Grant Ch. (U. C.) 320.

within six months *after the death* of the survivor of A. and B.; it was held that the bequest was good, as not limited after an indefinite failure of issue.¹

Again, where the devise was to A. and his heirs, and if A. should have no issue, then to B., subject to such legacies *as A. should leave by will*, it was held to be an executory devise, inasmuch as if A. had taken an estate tail it would have been unnecessary to give him the specific power of charging the estate with legacies. (*Doe v. Frost*, 3 B. & Ald. 546, E. C. L. R. vol. 5)

So in *Doe v. Webber*, 1 B. & Ald. 713, where the gift was to A. and her heirs, and on her death without issue, to B., "paying 1000*l.* to the executors of A., or such persons as she should by will appoint," the failure of issue was held to be confined to the death of A.²

But in *Feakes v. Standley*, 24 B. 485, the gift over being "in case the said A. shall die without issue, the said lands to be sold *by his executors*," the restricted construction was not adopted.³

*209] *Again, where the testator devised lands, in case he should die without having issue, to A. for life with remainder to B. for life, with remainder to trustees in trust to sell and out of the proceeds pay 4000*l.* to C., to be a vested interest at twenty-one, notwithstanding the payment should be postponed *till the death of the survivor of A. and B.*, it was held that the latter words showed that death without issue was to be restricted to a failure of issue at the death. (*Re Rye's Settlement*, 10 Hare 106.)

"*In default of issue*," *q.c.*, *restricted*.—Even the expressions "in default of issue," and "on failure of issue," which do not contain in themselves any reference to the *death* of the person whose issue are spoken of, may be restricted to a failure of issue

¹ *Hauer v. Shitz*, 3 Yeates 235. So, if the gift over is subject to payments to be made to three grandsons, when they should respectively become of age: *Hill v. Hill*, 4 Barb. 419.

² *Eaton v. Straw*, 18 N. H. 329: so also where if the devisee dies "without leaving any legitimate issue" the land is to be sold by the testators: *Middlewarth's Adm'r v. Blackmore*, 74 Penn. St. 414.

³ *Broadbuss v. Turner*, 5 Rand. 308. Sed. contra, *Taylor v. Taylor*, 63 Penn. St. 485.

at the death, if the ulterior limitations are such as could not be reasonably meant to depend on a general failure of issue.¹

Thus, if a testator, having no issue, devises lands, *in default or on failure* of his own issue, to trustees in trust to pay his debts, legacies, and the annuities given by his will, the devise will be construed as intended to take effect only on a failure of issue at the death of the testator. (*French v. Caddell*, 3 Bro. P. C. Toml. 257; *Wellington v. Wellington*, 4 Burr. 2165.)

Whether a devise or bequest to take effect on a *general* failure of issue (not being a remainder on an estate tail) is good if the failure of issue happen in the testator's lifetime, is not yet settled. (See, per Turner, V.-C., 10 Hare 112.)²

Secondly, gift over to the survivors or survivor, where there is a bequest of personal estate to several as tenants in common, with a gift over of the share of any one dying without issue to the *survivors or survivor*, the presumption is raised that an indefinite failure of issue was not contemplated, and the words "die without issue" will be restrained to a failure of issue at the death of the person whose share is spoken of. (*Hughes v. Sayer*, 1 P. W. 534; *Massey v. Hudson*, 2 Mer. 133; *Ranelagh v. Ranelagh*, 2 My. & K. 441; *Turner v. Frampton*, 2 Coll. [*210 231; *Westwood v. Southey*, 2 Sim. N. S. 192.])³

"I adopt the language of Sir W. Grant, in *Massey v. Hudson*, and take the rule to be, that *primâ facie*, a bequest over to the survivor or survivors of two or more persons, after the death of one without issue, affords the presumption that an indefinite failure of issue could not be in the testator's contemplation." (Per Sir J. Leach, 2 My. & K. 441.)

¹ *Daniel v. Whartenby*, 17 Wall. 639.

² It is decided in the negative in *Lesly v. Collier*, 3 Rich. Eq. 125.

³ *Moffat v. Strong*, 10 Johns. 12; *Fairchild v. Crane*, 2 Beas. 108; *Threadgill v. Ingram*, Ired. 577; *Carson v. Kennerly*, 8 Rich. Eq. 259; *Williams v. Graves*, 17 Ala. 62; *Birney v. Richardson*, 5 Dana 427; *Booker v. Booker*, 5 Humph. 505; *Moody v. Walker*, 3 Ark. 148. This rule was not noticed in *Smith's Appeal*, 23 Penn. St. 9, but was recognized in *Bedford's Appeal*, 40 id. 22, and acted on in *Mifflin v. Deal*, 6 S. & R. 460; and *Rapp v. Rapp*, 6 Penn. St. 49; *Ingersoll's App.*, 86 id. 240; *Snyder's App.*, 95 id. 174.

But if the gift over be with words of limitation, as to the survivor, "his executors, administrators or assigns," it seems that the principle of *Hughes v. Sayer* does not apply. (*Massey v. Hudson*, 2 Mer. 134.)¹

Aliter in devises of real estate.—It would appear that *Hughes v. Sayer* does not apply to devises of real estate (where the presumption is in favor of an estate tail in the first taker); so that under a devise to several and their heirs, as tenants in common, with a gift over on the death of any without issue to the survivors, the devisees will take estates tail. (*Chadock v. Cowley*, Cro. Jac. 695; *Roe v. Scott*, *Fearne C. R.* 473, n.)²

Hughes v. Sayer does not apply where the gift over is to the survivors or survivor of *other persons*, or to those of other persons who may be then living. Thus, if the bequest be to A., with a gift over on his dying without issue to the nephews and nieces of the testator who may be then living (*Candy v. Campbell*, 2 Cl. & F. 421), or "to the then surviving legatees" of other property (*Greenwood v. Verdon*, 1 K. & J. 74), the gift over will not be confined to a failure of issue at the death of A.³

¹ The Court refused to accept this ruling in *Threadgill v. Ingram*, 1 Ired. 577; but it was acknowledged in *Barksdale v. Gamage*, 3 Rich. Eq. 276; *Prealey v. Davis*, 7 id. 108.

² *Dart v. Dart*, 7 Conn. 250; *Burrough v. Foster*, 6 R. I. 534; *Lapsley v. Lapsley*, 9 Penn. St. 130; *Wall v. Maguire*, 24 id. 248; *Jackson v. Dashiell*, 3 Md. Ch. 257; *Hoxton v. Archer*, 3 Gill & Johns. 199; *Bells v. Gillespie*, 5 Rand. 273; *Broaddus v. Turner*, id. 308; *Nowlin v. Winfree*, 8 Gratt. 348. But in many of the American states the rule is applied to devises and bequests alike: *Anderson v. Jackson*, 16 Johns. 382; *Wilkes v. Lion*, 2 Cowen 385; *Jackson v. Chew*, 12 Wheat. 153; *Den v. Allaire*, *Spencer* 6; *Seddel v. Wells*, id. 223; *Southerland v. Cox*, 3 Dev. 394; *Zollicoffer v. Zollicoffer*, 4 Dev. & Bat. 438; *McCorkle v. Black*, 7 Rich. Eq. 407; *Russ v. Russ*, 9 Fla. 105; *Deboe v. Lowen*, 8 B. Monr. 620. In *Massachusetts Hall v. Priest*, 6 Gray 18, follows the English authorities. But on the other hand *Richardson v. Noyes*, 2 Mass. 62; *Brightman v. Brightman*, 100 id. 238; *Hooper v. Bradbury*, 133 id. 303; and *Abbot v. Essex Co.*, 2 Curtis 126, 18 How. 203, are in favor of the construction more generally adopted in this country. The question is considered doubtful in *Georgia* and *Alabama*: *Mayer v. Wiltberger*, Ga. Dec., Pt. 2, 27; *Williams v. Graves*, 17 Ala. 62.

³ *Porter v. Ross*, 2 Jones Eq. 196; *Gray v. Gray*, 20 Ga. 804; but on the other hand in *Forman v. Troup*, 30 id. 496, this distinction was rejected.

Gift over for life only.—Notwithstanding *Roe v. Jeffrey*, 7 T. R. 589, it is settled that the fact of the devise or bequest over after the death without issue of the first taker, being of an estate for life only, is not sufficient to restrain the meaning to failure of issue at the death of the first taker. “The creation of life estates after the failure of the issue, would not be sufficient to limit the failure of issue to the death of the testator,” [the gift over being on the testator’s death without issue,] “for it would be consistent *with an intention that the tenants for life should take if [*211 the issue failed in their lifetime.” (Per Turner, V.-C., *Re Rye’s Settlement*, 10 Hare 111.)¹

Failure of issue living certain persons.—But the cases in which “die without issue” is restricted to failure of issue *at the death* of the person whose issue are spoken of, must be distinguished from those in which, although not so restricted, it is still confined to a failure of issue in *the lifetime of certain other persons*.

Thus if real estate be devised to A. and his heirs, with a gift over upon the death of A. without issue *in the lifetime* of B., and B. be living at the testator’s decease, A. takes an estate in fee, with an executory devise over on failure of his issue within the given period, and not an estate tail. (*Pells v. Brown*, Cro. Jac. 590.)²

Again, if personal estate be given over on the death of A. without issue, to B. *for life* only, and B. be living at the testator’s death, the bequest is good, inasmuch as it must take effect, if at all, on failure of A.’s issue during the lifetime of B.

So, if the gift over be to those of certain persons (living at the testator’s death) who shall be *then living*, i. e., living at the time of the decease and failure of issue of the first taker, the gift over

¹ *Roe v. Jeffrey* is recognized as an authority in *Ide v. Ide*, 5 Mass. 502, and *Taylor v. Taylor*, 63 Penn. St. 485. That the fact of the gift over being for life only, is sufficient to restrict the meaning of the words “die without issue,” was determined in *Wilson v. Wilson*, 32 Barb. 328, and *Drury v. Grace*, 2 Har. & Johns. 356. In *Watkins v. Sears*, 3 Gill 496, however, which was a devise of real estate, it was decided that it was insufficient: so also in *Dale v. McGuinn*, 15 Grant Ch. (U. C.) 101. The matter is considered doubtful in *Stevenson v. Jacocks*, 3 Murph. 558.

² *Daley v. Koons*, 90 Penn. St. 246.

may take effect as an executory devise or bequest, being restrained to a failure of issue during the lifetime of any of the persons entitled under the ulterior devise or bequest. (*Greenwood v. Verdon*, 1 K. & J. 74.) Thus, where, after legacies to several living persons, real estate was devised to A. and his heirs, with a gift over on the death of A. without issue to "the *then surviving legatees*" in fee simple, A. was held to take, not an estate tail, but the fee simple, with an executory devise over in the event of his death and failure of his issue in the lifetime of any of the legatees. (Ib.)¹

But if personal estate be given to A., and if A. die without issue, to the nephews and nieces of the testator who shall be then living, the testator having brothers and sisters living at his decease, the gift over cannot take effect as an executory bequest, *212] inasmuch as the testator *might have nephews or nieces born more than twenty-one years after his death, and therefore the failure of issue would not of necessity be confined within the legal period. (*Candy v. Campbell*, 2 Cl. & F. 421.)

¹ *Langley v. Heald*, 7 W. & S. 96; *Toman v. Dunlop*, 18 Penn. St. 72; *Fairchild v. Crane*, 2 Beas. 108; *Jones v. Jones*, 20 Ga. 701; *Bramlet v. Bates*, 1 Sneed 554.

In some cases where a gift over is made to certain persons in being, without words of limitation, it has been considered as intended as a personal benefit to those persons, and the gift will be construed as one to take effect on the death of the first legatees without issue during the lives of the ultimate legatees: *Eichelberger v. Barnitz*, 17 S. & R. 292; *Deihl v. King*, 6 id. 33; *Timberlake v. Graves*, 6 Munf. 175; *Clifton v. Haig*, 4 Dessaus. 330; and a personal trust is on the same footing as a personal benefit; *Re Chisholm*, 17 Grant Ch. (U. C.) 403; 18 id. 467; *Carradice v. Scott*, 22 id. 426.

Where the gift was upon the death of A. without issue to B., and if B. have no children to C., it was held, that since the gift over from B. to C. was to take effect on B.'s death without children, the gift over from A. to B. was to take effect if at all in B.'s lifetime: *Budd v. State*, 22 Md. 48.

In Maryland a bequest over of a man slave, in case the first taker die without issue, was construed a gift upon failure of issue during the life of the slave: *Biscoe v. Biscoe*, 6 Gill & Johns. 232, and the same construction was given to a bequest of liberty to a slave or slaves upon the death of the first taker without issue: *Woodland v. Wallis*, 6 Md. 151. In Virginia the same construction was applied to a gift over of a number of slaves both male and female, no mention being made of their issue: *Royall v. Eppes*, 2 Munf. 479.

Again if personal estate be given to A., but if A. die without issue "to the children of the testator then living," the gift over is not void for remoteness. But if the gift over be "to the children of the testator or such of them as shall be then living," the gift over cannot take effect as an executory bequest; for by the rule in *Brown v. Lord Kenyon*, post, p. 266, this form of gift operates as a vested gift to *all* the children, subject to be divested in favor of those (if any) living at the death of A. without issue; and therefore the failure of issue remains indefinite. (*Greenwood v. Verdon*, 1 K. & J. 89.)

So, if the bequest be to A., but, if A. should die without issue, to the children of the testator living *at the death of A.* (not, at the death of A. *without issue*), or at any other collateral period, the failure of issue remains indefinite, and the gift over is void. (*Garratt v. Cockerell*, 1 Y. & C. C. C. 494.)

Thirdly, where there is a devise to A. and his heirs, with a gift over if A. should die under twenty-one, *or*, having attained twenty-one, should die without issue, it has been held that the correspondence between the two events on which the limitation over is to take effect, is sufficient to restrain the dying without issue to a failure of issue at the death. (*Glover v. Monckton*, 3 Bing. 13 (E. C. L. R. vol. 11); *Doe d. Johnson v. Johnson*, 8 Exch. 81.)¹

Gift to issue in remainder.—Where there is a bequest of personal estate to A. for life, and after his decease to his issue as A. shall appoint, with a gift over on the death of A. without issue, the dying without issue may be restrained to a failure of issue at the death. (*Target v. Gaunt*, 1 P. W. 432; *Leeming v. Sherratt*, 2 Hare 14).²

Again where real estate is devised to A. for life, with remainder to his children in fee, with a devise over on the death of A.

¹ The same construction is given to a gift over in case of the death of A. unmarried or without issue: *Downing v. Wherrin*, 19 N. H. 87; *Deihl v. King*, 6 S. & W. 33.

² *Newman v. Miller*, 7 Jones 518; *Woodley v. Findlay*, 9 Ala. 716. In *Torrance v. Torrance*, 4 Md. 11, a case appropriate for its application, this rule is not noticed.

*213] without issue, the gift over takes effect as an *alternate contingent remainder, in the event of there being no children entitled under the prior devise. (*Goodright v. Dunham*, Doug. 264; *Malcolm v. Taylor*, 2 R. & My. 416.)¹

Failure of issue restrained to period of distribution.—In some cases a gift over on the death of a person without issue may be restrained to the event of failure of issue before the period of possession or distribution. Thus, if real estate be devised to A. and his heirs, with a gift over if A. die leaving issue, and also a gift over if A. die without issue, the words may be restrained to the event of A. dying without issue before the devise takes effect in possession (whether the devise be immediate or in remainder), in order to avoid an absolute inconsistency with the prior devise in fee to A. (*Clayton v. Lowe*, 5 B. & Ald. 636 (E. C. L. R. vol. 7); *Gee v. Mayor of Manchester*, 17 Q. B. 737, E. C. L. R. vol. 79.) See *post*, Chapter XVIII.

"Die without leaving Issue."

The principle that words may be differently construed, according to differences in the subject-matter, is strongly exemplified in the rule of construction which follows—viz., that—

RULE. In wills made before January 1, 1838,

In relation to real estate, the words "die without *leaving* issue" are equivalent to "die without issue," and import a failure of issue at the death of the person whose issue are spoken of, *or at any time afterwards*, unless an intention appears to the contrary.²

¹ *Sheets' Estate*, 52 Penn. St. 268; *Stevens v. Evans*, 10 Ohio St. 307.

² *Hawley v. Northampton*, 8 Mass. 38; *Whitford v. Armstrong*, 9 R. I. 394; *Eichelberger v. Barnitz*, 9 Watts 447; *Miller v. Macomb*, 26 Wend. 229; *Ferris v. Gibson*, 4 Ed. Ch. 707; *Foley v. Foley*, 17 Hun (N. Y.) 235; *Moorehouse v. Cotheal*, 1 Zab. 480; *Chetwood v. Winston*, 40 N. J. L. 337; *Wynn v. Story*, 38 Penn. St. 166; *Middleswarth's Adm'r v. Blackmore*, 74 id. 414; *Newton v. Griffith*, 1 Har. & Gill 111.

In Georgia it is held that the words "die without leaving issue" import a definite failure of issue in devises of realty as well as in bequests of personalty: *Griswold v. Grier*, 18 Ga. 550. The same is perhaps the rule in

But, in relation to *personal estate* and chattels real, the words "die without leaving issue" import a failure of issue at the death of the person spoken of, and not an indefinite failure of his issue. (*Forth v. Chapman*, 1 P. W. 663.)¹

*And the words in question, when applied to both descriptions of property in the same sentence, receive the one [*214 construction as regards the real estate, and the other construction as regards the personal estate.

Thus, if freeholds and leaseholds be devised together to A., but if A. should die without *leaving* issue, then to B., A. takes an estate tail in the freeholds, with remainder to B.; and the absolute interest in the leaseholds, subject to a contingent executory bequest in favor of B., to take effect upon the death of A. without issue *living at his death*. (*Forth v. Chapman*, 1 P. Wm. 663.)²

Alabama: *Flinn v. Davis*, 18 Ala. 132; and such construction was certainly given to a gift over of realty and personalty together on death "without leaving issue:" *Edwards v. Bibb*, 43 Ala. 666; and see also *Clapp v. Fogleman*, 1 Dev. & Bat. Eq. 466.

¹ *Rathbone v. Dyckman*, 3 Paige 30; *Drummond v. Drummond*, 26 N. J. Eq. 234; *Still v. Spear*, 3 Grant's Cases; 306; *Usilton v. Usilton*, 3 Md. Ch. 36; *Allender v. Sussan*, 33 Md. 11; *Robards v. Jones*, 4 Ired. 53; *Miller v. Williams*, 2 Dev. & Bat. 500; *Perry v. Logan*, 5 Rich. Eq. 202; *Robert v. West*, 15 Ga. 123; *Flinn v. Davis*, 18 Ala. 132; *Moore v. Howe*, 4 Monr. 199. But in *Patterson v. Ellis*, 11 Wend. 277, it was held that "leaving" did not restrict the failure of issue in regard to either real or personal estate

² The words, "die before having issue" are read "die without having had any issue" and the estate becomes absolute on the birth of issue: *Ray v. Enslin*, 2 Mass. 562; *Dashiell v. Dashiell*, 2 Har. & Gill 127; *Sadler v. Wilson*, 5 Ired. Eq. 296; *Marshall v. Rivers*, 8 Rich. L. 88

When there is a gift to A. for life or indefinitely "and if he has issue to him in fee; but if he die without issue then to B.," the restricted construction is adopted. *Shriver v. Lynn*, 2 How. 43; *Waddell v. Rettew*, 5 Rawle 231; *Clagett v. Worthington*, 3 Gill 83; *Badger v. Harden*, 6 Rich. Eq. 148; *Sheftall v. Roberts*, 30 Ga. 543. But contrary to these cases is *Arnold v. Brown*, 7 R. I. 188; and in *Callis v. Kemp*, 11 Gratt. 78, where an estate was given to A. for life, "and if he should die without issue to B., but if A.

“Die without Issue,” &c.—New Law.

The rule which construed gifts on death without issue as depending on an indefinite failure of issue, is abolished by the 29th section of the Wills Act as regards wills subsequent to 1837; and the contrary rule established, viz., that—

RULE. In wills made or republished on or after January 1, 1838,

In devises and bequests of real or personal estate, the expressions “die without issue,” “die without having issue,” “die without leaving issue,” and any other equivalent words, are constructed to mean a failure of issue *at the death* of the person whose issue are spoken of, and not an indefinite failure of his issue, unless an intention appear to the contrary. (Stat. 1 Vict. c. 26, s. 39.)¹

should leave lawful issue he might dispose of the land to such of his issue as he should see fit,” it was held the limitation to B. was on an indefinite failure of issue of A.

A bequest over on the death of A. “without issue who shall attain twenty-one” means without issue living at his death who shall attain twenty-one: *Westenberger v. Reist*, 13 Penn. St. 594.

A bequest over on the death of A. “without issue alive:” *Den v. Schenck*, 3 Halst. 29, or “without surviving issue:” *Nicholson v. Bettie*, 57 Penn. St. 386, imports a failure of issue at death.

Where there is one limitation over on the death of any or all of the devisees or legatees without issue, and by reason of the nature of the previous gifts to some of the devisees or legatees, the failure of issue is construed a failure of issue at death, and there appears no intention to make any distinction between the several gifts, the same construction will be given to them all: *Gibson v. Gibson*, 4 Jones 428; *Sheftall v. Roberts*, 30 Ga. 462.

¹ Similar statutes have been adopted in New York (Revised Statutes taking effect Jan. 1, 1830) R. S. 1875; part 2, Ch. 1, tit. 2, § 22; New Jersey (Act of March 12, 1851) R. S. 1877, p. 1248, pl. 25; Maryland (Act of 1862) Rev. Code 1878, Art. 49, § 9; Virginia (Act of March 12, 1819) Code 1873, tit. 33, Ch. 112, § 10; *Wine v. Markwood*, 31 Gratt. 43; West Virginia, R. S. 1879, Ch. 82, § 10; North Carolina (Act taking effect Jan. 15, 1828); South Carolina (Act of Dec. 20, 1853) Gen. Stat. 1882, § 1862; Georgia (Act of Feb. 11, 1854) Code, ed. 1882, § 2251; Alabama (Code, taking effect Jan. 1, 1853) Code 1876, § 2181; Tennessee, Comp. Stat.

“That in any devise or bequest of real or personal estate the words ‘die without issue,’ or ‘die without leaving issue,’ or ‘have no issue,’ or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean *a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by

1871, 2009; Mississippi (Act of June 13, 1822) Rev. Code 1880, § 1203; Wisconsin (R. S. 1878, § 2046); Michigan (Code, taking effect March, 1847) How. Ann. Stat. 1882, § 5538; Missouri (Revised Code of 1845) R. S. 1879, § 3942; Minnesota (Stat. at Large, 1873, Ch. 32, § 22); Dakota (Rev. Civ. Code, § 617); and California (Act of April 27, 1855) Civ. Code 1872, § 1071.

Of the above statutes, all except those of New Jersey and Maryland apply the same rule of construction to the words “die without heirs,” “heirs of body,” as is by the English statute applied to “die without issue.”

There is a similar statute in Ontario; R. S. O. cap. 106, sec. 31.

In North Carolina the operation of the act is in terms confined to wills made after its date, that is, after January 15, 1828. In Georgia, however, the act has been held to apply to all wills *taking effect* after the date of the act, that is, February 17, 1854: *Worrill v. Wright*, 25 Ga. 657. The same is the effect of the Act of New Jersey: *Condict v. King*, 2 Beas. 377.

In those states in which the common law rule has not been abolished it may perhaps be modified as regards devises by the statutes abolishing estates tail. Thus in *Dennett v. Dennett*, 43 N. H. 501, it was said that while it is true that where an estate is limited over in default of issue of any person, that person will take an estate tail by implication. . . . “It by no means follows that such an implication can be made when estates tail do not exist. . . . An estate in fee admits of no remainder, and the implication of an estate in fee must destroy the devise. . . . And we are therefore compelled to hold that a devise over on failure of issue of one of the devisees, will not give an estate in fee by implication to that devisee.” And in *Zollicoffer v. Zollicoffer*, 4 Dev. & Bat. 440, it was held that in a devise over on death without *leaving* issue, or on death without issue to the *survivors*, the restricted construction should be adopted, because since the abolition of estates tail, there was no more reason for taking these words in a technical and artificial sense in regard to lands than in regard to chattels. Therefore, in a devise of land, we must receive them in their natural sense, as they have been before received in both countries in personal bequests.” And see also *Clapp v. Fogleman*, 1 Dev. & Bat. Eq. 468; *Smith v. Chapman*, 1 Hen. & Munf. 240; *Flinn v. Davis*, 18 Ala. 132; *Forman v. Troup*, 30 Ga. 496.

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. (Stat. 1 Vict. c. 26, s. 29.)

Effect of section 29.—Thus if (in a will since 1837) real estate be devised to A. and his heirs, or to A. indefinitely, with a limitation over to take effect on the death of A. without issue, or without having or leaving issue, A. will not (as before) take an estate tail with remainder over, but an estate in fee, with an executory devise over in the event of his death without issue *living at his death*.

So, if the devise be to A. for life, with a limitation over on his death without issue, A. will not, as before, take an estate tail, but an estate for life only, with the like executory devise over.

Again, if personal estate be given to A., with a bequest over to B. upon the death of A. without issue, the gift over will not (as before) be void for remoteness, but will take effect as a contingent executory bequest upon the death of A. without issue living at his death.

The 29th section does not absolutely prevent the words “die without issue” from in any case raising an estate tail by implication. If there be a devise to A. for life, with estates in remainder to some only of his issue, and with a limitation over upon the death of A. without issue; if it be clear upon the whole will that *all* the issue of A. were intended to take, and not those only to whom particular estates are limited, A. may still take an estate tail by implication, in order to carry out that intention. (*Ellicombe v. Gompertz*, 3 My. & Cr. 127; *Leeming v. Sherratt*, 2 *216] *Hare* 14; *Sanders v. Ashford*, 28 B. 609.) “Provision is made for certain members of a class answering a particular description, and then a gift over is made upon the 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 ; and on the other hand, if it appears that all the class were intended to take although some only are enumerated, and the gift over be upon the failure of the whole class, the Court will adopt such a construction as will extend the benefit, in the best way the law will admit, to the whole class." (Per Lord Cottenham, *Ellicombe v. Gompertz*, 3 My. & Cr. 151.)

But it is not possible to lay down any general rules to determine where a gift over on death without issue, or on failure of issue, refers only to issue previously mentioned, and where not. (*Key v. Key*, 4 D. M. & G. 73 ; *Pride v. Fooks*, 3 De G. & J. 252.)¹

In default of issue, &c. — It seems doubtful whether the 29th section applies to the expressions "in default of issue," and "on failure of issue." These expressions are not mentioned in the section, and they stand on a different footing from "die without issue," inasmuch as they contain in themselves no reference to the *death* of the person whose issue are spoken of. But as they certainly *may* by force of context "import a want or failure of issue of any person in his lifetime, or at the time of his death" (as in *French v. Caddell*, and *Wellington v. Wellington*), the language of the 29th section may be held to embrace these expressions also.

MAITLAND v. CHALIE.

Where provision is made for children (whether of the testator or another person) by will, subject to the usual conditions as to vesting, *i. e.*, to sons at twenty-one, and to daughters at twenty-one or marriage, the Courts lean *strongly against a construction which makes the interest of a child who has attained the given age subject to the additional contingency of surviving his or her parent : and it is a rule that—

¹ Under the new law a devise over on the death of A. without issue in the lifetime of B. means a failure of issue during the life of B. and not at the death of A., and therefore where A. dies leaving issue, living B. and the issue die before B. the gift over takes effect : *Jarman v. Vye*, L. R. 2 Eq. 784.

RULE. If personal estate be given to the children of A., the shares to vest in them on attaining a given age or marriage, without reference to their surviving the parent, but there is a gift over on the death of A. without "leaving" a child or children:—the word "leaving" will be construed "having" or "having had," in order not to defeat the prior vested interests. (*Maitland v. Chalie*, 6 Mad. 243; *Casamajor v. Strode*, 8 Jur. 14; *Re Thompson's Trusts*, 5 De G. & Sm. 667; *Kennedy v. Sedgwick*, 3 K. & J. 540.)¹

"In this case a clear vested interest is in the first place given to the children of a daughter attaining twenty-one. If, in the clause which gives the property over on failure of children of the daughter, the word 'having' be read for 'leaving,' the whole will express a consistent intention to that effect. I feel myself bound by the authorities to adopt this construction." (*Maitland v. Chalie*, 6 Mad. 250.)

The rule would probably apply where the shares of the children are given to them in the first instance absolutely, not contingent on their attaining a particular age.

Real estate.—It would appear that the rule may be applied to devises of real estate. (*Marshall v. Hill*, 2 M. & Sel. 608; *Ex parte Hooper*, 1 Drew. 264.)²

If, however, the gift to the children is *introduced* by words importing the contingency, as if the gift be "in case A. shall leave any child or children, to the children of A. at twenty-one, &c., but if A. shall die without leaving children," over, the rule is excluded, and the word "leaving" must have its natural sense. (*Bythessea v. Bythessea*, 23 L. J. Ch. 1004; *Young v. Turner*, 1 Best & S. 550.)

*218] *But although the gift be thus contingent on *some* child surviving the parent, yet if any child survives, all the children, including those who predeceased the parent, will take. (*2 J. & W. 459*; *Boulton v. Beard*, 3 D. M. G. 608.)

¹ *Du Bois v. Ray*, 35 N. Y. 162.

² *White v. Hill*, L. R. 4 Eq. 265.

Gift over before shares are "payable," &c.—Wherever a fund is given to a person for life, and after his decease to his children, and the vesting or payment of the shares of the children is postponed till a given age or marriage, a gift over of the share of any of the children will be construed if possible to refer to death before the age or time appointed for vesting or payment, and not to death in the lifetime of the parent.

Thus, if the bequest be to A. for life, and after his death to his children at twenty-one, with a gift over of the shares of children dying before their shares become *payable*, the gift over will be held to operate only on the share of a child dying under twenty-one, and not on the share of a child who attains twenty-one, and afterwards dies in the lifetime of the parent. (*Hallifax v. Wilson*, 16 Ves. 168; *Mocatta v. Lindo*, 9 Sim. 56; *Walker v. Main*, 1 J. & W. 1.)

So, if the gift over be of the share of any child dying before he becomes "entitled to the receipt of" his share (*Hayward v. James*, 28 B. 523); or before he becomes "entitled in possession." (*Re Yates' Trusts*, 16 Jur. 78.)¹

Rule in Howgrave v. Cartier.—In cases, more especially of wills making provision for children of the testator, or for other persons towards whom the testator places himself in *loco parentis* (see *Farrer v. Barker*, 9 Hare 737), a principle or rule originally laid down with regard to settlements, sometimes called the rule in *Howgrave v. Cartier*, 3 V. & B. 85, applies.

This principle or rule, as applied to settlements, is: "That *primâ facie* a child having attained twenty-one, or marriage, is to

¹ So if the gift over be of the share of any child dying before his share "should be received:" *West v. Miller*, L. R. 6 Eq. 59; *Re Dodgson's Trusts*, 1 Drew. 440. So where there is a direction to sell after the expiration of a life estate, and to divide the proceeds among the testator's sons and daughters, with a gift over of the shares of any dying "prior to such division, and leaving no issue living at the time of such division," the estate vests absolutely in all who survive the widow: *Manice v. Manice*, 43 N. Y. 303.

Where there is an immediate gift with a gift over of the shares of those dying before the testator, or "before they have actually received their share," the latter contingency will be rejected as "an immeasurable purpose:" *Martin v. Martin*, L. R. 2 Eq. 411.

be considered a child entitled to a portion" (per Lord Eldon, *219] *Hope v. Lord Clifden*, 6 Ves. *509); and that the settlement is not to be read as making the provision for a child contingent on its surviving either or both its parents, unless the intention to do so is perfectly unambiguous.

"If the settlement clearly and unequivocally makes the right of the child to a provision to depend upon its surviving both or either of the parents, a Court of Equity has no authority to control that disposition. If the settlement is incorrectly or ambiguously expressed, if it contains conflicting and contradictory clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which, the shares are to vest, the Court leans strongly towards the construction which gives a vested interest to the child, when that child stands in need of a provision, usually as to sons at twenty-one, and as to daughters at that age or marriage. (*Howgrave v. Cartier*, 3 Ves. & B. 85.)

Thus, words importing the necessity of survivorship have been got rid of on strength of other expressions in *Emperor v. Rolfe*, 1 Ves. sen. 208; *Woodcock v. Duke of Dorset*, 3 Bro. C. C. 599; *Hope v. Lord Clifden*, 6 Ves. 509; *Howgrave v. Cartier*, 3 Ves. & B. 85; *King v. Hake*, 9 Ves. 438;¹ by the effect of a power of advancement: *Powis v. Burdett*, 9 Ves. 428; *Walker v. Simpson* (a will), 1 K. & J. 713; on the word "payable": *Schenk v. Legh*, 9 Ves. 300; *Fry v. Lord Sherborne*, 3 Sim. 243; *Jones v. Jones*, 13 Sim. 561 (a will); on the language of the gift over: *Perfect v. Lord Curzon*, 5 Madd. 442; *Torres v. Franco*, 1 Russ. & My. 649; *Swallow v. Binns*, 1 K. & J. 417.

In *Dalton v. Hill*, 10 W. R. 396, V.-C. W., a strong case, the bequest was to the testator's daughter for life, remainder to her husband for life, remainder to the children of the testator's daughter *who should be living at her decease*, the shares of the children to be vested in them at twenty-one or marriage, but payment to be postponed till the death of the survivor of the daughter and her husband, with a gift over to the next of kin of the *220] testator, as if he had died without issue. *It was held that children of the daughter attaining twenty-one, but dying in her lifetime, were entitled to shares.

¹ *Jackson v. Dover*, 2 Hem. & M. 209.

But if the settlement or will contain no provisions inconsistent with the necessity of survivorship as a condition of the gift, the rule in question cannot be applied. (*Whatford v. Moore*, 3 Myl. & Cr. 270; *Farrer v. Barker*, 9 Hare 737 (a will); *Tucker v. Harris*, 5 Sim. 588 (a will); *Bright v. Rowe*, 3 Myl. & K. 316 (a will);¹ *Hotchkin v. Humfrey*, 2 Madd. 65; *Fitzgerald v. Field*, 1 Russ. 430; *Bythesea v. Bythesea*, 23 L. J. Ch. 1004 (a will).)

¹ *Bright v. Rowe* is doubted in *West v. Miller*, L. R. 6 Eq. 64.

VESTING.

THE word "to vest" has several senses, which it is important to distinguish.

1. *Real estate*.—Originally the word had reference only to real estate. As applied to *estates* in land, "to vest" signifies the acquisition of a portion of the actual ownership or feudal possession of the land ("vestire"—*seisinam dare*—*infeodare*: Spelman): the acquisition, not of an estate *in possession*, but of an actual estate. The fee simple being supposed to be carved out into parts or divisions by the creation of particular estates, a grant to any person of one of these portions of the fee vested him with, or vested in him, an estate in the land. Thus "vested" is nearly equivalent to "possessed."

In this, its original sense, "vested" has no reference to the absence of *conditional*ness or contingency. If an estate tail be limited to A., with remainder to B., the estate of B. is a "vested" remainder, not because the failure of issue of A. is considered an event certain at some time or other to happen, as has been alleged (Smith's View of Executory Interests, sect. 192)—failure of issue of a person is an event altogether contingent—but because such a remainder vests in B. an actual portion of the fee, though the time of its falling into possession is wholly contingent and uncertain. B. is *invested* with a portion of the ownership of the land.

All remainders, not vested, are in fact contingent, not as being *222] necessarily limited on an uncertain event, but *because their taking effect depends on the contingency of their happening to vest during the continuance of the particular estate which supports them, and which may determine at any moment. Thus "vested" comes to mean the opposite of "contingent" or conditional. But the word itself refers, as has been said, not to contingency, but to possession.

It is obvious that this division into "vested" and "contingent" fails when applied to future executory interests in land, not taking effect as remainders. An executory devise, after a fee simple, cannot be said to be "vested," as an estate, until it vests in possession; yet it may be limited on an event absolutely certain to happen, and is, therefore, not contingent. When, therefore, Fearn (C. R. Introduction, p. 1) divides "vested estates" into (1) estates vested in possession, and (2) "estates vested in interest, as reversions, vested remainders, such executory devises, future uses, conditional limitations, and other future interests as are not referred to or made to depend on a period or event that is uncertain," he uses the expression "vested in interest" in a different sense from that which it bears as applied to a remainder. Thus, the word is already losing its original meaning.

2. *Personal estate*.—The rules and expressions relative to the vesting of personal estate have been derived in great measure from the civil law. In that system (see Domat, L. iv. Tit. 2, sec. 9) legacies not immediately payable are divided into two classes: (1) legacies payable at a future time certain to arrive (as to which, *dies legati* was said *cessisse*, though not *venisse*): and (2) conditional legacies, or legacies payable on an event which might never happen. The former class were *transmissible* to the representatives of the legatee, if he died before the time of payment: the latter were not.

In speaking of the civil law rules, it is natural to use the term "vested" to denote the former class of legacies, and "contingent" to denote the latter. In the *civil law, therefore [*223 "vested" is equivalent to *unconditional* and to *transmissible*: "contingent" is equivalent to *conditional* and to *non-transmissible*.

But it is obvious that this division is wholly inapplicable to the English law of legacies, which allows future conditional interests to be transmitted to the representatives of the legatee, and which considers some kinds of conditional gifts as "*vested* subject to be divested," i. e., subject to a condition subsequent and not precedent. By English law contingent legacies may be transmissible (as, a legacy to A., if B. returns from Rome), and vested legacies may be conditional (as, a legacy to A., with a gift over on his

death under 21). To retain, therefore, the civil law definitions of "vested" and "contingent," as equivalent respectively to "transmissible" and "non-transmissible," as is done by Roper (Rop. Leg. vol. i. p. 500, 4th ed.), appears to be fallacious.

3. The only definition that can be given of the word "vested" in English law, as applied to future interests, other than remainders, is, that it means "not subject to a condition precedent:" what amounts to a condition precedent, the cases only can determine. As applied to remainders in land, the word retains its original sense, denoting the actual possession of an estate in the land.¹

The rules as to the vesting of gifts by will differ according as the subject-matter is personal estate, real estate, or a legacy charged on land.

¹ In New Jersey it is held that whether a legacy is contingent or vested, depends not upon the time, but upon the event upon which it is to take effect. If the event is uncertain the legacy is contingent, though the time is fixed; and if certain it is vested, although the time is uncertain. Thus a gift when the legatee arrives at twenty-one is contingent, because the event is uncertain; but a gift at the death of A. is vested, not it would seem for the reason given by the English authorities, but because the event is certain to happen. *Thomas v. Anderson*, 6 C. E. Green 22; *Beatty v. Montgomery*, id. 324; *Clayton v. Somers*, 27 N. J. Eq. 230; and in *Van Dyke v. Vanderpool*, 1 McCart. 206, the inclination is to confine the uncertain events which will make a legacy contingent to those which are personal to the legatee.

A similar doctrine is laid down in *Taylor v. Mosher*, 29 Md. 443. In this latter case the Court say, "To make an estate contingent it *must appear* from the language used and the nature and circumstances of the case, that the time of payment was made the substance of the gift, and that the testator meant that time as the period of vesting."

One case, however, in North Carolina holds the strict doctrine that a postponement itself makes the gift contingent, unless it appear that it is the time of payment only that is postponed; the death of the legatee before the time of the gift, causing, as it were, a lapse, there being no legatee to answer to the description at the time the gift is to take effect: *Anderson v. Felton*, 1 Ired. Eq. 55. The general doctrine in this country, however, is that a postponement will not of itself create a contingency, unless it be upon an event of such nature that it is to be presumed the testator intended to make no gift unless the event happened, or as it is sometimes put, unless the time be annexed to the *substance* of the gift: *Van Wyck v. Bloodgood*, 1 Bradf. 154.

I. PERSONAL ESTATE.

Where a legacy is given to a person “if” he attains a given age, it is plain that the legacy is contingent till he attains that age; and in the absence of indications of a contrary intention, the same effect is given to the following expressions, viz:—

RULE. A bequest of personal estate to A., “at” a *given age or marriage, is *primâ facie* contin- [*224
gent. (*Stapleton v. Cheales*, Prec. Ch. 317.)

So, a bequest to A. “upon” attaining a given age, is *primâ facie* contingent. (*Leake v. Robinson*, 2 Mer. 363.)¹

So, a bequest to A. “when” or “as” he shall attain, or “from and after” his attaining a given age, is *primâ facie* contingent. (*Hanson v. Graham*, 6 Ves. 239; *Leake v. Robinson*, 2 Mer. 363; *Davies v. Fisher*, 5 B. 201.)²

The rule is the same where the bequest is to a class; as, to the children of A. at or upon attaining, or when or as they shall attain, a given age. (*Leake v. Robinson*, 2 Mer. 363.)

The rule is the same where the gift is in the form of a direction to pay (*Leake v. Robinson*, 2 Mer. 363). Thus, if the bequest be to trustees upon trust for A. for life, and after his decease upon trust to pay and divide among

¹ *Travis v. Morrison*, 28 Ala. 494.

² *Locke v. Lamb*, L. R. 4 Eq. 372; *Snow v. Snow*, 49 Me. 159; *Moore v. Smith*, 9 Watts 403; *Seibert's Appeal*, 13 Penn. St. 501; *Giles v. Franks*, 2 Dev. Eq. 521; *Seabrook v. Seabrook*, 1 McMull. Eq. 210; *Major v. Major*, 32 Gratt. 819; *Green v. Green*, 86 U. C. 546; *Allen v. Whitaker*, 34 Ga. 6; *Roberts v. Brinker*, 4 Dana 572; *Foster v. Holland*, 56 Ala. 474; *Bolton v. Bailey*, 26 Grant Ch. (U. C.) 361. In Connecticut it is doubted whether the words “as,” “when,” and “at,” ought in this country to be construed as importing a contingency, when there is no express disposition of the intermediate income, nor anything else to indicate an intention to give contingently: *Colt v. Hubbard*, 33 Conn. 285.

his children *when* they shall respectively attain twenty-one, no child dying under that age will be entitled.¹

So, a gift to the children of a person living at the testator's decease, when, as, upon, or from and after, attaining the age of twenty-five, is void for remoteness.

"If I give to persons of any description when they attain twenty-five, or upon their attaining twenty-five, or from and after their attaining twenty-five, is it not precisely the same thing as if I gave to *such* of those persons as should attain twenty-five? None but a person who can predicate of himself that he has attained twenty-five, can claim anything under such a gift." (Leake v. Robinson, 2 Mer. 386.)

"No case has determined that the word 'when,' as referred to a period of life, standing by itself, and unqualified by any words *225] or circumstances, has ever been *held to denote merely the time at which it is to take effect in possession; but, standing so unqualified and uncontrolled, it is a word of condition, denoting the time when the gift is to take effect in substance. That this is so, is evident upon mere general principles; for it is just the same, speaking of an uncertain event, whether you say 'when' or 'if' it shall happen. Until it happens, that which is grounded on it cannot take place." (Hanson v. Graham, 6 Ves. 243.)

Contrary intention.—But these expressions are ambiguous, and but slight circumstances in the context may suffice to show that the attainment of the specified age was not intended as a condition, but only to fix the time of actual payment.²

Thus, if the bequest be in trust to pay to the children of A. as they respectively attain twenty one, with a gift over in the event of A. dying *without leaving children* (not without children who should attain twenty-one), the gift over may be held to show an intention that the children (if any) should take, although not

¹ Moore v. Smith, 9 Watts 403; the rule is the same where the direction is to divide the sum amongst those living at a certain future date: Taylor v. Meador, 66 Ga. 230.

² Shattuck v. Stedman, 2 Pick. 468; Dale v. White, 33 Conn. 296.

attaining twenty-one. (*Bree v. Perfect*, 1 Coll. 128 ; *Ingram v. Suckling*, 7 W. R. 386, V.C. W.)¹

Again, in the case of a gift to children *when and as* they should attain a given age, with a gift over of the shares of those dying under that age *without leaving issue*, it has been held that the children took vested interests, inasmuch as they were to take if leaving issue, although dying under the given age. (*Bland v. Williams*, 3 My. & K. 411.)²

Under a gift to children at twenty-one, "and if but one child, the whole to such only child," it has been held that an only child took though not attaining twenty-one. (*Walker v. Mower*, 16 B. 365 ; *King v. Isaacson*, 1 Sm. & G. 371.)

Gift and Time of Payment distinct.

A bequest to A. *at* twenty-one, and a bequest to A. *payable at* twenty-one, do not much differ in expression : *yet one is a vested, the other a contingent gift ; for it is a rule of construction that—

RULE. In bequests of personal estate, if the *gift* and *direction as to payment* are distinct, the direction as to the time of payment does not postpone the vesting. (*Bartholomew's Trusts*, 1 Mac. & G. 354 ; *Lister v. Bradley*, 1 Hare 12.)

Thus, a bequest to A. *payable at* twenty-one, or to be paid at twenty-one, is vested ; and if A. dies under twenty-one, his representatives will be entitled.

So, a bequest to the children of A., equally to be *divided* among them when they attain twenty-one, vests

¹ This rule was not observed in *Seibert's Appeal*, 13 Penn. St. 501.

² *Kimball v. Crocker*, 53 Me. 263 ; *Chew's Appeal*, 37 Penn. St. 28. A gift over on death of the legatee under twenty-one has been considered an indication of intention that the gift should be vested, subject to be defeated on that event : *Pearman v. Pearman*, 33 Beav. 394. In *Raney v. Heath*, 2 Patt. & H. 219, and *Hughes v. Hughes*, 12 B. Monr. 117, the rule of *Edwards v. Hammond* is held applicable to bequests of personal estate. (See p. 241.)

in the children at birth. (*Williams v. Clark*, 4 De G. & Sm. 472.)¹

"A distinction has been introduced between the effect of giving a legacy at twenty-one and a legacy payable at twenty-one. That is also borrowed from the civil law. The code (lib. 6, tit. 53, sect. 5) thus states it:—"Ex his verbis, *dole go Æliæ Severinæ filiæ meæ et secundæ decem, quæ legata accipere debebit, cum ad legitimum statum pervenerit: non conditio fidei commissio vel legato inserta, sed petitio in tempus legitimæ ætatis dilata videtur.*" (*Hanson v. Graham*, 6 Ves. 245.)

In *Bartholomew's Trusts*, 1 Mac. & G. 354, the bequest being to trustees "upon trust to pay the same unto or amongst the

¹ *Kimball v. Crocker*, 53 Me. 267; *Verrill v. Verrill*, 68 Me. 318; *Brown v. Brown*, 44 N. H. 281; *Shattuck v. Stedman*, 23 Pick. 468; *Emerson v. Cutler*, 14 Pick. 113; *Teele v. Hathaway*, 129 Mass. 164; *Dale v. White*, 33 Conn. 295; *Tucker v. Ball*, 1 Barb. 95; *Parsons v. Layman*, 4 Bradf. 269; *Smith v. Edwards*, 88 N. Y. 92; *Bushnell v. Carpenter*, 92 id. 270; *Landers v. Bartle*, 29 Hun 170; *Bowman's Appeal*, 34 Penn. St. 23; *Conwell v. Heavilo*, 5 Harring. 297; *Hathaway v. Leary*, 2 Jones Eq. 264; *Young v. McKinnie*, 5 Fla. 548; *Cox v. McKinney*, 32 Ala. 462; *Higgins v. Waller*, 57 id. 396; *Gregg v. Bethea*, 6 Port. 9; *Blackburn v. Hawkins*, 1 Eng. 51; *Warren v. Hembree*, 8 Or. 118.

If there is a doubt whether the postponement is of the gift, or of the time of payment, the latter construction will be adopted. Thus in a bequest "to my son and my three daughters, to be equally divided between them, when my son arrives at the age of twenty-one years," the word "when" is referred to the clause "to be equally divided:" *Guyther v. Taylor*, 3 Ired Eq. 327. So a bequest, "to A. \$500, if he shall attain the age of twenty-one, then to be paid to him," is read as if written "to be paid to him if he shall attain the age of twenty-one years:" *Furness v. Fox*, 1 Cush. 135. In *Reed v. Buckley*, 5 W. & S., the bequest was as follows: "I direct that the net proceeds of my estate be equally divided between my children, share and share alike, and at the times of their respectively arriving at the age of twenty-one years." It was held that the sentence was elliptical, and that the word "paid" should be inserted after the word "and;" and the legacies were therefore vested.

A gift to a trustee in trust for A., or for the use and benefit of A. (being a gift to A.), to be paid him when he arrives at the age of twenty-one years, is a separate gift and direction as to payment: *Bayard v. Atkyns*, 10 Penn. St. 18.

children of A., as and when they shall attain the age of twenty-one years, *to whom I give and bequeath the same accordingly*," the latter words were held to constitute a gift independent of the direction to pay, so that the interests vested at birth. But a direction to transfer and pay unto and amongst children "in manner following, that is to say," the shares of sons to be payable at twenty-one, &c., does not contain a gift distinct from the time of payment. (*Shum v. Hobbs*, 3 Drew. 93.)

If there be a gift distinct from the direction to pay, a direction to accumulate the income till the time of payment *does not postpone the vesting. (*Blease v. Burgh*, 2 B. 221; [*227 *Josselyn v. Josselyn*, 9 Sim. 63.]

Bequest to A., to be paid on marriage (only).—It seems that the rule does not apply where the payment is to be made, not on attaining a given age, or marriage, but on marriage only. Thus a bequest to A., to be paid on his marriage, is *prima facie* contingent. (*Atkins v. Hiccocks*, 1 Atk. 500.)¹ But a bequest to A. to be paid on his marriage, *with interest in the mean time*, is vested. (*Vize v. Stoney*, 1 D. & War. 337.)²

Contrary intention.—But although there be a gift distinct from the direction to pay, the context may show that the vesting is to be postponed till the time of payment. Thus a bequest to A., payable at twenty-one, *if or in case* he attains that age, would be contingent. (*Knight v. Cameron*, 14 Ves. 389; *Lister v. Bradley*, 1 Hare 12.)³

In *Judd v. Judd*, 3 Sim. 525, 4 Sim. 455, a gift to children to be paid on attaining twenty-five, was held upon the whole will to be contingent and void for remoteness, there being a direction that if but one child the whole should "become the property of" such one child at twenty-five, and be transmissible to his executors. *Sed qu.?*

¹ But see *Loder v. Hatfield*, 71 N. Y. 92.

² *Boone v. Sinkler*, 1 Bay 369.

³ See *Merry v. Hill*, L. R. 8 Eq. 619. But in *Furness v. Fox*, 1 Cush. 135, it was held that a bequest to A. to be "paid to him if he attained twenty-one" would be vested.

Gift of Interest vests the Principal.

It is "an established rule of the court, that though such words are used as would not have vested the legacy, yet the circumstance of giving interest is a circumstance of intention explanatory" (6 Ves. 249): in other words that—

RULE. In bequests of personal estate, a gift of the whole interim interest to or for the benefit of the legatee, *prima facie* vests the principal.

Thus, a bequest to A. *when* he attains a given age, the interest to be paid to him in the mean time, is vested: *228] and if A. dies under that age, his *representatives will be entitled. (Stapleton v. Cheales, Prec. Ch. 317.)¹

The rule is the same where the interest is given to other persons to be applied for the benefit of the legatee.

Thus, a bequest to the children of A. when they attain twenty-one, the interest to be applied for their maintenance and education during their minorities, vests in the children at birth. (Hanson v. Graham, 6 Ves. 239; Hammond v. Maule, 1 Coll. 281.)²

¹ Newberry v. Hinman, 49 Conn. 130; Burrill v. Sheil, 2 Barb. 471; Weyman v. Ringold, 1 Bradf. 40; Warner v. Durant, 15 Hun 450; Thompson v. Conway, 23 id. 621; Bayard v. Atkyns, 10 Penn. St. 20; Provenchere's Appeal, 67 Penn. St. 466; Hanson v. Brawner, 2 Md. 102; Green v. Green, 86 N. C. 546; Nixon v. Robbins, 24 Ala. 669; Selna's Est., My. & Prob. 233.

² Hardcastle v. Hardcastle, 1 Hem. & M. 403; Ashmore's Trust, L. R. 9 Eq. 99; Robert's Appeal, 59 Penn. St. 70; Lemonnier v. Godfroid, 6 Har. & Johns. 472; Sutton v. West, 77 N. C. 429; Everett v. Mount, 22 Ga. 328; Gairdner v. Gairdner, 1 Ont. 184.

In Roberts' Appeal an immediate severance of the legacy with a gift of the income were sufficient to overcome the contingency implied by the use of the words "in case;" the gift being to A. of the principal, "in case he lives to attain" twenty-one years. Roberts' Appeal, 59 Penn. St. 70, and see also Boies v. Wilcox, 40 Barb. 286.

“Where a legacy is given by a direction to pay when the legatee attains a certain age, the direction to pay may import either a gift at the specified age or a present gift with a postponed payment, and if the interest is given in the mean time, it shown that a present gift was intended. (Per Turner, L. J., *Re Hart's Trusts*, 3 De G. & J. 202.)

In *Hanson v. Graham*, 6 Ves. 239, the gift was to the children of A. at twenty-one or marriage, the interest to be laid out at the discretion of trustees for the benefit of the said children till they should attain twenty-one or marry. Sir W. Grant said (p. 249), “On the other side it was contended, that the interest is not so given as to bring it within the general rule, but what is given is more like maintenance. It is true, it has been held, that it has not the same effect as giving interest, upon this principle, that nothing more than a maintenance can be called for, however, large the interest may be: and therefore what is not taken out of the fund for maintenance must follow the fate of the principal, whatever that may be. But by this will it is clear, the whole interest is given. All that is left to the trustees is to determine in what manner it may be best employed. It is therefore the simple case of interest.”

But where the gift is to *such* of the children of A. as shall attain twenty-five, the interest to be applied in the mean time for their benefit, the gift of interest does not *vest the principal in those under twenty-five. (*Southern v. Wollaston*, [*229 16 B. 166.])¹

Gift of interest subject to a charge.—The rule applies where part of the income of the fund is to be applied in payment of a charge, if the whole of the remaining interest is given to the legatee: the bequest being in fact of the whole interest, subject to the charge. Thus if the bequest be to trustees in trust out of the income to pay an annuity to A., and to apply the remaining income for the benefit of B. during his minority, and when B. attains twenty-one to transfer the fund to him, B. takes an imme-

¹ Pleasonton's App. 99 Penn. St. 362.

diate vested interest. (*Jones v. Mackilwain*, 1 Russ. 220 ; *Potts v. Atherton*, 28 L. J. Ch. 486.)¹

Batsford v. Kebbell.—In some cases it has been held that a gift of interim interest *amounting* to the income of the fund was not a gift of the income of *the fund itself*, and therefore did not vest the principal. As in *Batsford v. Kebbell*, 3 Ves. 362, where the direction was to pay to A. the dividends on 500*l.* until thirty-two, and then to transfer to him the principal sum of 500*l.* : and in *Watson v. Hayes*, 5 My. & Cr. 125, where the sum of 25*l.* yearly was directed to be paid for the maintenance and education of A. till twenty-one or marriage, when the sum of 500*l.* was to be paid to her : in both cases it was held that the legacy lapsed by the death of A. under the specified age. But it seems probable that the doctrine of these cases will not be extended. (*Re Hart's Trusts*, 3 De G. & J. 202.)²

Discretionary power of maintenance.—A discretionary power given to the trustees of the fund, to apply all or any part of the income towards the maintenance or education or for the benefit of the legatees, does not vest the principal. (*Pulsford v. Hunter*, 3 Bro. C. C. 416 ; *Leake v. Robinson*, 2 Mer. 363.)³

In some cases (*Harrison v. Grimwood*, 12 B. 192 ; *Eccles v.*

¹ *Van Wyck v. Bloodgood*, 1 Bradf. 175.

² *Provenchere's Appeal*, 67 Penn. St. 464.

In *Fuller v. Winthrop*, 3 Allen 61, it was held that a direction to pay a semi-annual sum equal to the interest on the principal of the legacy was substantially the same as a gift of interest.

³ *Ashmore's Trusts*, L. R. 9 Eq. 99 ; In re *Grimshaw's Trusts*, L. R. 11 Ch. D. 406 ; *Anderson v. Felton*, 1 Ired. Eq. 60 ; *Seabrook v. Seabrook*, 1 McMul. Eq. 210. A gift of a definite sum for maintenance, which is less than the income of the legacy, is evidence of an intention not to vest the legacy sufficient in a doubtful case to make it contingent : *Colt v. Hubbard*, 33 Conn. 286.

In *Bayard v. Atkyns*, 10 Penn. St. 20, C. J. Gibson states the rule on this subject somewhat differently from the English authorities. He says, "If a partial maintenance be given, as for instance, an annual sum, less than the whole annual interest of the principal, the child shall have no more, and the executor paying that sum shall have all the rest. But if maintenance be given generally so that the whole interest may be exhausted, that shows that the testator meant the fund to carry interest for the benefit of the child," and concludes that the gift will therefore be vested.

Birkett, 4 De G. & Sm. 105 ; Davies v. Fisher, 5 B. 201), directions as to maintenance, advancement, &c., out of the shares of infant legatees (not amounting to an *absolute gift of the whole income) have been relied on as showing the shares to be vested :¹ but the authority of these cases is doubtful. In Davies v. Fisher, 5 B. 201, the gift was to the children of A. as they should attain twenty-five, the income to be applied during their *minorities* for their maintenance. It was held that the direction as to maintenance applied only till the children attained twenty-one ; but nevertheless that the gift was vested. But *qu.* ? whether the word “ minority ” should not be held in such a case to extend to twenty-five, so that the ordinary rule would apply.

Contingent gift of interest.—If the gift of interest itself is contingent on the legatee attaining the specified age, so that the interest is to follow the fate of the principal, it of course cannot have the effect of vesting the principal. As, if the gift be “ I bequeath to A. when he attains twenty-one the sum of 1000*l.* with interest ” (not with interest in the mean time) (Knight v. Knight, 2 Sim. & Stu. 490). So, in Morgan v. Morgan, 4 De G. & Sm. 164, a gift of 5000*l.* to A. upon marriage, “ with the accumulations of interest thereon from my death,” was held contingent.

Immediate severance of legacy.—But although the interest be not given to the legatee till he attains the specified age, yet if the subject-matter of the bequest be at once severed from the rest of the testator’s property, and given to trustees for the legatee in trust to accumulate until the legatee attains the specified age, an inference in favor of immediate vesting arises. (Saunders v. Vautier, Cr. & Ph. 240 ; Oddie v. Brown, 4 De G. & J. 179.)²

“ Where funds are given to trustees to be held by them upon trusts, direction must of course be given to the trustees as to the time and manner in which they are to deal with the funds in favor of the person for whose benefit they are intended. Words,

¹ Re Miller’s Wills, 2 Lea 54.

² Dundas v. Murray, 1 Hem. & M. 425 ; Weyman v. Ringold, 1 Bradf. 40 ; Van Dyke v. Vanderpool, 1 McCart. 206 ; Robert’s Appeal, 59 Penn. St. 72 ; Proctor v. Robinson, 25 Mich. 284.

therefore, which in other cases might import condition or contingency, may in such cases be used for a wholly different purpose,—for the purpose namely of conveying the necessary directions *to the trustees. (Per Turner, L. J., *Oddie v. Brown*, *231] 4 De G. & J. 194.

Thus, where a sum of stock was given to trustees upon trust to accumulate the interest till A. should attain the age of twenty-five, and then to pay or transfer the principal, together with such accumulated interest, unto the said A., his executors, administrators or assigns, A. was held to take an immediate vested interest. (*Saunders v. Vautier*, Cr. & Ph. 240.)¹

So, where the testator directed that 5000*l.* should be deposited in the hands of trustees for accumulation, and placed in the Bank of England in the names of trustees for the use of A., at his attaining the age of thirty years, the legacy was held vested. (*Greet v. Greet*, 5 B. 123.)

So in *Branstrom v. Wilkinson*, 7 Ves. 420, a gift to A. and B. when they should attain twenty-one, followed by a clause in the words, "I appoint C. a trustee for them during their minority," was held to confer a vested interest on A. and B.

Again, in *Lister v. Bradley*, 1 Hare 14, Wigram, V.-C., said, "The circumstance that the testator has anxiously directed the four legacies to his reputed children to be immediately severed from his general estate, and put to interest on separate deeds, which are to specify the names of the respective legatees, is sufficient, in my judgment, to fix the construction of the words "when or if" as being used for the convenience only of the legatees themselves, and not for the purpose of making their interest contingent on their attaining twenty-one years of age."²

¹ *Kimball v. Crocker*, 53 Me. 263.

² In *Bowman v. Long*, 23 Ga. 248, the appointment of a trustee is considered almost, if not quite conclusive in favor of vesting; and certainly so in a case of doubt; and so, *Collier's Will*, 40 Mo. 325. A gift of slaves to A. in trust for his children, he not to be accountable until the children should attain twenty-one years, to use the proceeds to enable him to educate the children was held a present gift with directions for a future payment: *Myers v. Williams*, 5 Jones Eq. 362; and the same was held in a gift to a trustee, with discretionary power of maintenance and directions to pay at a certain age, in *Felton v. Saywer*, 41 N. H. 202.

It has been said that the Courts especially lean in favor of vesting in the bequest of a residue. (*Booth v. Booth*, 4 Ves. 399.)¹

"*Vested*," read "*indefeasible*."—Even if the testator expressly directs that the interests of legatees shall "vest" at a given age, they may upon the whole will be held to take vested interests before that age, subject to be divested, the word "vested" being construed as "indefeasible," or immediately payable." *Taylor v. *Frobisher*, 5 De G. & Sm. 191; *Berkeley v. Swinburne*, [*232 16 Sim. 275.)*²

Hallifax v. Wilson.

A bequest to A." from and after" his attaining twenty-one, is *prima facie* contingent: but a bequest to A. "from and after" the death of B., following a gift to B. of a life interest in the fund, is vested; for it is a general rule that—

RULE. A bequest in the form of a direction to pay, or to pay and divide, at a future period, vests immediately, if the payment be postponed for the convenience of the estate, or to let in some other interest.³

¹ *West v. West*, 4 Gif. 202; *Pearman v. Pearman*, 33 Beav. 396; *Tayloe v. Mosher*, 29 Md. 451; *Allen v. Thomson*, 21 Grant Ch. (U. C.) 279.

² *Edmondson's Estate*, L. R. 5 Eq. 389; *Thompson v. Thompson*, 28 Barb. 436.

³ *Yeaton v. Roberts*, 8 Fost. 459; *Winslow v. Goodwin*, 7 Metc. 363; *Childs v. Russell*, 11 id. 16; *White v. Curtis*, 12 Gray 54; *Kimball v. Tilton*, 118 Mass. 311; *Staples v. D'Wolf*, 8 R. I. 74; *Tucker v. Ball*, 1 Barb. 94. *Barker v. Woods*, 1 Sandf. Ch. 129; *Larocque v. Clark*, 1 Redf. Sur. Rep. 469; *Robert v. Corning*, 89 N. Y. 225; *Van Dyke v. Vanderpool*, 1 M'Cart. 207; *Howell v. Green*, 2 Vroom 570; *Thomas v. Anderson*, 6 C. E. Green 22; *M'Gill's Appeal*, 61 Penn. St. 47; *McClure's App.*, 72 id. 415; *Conwell v. Heavilo*, 5 Harring. 296; *Tayloe v. Mosher*, 29 Md. 443; *Brent v. Washington*, 18 Gratt. 529; *Johnson v. Baker*, 3 Murph. 318; *Fuller v. Fuller*, 5 Jones Eq. 223; *Shuler v. Bull*, 15 S. C. 421; *Falls v. M'Cullough*, Phill. Eq. 140; *M'Ginnis v. Foster*, 4 Ga. 377; *Nixon v. Robbins*, 24 Ala. 670; *Thieband v. Sebastian*, 10 Ind. 454; *Allen v. Mayfield*, 20 id. 293; *Roberts v. Brinker*, 4 Dana 573; *Rawlings v. Landes*, 2 Bush 169; *Watkins v. Quarles*, 23 Ark. 179; *Webster v. Leys*, 28 Grant Ch. (U. C.) 475.

"Where the enjoyment of an entire fund is given in fractional parts at successive periods, which must eventually arrive, the distinction between

Thus, under a bequest to trustees in trust for A. during his life, and after his death to pay and divide among his children, the shares of children dying in the lifetime of A. are vested, and pass to their representatives. (*Hallifax v. Wilson*, 16 Ves. 171; *Leeming v. Sherratt*, 2 Hare 14; *Packham v. Gregory*, 4 Hare 396.)¹

“If there is a gift to a person at twenty-one, or on the happening of any event, or a direction to pay and divide when a person attains twenty-one, then the gift being to persons answering a particular description, if a party cannot bring himself within it, he is not entitled to take the benefit of the gift. There is no gift in those cases, except in the direction to pay, or in the direction to

time annexed to payment and time annexed to gift becomes unimportant. In such case it is well settled that all the interests vest together,” per Gibson, C. J., in *King v. King*, 1 W. & S. 207.

Where the testator orders his whole estate to be kept together for the benefit of his wife and children and directs that it be divided when the youngest child attains twenty-one, or that each child shall be paid a certain share when he attains twenty-one, it is presumed that the postponement is made rather for the purpose of providing a home for the family, than of postponing the vesting of the shares, and therefore all the interests will vest at death: *Devane v. Larkins*, 3 Jones Eq. 377; *Smith v. Wiseman*, 6 Ired. Eq. 540; *Everett v. Mount*, 22 Ga. 323; *M’Lemore v. M’Lemore*, 8 Ala. 687; *Linton v. Laycock*, 33 Oh. St. 128; *Toms v. Williams* 41 Mich. 552; *Scott v. James*, 3 How. (Miss.) 307; *Hancock v. Titus*, 39 Miss. 225; *Collier’s Will*, 40 Mo. 323. In like manner it has been held that whenever property is given to another person until one or more of the ultimate legatees shall attain a certain age, the latter will take vested interests, the presumption being that the testator postponed the payment for the purpose of the prior bequest: *Watkins v. Quarles*, 23 Ark. 179; *Roberts v. Brinker*, 4 Dana 573. These cases extend the rule of *Borastin’s Case* to personal estate, which was done also in *Collier’s Will*, 40 Mo. 287, in a case of a mixed gift of realty and personalty.

In Tennessee a gift to an open class, after an estate for life is a gift to the class as constituted at the death of the life tenant, and the interests are therefore contingent; but if the gift be to individuals or to all the members of a class, the gift vests at the death of the testator: *Harris v. Alderson*, 4 Sneed 250; *Alexander v. Walch*, 3 Head 493; *Green v. Davidson*, 4 Bax. 488.

¹ *Re Meyer*, 57 How. Pr. 203; *Thornton v. Roberts*, 30 N. J. Eq. 473.

pay and divide. But if, upon the whole will, it appears that the future gift is only postponed to let in some other interest, or, as the Court has commonly expressed it, for the greater convenience of the estate, the same reasoning has never been applied to the case. The interest is vested notwithstanding, although the enjoyment is postponed." (*Packham v. Gregory*, 4 Hare 398.)

**Leeming v. Sherratt.*

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Although the period appointed for actual payment does not in general influence the vesting, it has this effect in the following case, viz:

RULE. A bequest to the children of A. *when the youngest child attains twenty-one*, vests in all the children who attain twenty-one, to the exclusion, *primâ facie*, of those dying under twenty-one. (*Leeming v. Sherratt*, 2 Hare 14; *Parker v. Sowerby*, 1 Drew. 468; *Lloyd v. Lloyd*, 3 K. & J. 20; *Cooper v. Cooper*, 29 B. 229.)¹

The division is therefore among the children living when the youngest attains twenty-one, and the representatives of those have attained twenty-one and died before that period.

In *Leeming v. Sherratt*, 2 Hare 14, the bequest was to trustees in trust to sell, "and to pay and divide the money arising therefrom, so soon as my youngest child shall attain the age of twenty-one, unto and equally amongst my children, share and share alike." Wigram, V.-C., said (p. 23): "The testator having postponed the division of the residue until his youngest child attains that age, I think no child who did not attain that age

¹ *Delavernne v. Dean*, 45 H. Pr. 206; *Magill v. McMillan*, 23 Hun 193; *Stinson v. Stinson*, 21 Grant Ch. (U. C.) 116. In *Anderson v. Felton*, 1 Ired. Eq. 55, the gift was as follows: "I likewise will that at the time my youngest daughter S. arrives at the age of fifteen years, that all my negroes and perishable property shall be divided between all my children, and the money likewise to be divided;" and it was held that the shares of the children were contingent until the youngest daughter arrived at the age specified. There was no gift before that time. "Consequently the legatees must be living at that time so as to answer to the description."

could have been intended to take a share therein. But this is consistent with the proposition that all who lived to that age should participate in the residue, as soon as the youngest child, who should attain that age, had reached it, which is the intention I ascribe to the testator."

It would appear that the rule would apply although there were a gift distinct from the direction to pay; as if the bequest were to the children of A., *to be paid* when the youngest child attained twenty-one.

*234] **Gift of interest does not exclude the rule.*—A gift of the income of the fund to be applied for the maintenance, &c., of *all* the children during their minorities is not inconsistent with the rule. (*Lloyd v. Lloyd*, 3 K. & J. 20.) And, it would seem, the rule is not excluded, although the interest be given to be applied for the benefit of the children until the period of division, *i. e.*, expressly until the youngest child attains twenty-one. (*Cooper v. Cooper*, 29 B. 229.)¹

But where the gift upon the youngest child attaining twenty-one was "to the said children, *that is to say* to A. one-fifth, to B. one-fifth, &c., the bequest not being to a class, but to the

¹ *Bigelow v. Bigelow*, 19 Grant Ch. (U. C.) 549. In *Lloyd v. Lloyd* the income was to be applied for the benefit of the children "during their minority" and the gift was "when and so soon as all such children should have attained the age of twenty-one years. Wood, V.-C., said: "No doubt the testator contemplated that all the children should live to attain twenty-one. . . . It is plain that the testator never intended that children who died under twenty-one should have such an interest, that their executors should receive the rents until all the children should have attained twenty-one. There are no words to carry such a gift. . . . *This view of the case takes it out of the rule in Hanson v. Graham.*"

In *Grove's Trusts*, 3 Gif. 575, where the gift was to trustees "to pay the rents, issues and profits, to *all and every* the children of A. until the youngest of them should have attained the age of twenty-one, and when and so soon as the youngest of them should have, &c., to sell, &c., and to pay and distribute, &c., among the *said children* of A." Stuart, V.-C., held that the interests were vested. He declares that *Lloyd v. Lloyd* turns on the fact that the language of the will excluded all children who did not attain twenty-one, while in the case before him the testator had in clear language made "*all and every* the children" the objects of his bounty both as to interest and capital.

children named, it was held that the rule was excluded, and that the share of A. who died under twenty-one, was vested and passed to his representatives. (*Cooper v. Cooper*, 29 B. 229.)

II. LEGACIES CHARGED ON LAND.

There is a material distinction, as regards vesting, between legacies payable at a future time out of real estate, and legacies payable at a future time out of personalty. As regards the latter, the time of payment does not in general affect the vesting; but, as regards the former the rule is that—

RULE. Legacies charged on land do not vest before the time appointed for payment, unless an intention appear to the contrary. (*Poulett v. Poulett*, 1 Vern. 204; *Duke of Chandos v. Talbot*, 2 P. Wms. 601; *Remnant v. Hood*, 2 De G. F. & J. 396.)¹

Thus, a legacy to A. payable at twenty-one charged upon land, fails by the death of A. under twenty-one.

The rule is the same although interest be given in the mean time. Thus, a legacy to A. payable at twenty-one, with interest from the testator's death to be applied for his maintenance, charged on land *is contingent. [*235 (*Pearce v. Loman*, 3 Ves. 135; *Parker v. Hodgson*, 1 Dr. & Sm. 568.)²

Contrary intention.—But the rule will be excluded if the context shows that the legacy was intended to vest at an earlier period.³

Thus, where legacies were given to the children of A. to be paid within twelve months after the youngest should have at-

¹ *Lyman v. Vanderspiegel*, 1 Aik. 280; *Birdsall v. Hewlitt*, 1 Paige 34; *Stone v. Massey*, 2 Ycates 363; *Spence v. Robins*, 6 Gill & Johns. 511; *Roberts v. Malin*, 5 Ind. 18.

In *Willis v. Roberts*, 48 Me. 257, no notice was taken of any distinction between legacies charged on land and other legacies.

² *Smith v. Wiseman*, 6 Ired. Eq. 540.

³ *Stone v. Massey*, 2 Yeates 363.

tained twenty-one, but the testator directed that the devisee of the land might, if he thought proper, pay the legacies to such as had attained twenty-one at an earlier period, it was held that the legacies vested at twenty-one. (*Brown v. Wooler*, 2 Y. & C. C. C. 134.)

So, if the legacy be to A. to *vest* at the testator's death, but to be *paid* at twenty-one, the rule is excluded. (*Watkins v. Cheek*, 2 S. & Stu. 199.)

In *Murkin v. Phillipson*, 3 My. & K. 257, a legacy of 50*l.* to each of the children of A. when the youngest should come of age, out of land, was held to vest in each child who attained twenty-one, there being a gift over of the legacy of a child dying under twenty-one without issue to the surviving children.

Convenience of the estate.—If the payment of the legacies is postponed for the convenience of the estate, and not for reasons personal to the legatee, the rule in general will not apply. (*King v. Withers*, Ca. t. Talb. 117; *Evans v. Scott*, 1 H. L. C. 43; *Remnant v. Hood*, 2 De G. F. & J. 396.)¹

Thus, if real estate be devised to A. for life, with remainder to B. in fee, charged with a legacy to C. to be paid by B. within twelve months after the death of A., the legacy to C. is vested. (*Poole v. Terry*, 4 Sim. 294.)

“It is well settled, as a general rule, that legacies or portions charged on real estate, and payable at a future time, do not vest until the time appointed for payment of them; but upon the death of the legatee or portioner before that time, lapse and sink into the inheritance. The rule, however, though general, is not universal. If *the payment of the legacy or portion is postponed, not from any considerations personal to the legatee or portioner, but simply for the convenience of the estate, the legacy or portion may vest, notwithstanding the death of the legatee or portioner before the time appointed for payment. The

¹ *Jones v. Habersham*, 107 U. S. 174; *Bowker v. Bowker*, 9 Cush. 520; *Birdsall v. Hewlitt*, 1 Paige 34; *Harris v. Fly*, 7 Paige 421; *Loder v. Hatfield*, 6 Thomp. & C. 315; *Post v. Herbert*, 27 N. J. Eq. 540; *Young v. Stoner*, 37 Penn. St. 105; *O'Byrne v. O'Byrne*, 9 Md. 512; *Pollard v. Hodgson*, 22 Grant Ch. (U. C.) 287.

Court, seeing the purpose for which the payment was postponed, does not consider the postponement to draw with it the consequences which would otherwise attach upon it." (Per Turner, L. J., *Remnant v. Hood*, 2 De G. F. & J. 410.)

But if lands be devised to A. for life, and then charged with portions for his younger children to be raised on his decease, *qu.*? whether a child who dies under twenty-one, unmarried, becomes entitled to a portion. (Ib.)¹

Legacy payable out of real and personal estate.—If a legacy is payable out of both real and personal estate, so far as the personal estate extends, the construction is governed by the rules relating to the vesting of bequests of personal estate; and so far as the real estate is sought to be resorted to, the construction is the same as if the legacy had been payable out of the real estate only. (*Duke of Chandos v. Talbot*, 2 P. Wms. 601; *Prowse v. Abingdon*, 1 Atk. 482.)²

Thus if the legacy be to A. payable at twenty-five, and A. dies under twenty-five, the legacy is payable out of the personal estate, but not out of the real estate.

But the assets will not be marshalled in favor of the legacy. (*Pearce v. Loman*, 3 Ves. 135.)

Proceeds of land converted.—A legacy payable out of the proceeds of land directed to be sold is governed by the rules of construction relating to bequests of personal estate, and not by those relating to legacies charged upon land. (Re *Hart's Trusts*, 3 De G. & J. 195.)³

A legacy charged on leaseholds for long terms is of course a legacy payable out of personal estate, as regards construction. (Re *Hudsons*, 1 Drury 6.)

*III. REAL ESTATE.

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In the construction of devises of real estate, "it has long been an established rule for the guidance of the Court, that all estates

¹ *Patterson v. Hawthorn*, 12 S. & R. 114.

² *Fuller v. Winthrop*, 3 Allen 51; *Patterson v. Hawthorn*, 12 S. & R. 112.

³ *Roberts v. Brinker*, 4 Dana 571.

are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the Courts cannot treat them as vested without deciding in direct opposition to the terms of the will." (Per Best, C. J., *Duffield v. Duffield*, 1 Dow & Cl. 311.) To accomplish this, (1) Words of seeming condition are, if possible, held to have only the effect of postponing the right of possession: and (2) if the devise be clearly conditional, the condition will, if possible, be construed as a condition subsequent and not precedent, so as to confer an immediately vested estate, subject to be divested on the happening of the contingency.

First, where no condition is held to be involved:—

BORASTON'S CASE.

RULE. If real estate be devised to A. when he shall attain a given age, and until A. attains that age the property is devised to B., A. takes an immediate vested estate, not defeasible on his death under the specified age; the gift being read as a devise to B. for a term of years, with *remainder* to A. (*Boraston's Case*, 3 Co. 21 a., b.; *Goodtitle v. Whitby*, 1 Burr. 228; *Doe v. Lea*, 3 T. R. 41; *Doe d. Cadogan v. Ewart*, 7 Ad. & Ell. 636, E. C. L. R. vol. 34.)¹

The rule is the same if the devise be to A. "at," "upon," or "from and after," attaining a given age, with a devise in the mean time to B.

¹ *Daniels v. Eldredge*, 28 Mass. 356; *Austin v. Bristol*, 40 Conn. 120; *Roome v. Phillips*, 24 N. Y. 465; *Kinsey v. Lardner*, 15 S. & R. 196; *Minnig v. Batdorff*, 5 Penn. St. 503; *Rudebaugh v. Rudebaugh*, 72 id. 271; *Meyer v. Eisler*, 29 Md. 32; *Rivers v. Fripp*, 4 Rich. Eq. 276; *Danforth v. Talbot*, 7 B. Mon. 623; *Allan v. Vanmeter*, 1 Metc. (Ky.) 264; *Collier's Will*, 40 Mo. 285; *Scott v. Logan*, 23 Ark. 352; *Marcon v. Alling*, 5 Grant Ch. (U. C.) 562.

In *Roberts v. Brinker*, 4 Dana 573 and *Watkins v. Quarles*, 23 Ark. 179, the rule of *Boraston's Case* was applied to bequests of personal property, and *Collier's Will*, 40 Mo. 287, it was held applicable to mixed gifts of realty and personalty.

If the devise to A., on attaining twenty-one, be in fee
 *or in tail, and A. dies under twenty-one, the estate con- [*238
 sequently descends to his heir.

“Where an absolute property is given, and a particular interest given in the mean time, as ‘until the devisee shall come of age,’ &c., and *when* he shall come of age, &c., then to him, &c., the rule is, that that shall not operate as a condition precedent, but as a description of the time when the remainderman is to take in possession.” (Goodtitle *v.* Whitby, 1 Burr. 228.)

“The cases on this subject appear to be resolvable into two classes: first, those in which the Courts have relied on the circumstance that the estate, prior to the attainment of the age of twenty-one, has been given to some third persons, either for the benefit of the devisee himself, as in Goodtitle *v.* Whitby, or for the benefit of some other persons, to endure during his minority, as in Boraston’s Case and Mansfield *v.* Dugard; and, secondly, those cases in which the estates are given over in the event of the devisee dying under twenty-one, as in Edwards *v.* Hammond, Bromfield *v.* Crowder, and Doe *v.* Moore. The first class of cases proceeds on the ground that the estate given to the devisee on his attaining twenty-one is in fact only a remainder, taking effect in its natural order on the determination of the preceding estates; and that the attaining the prescribed age in such a case no more imports a condition precedent than any other words indicating that a remainderman is not to take until after the determination of the particular estates. The second class of cases goes on the principle that the subsequent gift over, in the event of the devisee dying under twenty-one, sufficiently shows the meaning of the testator to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which of course gives him the immediate interest, subject only to the chance of its being divested in a future contingency.” (Per Tindal, C. J., Phipps *v.* Ackers, 9 Cl. & F. 591.)

The rule applies whether the devise to A. be of an estate in fee, or in tail, or for life only.

Executory trusts.—The rule applies to executory trusts. Thus, if the *devise be to trustees in trust to receive the rents [*239
 until A. shall attain twenty-one, and immediately after he

shall attain twenty-one *to convey* to the use of A. for life, with remainder to his children in tail, the estate of A. vests on his birth. (*Stanley v. Stanley*, 16 Ves. 491.)

Nature of intermediate estate.—The rule proceeds on the ground that the words of time, “when,” “upon,” &c., express only that the ulterior estate is to take effect subject to and on the determination of the intermediate estate; the rule, therefore, applies wherever there is an intermediate estate carved out, extending over the whole period; although the beneficial interest be given, not for the benefit of the ulterior devisee, but of some other person, as a devise to the testator’s wife, until A. shall attain twenty-four. (*Doe v. Lea*, 3 T. R. 41; *Mansfield v. Dugard*, 1 Eq. Ca. Abr. 195.)

And it is immaterial that the *beneficial* interest during the intermediate period is partly undisposed of, as if the devise be to trustees in trust to apply *so much* of the rents and profits as they should think fit towards the maintenance of A. during his minority. (*James v. Lord Wynford*, 1 Sm. & G. 40.) “The principle of *Boraston’s Case* is, that an intermediate interest carved out does not prevent the vesting, whether it be so carved out for the benefit of the devisee or of any other person, and whether it exhausts the whole intermediate rents and profits, or only a part.” (*Ib.*)¹

Freeholds and leaseholds.—And where freeholds and leaseholds were included in the same gift, and the devisee was held to take a vested estate in the freeholds by virtue of the rule, it was held that the leaseholds vested also, although the trust declared of the intermediate income being only of *so much* as the trustees should think fit, the gift, in the case of personal estate only would not have been vested. (*James v. Lord Wynford*, 1 Sm. & G. 40)²

Devise to A. “if” he attains twenty-one.—The principle of *Boraston’s Case* being that words which might *import a condition are in certain cases held to denote merely the time of taking effect in possession, it does not appear that the rule can apply where the devise is to a person “if” he attains a given age, with a devise to another until he attains it. The word

¹ *Bigelow v. Bigelow*, 19 Grant Ch. (U. C.) 549.

² *Collier’s Will*, 40 Mo. 287.

“if” may (as by the force of a gift over) be held to denote a condition *subsequent* only, and not precedent, as in *Edwards v. Hammond*; but it can scarcely be held not to import a condition at all. “Had the devisor used these words, ‘if M. L. shall attain the age of twenty-four,’ that would have made it a condition precedent, and no interest would have vested in him, unless he had attained that age. But here the devisee’s estate was to take effect in possession *when* he should attain the age of twenty-four.” (Per Ashurst, J., *Doe v. Lea*, 3 T. R. 43.)¹

A devise to A. *when* he shall attain a given age, standing alone, and unpreceded by any intermediate interest, would probably be contingent. (Ferne, Posth. Op. 191.)²

So, a gift in the form of a direction to trustees to convey to A. at twenty-one, would *prima facie* be contingent. (*Walker v. Mower*, 16 B. 365.)

Secondly, where the condition is held to be subsequent and not precedent:—

Edwards v. Hammond.

RULE. If real estate be devised to A. “if,” or “when,” he shall attain a given age, with a limitation over in the event of his dying under that age, the attainment of the given age is held to be a condition subsequent and not precedent, and A. takes an immediate vested estate, subject to be divested upon his death under the specified age. (*Edwards v. Hammond*, 1 B. & P. N. R. 324, n.; *Bromfield v. Crowder*, 1 B. & P. N. R. 313; *Doe d.*

¹ A devise that “at the death or second marriage of my wife . . . my son Thomas, if he be then living, shall have lot number 1, which I hereby devise to him, his heirs and assigns, to and for his and their own use forever,” was held by the Supreme Court of Canada to give Thomas an estate contingent upon surviving the wife of the testator: *Merchant’s Bank v. Kelfer*, 5 C. L. T. 66, reversing the Court below, 9 Ont. App. 117, *sub nom.* *Kelfer v. McKay*.

² *Briscoe v. Wickliffe*, 6 Dana 161; *Bigelow v. Bigelow*, 19 Grant Ch. (U. C.) 549.

*241] Roake v. *Nowell, 5 Dow 202; Phipps v. Ackers, 9 Cl. & F. 583.)¹

And if the devise be to A. if or when he shall attain a given age, with a limitation over upon his death under that age *without issue*, A. takes a vested estate, defeasible only in the event of his death without issue under the specified age. (Phipps v. Ackers, 9 Cl. & F. 583.)²

The rule is the same if the devise be to A. "at," "upon," or "from and after" attaining a given age, with the like gift over.

The rule is the same where the devise is to a class; thus under a devise to the children of A. when they attain twenty-one, with a gift over in default of children who should attain twenty-one, the estates of the children vest at birth. (Randoll v. Doe d. Roake, 5 Dow 202.)

The rule applies to devises by way of executory trust. (Phipps v. Ackers, 9 Cl. & F. 583.)

"Where the devise is to a party at a given age, and the property is given over if the devisee dies under that age, . . . the Court has discovered an intention expressed in the will, that the first devisee shall take all that the testator has to give, except what he has given to the devisee over; and in order to give effect to that intention, has held by force of the language of the will, that the first devise was not contingent, but vested, subject to be divested upon the happening of the event upon which the property was given over." (Bull v. Pritchard, 5 Hare 571.)

¹ Weston v. Weston, 125 Mass. 268; Weston v. Jenkins, 128 id. 562; Roome v. Phillips, 24 N. Y. 465; Boies v. Cuming, 1 Redf. Sur. R. 392; Raney v. Heath, 2 Patt. & H. 218; Rivers v. Fripp, 4 Rich. Eq. 276; Bowman v. Long, 23 Ga. 247; Hughes v. Hughes, 12 B. Monr. 117; Keefer v. McKay, 29 Grant Ch. (U. C.) 162.

In Raney v. Heath, 2 Patt. & H. 219, and Hughes v. Hughes, 12 B. Monr. 117, it is held that this rule applies also to bequests of personal estate, especially where real estate and personal estate are given together in the same clause.

² Holtby v. Wilkinson, 28 Grant Ch. (U. C.) 550.

Devise to children who shall attain twenty-one.—It has been much disputed whether the rule in *Edwards v. Hammond* can be applied, where the attainment of the given age is made *part of the description* of the devisee: as if the devise be to all and every the children of A. *who* *shall attain twenty-one, or to *such* [*242 children of A. as shall attain twenty-one, with a gift over in default of children attaining that age. Notwithstanding *Browne v. Browne*, 3 Sm. & G. 568, the weight of authority appears to be against the extension of the rule to such cases. (*Festing v. Allen*, 12 M. & W. 279; *Bull v. Pritchard*, 5 Hare 567; and the leading cases of *Duffield v. Duffield*, 1 Dow & Cl. 268.) In *Duffield v. Duffield*, Best, C. J., said (1 Dow & Cl. 314), “It is impossible to say that the words of this will do not import conditions precedent to the vesting these estates. The estates are not given to any particular children by name, but to such children as shall attain the age of twenty-one years; until they have attained that age, no one completely answers the description which the testator has given of those who are to be devisees under his will; and therefore there is no person in whom the estates can vest.”¹

Devise to such child or children as shall attain twenty-one.—And it appears to be settled, that a devise to “such child of A. as shall attain twenty-one” (*Stephens v. Stephens*, Ca. t. Talb. 228; *Duffield v. Duffield*, 1 Dow & Cl. 268), or to the children of A. who shall attain twenty-one (*Festing v. Allen*, 12 M. & W. 279), is *prima facie* contingent, notwithstanding a gift over in default of a child or children who should fulfil the required condition.

But the context may of course qualify any words of contingency: and may show that under a devise to such children as shall attain twenty-one, the children were intended to take vested estates at birth, subject to be divested. (*Riley v. Garnett*, 3 De G. & Sm. 629.) So if the devise be to such children as shall be living at the decease of B. (*Doe v. Hopkinson*, 5 Q. B. 223; *E. C. L. R.* vol. 48.)

¹ To the same effect are *Holmes v. Prescott*, 33 L. J. Ch. 264; *Patching v. Barnett*, 28 W. R. 886; *Campbell v. Robertson*, 62 Ga. 709; *Crook's Est.*, Myr. Prob. 247.

Devise to A. "provided" he attain twenty-one.—In *Simmonds v. Cock*, 29 B. 455, a devise to A., "provided" he attain a given age, was considered to be a vested estate, subject only to be divested.¹

¹ *Chinn v. Keith*, 4 Thomp. & C. (N. Y.) 126. In *Rivers v. Fripp*, 4 Rich. Eq. 276, the rule is applied to a gift to the issue of A. living at his death, who shall attain twenty-one years, or who, dying before that time, shall leave issue to live until the time at which the parents, if alive, would have reached the full age of twenty-one years. The interests were held defeasible but vested: *Rush v. Rush*, 40 Ind. 83; compare *Bailey v. Hopkin*, 12 R. I. 560.

Raney v. Heath, 2 Patt. & H. 218; *Foster v. Wick*, 17 Ohio 250.

SUBSTITUTION, SURVIVORSHIP, ETC.

Substitution in Testator's Lifetime.

THERE is a distinction between gifts by way of substitution, and successive limitations. If property be limited upon the death of one person to another, and the first donee happens to predecease the testator, the gift over would of course take effect notwithstanding the failure by lapse of the prior gift. But where the *legacy* or *share* of a legatee is given over by way of substitution to another person, it might be contended that if the prior legatee died in the testator's lifetime, there was in effect no legacy to him, and therefore that nothing could go over: the rule however is otherwise, and it is settled that wherever there is a bequest, whether immediate or deferred, to *individuals*, substitution may take place before the testator's death, and that—

RULE. A gift over of the *legacy* or *share* of a legatee dying under certain circumstances, takes effect if the event happens in the testator's lifetime. (*Willing v. Baine*, 3 P. W. 113; *Humberstone v. Stanton*, 1 V. & B. 388. *Walker v. Main*, 1 J. & W. 1.)¹

The rule is the same, whether the legacy be immediate or in remainder.

*Thus, if the bequest be to A., for life, and after his death equally between B. and C. with a gift over of the share of either dying in the lifetime of A., and B. or C. dies in the lifetime of A. during the testator's lifetime, the gift over takes effect. [*244

¹ *Goddard v. May*, 109 Mass. 468; *Goodall v. McLean*, 2 Bradf. 309; *Mowatt v. Carrow*, 7 Paige 336.

So if the bequest be to A., but if he die under twenty-one to B. (*Willing v. Baine*), or to A., with a gift over in case of his death before the legacy shall become payable (*Walker v. Main*), or to A., with a gift over in the event of his dying without issue. (*Mackinnon v. Peach*, 2 Keen 555.)

So if the bequest be to "A. or his issue," and A. dies in the testator's lifetime, the issue will take.

So where the bequest was, "I give to my five daughters a sum of 6000*l.* each, which said sum of 6000*l.* to each of them shall be invested in real or government securities by my executors within seven years from my decease; but if any of my said daughters should die leaving no issue, then the *share or portion so invested* shall be divided among those who have issue," the gift over was held to operate on the share of a daughter who died without issue in the testator's lifetime. (*Varley v. Winn*, 2 K. & J. 700.)

"It seems formerly to have been a question, whether a bequest over in case of the death of the legatee before a certain period could take effect, where he died during the testator's life, though before the period specified. In the case of *Willing v. Baine*, legacies were given to children payable at their respective ages of twenty-one: and if any of them died before that age, the legacy given to the person so dying to go to the survivors: one having died under twenty-one in the life of the testator, it was contended that his legacy lapsed, and did not go over to the survivors. The argument was, that the bequest over could not take place, as 'there can be no legacy unless the legatee survives the testator: the will not speaking till then: wherefore this must only be intended where the legatee survives the testator, so that the legacy vests *in him, and then he dies before the age of twenty-one. It was however held, and is now settled, that in such a case the bequest over takes place. (*Humberstone v. Stanton*, 1 V. & B. 388.)

So, if the gift be to A. for life, remainder to B. and C. equally, and if either die before his share should become payable without issue, the share of the one so dying to go to the *survivor*: B.

dying in the testator's lifetime, C. takes the whole fund. (*Humphreys v. Howes*, 1 R. & My. 689.)

Legatee dead at date of will.—And in the case of a bequest to individuals, the rule will apply, and substitution take place, if the legatee is dead (under the prescribed circumstances) at the date of the will, the testator being presumed to have made the bequest on the supposition that he was alive. (*Ive v. King*, 16 B. 46; *Sheppard's Trusts*, 1 K. & J. 269; *Hannam v. Sims*, 2 De G. & J. 269.) Thus if the bequest be to A. for life, with remainder to B. and C. equally, with a direction that if B. or C. "shall" die in the lifetime of A., or before his share should become payable, or "in case of his death," his share should go to his children, and B. is dead at the date of the will, his children will be entitled:—and the word "shall" in such a case is not considered as referring only to future time. (*Re Sheppard's Trusts*, 1 K. & J. 269.)

"I am of opinion that the principles and reasons applicable to the case of the designated legatees dying in the lifetime of the testator, and which in that event give effect to the gift, apply equally to the case of the legatee being, although it may be unknown to the testator, dead at the date of the will." (*Ive v. King*, 16 B. 56.)¹

Exception.—*Gift over to the executors or administrators.*—But the rule does not apply where the gift over is to the executors or administrators of the legatee, unless the gift be immediate.

If the share of the legatee is given over to his *executors or administrators*, the presumption is, that it is simply another way of giving a vested interest to the legatee on the testator's death, and therefore, if there is any other period to which the gift over can be referred, it will not be construed to take effect in the case of the legatee dying in the testator's lifetime. (*Corbyn v. French*, 4 Ves. 418; *Bone v. Cook*, M'Clel. 168; *Re Porter's Trust*, 4 K. & J. 188.)

¹ *Lawrence v. Hibbard*, 1 Bradf. 256; *Wright v. Trustees*, 1 Hoff. Ch. 211; *State v. Lyons*, 5 Harring. 196.

"Where there is a tenant for life of a fund out of which the legacy is to be paid, so that there is an interval between the death of the testator and the time when it is payable, and a provision that in case of the death of the legatee before the legacy should become payable, it should go to the executors or administrators, the provision shall only apply to the case of the legatee dying at any period between the death of the testator and that of the tenant for life." (*Bone v. Cook*, M'Clel. 168.)

Thus if the bequest be to A. for life, and after his death to B. or his representatives, the gift to B. will lapse by his death in the testator's lifetime, "representatives" being equivalent to "executors or administrators." (*Corbyn v. French*, 4 Ves. 418.)

But an *immediate* bequest to A. or his representatives will not lapse by the death of A. in the testator's lifetime; whether "representative" retains its proper meaning, or, according to *Re Crawford's Trusts* (2 Drew. 234, *supra*, p. 109), is construed (on account of the gift being immediate) to mean the persons beneficially entitled in case of intestacy.

A bequest to A. his executors or administrators, is not substitutional, but will lapse by his death, although the gift be immediate. (*Elliott v. Davenport*, 1 P. Wms. 83.)¹

In *Bone v. Cook*, M'Clel. 168, the bequest was to A. for life, with remainder to several as tenants in common, and with a proviso that if any of them should die before his legacy should become payable, his legacy should go to his *children*: and "in case of *such* death of any of them" without children, his legacy should go to his executors or administrators. It was held, notwithstanding the correspondence between the two gifts over, that the gift over to children would, but that the gift to executors or administrators would not, take effect in the case of a legatee *247] dying in the testator's lifetime, the bequest not being immediate.

Bequest to A. or his heirs.—The doctrine of *Bone v. Cook* does not apply, where the gift over is to the persons *beneficially* entitled

¹ In *Ware v. Fisher*, 2 Yeates 579; *Abbott v. Jenkins*, 10 S. & R. 299; *Stook's Appeal*, 29 Penn. St. 349, it was held that a gift to several or their representatives after a life estate was substitutional. Though in each of these cases this construction was aided by the context.

in case of intestacy.¹ Thus, if the gift be to one for life, and after his decease to "A. *or his heirs*," the word "heirs" being construed to mean the persons entitled under the Statute of Distributions, the gift over, although the bequest is not immediate, takes effect if A. dies in the testator's lifetime. (Re Porter's Trusts, 4 K. & J. 188.) "Where there is a bequest to A. for life, and after his decease to B. or his executors, or to B. or his personal representatives, or a bequest to B. to be paid so many months after the testator's decease to him or to his personal representatives, it is simply another way of giving a vested interest to B. upon the testator's own death, and if B. die before the testator, the bequest shall lapse; but if instead of 'personal representatives' the word 'heirs' is used, I apprehend that circumstance shows an intention on the part of the testator that the persons he designates as 'heirs' are to take by way of substitution whenever B. may die, and the bequest will not lapse, although B. may die in the lifetime of the testator." (Ib.)²

¹ Therefore where the gift is to A. *or his representatives according to the statute*, the gift though not immediate will be construed as substitutional: Brent v. Washington, 18 Gratt. 526.

² Finlason v. Tatlock, L. R. 9 Eq. 258; Whitehead v. Lassiter, 4 Jones Eq. 79; Heyward v. Heyward, 7 Rich. Eq. 289.

But in Pennsylvania it has been held otherwise: In Patterson v. Hawthorn, 12 S. & R. 114, the gift was of the proceeds of stock to M. during her life, and after her death to T. and G. *or their heirs*, and it was held that the interests of T. and G. vested absolutely at the testator's death. "What did the testator mean by the words *or their heirs*? I understand it, as if he had said, to be paid to them, or such person as would be entitled to it as their representatives by the law of the country; that is to say, it was not in case of the death of one to go to the survivor, but to be considered as if vested in the deceased child." Per Tilghman, C. J., (Ib.) and see also McGill's Appeal, 61 Penn. St. 50.

A gift to A. *and his heirs* will be construed a substitutional gift when such appears from the context to have been the intention of the testator. Thus, where the words "and his heirs" are clearly used in one clause of the will as creating a gift of substitution and not as words of limitation, when used in another clause in the same connection they will have the same meaning: Hawn v. Banks, 4 Edw. Ch. 666.

A gift to A. *and to the persons beneficially entitled in case of intestacy, as to "A. and his representatives under the statute,"* will be construed a substitutional gift: Brent v. Washington, 18 Gratt. 526.

Immediate gift, what is.—It seems that a bequest to A. to be paid at the end of a year from the testator's death, or to his representatives, is not an immediate gift, and therefore if A. dies in the testator's lifetime, substitution will not take place. (*Tidwell v. Ariel*, 3 Mad. 403.) "Whether the direction be that the legacy shall be paid as there, a few months after the testator's decease, or as here, at the death of a tenant for life, is plainly immaterial." (*Re Porter's Trusts*, 4 K. & J. 195.)

*Substitution in gifts to a class.*¹—The rule that substitution takes place with respect to the share of a legatee dying in the testator's lifetime, does not apply where the bequest is to a class, and the gift over is construed as a gift only of the shares of *248] *members of the class*. In this case substitution cannot take place until the period when the class is ascertained, which cannot be in the testator's lifetime. "If a testator gives a legacy to a class of persons, such as the children of A., and goes on to provide that in case of the death of any one of the children before the period of distribution, the issue of such child shall take their parent's share; such issue cannot take unless the parent might have taken, and consequently if a child of A. be dead at the date of the will, or at the death of the testator, the issue of that child cannot take anything." (*Ive v. King*, 16 B. 53.)²

¹ In *Re Porter's Trusts*, Malins, V.-C., seems disposed to reject entirely the distinctions which have been made on this subject by the former authorities. He says concerning the distinction between gifts to classes and gifts to individuals: "I am of opinion that there is no reasonable ground for any such distinction. What substantial difference can there be between a gift, for instance, to six children by name, and a gift to children simply, there being six?" In this case the gift was, after a life interest to nephews and nieces; "and in case of the death of any of my said nephews and nieces leaving issue, then I direct that such issue shall take the share his, her or their parent would have taken if living;" and it was held that the issue of nephews and nieces dead at the date of the will, as well as of those dying before the testator, took: *Re Porter's Trusts*, L. R. 8 Eq. 52. But in *Re Hotchkiss's Trusts*, L. R. 8 Eq. 643, James, V.-C., says that *Re Porter's Trusts* was a case of independent gifts, coming within the rule of *Loring v. Thomas*, and considers *Christopherson v. Naylor* as still good authority notwithstanding the remarks of Vice-Chancellor Malins.

² See *Herr's Estate*, 28 Penn. St. 467.

In *May's Appeal*, 41 Penn. St. 512, where the question of substitution in gifts to classes was discussed and the English authorities, the distinction

"The proposition in *Ive v. King* is very simple and well established, viz., that where there is a bequest to a class, followed by a substitutional bequest in case of the death of any member of the class, there to determine whether the substitutional bequest is to take effect upon the death of any particular individual, you must first inquire whether he was a member of the class at all. If he was not, it is impossible to predicate substitution with respect to him." (*Re Porter's Trusts*, 4 K. & J. 191.)

Thus, whereas, under a bequest to A. for life, and after his decease to B. or his issue, the issue of B. are entitled if he die in the testator's lifetime or before the date of the will, on the other hand, under a bequest to A. for life, and after his decease to the *children* of B. or their issue, the issue of a child dying in the testator's lifetime, or dead at the date of the will, cannot take (there being no gift to a child who does not survive the testator): but only the issue of a child who survives the testator, and afterwards dies leaving issue in the lifetime of A. (*Congreve v. Palmer*, 16 B. 435.)

So in *Thornhill v. Thornhill*, 4 Mad. 377, the gift being, at the death of A., to the testator's nephews and nieces, "the children of such of them as should be then dead standing in the place of their father or mother deceased," it was held that the children of nephews dying in the testator's lifetime could not take.

Note.—*Thornhill v. Thornhill* is not, as has been sometimes stated, inconsistent with *Collins v. Johnson*, 8 Sim. *356 [*249 n. In the latter case the testator gave legacies to his

made in the English cases between substitutional and independent gifts is not noticed. In that case the gift was to the testator's grandchildren, to be paid them as they should respectively arrive at the age of twenty-one years, but in the event of the death of *any one of the said grandchildren* before he should arrive at the age of twenty-one years, a gift over of the share of the one so dying. It was held that, one of the grandchildren dying during the life of the testator, the gift over took effect. *Cort v. Winder* was mainly relied on; but in that case the gift was to take effect immediately upon the testator's death, and the gift over was upon the death of any before their shares became due and payable, that is, before the death of the testator. In this case it was before they should attain the age of twenty-one years. *Smith v. Smith*, 8 Sim. 353, was also relied upon, but that is a case of independent gifts.

nephew A. and his niece B., with a gift over of the legacy of any of his nephews or nieces *before named* who should die before the said legacies should become payable, to their issue. Here the bequest being not to a class, but to named individuals, it is obvious that *Walker v. Main* applied, and not *Ive v. King*.

Independent gifts.—But the cases where there is a gift to children as a class, with a gift over of the shares of members of the class (only) to their issue, must be distinguished from those in which the children and issue of children form two distinct classes, the objects comprised in the second class, taking not by way of substitution for members of the first class, but under a substantive gift to them.¹

Thus under a bequest to the children of A. living at a given period, *and* the issue of such children of A. as shall have died before that period, the issue of a child of A. who may have died in the testator's lifetime, or who may have been dead at the date of the will, are entitled; the gift to issue involving no condition as to the time of death of the parent or ancestor. (*Coulthurst v. Carter*, 15 B. 421; *Rust v. Baker*, 8 Sim. 443; *Loring v. Thomas*, 1 Dr. & Sm. 497.)²

And if the gift be to the children of A., followed by a proviso that if any child of A. (not any of the *said* children) shall die before the period of distribution, the issue of such child shall be entitled to the share which such child would have taken if living; this form of bequest may be held to contain a substantive gift to issue (not a *substitutional* gift engrafted on the prior gift to a class), so as to entitle the issue of a child dead at the date of the will, or dying in the testator's lifetime, to share under it. (*Loring v. Thomas*, 1 Dr. & Sm. 497; *Smith v. Smith*, 8 Sim. 353.)

¹ *Wheeler v. Allan*, 54 Me. 233.

² *Atwood v. Alford*, L. R. 2 Eq. 479; *Lawrence v. Hebbard*, 1 Bradl. 256; *Long v. Labor*, 8 Penn. St. 229.

"A gift is *substitutional* when the share which the issue are to take is by a prior clause expressed to be given to the parent of such issue; and a gift to issue is an *original* gift when the share which the issue are to take is not by a prior clause expressed to be given to the parent of such issue:" per *Kindersley, V.-C.*, *Lamphier v. Buck*, 2 Dr. & Sm. 494.

Shall die, not emphatic.—The words “*shall die*” or “*shall happen to die*,” do not necessarily point to a future death, so as to exclude the issue of a child who may have died before the date of the will. (*Loring v. Thomas*, 1 Dr. & Sm. 497; [^{*250} *Christopherson v. Naylor*, 1 Mer. 320.]) Nor does a direction that the issue shall take the share which their parents or ancestor would have taken, render the gift to issue substitutional only. (*Ib. Tytherleigh v. Harbin*, 6 Sim. 329.)¹

In *Tytherleigh v. Harbin*, 6 Sim. 329, the gift was (in remainder after a life interest) to the children of A. who should be living at his decease, and the issue of such of *them* as should be then dead leaving issue, such issue to take only the share which their parents would have been entitled to if then living. It was held that the word “*them*” meant only “*children of A.*,” and did not render the gift substitutional; and that the children of a child dead at the date of the will were entitled under the bequest. And a similar construction was adopted in *Giles v. Giles*, 8 Sim. 360, and in *Jarvis v. Pond*, 9 Sim. 549.²

Gifts partly substitutional.—Besides gifts to issue purely substitutional, engrafted on a gift to children as a class, and independent gifts to children and issue of children concurrently, there is a third class of cases, in which the substitution, if it can be called such, takes place before the members of the primary class are ascertained, but on the other hand takes place only as regards those who at the date of the will had the capacity of becoming members of the class. Thus the issue of children dying in the testator's lifetime are entitled, but the issue of children dead at the date of the will are excluded.³

As in *Christopherson v. Naylor*, 1 Mer. 320, where the bequest was to the children of A. living at the testator's decease, but if any children of A. should die in the testator's lifetime, the legacy “*hereby intended for such child or children so dying*” was given to their issue. It was held that the issue took only in the way of substitution, and that the issue of a child dead at the date of the

¹ Re Chapman's Will, 32 Beav. 382.

² *Long v. Labor*, 8 Penn. St. 229.

³ *Hotchkiss's Trust*, L. R. 8 Eq. 643.

*251] will could show no object of substitution, and were *therefore excluded. See also *Gray v. Garman*, 2 Hare 268.¹

So in *Butter v. Ommaney*, 4 Russ. 70, the gift being (in remainder after a life interest) to the children of A. then living, with a direction that as to such of them as should be then dead leaving children, such children should stand in the place of their parents;—it was held that the children of children dead at the date of the will could not take.

So if there be an *immediate* bequest to children as a class, with a gift over of the shares of those dying before their shares become payable, the gift over takes effect in the case of children alive at the date of the will, and subsequently dying in the testator's lifetime. (*Cort v. Winder*, 1 Coll. 320.)²

Again in *King v. Cleaveland*, 4 De G. & J. 477, under a bequest to A. for life, and after his decease "to his children *then living, or their representatives*," it was held that there were so far two distinct classes of legatees, that the representatives of children dying in the testator's lifetime, but alive at the date of the will, were entitled to share.

And in *Re Thompson's Trusts*, 5 D. M. G. 280, under a bequest to the testator's children living at a given period, and the issue of such of "my *said* children" as should be then dead, the same construction was adopted.

Forms of gift compared.—The different forms of gift above considered, as regards the capacity of issue to take, depending on the time of the death of their parent or ancestor, may be thus stated:—

¹ An exception to the rule of *Christopherson v. Naylor* occurs when all the class are dead at the date of the will, and known to the testator to be so. "The general principle, that where a testator refers to a class, he cannot be held to have intended to include dead persons in it, is displaced in this instance by the fact that the testator must have known that his own brothers were all dead. . . . Where the testator speaks of his brothers and sisters at a time when he must be taken to have known that all his brothers and one of his sisters were dead, the only rational inference is that he named brothers and sisters for the purpose of showing how the property was to be divided;" per Turner, L. J., in *Gowling v. Thompson*, cited *Barnaby v. Tassell*, L. R. 11 Eq. 367; and see also *Jordan's Trusts*, 2 N. R. 57.

² *Brokaw v. Peterson*, 2 M'Cart. 194; *Ritter v. Fox*, 6 Whart. 99.

1. A gift to individuals, as to A. and B. *or* their issue. Here *Willing v. Baine* applies, and the issue take by substitution for A. or B. dying in the testator's lifetime or dead at the date of the will, whether the gift be immediate or in remainder.

2. A gift to the children of A. *or* their issue. Here if the gift be immediate, *Cort v. Winder* applies, and the issue of a child dying in the testator's lifetime take, but *not, it would appear, the issue of a child dead at the date of [*252 the will.

But if the gift be in remainder after a life interest, *Ive v. King* applies, and, the gift being substitutional, the issue of a child who does not survive the testator are excluded.

3. A gift to the children of A. living at a given period, *and* the issue of such as shall be then dead. Here the gift to issue is independent, and the issue of a child dying in the testator's lifetime, or dead at the date of the will, may be entitled.

Gifts to children, followed by directions that the issue of deceased children shall take their parent's shares, are ambiguous; and it would appear that no general rules can be laid down to determine when such gifts to issue are to be considered as substitutional, and when as independent.

Two further questions arise respecting the capacity of issue to take under a gift to children and issue of children concurrently (whether the gift to issue be substitutional or independent); viz., 1. Whether the issue must survive the stirps, or child through whom they claim; and 2. Whether the issue must be living at the period of distribution, where this condition is imposed on the children, but not expressly on the issue.

Issue must survive the stirps.—First, where the bequest is to the children of A. living at a given period, and the issue of such children as shall have died before that period *leaving issue*, it is settled that issue, in order to take, must survive their own stirps. (*Thompson v. Clive*, 23 B. 282; *Re Wildman's Trusts*, 1 Jo. & H. 299.)

And the case would be the same, if the gift were to the children of A., with a gift over of the shares of those who should have died *leaving issue* to their issue.

Again, wherever the gift to the issue is by way of substitution only, as if the gift be to A. for life with remainder to his children or their issue, inasmuch as the gift to the issue of any child cannot vest before the death of that child, it seems that issue who *253] pre-decease their own *stirps cannot be properly entitled. (Crause v. Cooper, 1 Jo. & H. 207.) "In no case can *substituted* issue take vested interests during their parent's life-time." (Per Wood, V.-C., Re Bennett's Trusts, 3 K. & J. 285.)

And it has been held that even where the gift to the issue is independent, the same rule applies. (Re Bennett's Trusts, 3 K. & J. 285; Humfrey v. Humfrey, 2 Dr. & Sm. 49.) Thus where the gift was to A. and B. at twenty-one, if then living, and the issue of either that should be then dead (not dead *leaving* issue), such issue taking their parent's share, with a gift over if both died under twenty-one without issue, it was held that issue of A. who pre-deceased him could not take. (Humfrey v. Humfrey, 2 Dr. & Sm. 49.)¹

Secondly, whether the contingency of being alive at the period of distribution is to be imported into the gift to issue.

Where there is a bequest to the children of A. living at a given period, and the issue (not the issue *then living*) of such as shall be then dead, the preponderance of authority is against importing the condition of being alive at the period of distribution into the gift to issue. The authorities on this side are Lyon v. Coward, 15 Sim. 287; Barker v. Barker, 5 De G. & Sm. 753; and Re Wildman's Trusts, 1 Jo. & H. 299; while Macgregor v. Mac-

¹ But in Lamphier v. Buck, 2 Dr. & Sm. 498, Vice-Chancellor Kindersley retracts the opinion he expressed in Humfrey v. Humfrey, saying he had with great reluctance followed the authorities presented to him. In this case, he holds that if the gift to issue be independent, it is not necessary that they should survive the stirps. "If it be an original gift, I see no more reason for imposing the condition that the child must survive its parents, than for imposing a condition that the child must survive 'the period of distribution.' In either case, the imposing such a condition appears to me a violation of the plain rule of construction, which forbids the Court to introduce any clause or condition not expressed by the testator, unless the context renders it absolutely necessary to do so." He admits, however, that if the gift is substitutional the case is altogether different, for "it would be absurd to talk of substituting for the parent at his death, such of his children as were then already dead."

gregor, 2 Coll. 192, is *contra*. In *Penny v. Clarke*, 1 De G. F. & J. 425, the Court were divided: Knight Bruce, L. J., saying—"It appears to me that the context requires us to read the words 'issue of such' as equivalent to issue *then living* of such," &c.: and Turner, L. J., saying—"I do not see why, because the gift to the first member of the body is contingent, the gift to the other member of the body should be contingent also: or why the issue should not be held to have taken vested interests, as they would have done had the gift been to them alone" (p. 431). The point is still unsettled.¹

If the gift to the issue be not independent but substitutional, as to the children of A. *or* the issue of any *deceased [*254 child, Wood, V.-C., appeared to think that the contingency should be imported. (*Crause v. Cooper*, 1 Jo. & H. 207.)²

The point in question may often be settled by the context: thus, if the bequest to children living at the death of A. and the issue of children who may be then dead be followed by a gift over if there be no children or issue of children *living at the death* of A., it is clear that the contingency is to be imported. (*Re Kirkman*, 3 De G. & J. 558.)

Gifts to A. and "in case of his death," to B.

Where a gift of the absolute interest in property to one person is followed by a gift of it to another in a particular event, the disposition of the Courts is to put such a construction on the gift

¹ This question was settled in *Martin v. Holgate*, L. R. 1 H. L. C. 175, where it was held that the children who survive their parent take vested interests, although they die before the period of distribution.

The ruling of *Martin v. Holgate* was adopted in *Brent v. Washington*, 18 Gratt. 535.

² The same opinion was expressed by Romilly, M. R., in *Holgate v. Jennings*, 34 Beav. 79. But in *Lamphier v. Buck*, 2 Dr. & Sm. 496, Vice-Chancellor Kindersley was of a different opinion; and in *Re Merrick's Trusts*, L. R. 1 Eq. 557, Vice-Chancellor Wood says that he is "quite satisfied, after considering Vice-Chancellor Kindersley's very lucid judgment on the subject, that he was in error" in the opinion he expressed in *Crause v. Cooper*.

The doctrine of these latter cases is adopted in *Brent v. Washington*, 18 Gratt. 535.

over as will interfere as little as possible with the prior gift. When death is spoken of as a *contingent event*, a gift over in the event of death may well be considered to mean, not death at any time, but death before a particular period, *e. g.*, the period of distribution: and thus the gift over may be read as a gift by way of *substitution* and not of *remainder*. It is consequently a rule of construction that—

RULE. Where there is a bequest to one person, and “*in case of his death*” to another, the gift over is construed to take effect only in the event of the death of the prior legatee *before the period of payment* or distribution, unless an intention appear to the contrary. (*Cambridge v. Rous*, 8 Ves. 12; *Ommaney v. Bevan*, 18 Ves. 291; *Home v. Pillans*, 2 Myl. & K. 15.)¹

Thus “a bequest to A. and in case of his death to B., is a gift absolute to A. unless he dies in the testator’s lifetime.

“A bequest to C. for life, and then to A., and in
*255] *case of his death to B., is a gift absolute to A.
unless he dies during C.’s life.

“A bequest to A., when and if he attain the age of twenty-one, and in case of his death to B., is a gift absolute to A. unless he dies under age.” (*Home v. Pillans*, 2 My. & K. 23.)²

The rule is the same where the bequest is to A. and “*in the event of his death*” to B. (*Re More’s Trusts*, 10 Hare 171; *Schenk v. Agnew*, 4 K. & J. 405): or to A. and “if he die” to B. (*King v. Taylor*, 5 Ves. 806).

¹ *Briggs v. Shaw*, 9 Allen 517; *Traver v. Schell*, 20 N. Y. 89; *Murphy v. Harvey*, 4 Edw. Ch. 131; *Kelly v. Kelly*, 61 N. Y. 47; *Beatty v. Montgomery*, 6 C. E. Green 327; *Karker’s Appeal*, 60 Penn. St. 150; *Fulton v. Fulton*, 2 Grant’s Cases 28; *Dorsey v. Dorsey*, 9 Md. 40; *Hammett v. Hammett*, 43 id. 307; *Hamilton v. Boyles*, 1 Brevard 414; *Bailey v. Ross*, 66 Ga. 354; *Sims v. Conger*, 39 Miss. 234.

² *Hughes v. Hughes*, 12 B. Monr. 254.

"A bequest to any person, and in case of his death to another, is an absolute gift to the first legatee if he survive the testator" [the bequest being *immediate*]: "and this, whatever be the form of expression, as 'if he die,' 'should he happen to die,' 'in case death should happen to him,' and so forth. The event here contemplated being so inevitable that it cannot be deemed a contingency, the Courts have held that something else must be intended than merely to provide for the case of the legatee dying at some time or other . . . and so have read those words as if they had been 'in case of his death during the testator's lifetime,' in which event alone they have allowed the bequest over to take effect." (*Home v. Pillans*, 2 My & K. 20.)

If the bequest be in remainder after a life interest, the gift over is not restricted to death in the testator's lifetime, but operates during the continuance of the life interest (*Hervey v. McLaughlin*, 1 Price 264): but, in accordance with the previous rule (*Willing v. Baine*), it operates *also* in case of death during the testator's lifetime.¹

Bequest to A. or his issue.—A gift to "A. or his issue" is equivalent to a gift to A., and "in case of his death" to his issue, and takes effect in the same manner. (*Salisbury v. Petty*, 3 Hare 86.) And if there be two bequests to "A. or his issue," one immediate and the other in remainder, the substitutional *gift takes effect down to the period of distribution in each [*256 case respectively. (Ib.)

In *Salisbury v. Petty* a bequest to A. or his issue, to be paid *at the end of twelve months* from the testator's death, was held an immediate bequest; and that the legatee, if he survives the testator, takes absolutely. (Ib.; see decree, 3 H. 94. But see *ante*, p. 247.)

Real estate.—The rule appears to apply to devises of real estate, where the prior devise passes the fee simple. (*Edwards v. Edwards*, 15 B. 357; *Randfield v. Randfield*, 8 H. L. C. 225.) Thus a devise to A. and his heirs, and in case of his death to B.,

¹ But where the bequest is of a sum of money charged on real estate, and the payment is postponed merely for the convenience of the devisee of the land charged, the first legatee will take an absolute interest if he survive the testator: *Traver v. Schell*, 20 N. Y. 90.

is an absolute devise to A. if he survives the testator. And in a will made since 1837, a devise to A. simpliciter, and in case of his death to B., would, it should seem, receive the same construction.¹

"In case of death," following a life-estate only—But if the prior devise or bequest confers a life interest only, the rule does not apply, and the gift over will take effect by way of remainder, whenever the death of the first taker may happen. Thus, in a will prior to 1838, a devise of land to A., and in case of his death to B., is equivalent to a devise to A. for life, with remainder to B. (*Bowen v. Scowcroft*, 2 Y. & C. 640.) So if personal estate be given to A. for life, with a gift over in the event of his death to B. (*Re More's Trusts*, 10 Hare 171.)

Where there was an absolute bequest and also a bequest for life in the same will, the words "in the event of death" were construed differently with respect to them. (*Re More's Trusts*, 10 Hare 171.)

Gift in case of death leaving children, &c.—A bequest to A., "but if he die and leaving no children," to B. (*Edwards v. Edwards*, 15 B. 357), is within the rule, the words importing contingency being used with reference to the event of death simply, and not to that of death without leaving children.

A bequest to A., "and in case of his death leaving children," *257] to his children, or to A., "and in case of his *death not leaving a child," to B., is ambiguous. The words "in case of" may refer either to death simply (as though a comma were inserted before the words "leaving children"), in which case the rule would apply, and the gift over be restricted to the period of distribution: or they may refer to death leaving or not leaving children, i. e., to death under particular circumstances: in which case the words importing contingency are satisfied by the words being taken literally, as referring to the death of the legatee *at any time* (whether before or after the period of distri-

¹ *Whitney v. Whitney*, 45 N. H. 311; *Briggs v. Shaw*, 9 Allen 516; *Ash v. Coleman*, 24 Barb. 645; *Hill v. Hill*, 5 Gill & Johns. 88.

bution), under the prescribed circumstances. The courts lean rather to the former construction.

Thus in *Home v. Pillans*, 2 My. & K. 15, the gift was to A. and B. when and if they should attain twenty-one, and "in case of the death of either leaving children," the share of the one so dying was given to her children. The gift over was held to be restricted to the contingency of death *under twenty-one* leaving children, i. e., to the period of distribution. It was said (p. 21): "The inconsistency of treating as a contingency the event of all others the most certain, is not the only consideration which has swayed the Courts in seeking for qualifications to restrict the generality of such clauses. The leaning in favor of vesting, and against a construction which would postpone the absolute enjoyment, and indeed keep in suspense the nature of the interest bestowed, has here, as in other branches of the law, operated powerfully in the same direction." (p. 21.)

So in *Barker v. Cooks*, 6 B. 82, where the bequest was (in remainder after a life interest) to A., B. and C., share and share alike, but in case of the death of A. without leaving issue, her share was to go to the others, it was held that the gift over was restricted to death before the period of distribution, the intention being that each of the legatees should at that period take an equal and indefeasible interest.

Doctrine of Edwards v. Edwards.—It was laid down by Romilly, M. R., in *Edwards v. Edwards*, 15 B. 357, as "a general rule, that where there is a bequest to A., but if he die leaving, or without leaving issue or children, to B.,—if the gift be in *remainder* after a life interest, the gift over will be *prima facie* restricted to the event of death before the period of distribution: but that if the gift be *immediate*, the gift over will not be so restricted. And in *Johnston v. Antrobus*, 21 B. 556, this rule was acted on, and under a bequest to A., his executors, administrators, and assigns, "but in case he shall die leaving children," then to trustees in trust for his children, the gift being immediate, A. having children was held to take for life only.

But this distinction appears to be scarcely tenable. A gift over on death leaving or without leaving children can hardly be

restrained to death before the period of distribution, without some appearance of intention arising from context (see *Cooper v. Cooper*, 1 K. & J. 658; *Gosling v. Townshend* (on appeal), 2 W. R. 23, per Lord Cranworth);¹ but, if the context furnishes ground for the restricted construction, it does not seem to be material whether the gift be immediate or in remainder.² In *Johnston v. Antrobus*, *qu.* whether the restricted construction was not the right one. No general rule can be laid down to determine where a gift over of the share of a legatee dying without issue is substitutional, and where not. (*Ware v. Watson*, 7 D. M. G. 248.)

If the gift over on the death of a legatee without issue be of the share "*intended for*" such legatee, it is clear that the gift over is by way of substitution only. (*Ware v. Watson*, 7 D. M. G. 248.)³

Alternative gifts over.—Where real or personal estate is given with *words of limitation* implying the absolute ownership, but there follow alternative gifts over in the event of the first taker dying with and without issue or children, which exhaust all contingencies, so that, if unrestricted in point of time, their combined effect is to reduce the interest of the first taker to a life estate only, a ground is presented for restricting the gifts over to the

¹ The doctrine of *Edwards v. Edwards*, is now overruled; *O'Mahoney v. Burdett*, L. R. 7 H. L. 388; *Ingram v. Soutten*, id. 408; *Munro v. Smart*, 4 Ont. App. 449; *Dumble v. Dumble*, 8 id. 476; *Re Charles*, 1 Ont. 362, reversed in appeal, 10 Ont. App. 281, without affecting the point. It was adopted in *Slaney v. Slaney*, 33 Beav. 633; *Dean v. Handley*, 2 Hen. & M. 635; *Re Hill's Trusts*, L. R. 12 Eq. 308; and in this country in *Wurts v. Page*, 4 C. E. Green 373, and *Birney v. Richardson*, 5 Dana 424. On the other hand that of *Gosling v. Townshend* is followed in *Bowers v. Bowers*, L. R. 5 Ch. App. 247; *Jessup v. Smuck*, 16 Penn. St. 327; *Sims v. Conger*, 39 Miss. 230.

² *Wolfe v. Van Nostrand*, 2 Comst. 436; *Biddle's Estate*, 28 Penn. St. 59; *Karker's Appeal*, 60 id. 150; *Hilliard v. Kearney*, Busb. Eq. 221; *Murchison v. Whitted*, 87 N. C. 465; *Chaplain v. Turner*, 2 Rich. Eq. 136; *McGraw v. Davenport*, 6 Port. 319.

³ *Clark v. Henry*, L. R. 11 Eq. 222.

*period of distribution, in order to avoid an inconsistency [*259 with the prior absolute gift.¹

Thus if real estate be devised to A. *and his heirs*, with a gift over upon the death of A. leaving children to his children, and a gift over upon the death of A. not leaving children to B., the devise over may be restrained to the death of A. before his estate falls into possession, whether the devise be immediate or in remainder. (*Clayton v. Lowe*, 5 B. & Ald. 636 (E. C. L. R. vol. 7) ; *Gee v. Mayor of Manchester*, 17 Q. B. 737 (E. C. L. R. vol. 79.))

So if personal estate be given to A. "for his own use and benefit absolutely," with the like alternative gifts over (*Galland v. Leonard*, 1 Sw. 161 ; *Da Costa v. Keir*, 3 Russ. 360) ; or to A. his executors, administrators, and assigns with the like gifts over (*Johnston v. Antrobus*, 21 B. 556).²

But if the devise or bequest be to A. *simpliciter*, without words implying an absolute interest, the ground for this construction fails, and the gifts over will in general be held to take effect whenever the respective events happen. (*Cooper v. Cooper*, 1 K. & J. 658 ; *Gosling v. Townshend*, 17 B. 245 ; *Ib.*, on appeal, 2 W. R. 23.) In *Gosling v. Townshend*, the bequest was in trust to *pay and divide* in equal shares among the legatees, with gifts over if they should happen to die leaving, and without leaving, issue respectively :—it was held, that the legatees took life interests only.

Gift over to the "survivors" of legatees.—It is to be observed, that where the bequest is to several, with a gift over, in the event of any dying without issue or children, of their shares to the *survivors*, although the contingency of death without issue cannot *per se* be restricted to death before the period of distribution, yet if the survivorship can be referred to that period, the same result will be attained. As in *Evans v. Evans*, 25 B. 81, where the gift was to several, if one died without issue his share to go to the survivors :—it was held that the survivorship, and therefore the

¹ *Gibson v. Walker*, 20 N. Y. 476 ; *Caldwell v. Skelton*, 13 Penn. St. 153 ; *Mickley's App.*, 92 id. 514 ; *Fitzwater's App.*, 94 id. 141.

² *Umstead's Appeal*, 60 Penn. St. 365 ; *Blum v. Evans*, 10 S. C. 56.

*260] gift over, was to be restricted to the *period of distribution. But *qu.* whether in this case the survivorship did not more properly refer to the last antecedent, viz., the dying without issue in the lifetime of the other legatee or legatees, upon the principle of *White v. Baker*, 2 De G. F. & J. 55 (see next rule): which would have allowed the gift over to take effect upon the death of one legatee, living any other of them.¹

Gift over restricted to death before vesting.—Similarly, the gift over in case of the death of one legatee to the survivors, may be restricted by the survivorship being referred to the period, not of distribution, but of *vesting*, according to the doctrine of *Crozier v. Fisher*, 4 Russ. 398. Thus in *Bouverie v. Bouverie*, 2 Phill. 349, where the gift was to A. for life, with remainder to her children at twenty-one; “in case one dies, the other to have share and share alike; the *survivor* to have the whole:”—it was held that children who attained twenty-one and died in the lifetime of A. took absolutely, and that the gift over was restricted to the event of death before attaining twenty-one.

CRIPPS v. WOLCOTT.

Where property is given to those of certain persons who shall be “surviving” at some period, but the exact period is not specified, the general leaning of the courts in favor of vesting is a reason for construing the survivorship to refer to as early a period as possible: and it was formerly the rule (both with regard to real and personal estate) that “surviving” should, whenever possible, be construed “surviving the testator,” so that the objects might be ascertained at the testator’s death. The true rule perhaps is, that survivorship *prima facie* refers to the point of time mentioned in the gift in nearest juxtaposition with the words: and as the point of time so mentioned is generally the period at which the gift is limited to take effect, it has become established as a rule of construction, in opposition to the earlier authorities, that—

*261] *RULE. In bequests of personal estate, words of survivorship are *prima facie* to be referred to the

¹ *Williamson v. Chamberlain*, 2 Stockt. 373.

period of payment or distribution, and not to the death of the testator. (*Cripps v. Wolcott*, 4 Mad. 11; *Neathway v. Reed*, 3 D. M. G. 18; *Hearn v. Baker*, 2 K. & J. 383.)¹

Thus, if the bequest be to A. for life, and after his decease to his *surviving* children, "surviving" is construed to mean "living at the death of A." (*Neathway v. Reed*, 3 D. M. G. 18.)

So if the bequest be to A. for life, and after his decease to B., C., and D., or *the survivors*, those living at the death of A. will take the whole fund. (*Hearn v. Baker*, 2 K. & J. 383.)

"I consider it to be now settled, that if a legacy be given to two or more, equally to be divided between them, or to the sur-

¹ *Hill v. Bank*, 45 N. H. 270; *Van Tillburgh v. Hollingshead*, 1 McCart. 32; *Holcomb v. Lake*, 4 Zab. 689; *Biddle v. Hoyt*, 1 Jones Eq. 163; *Vars v. Freeman*, 3 Jones Eq. 224; *Evans v. Godbold*, 6 Rich. Eq. 26; *Schoppert v. Gillam*, 6 id. 83; *Stinton v. Boyd*, 19 Ohio St. 30; *Blatchford v. Newberry*, 99 Ill. 11; *Hughes v. Hughes*, 12 B. Monr. 115; *Wren v. Hynes*, 2 Metc. (Ky.) 129.

In *Moore v. Lyons*, 25 Wend. 119, the property in dispute was real estate, but the court reject entirely the authority of *Cripps v. Wolcott*, and hold that words of survivorship should be referred to the death of the testator; and see the numerous cases to the same effect collected in *Lyons v. Mahan*, 1 Demarest 180; *Ross v. Drake*, 37 Penn. St. 373, and *Johnson v. Morton*, 10 id. 245, are also both cases concerning devises of realty, but in them the rule of *Cripps v. Wolcott* is rejected, and words of survivorship are referred to the death of the testator. The question is perhaps doubtful in Maryland, but the readiness with which the phraseology of the will was accepted as indicating an intention to confine the survivorship to the death of the testator, and the whole opinion of the Court, in *Branson v. Hill*, 31 Md. 187, show a strong inclination to reject the rule. In Virginia words of survivorship are referred *primâ facie* to the death of the testator; *Martin v. Kirby*, 11 Gratt. 67. The same was held in *Drayton v. Drayton*, 1 Dessaus. 324, which, however, was decided before the case of *Cripps v. Wolcott*. In Georgia also (*Vickers v. Stone*, 4 Ga. 461), the death of the testator is the period at which the survivorship is to be determined. *Hempstead v. Dickson*, 20 Ill. 195, was a devise of realty, and the words of survivorship were referred to the death of the testator. In *Blatchford v. Newberry*, 99 id. 11, however, the rule in *Cripps v. Wolcott* was followed.

vivors or survivor of them, and there be no special intent to be found in the will, that the survivorship is to be referred to the period of division. If there be 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. Wolcott*, 4 Mad. 15.)

The rule applies where the gift is to A. for life, with remainder to his surviving children "when they should attain twenty-one," and the survivorship is referred to the death of A. (*Huffam v. Hubbard*, 16 B. 579.)

In *Carver v. Burgess*, 7 D. M. G. 96, the gift was of a legacy to each of the testator's daughters for her separate use, and "if she has any children the principal to be divided among them after her death if they should attain twenty-one, if not, to be divided among her *surviving* sisters:" one of the daughters having died *262] leaving a child, *who afterwards died under twenty-one, it was held that the survivorship was to be referred to the death of such child (being the period of distribution) and not to the death of the daughters.

Where the bequest was to such persons as A. should by deed or will appoint, and in default of appointment to his surviving brothers and sisters, and A. died without exercising the power, it was held that the brothers and sisters living at the death of A. were entitled. (*Davies v. Thorns*, 3 De G. & Sm. 347.)

If the bequest be to A. for life, and after his death to his surviving children, and A. dies in the testator's lifetime, the survivorship is to be referred to the death of the testator (being the period of distribution), and not to the death of A. (*Spurrell v. Spurrell*, 11 Hare 54.)

So if the bequest be to A. for life, remainder to B. for life, and after the decease of B. to his children, or the survivors, and B. dies in the lifetime of A., the survivorship is to be referred to the death of A., and not to that of B. (*Daniell v. Daniell*, 6 Ves. 297.)¹

¹ See also, *Howard v. Collins*, L. R. 5 Eq. 349. But in *Drakeford v. Drakeford*, 33 Beav. 43, the gift was to A. for life, the remainder to B. for

Real Estate.—It is not yet settled whether the rule in *Cripps v. Wolcott* applies to real estate. (*Haddelsey v. Adams*, 22 B. 271.) The older authorities are strongly in favor of referring survivorship to the testator's death. Thus under a devise to A. for life, and after his death to his surviving children, the devise was held to vest in the children living at the testator's death. (*Doe v. Priggs*, 8 B. & Cr. 231, E. C. L. R. vol. 15.) But in *Buckle v. Fawcett*, 4 Hare 536, Wigram, V.-C., was strongly opposed to the establishment of a distinction between real and personal estate in this respect.¹

Contrary intention.—But the rule will readily yield to indications of a contrary intention, where a different point of time is mentioned in immediate connection with the words of survivorship.²

Thus where the gift was to A. for life with remainder to B. and C. or the survivors, with a direction that if B. should not survive *the testator*, her children should stand *in her [*263 place, it was held that the survivorship referred to the death of the testator. (*Rogers v. Towsey*, 9 Jur. 575.) In

life, "at whose death the principal is to be equally divided between his surviving children." Romilly, M. R., held that the rule of *Cripps v. Wolcott* did not apply, because the testator had fixed another period for the class to be ascertained, to wit, the death of B.; and, therefore, though A. survived B., yet the children of B., who survived their father, took vested interests at his death.

¹ In *Re Gregson's Trusts*, De G. J. & S. 437, the opinion of Turner, J., was in favor of applying the rule to devises of realty. The case before him really turned upon the context of the will; but he declares that he would decide it, apart from that, on general principles. And see, also, *Mariott v. Abell*, L. R. 7 Eq. 482.

In *Holcomb v. Lake*, 4 Zab. 689, it was held that the rule applies to devises of real estate.

In Ontario the rule in *Cripps v. Wolcott* does not apply to real estate; *Peebles v. Kyle*, 4 Grant Ch. (U. C.) 334; *Smith v. Coleman*, 22 id. 507.

² In a gift, after a life estate, to the surviving children of A. and of B., or their heirs and assigns, either the survivorship must be confined to the death of the testator, or the word "or" must be read "and." Of the two the former construction must be adopted, since it gives full effect to the testator's language as it stands: *Re Hopkins's Trust*, 2 Hem. & M. 411; *Nicholl v. Scott*, 99 Ill. 529.

Blackmore v. Snee, 1 De G. & J. 455, the testator's death was adopted as the period of survivorship; but *qu.* how far this case is consistent with the rule.

Survivorship referred to last antecedent.—Again, if the bequest be to A. for life, with remainder to B. and C. equally, but *if either should die* in the lifetime (or before the death) of A., the whole to the survivor, the point of time mentioned in immediate connection with the words of survivorship being, not the death of A. but the death of B. or C. in his lifetime, the words are held to refer to the event of one of the legatees surviving *the other*, and not to the event of one of the legatees surviving the period of distribution—so that if both die in the lifetime of the tenant for life, the gift vests in the representatives of the survivor. (*Scurfield v. Howes*, 3 Bro. C. C. 90; *White v. Baker*, 2 De G. F. & J. 55.) “Where there is a bequest to A. for life, and after his death to B. and C., or the survivor of them, some meaning must, of course, be attached to the words ‘the survivor.’ They may refer to any one of three events: to one of the persons named surviving the other, to one of them only surviving the testator, or to one of them only surviving the tenant for life; and in the absence of any indication to the contrary, they are taken to refer to the latter event as being the more probable one to have been referred to. But when, as in the present case, the bequest is to A. for life, and after his death to B. and C., and in case either of them dies in the lifetime of A., the whole to the survivor, it is plain that the words in their natural import refer to the one surviving the other.” (Per Turner, L. J., *White v. Baker*, 2 De G. F. & J. 55.)

But if the gift be to A. for life, with remainder to B. and C. and in the event of the death of either in the lifetime of A., the share of the one so dying *to be transferred* to the survivor, the immediate antecedent being the period of transfer, and not the death of one of the *legatees, the rule applies, and the survivorship is referred to the period of distribution. (*264] (*Littlejohn v. Household*, 21 B. 29.)

Survivorship referred to period of vesting.—Where the bequest is one for life, with remainder to his children with words of survi-

vorship, and the interests of the children are to vest at a given age or marriage, the construction may be affected by the leaning of the Courts against making a provision for children subject to the additional contingency of surviving their parents, and the words of survivorship may be referred to the period of vesting and not of distribution, "surviving" being held to mean "surviving so as to attain twenty-one." (*Crozier v. Fisher*, 4 Russ. 398; *Weedon v. Fell*, 2 Atk. 123; *Salisbury v. Lambe*, Amb. 383.) As in *Bouverie v. Bouverie*, 2 Phill. 349, where the gift was to A. for life, with remainder to his children when they should attain twenty-one; "in case one dies, the others to have share and share alike; the *survivor* to have the whole."

So if the bequest be to A. for life, with remainder to his children at twenty-one or marriage, "with benefit of survivorship," the latter words are construed to refer only to the case of children dying under twenty-one unmarried, and not to the case of a child attaining twenty-one and afterwards dying in the lifetime of A. (*Tribe v. Newland*, 5 De G. & Sm. 236; *Knight v. Knight*, 25 B. 111; *Berry v. Briant*, 2 Dr. & Sm. 1.)¹

So where the bequest was to trustees in trust to apply the interest for the benefit of the children till the youngest attained twenty-one, and then all the said children or the survivors were to be *let into possession* of the property, it was held that the interest of a child who attained twenty-one, but died before the youngest attained that age, was not divested in favor of those living when the youngest attained twenty-one. (*Crozier v. Fisher*, 4 Russ. 398.)

But where the gift was to A. for life, and on her decease the interest to be applied for the use of her children till *they [*265 should attain twenty-one, and then the principal to be *paid* to the survivors, the only gift being in the direction to pay, it was held that the children who survived A. alone could take. (*Turing v. Turing*, 15 Sim. 139.) So where the gift was a direction to divide among children *when* the youngest attained twenty-one, "with benefit of survivorship." (*Vorley v. Richardson*, 8 D. M. G. 126.) So in *Re Crawhall's Trust*, 8 D. M. G. 480.

¹ *Cornech v. Wadman*, L. R. 7 Eq. 80.

Survivorship, indefinite or substitutional.—The rule in *Cripps v. Wolcott*, referring words of survivorship to the period of distribution rather than the death of the testator, applies only where the gift to survivors is *substitutional*, and does not decide the question when the survivorship is substitutional, and when it is indefinite, so as to create a joint tenancy, or a tenancy in common with cross-remainders.

A gift to several “and the survivors *or* survivor,” is clearly substitutional, and equivalent to a gift to them “*or* the survivors or survivor.” (*Cripps v. Wolcott*, 4 Mad. 11; *Wagstaff v. Crosby*, 2 Coll. 746.) So a gift to several, “and the *survivors*” (*Brown v. Bigg*, 7 Ves. 279), is substitutional.

And it seems that a bequest of personal estate to several “equally to be divided between them, *and* the survivors *and* survivor of them,” without a gift over, is *primâ facie* substitutional, and vests absolutely in those living at the period of distribution. (*Stringer v. Phillips*, 1 Eq. Ca. Abr. 293; *Macdonald v. Bryce*, 16 B. 581; *Hodson v. Micklethwaite*, 2 Drew. 294.)

But a devise of real estate to A. and B. and the survivor of them, their heirs and assigns, as tenants in common, creates a joint tenancy for life, with several remainders in fee. (*Barker v. Giles*, 3 Bro. P. C. Toml. 104.)¹

Bequest to several, “or” those living at a given period.

If a testator gives property to several persons *or* to those of
 *266] them who shall be alive at a particular period, *the latter words are generally intended, not as a fresh gift engrafted on the former, but as a qualification of the original gift, so as to introduce into it the condition of surviving the specified period. The Courts however lean so strongly in favor of vesting, that the words in question are considered to import, not a *condition*, but only a *preference* in favor of those living at the given time: so that, failing any of those to whom preference is given, the original gift to all remains unaffected: and it is a rule of construction that—

¹ *Taafe v. Connec*, 10 H. L. C. 64.

RULE. A bequest to several, or to a class, “*or*” to such of them as shall be living at a given period, is construed as a vested gift to all, subject to be divested in favor of those living at that period, if there be such; and if none are then living, all are held to take. (*Browne v. Lord Kenyon*, 3 Mad. 410; *Sturgess v. Pearson*, 4 Mad. 411; *Belk v. Slack*, 1 Keen 238.)¹

Thus if the gift be to A. for life, with remainder to his children, *or such of them as shall be living* at his decease, and no child is living at the death of A., all the children are entitled, as if the gift had been to A. for life, with remainder to his children *simpliciter*. (*Sturgess v. Pearson*.)

So if the gift be to A. for life, and after his decease to his children *or the survivors*:—the rule in *Cripps v. Walcott* being applicable. (*Browne v. Kenyon*.)²

“The obvious meaning is, that if one only survived the tenant for life, he should take the whole. It is in expression therefore a vested gift to the two as tenants in common, subject to be divested if one alone should survive the tenant for life; but which never was divested, because that event did not happen. The two brothers therefore took vested interests as tenants in common, and the *money is now divisible between their representatives. [*267 It may be well doubted whether this was the real intention, and whether the testator did mean that either brother should take any interest without surviving the tenant for life: but the force of the expression is otherwise.” (*Browne v. Lord Kenyon*, 3 Mad. 416.)

So a bequest to “A. *or his issue*,” is a vested interest in A., subject to be divested upon his death before the period of distribution in favor of his issue, if any, then living. (*Salisbury v. Petty*, 3 Hare 86.)

¹ *Re Sanders' Trusts*, L. R. 1 Eq. 683.

² *Kirsh v. Yongue*, 7 Rich. Eq. 100.

The same rule applies to substitutional gifts generally, though not introduced by the word "or."

Thus if the bequest be to A. for life, with remainder to B. and C. equally, "and in case of the death of either in the lifetime of A., the whole to the survivors *living at his decease*:"—if B. and C. both die in the lifetime of A., the representatives of both take the fund equally. (*Harrison v. Foreman*, 5 Ves. 207.)

But if the gift over be to the *survivor* (not, to the survivor *living at the decease of A.*), the survivorship would be referred to the death of the legatee who died first, and the representatives of the survivor would be entitled, although the survivor predeceased the tenant for life. (*White v. Baker*, 2 De G. F. & J. 55.)

Again, if there is a bequest to several legatees absolutely, with a direction that upon the death of any one of them before the period of distribution, the share of the one so dying shall go to his children or issue: the gift being vested subject to be divested in favor of children or issue (if any), the representatives of those dying without issue will be entitled. (*Smither v. Willock*, 9 Ves. 233; *Hervey v. M'Laughlin*, 1 Price 264; *Gray v. Garman*, 2 Hare 268.)

Directions to settle children's shares.—If there is a gift to children or legatees, the shares being given absolutely in the first instance, followed by a direction to settle the shares of some of the legatees upon trusts which do not exhaust the whole interest:—subject to the qualifying trusts, the legatees take their shares *268] absolutely. (*Whittell v. Dudin*, 2 J. & W. 279; *Hulme v. Hulme*, 9 Sim. 644; *Mayer v. Townshend*, 3 B. 433.) As if the shares of daughters be settled on themselves for life, with remainder to their children:—the shares of those dying childless pass to their representatives.

In *Ware v. Watson*, 7 D. M. G. 248, shares were given to children absolutely, with a clause of accruer between them, followed by a direction to settle the share of each child being a daughter: it was held that the direction to settle did not apply to the accrued shares of daughters.

Ex parte West.

If property be given to several, with a direction that in certain events the shares of one or more of them shall go over and accrue to the others, it is a nice point whether that which is directed to go over by the clause of accruer can be said to include that which has already been operated on by the same clause: in other words, whether the force of the clause of accruer is not exhausted, when it has once operated on each division of the property. The disposition to hold interest once vested to be, as far as possible, indefeasible in the donees, favors this construction: and it is established as a rule, in the absence of expressions indicating a contrary intention, that—

RULE. A clause of accruer of the shares of devisees or legatees does not, *prima facie*, operate on shares which have already accrued under the clause in question.

Thus, if real or personal estate be given to A., B., and C., as tenants in common, with a direction that if any of them die without issue, the *share* of the one so dying shall be divided among the *survivors*:—if A. and B. successively die without issue, the original *share of B. will accrue to C., but not the share which [*269 accrued to B. upon the death of A. (Ex parte West, 1 Bro. C. C. 575; Crowder v. Stone, 3 Russ 217; Douglas v. Andrews, 14 B. 347.)¹

“Where a man gives a sum, suppose of 1000*l.*, to be divided amongst four persons, as tenants in common; and that if one of

¹ Hutchinson's Appeal, 34 Conn. 300; Everitt v. Everitt, 29 N. Y. 39; Gill v. Roberts, 33 N. J. Eq. 474; Masden's Estate, 4 Whart. 429; Hoxton v. Archer, 3 Gill & Johns. 213; Brooke v. Croxton, 2 Gratt. 507; Owen v. Owen, 1 Busb. Eq. 121.

In Ohio this rule is not observed in a devise to several, their heirs and assigns, with a direction that “if any should die without issue the share or shares of such decedent or decedents should be equally divided among the survivors.” It was held that the latter clause operated on accrued as well as original shares: Taylor v. Foster, 17 Ohio St. 166.

them die before twenty-one or marriage, it shall survive to the others: if one dies, and three are living, the share of that one so dying will survive to the other three; but if a second dies, nothing will survive to the remainder but the second's original share: for the accruing share is as a new legacy, and there is no further survivorship." (Per Lord Hardwicke, 3 Atk. 80.)

But if A. and B. both died *in the lifetime of the testator*, no doubt upon the testator's death the original shares of both of them would accrue to C.¹

The rule applies where the word "portion" is used instead of share. (*Bright v. Rowe*, 3 My. & K. 316.) So if the word be "part," as where the property was devised to three, with a direction that as each died, his or her "part" should go to the others then living. (*Goodwin v. Finlayson*, 25 B. 65.)²

In *Douglas v. Andrews*, 14 B. 347, it was said that if the "share and interest" of the legatee was given over, the word "interest" would carry the accrued share: *sed qu.*

Contrary intention.—But if an intention is expressed of keeping the estate or fund in an aggregate mass, with a gift over of the whole to persons in remainder, the rule is excluded, and the accrued share will survive with the original shares.

As if lands be devised to several as tenants in common in tail, with remainder as to the shares of those dying without issue to the survivors in tail, *with remainder over*. (*Doe v. Birkhead*, 4 Exch. 110.)

*270] So if personal estate be given to A., B., and C., with a *direction that the shares of any of them dying without issue shall accrue to the survivors, and in the event of *all* dying without issue, the whole is given over to D.:—upon the death of one without issue, the accruing shares will not vest absolutely in the others, liable only to be divested on the death of all without issue; but on the death of each legatee the accrued share will survive to the others. (*Worldidge v. Churchill*, 3 Bro. C. C. 465;

¹ *Bujac's Est.*, 76 Penn. St. 27.

² But in *Turner v. Withers*, 23 Md. 43, the words, "the part which the child so dying shall be entitled to," were held to include accrued shares.

Douglas v. Andrews, 14 B. 347.) "If the intention is clearly expressed of keeping the fund in one aggregate mass, the rule does not apply. Observe what an inconsistency would arise if it were otherwise. Suppose there were four or five children, one of whom died without leaving issue, his share would go to the survivors; but if one of such surviving children afterwards died without issue, his accrued share would go to his legal personal representative, while his original share would go over to the survivors; but suppose that afterwards they all died without issue, then the legal personal representative must be divested of the accrued shares, in order that the whole fund might go over in mass to the parties entitled in that event." (*Douglas v. Andrews*, 14 B. 355.)¹

Again, if the clause of accruer directs the shares to go over to the survivors "in manner aforesaid," or "in manner thereinbefore directed concerning the original shares," the accrued shares will be subject to the same trusts (including the clause of accruer) as the original shares. (*Milsom v. Awdry*, 5 Ves. 465; *Goodman v. Goodman*, 1 De G. & Sm. 695.)

Double clause of accruer.—It appears that the rule does not extend to prevent a clause giving over the shares of legatees dying under given circumstances, from operating on shares which may have accrued to them under *another* clause in the bequest.

Thus, if the gift be to A., B., and C., equally, with a direction that the shares of any who may die without leaving children shall go to the survivors equally, and that if any die leaving children, his share shall go to his children:—*if A. die first without leaving children, and B. afterwards die in the lifetime of C., the children of B., if any, will take his accrued as well as original share: although, if B. died without children, his original

¹ *Dutton v. Crowdy*, 23 Beav. 272; *Turner v. Withers*, 23 Md. 44. So if the gift be to several, and if either of them should die without issue then the survivors or *survivor* of them to have *all* the said property: *Spruil v. Moore*, 5 Ired. Eq. 284.

share only would survive to C. (*Eyre v. Marsden*, 4 My. & Cr. 231; *Leeming v. Sherratt*, 2 Hare 14.)

Benefit of survivorship.—A gift to several, “with benefit of survivorship,” carries over the accrued as well as the original shares. (*Re Crawhall’s Trust*, 8 D. M. G. 480.)

CHARGES, LIABILITY TO DEBTS, ETC.

Dower.

IN wills not subject to the provisions of the Dower Act (3 & 4 W. 4, c. 105), all devises of land liable to dower of course take effect subject to the widow's rights in that respect; but if the will indicates an intention to dispose of the lands *adversely* to her right, the widow, if taking any benefits under the will, is put to her election. Such an intention may appear in two ways: (1) by the gift to the widow herself of an interest in the land, implying that such interest is to be taken by her in lieu of dower: (2) by the devise of the land to other persons in such a way, that the disposition would be defeated by the assertion of the right to dower out of it. But on both points the presumption is (in wills not subject to the Dower Act) against the construction which would put the widow to her election.

First, as regards the intended exclusion from dower by a gift of an interest in the land to the widow herself,—the rule, prior to the Dower Act, is as follows:—

RULE. In wills executed¹ before January 1, 1834, *and in other wills so far as regards the dower of [widows married on or before January 1, 1834. [*273

¹ The saving clause (sect. 14) of the Dower Act enacts, "That this Act shall not extend to the dower of any widow who shall have been or shall be married on or before January 1, 1834, and shall not give to any will, deed, contract, engagement, or charge *executed*, entered into, or created before January 1, 1834, the effect of defeating or prejudicing any right to dower."

It would appear that a will executed before 1834 is not brought within the Act by being republished subsequently to 1834 by codicil.

A devise to to the testator's widow of part of the land liable to her dower is not *primâ facie*, construed as a gift in lieu of dower, so as to put the widow to her election as regards the remaining land liable to dower. (Laurence v. Laurence, 2 Vern. 365, 3 Bro. P. C. Toml. 484; Birmingham v. Kirwan, 2 Sch. & Lef. 444.)¹

And a gift to the widow of an annuity charged on land liable to dower does not put her to election as regards dower out of the land charged. (Birmingham v. Kirwan, 2 Sch. & Lef. 444; Hall v. Hill, 1 D & War. 94; Holdich v. Holdich, 2 Y. & C. C. C. 18.)²

Thus, where the testator being seised of a mansion-house and 283 acres of land, devised that his wife should have the mansion-house for her life with the ground then in hand, being about 53 acres; it was held, that the widow might accept the devise, and also claim dower out of the remainder of the 283 acres. (Lord Dorchester v. Earl of Effingham, G. Coop. 319.)

So, where a house and demesne was devised to the widow for life, she paying 13s. yearly for every acre, to keep the house in

¹ Reed v. Dickerman, 12 Pick. 149; Lord v. Lord, 23 Conn. 331; Bull v. Church, 5 Hill 206; Norris v. Clark, 2 Stockt. 54; Webb v. Evans, 1 Binn. 565; Douglass v. Feay, 1 W. Va. 26; Higginbotham v. Cornwell, 8 Gratt. 83; Bailey v. Boyce, 4 Strobb. Eq. 90; M'Leod v. M'Donnel, 6 Ala. 241; Kelly v. Stinson, 8 Blackf. 388; Shaw v. Shaw, 2 Dana 342; Yancy v. Smith, 2 Metc. (Ky.) 408; Sully v. Nebergall, 30 Iowa 339; the Ontario cases are reviewed in Laidlaw v. Jackes, 25 Grant Ch. (U. C.) 293.

² Douglass v. Feay, 1 W. Va. 35. A charge of "comfortable support and maintenance" upon the estate is not to be considered in lieu of dower: Smith v. Kniskern, 4 Johns. Ch. 10. But the contrary was held in Worther v. Pearson, 33 Ga. 287, where it is also declared that a charge of an annuity on land in favor of the widow, is sufficient to put her to election; and in McLellan v. McLellan, 29 Grant Ch. (U. C.) 1, it was held that a charge "for her necessary comforts and for her board and maintenance," on all the testator's real estate devised, put the widow to her election; for these things were to be provided by the testator's son who was to "hold possession of the land from the time of my decease, subject to the proviso aforesaid;" and the allotment of dower to the widow would have disturbed these arrangements.

repair, and not to let, except in a certain manner, and the rest of the estate was devised to A. for life with remainder to B., it was held that the widow might claim dower out of the rest of the estate. (*Birmingham v. Kirwan*, 2 Sch. & Lef. 444.)

"I feel bound by the present state of the authorities to say, that a mere gift of an annuity to the testator's widow, although charged on all the testator's property, is not sufficient to put her to her election. I consider myself equally bound by the authorities to say, that a mere gift to the widow of an annuity so charged, and a gift of the whole of the testator's real estate, though specified by name, to some other persons, are not together of themselves sufficient to put the widow to her election; and moreover, that a gift of a portion of the real estate to the widow, whether for life or during widowhood, is not sufficient as to the residue of the estate to put the widow to her election in respect of dower." (*Holdich v. Holdich*, 2 Y. & C. C. C. 18.)

Contrary intention.—In some cases, where the testator has directed the land itself to be divided among the widow and other persons in certain proportions (*Chalmers v. Storil*, 2 V. & B. 222; *Dickson v. Robinson*, Jac. 503), or has given a certain proportion of the rents and profits of the land to the widow, and the remainder to other persons (*Roberts v. Smith*, 1 S. & Stu. 513), it has been held that the gift to the widow of a certain share of the property, implied that she was not to take more than that share, and that therefore she could not claim dower out of the other shares. In *Reynolds v. Torin*, 1 Russ. 129, where the testator gave to the widow four-sevenths of the income of certain specified property, including a Scotch heritable bond, and the remaining three-sevenths to other persons, it was held that the testator could not intend to give to the widow both four-sevenths and one-third of the interest of the bond, and therefore that, although the bond did not in fact pass by the will, the widow was put to her election as to her right of terce in the bond.¹

¹ *Lord v. Lord*, 23 Conn. 331; *Hickey v. Hickey*, 26 id. 261; *Creacraft v. Dille*, 3 Yeates 79; *Craig v. Walthall*, 14 Gratt. 518; *Bailey v. Boyce*, 4 Strob. Eq. 84; *M'Leod v. M'Donnel*, 6 Ala. 241; *McGregor v. McGregor*,

But these cases of gift to the widow of a definite share of the land, or in the rents and profits, must be distinguished from the case where the land is devised in trust for sale, with a gift to the widow of a definite share in the proceeds of the sale. In the latter case, the sale is supposed to be subject to the charge of dower, and the share of proceeds given to the widow is a share of what remains after that charge is satisfied; the claim of dower is therefore not inconsistent with that gift, and the widow is not put to her election. (*Bending v. Bending*, 3 K. & J. 257.)¹

Again, if the devise is to trustees in trust to pay an annuity to the widow, and to pay the *surplus* rents and profits to other persons; this is, in fact, a devise subject *to the annuity, and
*275] does not put the widow to election. (*Harrison v. Harrison*, 1 Keen 765.)

New law.—The Dower Act reverses the rule of construction just considered, and moreover, deprives the widow of the right of election between her dower and the interest devised to her: viz., by enacting that—

RULE. In wills executed on or after January 1, 1834, as regards (only) the dower of widows married after January 1, 1834:

“Where a husband shall devise any land out of which his widow would be entitled to dower if the same were

20 Grant Ch. (U. C.) 450; *Patrick v. Shaver*, 21 id. 123; *Armstrong v. Armstrong*, id. 351.

In *Hamilton v. Buckwater*, 2 Yeates 389, a devise to the widow during widowhood is deemed a bar to dower in the lands so devised; but *Bull v. Church*, 5 Hill 206, and *Sully v. Nebergall*, 30 Iowa 339, are otherwise.

In *Parker v. Parker*, 13 Ohio St. 95, it is held that a devise to a widow and other persons in certain proportions, is inconsistent with a declaration that the devises to the widow are not in lieu of dower, and that the former shall prevail.

Where the testator gave his wife not only a life interest in certain lands, but also annuities to such an amount that the rents and profits of his estate after paying the annuities were not sufficient to satisfy her claim for dower, it was held that she was bound to elect: *Becker v. Hammond*, 12 Grant Ch. (U. C.) 485.

¹ So *Fuller v. Yates*, 8 Paige 329; *Kinsey v. Woodward*, 2 Del. Ch. 92; but to the contrary *Duncan v. Duncan*, 2 Yeates, 302.

not so devised, or any estate or interest therein, to or for the benefit of his widow such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his said will." (Stat. 3 & 4 Will. 4, c. 105, s. 9.)¹

A devise to the widow of lands not liable to dower, or a bequest to her of personal estate, is not, either before or since the Dower Act, construed as a gift in lieu of dower.

¹ Similar provision is found in the statutes of Maine (Act of 1783, *Hustings v. Clifford*, 32 Me. 132); Massachusetts (Act of 1783, Pub. Stat. 1882, Ch. 127, § 20, see *Reed v. Dickerman*, 12 Pick. 146, and *Buffington v. Bank*, 113 Mass. 246); Rhode Island (Pub. Stat. 1882, p. 472, § 11); New York (Rev. Stat. of 1830) R. S. 1875, part 2, Ch. 1, tit. 3, § 13; New Jersey (Act April 16, 1846) R. S. 1877, p. 322, pl. 16; Pennsylvania (Act of April 8, 1833); Delaware (Act of Feb. 16, 1816) Rev. Code 1874, § 1744; Maryland (Act of 1798) Rev. Code 1878, Art. 50, § 228; Virginia (Act of Feb. 21, 1866) Code 1873, tit. 33, ch. 119, § 12; West Virginia (R. S. 1879, ch. 66, § 11); North Carolina (Act of April 19, 1784, R. S. 1873, Ch. 117, § 2; *Brown v. Brown*, 5 Ired. 136); Alabama (Code of 1852); Mississippi (Rev. Code 1880, § 1174); Ohio (Act of Jan. 19, 1804); Indiana (Act of 1843); Illinois (Act of 1829) R. S. 1883, 444; Tennessee (Act of 1784) Comp. Stat. 1871, § 2404; Michigan (Rev. Stat. of Sept. 1, 1838) How. Ann. Stat. 1882, § 5750; Wisconsin (R. S. 1878, § 2174; *Hardy v. Scales*, 54 Wisc. 452; Supplement to R. S., p. 462 note); Minnesota (Stats. at Large, 1873, Ch. 32, § 152); Missouri (Rev. Stat. 1845) R. S. 1879, § 2199; Arkansas (Act of March 20, 1839); Kansas; Oregon (Gen. Laws 1872, p. 586, § 18). But under these statutes the widow may in all cases elect between the provision made for her, and her dower.

In Maine, Massachusetts, Pennsylvania, Virginia, North Carolina, Florida, Ohio, Tennessee, Wisconsin, Minnesota, and Kansas, any provision whatever in a will of a husband for his widow, whether of real or personal estate, is construed to be in lieu of dower, unless a contrary intention appear from the will.

In Virginia, under a statute of 1785, in force until July 1, 1850, it could be shown by parol evidence that a devise was intended to be in lieu of dower.

In Illinois it is held that the terms of their statute, "Every devise of land or any estate therein," do not include a gift to the widow of the proceeds of land directed to be sold: *Jennings v. Smith*, 29 Ill. 116.

Secondly, a devise of lands liable to dower to other persons beneficially, does not necessarily import an intention on the part of the testator to devise the land otherwise than subject to the legal charges to which his estate therein is incident, among which is (prior to the Dower Act) the widow's right to dower. It is consequently the rule that—

RULE. In wills executed before January 1, 1834, and in other wills so far as regards the dower of widows married on or before January 1, 1834:

Every devise of lands liable to dower is *prima facie* *276] construed as a devise *subject* to the right to *dower: in order to put the widow to election, it must appear that her demand of dower by metes and bounds *would be repugnant to the disposition*. (French *v.* Davies 2 Ves. jun. 576; Birmingham *v.* Kirwan, 2 Sch. & Lef. 444; Ellis *v.* Lewis, 3 H. 313; Gibson *v.* Gibson, 1 Drew. 42.)

Thus a devise of “the lands called A,” being lands liable to dower, to trustees in trust to pay the rents to one for life, with remainders over, does not put the widow to her election.

And a devise of the lands to trustees *in trust for sale* does not exclude the right to dower: as the widow may concur, or the sale be made subject to dower. (Ellis *v.* Lewis, 3 H. 310; Gibson *v.* Gibson, 1 Drew. 42.)

“A distinction was at one time supposed to exist between a devise of a testator's estate or interest in his lands, and a devise of the lands themselves by that description; it being considered in the former case that the devise did not, in the latter that it did, express an intention by force of the language itself, that the devisee was to take the lands discharged of the widow's right to dower. But I take the law to be clearly settled at this day, that a devise of lands *eo nomine*, upon trust for sale, or a devise of lands *eo nomine*, to a devisee beneficially, does not *per se* express

an intention to devise the land otherwise than subject to its legal incidents, that of dower included." (Ellis v. Lewis, 3 Hare 313.)

"If it was impossible to sell lands subject to a widow's right to dower, or to sell the remaining two-thirds, after setting out by metes and bounds one-third for dower, and to sell the reversion of the third part thus set out, then, indeed, the assertion by the widow of her right to dower would defeat the disposition made by the will for sale of the estate, and then she would be put to her election. But so far from any impossibility, there is in fact no *difficulty in selling an estate subject to the widow's [277 dower; and therefore there is no ground for holding that a devise in trust for sale is a sufficient reason for putting the widow to her election." (Gibson v. Gibson, 1 Drew. 55.)

Direction as to proceeds of sale.—Nor of course does any direction as to the application of the proceeds of the sale alter the case. "The devise is of land subject to dower. The trust to sell is a trust to sell subject to dower, and the proceeds of the sale will represent the gross value of the estate, minus the value of the dower. Whatever direction, therefore, for the mere distribution of the proceeds the will may contain, that direction must leave the widow's right to dower untouched." (Ellis v. Lewis, 3 Hare 313; Bending v. Bending, 3 K. & J. 257.)

Nor is the right to dower excluded by a direction that until the sale the rents and profits shall be applied in the manner directed with respect to the income of the proceeds of the sale. (Gibson v. Gibson, 1 Drew. 57.)

Power of leasing, &c., inconsistent with dower.—But it is settled that a *power of leasing* extending over the whole estate given to trustees, is inconsistent with the enjoyment of dower by metes and bounds, and puts the widow to her election. (Hall v. Hill, 1 D. & War. 94; Parker v. Sowerby, 4 D. M. G. 321.)

And it seems that powers of management, &c., have the same effect. In Parker v. Sowerby, 4 D. M. G. 321, Turner, L. J., said, "The will also gives to the trustees the management of the estate, and directs them to make such repairs as they may deem necessary; this provision is also inconsistent with the existence of a right to dower in the wife."

Similarly, where a farm was devised to trustees in trust to carry on the business or to let the same during the minority of A. as they should think best (*Butcher v. Kemp*, 5 Mad. 61) ; or where the trustees were to take possession of, occupy, and manage the farm in question (*Roadley v. Dixon*, 3 Russ. 192), it has been held that the disposition was inconsistent with the right to dower.

*278] *In *Miall v. Brain*, 4 Mad. 119, and *Goodfellow v. Goodfellow*, 18 B. 356, it was held that a gift to a particular person of the *personal* occupation of *part* of the property devised was sufficient to show that the whole of the property was intended to be devised free from dower.

New law.—The Dower Act in effect abolishes the preceding rule by postponing, independently of any intention on the part of the testator, the widow's right to dower to every disposition made by will ; the enactment being that (in will executed on or after January 1, 1834, so far as regards the dower of widows married after January 1, 1834), every testamentary disposition of land includes, absolutely or *pro tanto*, the right to dower. (Stat. 3 & 4 W. 4, c. 105, ss. 4, 5.)

Section 4. "That no widow shall 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."

Section 5. "That all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, encumbrances, contracts, and engagements to which his lands shall be subject or liable, shall be valid and effectual as against the right of his widow to dower."

Mortgages.

Previously to the Act 17 & 18 Vict. c. 113 (*Locke King's Act*), debts created by the testator, and secured by mortgage, were payable primarily out of the personal estate in the same way as debts not so secured ; and the right of the devisee of the mortgaged estate to exoneration out of the personalty was not held to be taken away except by a clear expression of intention : it being a rule of construction that—

RULE. In wills made before January 1, 1855:

A devise of lands to A., *subject to a mortgage*, does not imply an intention that the devisee should take *cum onere*, so as to render the land devised primarily *liable. [*279 (Serle v. St. Eloy, 2 P. Wms. 386; Bickham v. Cruttwell, 3 M. Y. & Cr. 763; Goodwin v. Lee, 1 K. & J. 377.)¹

In Bickham v. Cruttwell, 3 Myl. & Cr. 763, estate A. being subject to a mortgage, the testator devised estates A. and B. "*the whole subject to the payment of the mortgage debt borrowed on A.*" It was held that although B. was thus charged with the debt, the devisee of A. did not take *cum onere*. It was said (p. 769), "The gift is of the houses, subject to the payment of the mortgage. That expression, however, it is clear, will not exonerate the personal estate; it is merely a description of the state of the property, and it has often been decided that such a form of expression does not amount to an exoneration of the personal estate. It is true, the devise subject to the charge includes also other property; that is to say, it charges other property which was not before subject to the mortgage debt. But that circumstance will not of itself exonerate the personal estate; it is merely an additional charge, giving a further security beyond what the mortgagee previously had."

¹ In America it has been held that a simple devise of lands, which at the time of the devise are subject to a mortgage created by the testator, passes to the devisee exonerated from the mortgage debt, unless a contrary intention appears in the will: Hewes v. Dehon, 3 Gray 205; Plimpton v. Fuller, 11 Allen 139; Richardson v. Hall, 124 Mass. 228; Gould v. Winthrop, 5 R. I. 319; McLenahan v. McLenahan, 3 C. E. Green 101; and the same rule applies to a specific devise of personalty pledged for a debt; Johnson v. Goss, 128 Mass. 433. But if the mortgage were created by a previous owner the devisee is not entitled to exoneration out of the personal estate, unless a different intention appears in the will, or the testator has during lifetime made the debt his own: Andrews v. Bishop, 5 Allen 493; Hoff's Appeal, 24 Penn. St. 203; Thompson v. Thompson, 4 Ohio St. 333.

If lands be devised which are held under a contract of sale and the purchase-money is not paid, the devisee is entitled to have it paid out of the personal estate of the testator: Lamport v. Beeman, 34 Barb. 239; McCracken's Appeal, 29 Penn. St. 426.

In *Goodwin v. Lec*, 1 K. & J. 377, two estates, Whiteacre and Blackacre, were subject to a mortgage for 1200*l.*; the testator devised Whiteacre to A., *subject to* payment of 200*l.*, part of the mortgage debt, and Blackacre to B., subject to payment of the remainder: it was held that the terms of the devise affected the incidence of the charge only as between A. and B., and that the descended real estate was not exonerated.

Contrary intention.—But if a particular provision be made for payment of the mortgage debt out of the estate charged, and only the residue after payment of the debt is bequeathed to the devisee, the estate charged is the primary fund. (*Hancox v. Abbey*, 11 Ves. 179.)

So a devise to A., *he paying* the mortgage thereon, has been
 *280] held to render the mortgaged estate primarily liable.
 *(*Lockhart v. Hardy*, 9 B. 379.) And where the testator expressly *charged* and made liable the estate with payment of the debt, it was held that, as the estate could not be charged in favor of the creditor more than it was before, it must be intended that the devisee was to take *cum onere*. (*Evans v. Cockeram*, 1 Coll. 428.)

New law.—The Act 17 & 18 Vict. c. 113, does not establish on this subject a new rule of construction, but enacts that, *in the absence* of any intention on the part of the testator appearing to the contrary, evidenced either by will or by *any document*, the mortgaged estate shall, as between the persons claiming under the testator, be primarily liable. Wills made before January 1, 1855, are not within the provisions of the Act.¹

^a Stat. 17 & 18 Vict. c. 113, s. 1. “When any person shall, after the 31st of December, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devise to whom such land or hereditaments shall descend or be devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any

¹ The New York Revised Statutes contain a similar provision.

What shows an intention not to devise cum onere.—It was said in *Woolstencroft v. Woolstencroft*, 2 De G. F. & J. 347, that in cases within Locke King's Act as strong an intention ought to be required to exonerate the mortgaged estate from the mortgage debt, as is required to exonerate the personal estate from debts generally: but this doctrine has not been approved. It appears to be settled that it is not necessary, in order to exoneration, that the mortgage debt should be thrown by name upon any other fund, and that it is sufficient that the mortgaged *estate should [*281 be specifically devised without mention of the mortgage, and another fund, whether real or personal, designated for payment of debts generally. (*Eno v. Tatam*, 1 N. R. 529; *Mellish v. Vallins*, 2 Jo. & H. 194; *Stone v. Parker*, 1 Dr. & Sm. 212; *Allen v. Allen*, 30 B. 395; *Smith v. Smith*, 3 Giff. 263.)

Thus, if the mortgaged estate be devised specifically, and the testator's debts are directed to be paid out of his *residuary* real and personal estate, or the residuary real and personal estate be devised subject to payment of debts, the mortgaged estate is exonerated. (*Stone v. Parker*, 1 Dr. & Sm. 212; *Allen v. Allen*, 30 B. 395.)

And although Romilly, M. R., in several cases (*Rawson v. Harrison*, 10 W. R. 705; *Moore v. Moore*, Ib. 877) held that a direction that debts should be paid out of the *personal* estate only was not sufficient to exonerate a mortgaged estate specifically devised, it appears to be now settled that if the mortgaged property be devised to persons taking beneficially, without reference to the mortgage debt, and the personal estate is bequeathed *subject to* payment of debts, or the debts are directed to be paid out of it, the mortgaged estate is *prima facie* exonerated. (*Eno v.*

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. . . .

"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 January 1, 1855."

It would appear that the republication by codicil since 1855, of a will made before 1855, would not bring the will, if containing a devise of the mortgaged estate, within the provision of the Act.

Tatam, 1 N. R. 529; Mellish v. Vallins, 2 Jo. & H. 194; Smith v. Smith, 3 Giff. 263.)¹ In Mellish v. Vallins, Wood, V.-C., said (p. 203): "The decision under the old law, that where lands were devised 'subject to the mortgage thereupon,' the words 'subject to the mortgage thereupon' were merely descriptive of the condition of the property, and no indication that the devisee was to take *cum onere*, was a strong decision, which could have only arisen from the favor extended at that period of the law to real estate. I feel that I ought not to extend it to personal estate, by holding that in this will the words 'subject to the payment thereout of all my just debts,' are to be treated as merely descriptive, and that the will is to be read as if they were omitted. The testator must be presumed to have been aware of the Act; and it appears to me that by the words in question he has taken *282] pains to signify his intention, that as *between the devisees of the real estate and the residuary legatee of the personalty, the mortgage debt is to be borne by the personal estate."

But if the fund designated for payment of debts *includes* the mortgaged estate, as if the testator directs his debts to be paid out of his "estate," i. e., his real and personal estate (Woolstencroft v. Woolstencroft, 2 De G. F. & J. 347), or directs his debts to be paid without saying out of what fund (Pembroke v. Friend, 1 Jo. & H. 132), the mortgaged property is, of course, not exonerated.²

So if the mortgaged estate were not specifically devised, or were devised *subject* to the mortgage, the act would of course apply.

¹ McGuire v. Brown, 41 Iowa 650. This rule was reversed by 30 & 31 Vict. c. 69.

² See also Brownson v. Lawrence, L. R. 6 Eq. 1; Moore v. Moore, 1 De G. J. & S. 602.

Where two properties are subject to a mortgage and one of them is devised specifically and the other passes by the residuary devise, the one specifically devised is exonerated: Brownson v. Lawrence, L. R. 6 Eq. 6.

In New York neither a direction to pay debts out of the residuary estate, or that they be paid by the executors, is sufficient to exonerate the mortgaged estate (Taylor v. Wendell, 4 Bradf. 330; Repelye v. Repelye, 27 Barb. 610). But a direction to pay all debts "whether on bond and mortgage or otherwise" is sufficient: Waldron v. Waldron, 4 Bradf. 144.

DEBTS AND LEGACIES.¹*Implied charge of Debts.*

Although lands not charged with debts are now liable to the claims of all creditors, the question whether any and what lands of the testator are by his will charged with debts is still of importance; both because a charge of debts deprives specialty creditors of their priority, and also because lands charged with debts are applied in order of administration before lands not charged. The rule of construction relative to implied charges of debts is as follows, viz:—

RULE. A direction by the testator that his debts shall be paid, charges all his real estate therewith. (*Shallcross v. Finden*, 3 Ves. 737; *Clifford v. Lewis*, 6 Madd. 33.)

But a direction by the testator that his debts shall be paid *by his executors*, charges only the real estate, if any, devised to them. (*Keeling v. Brown*, 5 Ves. 359; *Powell v. Robins*, 7 Ves. 209.)²

“I agree that if a testator does manifest in any part [*288] of his will that his debts shall be paid, they are to be paid before any disposition of what he has power to dispose of. ‘After payment of his debts,’ means that until his debts are paid, he gives nothing; that everything he has shall be subject to his debts. To give those words any effect, they must charge the real estate. I am very clearly of opinion, that wherever a testator says, he wills that his debts shall be paid, that will ride over every disposition, either as against his heir-at-law or devisee; and the words ‘after my debts paid’ mean the same thing.” (*Shallcross v. Finden*, 3 Ves. 738.)

¹ In this country where all debts of a decedent are payable out of his real estate in default of personalty, without any preference in favor of specialty creditors, the only questions which arise concerning a charge of debts on land by a will, are whether the lands are made liable *pari passu* with the personalty or not, or are charged in exoneration of the personalty or not.

² *Gaw v. Huffman*, 12 Gratt. 633.

"The authorities determine, that where the testator gives a general direction that his debts shall be paid, this amounts to a charge of the debts generally on the real estate, at least in all cases where the real estate is afterwards disposed of by the will. But an exception obtains where the direction that the debts shall be paid is coupled with a direction that they are to be paid by the executor, as is the case here ; in which case it is assumed that the testator meant that the debts should be paid only out of the property which passes to the executor." (*Cook v. Dawson*, 29 B. 126.)

It is immaterial by what form of words the direction to pay is conveyed : thus the expression "my debts being satisfied, I give, &c." (*Harris v. Ingledew*, 3 P. W. 91) ; or, "after-payment of debts, I give, &c." (*Shallcross v. Finden*), creates a charge of debts. And where the testator devised and bequeathed "all my freehold, copyhold, and leasehold estates *and* all the residue of my personal estate *after payment* of my debts," it was held that the latter words applied to the real estate, as well as to the personal estate. (*Withers v. Kennedy*, 2 My. & K. 607.)

It would appear that a general direction to pay debts charges all the real estate, and not only that devised by the will. In *Shallcross v. Finden*, 3 Ves. 738, it was said : "Is there a single case, in which the testator has said, 'after payment of my debts,' and the Court has said, it shall not affect *all* the real estate, *whether specifically devised or not?*"

*284] **Contrary intention*.—In a few cases (*Thomas v. Britnell*, 2 Ves. sen. 313 ; *Palmer v. Graves*, 1 Keen 545), a general direction to pay debts, followed by a specific appropriation of particular estates for the payment, has been held not to create a charge on the real estate not specifically appropriated : but the doctrine of these cases is doubtful.

Lands devised to executors charged.—It was formerly doubted whether a direction that debts should be paid by the *executors* would do more than charge the property coming to their hands *quæ* executors, *i. e.*, the personal estate. But it is settled that such a direction *primâ facie* constitutes a charge of debts on all

the property derived by them (jointly) under the will, whether real or personal (*Henwell v. Whitaker*, 3 Russ. 343; *Dover v. Gregory*, 10 Sim. 393; *Harris v. Watkins*, Kay 488): although not given to them in the character of executors.

And it is immaterial whether the real estate is devised to them as trustees or beneficially. (*Dover v. Gregory*, 10 Sim. 393; *Dormay v. Borrodaile*, 10 B. 263.) "I am of opinion that when a testator devises all his real estate to his executors and directs them to pay his debts, that constitutes a charge on the real estate, although they take no beneficial interest in it." (*Hartland v. Murrell*, 27 B. 204.)¹

Effect of charge on devise to executors.—It is to be observed that where the executors are directed to pay debts, and real estate is devised to the same persons as trustees, the effect of the charge will often be to enlarge the estate of the trustees, and so to extend the subject of the charge. (See ante, p. 152.) Thus if, the executors being directed to pay debts, real estate be devised to them in trust to pay the rents to A. for life, and after his death in trust for B. indefinitely, the executors will take the legal fee simple by force of the charge, and not an estate for the life of A. only (*Spence v. Spence*, 12 C. B. N. S. *109, E. C. L. [*285 R. vol. 104]; and thus B. will (even in a will before 1838) take an equitable fee simple by the rule in *Challenger v. Shephard*.

Again, if the testator's wife is made executrix, and directed to pay debts, and real estate is devised to her, with a direction that she should receive the rents beneficially for life only, and that after her death the property should go to other persons, it would appear that the wife should take the whole *legal* fee by force of the charge (*Finch v. Hattersley*, 3 Russ. 345, n.); though in *Cook v. Dawson*, 29 B. 123, on app. 3 De G. F. & J. 127, this construction seems not to have been adopted.

In *Creaton v. Creaton*, 3 Sm. & G. 386, it was held that a mere *general* direction to pay debts, the trustees being also executors, had the same effect of vesting in them the entire legal fee: but *qu.* as to this case.

¹ *Robson v. Jardine*, 22 Grant Ch. (U. C.) 420.

Devise to one of several executors, &c.—But if there are several executors, a direction to the executors to pay debts does not charge lands devised to one of them only. (*Warren v. Davies*, 2 My. & K. 49.)

Again, in *Symons v. James*, 2 Y. & C. C. C. 301), where the executors were to pay debts, and the real estate was devised to trustees (who were *not* the executors) upon trust as to a small portion only for the two persons who were executors, it was held that the debts were not charged on the portion devised in trust for the executors beneficially.

So in *Wasse v. Heslington*, 3 My. & K. 495, where the bulk of the real estate was devised to one only of the executors, and a small portion was devised to the executors jointly in trust for other persons, it was held that the latter portion was not charged: but *qu.* how far this case and *Braithwaite v. Britain*, 1 Keen 206, are consistent with the rule as established by *Henvell v. Whitaker*.

But where the bulk of the real estate was devised to the widow, the sole executrix, absolutely, and a small part was devised to her for life only, with remainder over, it was held that the whole *286] interest taken by her *under the will (including the part given for life only) was subject to the charge. (*Harris v. Watkins*, Kay 438.)

In *Cloudsley v. Pelham*, 1 Vern. 411, lands devised to the sole executor *in tail*, he being directed to pay debts, were held to be charged.

A direction that the debts shall be paid by the executors *may* have the effect of charging the real estate, though not expressly devised to them, as if the testator direct his debts to be paid by his executors out of his *estate*, i. e., real and personal estate. And if the testator, after directing his debts to be paid by his executors, devises the *residue* of his real, or real and personal, estate, it may perhaps be held that, upon the principle established by *Greville v. Browne* (see *post*), with respect to legacies, the debts are charged on the real estate by force of the word “*residue*.” (*Dowling v. Hudson*, 17 B. 248; see *Harris v. Watkins*, Kay 438.)

Direction to executors to pay legacies.—In *Preston v. Preston*, 2 Jur. N. S. 1040, it was held by Stuart, V.-C., following an old

case of *Alcock v. Sparhawk*, 2 Vern. 228, that the doctrine of *Henvell v. Whitaker* applied to directions to pay *legacies*, so that a direction to the executors to pay legacies would charge the legacies on all the real estate devised to them either beneficially or in trust for other persons.¹ But this doctrine is directly opposed to *Parker v. Fearnley*, 2 S. & Stu. 592: and in the cases adduced in support of it, except *Alcock v. Sparhawk*, the charge of legacies on the real estate is referable to the rule in *Greville v. Browne*, viz., where the gift of legacies is followed by a gift of the *residue* of the real and personal estate.²

Exoneration of Personality.

The personal estate being the primary and natural fund for payment of debts, and the real estate having formerly not, in the absence of a charge, been liable to the claims of simple contract creditors, it became the *established rule to construe pro- [*287
visions for payment of debts out of the real estate as in-
tended only to provide an auxiliary fund, and not to disturb the order of legal liability; and it is a rule of construction that—

RULE. “The charging the real estate ever so anxiously for payment of debts is not of itself sufficient to exempt the personal estate.” (*Tait v. Lord Northwick*, 4 Ves. 823.) In order that the personal estate may be exonerated, the intention must appear not only to *charge* the real estate, but to *discharge* the personal. (*Ib.*: *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454; *Watson v. Brickwood*, 9 Ves. 447; *Bootle v. Blundell*, 1 Mer. 193.)³

And a direction to *sell* the real estate for payment of debts does not alone furnish the intention of exemption. (*Ib.*; *Rhodes v. Rudge*, 1 Sim. 79.)

¹ *Thayer v. Finnegan*, 134 Mass. 62.

² But see *Brown v. Knapp*, 79 N. Y. 136 and cases cited.

³ *United States v. Parker*, 2 McAr. 444; *Seaver v. Lewis*, 14 Mass. 83; *Monroe v. Jones*, 8 R. I. 526; *Tole v. Hardy*, 6 Cow. 333; *Whitehead v. Gibbons*, 2 Stockt. 230; *Hanna's Appeal*, 31 Penn. St. 57; *Robards v. Wortham*, 2 Dev. 179; *Palmer v. Armstrong*, 2 id. 268; *Marsh v. Marsh*, 10 B. Monr. 360.

Thus, a direction by the testator that his real estate shall be sold, and the proceeds applied in payment of debts and legacies (*Rhodes v. Rudge*, 1 Sim. 79), or of funeral expenses and debts (*McClelland v. Shaw*, 2 Sch. & Lef. 538), does not make the real estate primarily liable.

"I take it to be certain, that it is not enough for the testator to have charged his real estate with, or in any manner devoted it to, the payment of his debts; that the rule of construction is such as aims at finding, not that the real estate is charged, but that the personal estate is discharged.

"Then it comes to this—upon each particular case, as it arises, the question will be, Does there appear, from the whole testamentary disposition taken together, an intention on the part of the testator, so expressed, as to convince a judicial mind that it was meant, not merely to charge the real estate, but so to charge it as to exempt the personal?" (Per Lord Eldon, *Bootle v. Blundell*, 1 Mer. 220, 230.)

*288] "It has long been the settled rule of Courts of Equity, that the direction of the testator to sell or mortgage his real estate for the payment of his debts and legacies, is not alone evidence of the intention of the testator that the personal estate should be exempt from those charges, and amounts only to a declaration that the real estate shall be so applied to the extent in which the personal estate, which by law is the primary fund, shall be insufficient for those purposes." (*Rhodes v. Rudge*, 1 Sim. 84.)

Contrary intention.—The intention to exonerate the personal estate may be inferred from a number of minute circumstances, as in *Bootle v. Blundell*, 1 Mer. 193, where a term of 500 years created to pay debts was held to be the primary fund: one of the *indicia* being that the costs of administering the *real and* the personal estate were charged together under the trusts of the term.

Specific bequest of the personal estate.—But the cases in which the rule has been held to be excluded, and the real estate to be the primary fund, are chiefly where (in addition to the provision made for payment out of the real estate of all those charges which

would primarily affect the personal estate) the whole personal estate has been *specifically* given.

As in *Greene v. Greene*, 4 Madd. 148, where the testator gave to his wife, for her sole and absolute use, all his ready money, securities for money, goods, chattels, and other personal estate whatever which he should die possessed of, and devised his real estate to trustees in trust to sell, and out of the proceeds to pay his debts, funeral expenses, and the expenses of proving his will, and to invest the residue in trust for his wife for life, with remainder to his children: it was held that the personal estate was exonerated. And the same construction was adopted in the very similar cases of *Michell v. Michell*, 5 Madd. 69; *Driver v. Ferland*, 1 R. & My. 681; and *Blount v. Hipkins*, 7 Sim. 43; and in *Plenty v. West*, 16 B. 173.¹

On the other hand, in *Collis v. Robins*, 1 De G. & Sm. 131, the personal estate was held not to be exonerated; *the form of gift being almost precisely equivalent, but without provision for the discharge of the *funeral and testamentary* expenses out of the real estate. [*289]

In *Lance v. Aglionby*, 27 B. 65, the testator gave part of his personal estate to his wife specifically, and devised his real estate in trust for sale and to pay thereout his debts, funeral expenses, and legacies; by a codicil he gave *all* his personal estate to his wife. It was held that the bequest by codicil was, like that in the will which it replaced, specific, and that the personal estate was exonerated.

If the real estate is devised to be sold to pay debts, and the residue after payment of the debts is to be *added* to the personal estate, the real estate is of course made the primary fund. (*Webb v. Jones*, 2 Bro. C. C. 60.)

Trust to pay a particular debt.—The rule with respect to exoneration does not apply so strongly to the case of provision being made out of the real estate to pay a particular debt,—as a mortgage debt charged on other portions of the property; in such case the real estate so pointed out may be the primary fund. (*Hancox v. Abbey*, 11 Ves. 179; *Evans v. Cockeram*, 1 Coll. 428.)

¹ See also *Gilbertson v. Gilbertson*, 34 Beav. 354; *Scott v. Scott*, 18 Grant Ch. (U. C.) 66.

Liability to legacies and annuities.—Legacies and annuities given generally, without reference to any particular fund, are of course payable out of the personal estate, and the rule with respect to exoneration applies to them.

But where particular legacies or annuities are given with reference to the funds or property on which they are charged, the rule is different, and the funds so pointed out may be primarily or solely liable.

Thus if real estate be directed to be sold, and a sum of money is given out of the proceeds, this is not a general legacy, and the personal estate is not liable. (*Hancox v. Abbey*, 11 Ves. 179; *Dickin v. Edwards*, 4 Hare 273.)

So if the testator gives annuities, and proceeds to *charge* them on particular parts of his real estate, the real estate so charged *190] may be primarily liable (*Creed v. Creed*, 11 *Cl. & F. 491; *Lomax v. Lomax*, 12 B. 290; *Ion v. Ashton*, 28 B. 379); and so if legacies be given with the like charge. (*Jones v. Bruce*, 11 Sim. 221; *Lamphier v. Despard*, 2 Dr. & War. 59.) But if an annuity or legacy be given, charged on a particular fund, and the fund in question fails, the personal estate will in general be *secondarily* liable. (*Mann v. Copland*, 2 Madd. 223.)¹

Blended, Real, and Personal Estate.

We may distinguish three gradations in the form of disposition of mixed, real, and personal estate: (1) the two may be given together, but retaining their several qualities; (2) the real estate may be converted, and the proceeds given along with the personal estate; or (3) the real estate may be converted, and the proceeds declared *to be part of* the personal estate, and disposed of as such. The first form of disposition does not affect the liability to charges; the second places the real and personal estate on an equality, as regards those charges to which both are

¹ In New York it is held that if legacies are expressly charged on land, and the personalty is specifically disposed of, the personalty is exonerated, and the land is primarily liable; but if the personal estate is not specifically disposed of it is primarily liable: *Hoes v. Van Hoeson*, 1 Barb. Ch. 400.

liable; the third subjects the real to the charges affecting the personal estate.

First, as regards the effect of conversion in destroying the *primary* liability of the personal estate, the rule is that—

Roberts v. Walker.

RULE. If real estate be directed to be sold, and the personal estate and proceeds of the real estate are given together, subject to charges,—as debts, legacies, or annuities,—the real and personal estate are liable to the charges *pari passu*, in proportion to their respective value. (*Roberts v. Walker*, 1 R. & My. 751; *Salt v. Chattaway*, 3 B. 576; see *Simmons v. Rose*, 6 D. M. G. 411.)¹

*But if real and personal estate be given together subject to charges, but the real estate *is not directed* [*291 to be sold, the personal estate remains primarily liable. (*Boughton v. Boughton*, 1 H. L. C. 406; *Tench v. Cheese* 6 D. M. G. 453.)

Thus if the testator gives his real and personal estate to trustees *in trust to sell*, and out of the moneys to arise to pay his debts, funeral expenses, and legacies, and to hold the residue in trusts for A., and A. dies in the testator's lifetime, the real and personal estate are liable to debts and legacies *pari passu*, even as between the heir-at-law and next of kin. (*Roberts v. Walker*.) But if the testator gives his real and personal estate to trustees, in trust out of the rents and profits of the real estate and the dividends and interest of the personal estate to pay certain annuities and legacies, and subject thereto in trust for A., the primary liability of the personal estate remains notwithstanding the charge. (*Boughton v. Boughton*.)

“When the testator creates from real estate and personal estate a mixed and general fund, and directs the whole of that fund to be applied for certain stated purposes, he does in effect direct that the real and personal estate which have been converted into that

¹ *Turner v. Turner*, 57 Miss. 775.

fund shall answer the stated purposes and every of them *pro rata*, according to their respective values." (Roberts v. Walker, R. & My. 752.)

"I agree in the opinion expressed by the Lord Chancellor upon that point, that the case is in that respect wholly governed by Boughton v. Boughton, which, as I understand it, establishes this distinction, that where there is a mixed fund of real and personal estate, the mere fact of the real and personal estate being given together does not constitute them a mixed fund for the payment of debts, legacies, or annuities; but that in order to effect that purpose there must be a direction *for the sale of the real estate*, *292] so as to throw the two funds *absolutely and inevitably together to answer the common purposes of the will." (Per Turner, L. J., Tench v. Cheese, 6 D. M. G. 467.)

In Falkner v. Grace, 9 Hare 282, the real and personal estate being given in moieties, but with no direction for conversion, and an annuity being directed to be paid out of *one moiety* of the rents and profits of the real estate and income of the personal estate, the charge was held to be apportionable; but this case was before the authority of Boughton v. Boughton was well established.

Roberts v. Walker not confined to express charges.—The doctrine of Roberts v. Walker, that converted real estate given together with personal estate is liable *pari passu* to charges, appears to apply not only to those charges which are *expressly* directed to be paid out of the mixed funds, but to all charges to which both funds are liable. Thus if the trust of the personal and proceeds of real estate are to pay legacies, but not debts, nevertheless debts as well as legacies would, it should appear, be payable *pari passu* out of the funds, whether there be or be not a general charge of debts on the real estate.

And it would seem that even if no charges were expressly laid on the blended funds, yet all charges to which both funds were impliedly liable would be payable *pari passu* out of them. Thus if legacies be given *simpliciter*, and the *residue* of the real and personal estate be directed to be sold, and the proceeds given to certain persons, the legacies being under the rule in Greville v.

Browne (see *post*) charged on the real estate, would be payable out of the residuary real and personal estate *pari passu*—whereas, if there was no direction to convert, they would be payable *primarily* out of the personal estate.

But the rule in *Roberts v. Walker* does not extend to *create* any charge on the real estate, to which it would not be otherwise (although secondarily) liable: thus a *gift of personal estate and converted real estate together would not have [*293 the effect of making legacies or annuities, given *simpliciter*, a charge on the real estate.¹

Secondly. If, however, the proceeds of real estate be *thrown into* the personal estate, a charge is created: it being the rule that—

Kidney v. Coussmaker.

RULE. A direction that real estate shall be sold, and the proceeds form or be considered as *part of* the residuary personal estate of the testator, subjects the real estate to all charges affecting the personal estate. (*Kidney v. Coussmaker*, 1 Ves. jun. 436; 2 id. 267; *Bright v. Larcher*, 3 De G. & J. 148; *Field v. Peckett*, 29 B. 568.)

And the real and personal estate are liable to the charges *pari passu*. (*Simmons v. Rose*, 6 D. M. G. 413.)

Thus, if real estate be directed to be sold to answer certain charges, and the surplus proceeds are “to go as the residue,” or “be disposed of in the same manner as,” or “be added to” the residue of the personal estate, legacies given *simpliciter* are a charge on such surplus proceeds.

“The testator has directed a fund to be set apart out of the amalgamated assets to answer the annuity, and has directed the fund so set apart to be disposed of as the residuary personal estate had been disposed of. Now, the residuary personal estate had been directed to be applied in payment of the debts, legacies, and funeral and testamentary expenses, and the authorities show

¹ *Reynolds v. Reynolds*, 16 N. Y. 257.

that a direction for the disposition of the proceeds of real estate in the same way as the residuary personal estate is as much a direction to apply the fund to the purposes to which the residuary *294] estate is liable, as if those *purposes had been declared with respect to the proceeds themselves. *Kidney v. Coussmaker* is a case of great importance and authority on this point.

. . . . In that case Lord Loughborough said: 'It is not going a great way too far to say, that where real estate is devised to executors, and there is a declaration that they shall sell, and the produce shall go as the residue of the personal estate, that it shall go subject to all that would affect the residue of the personal estate, *i. e.*, to debts.' Therefore, on the authorities as well as on the words of this will, I think that the proceeds of the real estate are charged with the legacies." (Per Turner, L. J., *Bright v. Larcher*, 3 De G. & J. 156.)

There can be no doubt that the rule subjects the converted real estate to *all* charges affecting the personal estate, and not to those only with which it is *expressly* charged.

GREVILLE v. BROWNE.

It has been said that a testator generally intends the legacies given by his will to be a charge on his *residuary* real estate as well as on his personal estate: but (in the absence of an express charge) they are held to be so only when the residuary real and personal estate are given together:—it being a rule of construction that—

RULE. If legacies are given generally, and the *residue* of the real and personal estate is afterwards given in one mass, the legacies are a charge on the residuary real as well as the personal estate. (*Greville v. Browne*, 7 H. L. C. 689; *Wheeler v. Howell*, 3 K. & J. 198; *Gyett v. Williams*, 2 Jo. & H. 429.)¹

¹ In accordance with the rule as stated in the text are *Hays v. Jackson*, 6 Mass. 149; *Wilcox v. Wilcox*, 13 Allen 252; *Thayer v. Finnegan*, 134 Mass. 62; *Gallagher's Appeal*, 48 Penn. St. 122; *Wertz's App.* 69 id. 173; *Davis' App.* 83 id. 348; *Hilford v. Way*, 1 Del. Ch. 342; *Robinson v. McIver*, 63 N. C. 649; *Johnson v. Farrell*, 64 Id. 268; *Ex parte Dickson*,

“For nearly a century and a half this rule has been laid down and acted upon, that if there is a general gift of legacies, and

64 Ala. 188; *Moore v. Beckwith*, 14 Ohio St. 135; *Lewis v. Darling*, 16 How. 10; *Read v. Cather*, 18 W. Va. 263; *Knotts v. Baily*, 54 Miss. 235.

The rule seems to be rejected in Connecticut (*Gridley v. Andrews*, 8 Conn. 1). In New York it is rejected in *Lupton v. Lupton*, 2 Johns. Ch. 614, and *Myers v. Eddy*, 47 Barb. 264, where it is held that a gift of legacies followed simply by a gift of “all the rest and residue, real and personal,” will not create a charge on the realty, but if the gift be of the residue “after paying debts and legacies,” then the real estate will be charged; and see *Spillane v. Duryea*, 51 How. Pr. 260; *Wiltrie v. Shaw*, 29 Hun 195; *Stoddard v. Johnson*, 20 N. Y. S. C. 606. But in *Church v. Wachter*, 42 Barb. 43, a gift of a legacy of \$500 followed by a gift of the “balance of my estate,” was held to create a charge on the real estate. This case is distinguished from *Lupton v. Lupton*, on the ground that in the latter case there was a previous devise of real estate. The same position was taken in *Sulters v. Johnson*, 38 Barb. 80. The Court there held that the fact that the testator owned large real estates and but little personalty, was a strong circumstance in favor of presuming an intention to charge the realty, and one which the Court would take into consideration. *McLoughlin v. McLoughlin*, 30 Barb. 459, supports this doctrine, but rests principally on the general nature of the provisions of the will. And see also *Tracy v. Tracy*, 15 Barb. 503; *Guelich v. Clark*, 3 Thomp. & C. (N. Y.) 315; *Forster v. Civill*, 20 Hun 282; *Manson v. Manson*, 8 Abb. N. Cas. 123; *Hoyt v. Hoyt*, 85 N. Y. 142. In the later cases the doctrine of *Lupton v. Lupton* has been much restricted, and the courts have inclined to the application of the rule stated in the text: *Finch v. Hall*, 24 Hun 226; *Le Fevre v. Toole*, 84 N. Y. 95; *Scott v. Stebbins*, 91 N. Y. 605; *Hoyt v. Hoyt*, 85 N. Y. 142.

Where the whole personal estate is given to the wife absolutely, with the exception of \$1000 which are given to her for life, and the whole real estate is given to her for life, and three legacies amounting in all to \$3500 are given to be paid after the death of the wife, and “the whole remaining part of” the testator’s “property” is given to a charity, the legacies are a charge on the real estate: *Goddard v. Pomeroy*, 36 Barb. 547.

In New Jersey (*Van Winkle v. Van Houten*, 2 Green Ch. 172; *Dey v. Dey*, 4 C. E. Green 137) it is held that a gift of blended realty and personalty as residue after general legacies is not sufficient of itself to create a charge, but may have that effect when combined with other circumstances, such as the addition of the words “not herein otherwise disposed of,” the fact that the legacy is a provision for a child, that the residuary devisees are the executors, or that the legacy is in consideration of lands of the legatee which the testator has disposed of by his will or otherwise. In a subsequent case (*Corwine v. Corwine*, 9 C. E. Gr. 579) the Court, after a careful re-examination of the subject, expressly adopted the rule in *Greville v. Brown*.

then the testator gives the rest and residue of his property, real *295] and personal, the legacies *are to come out of the realty.

It is considered that the whole is one mass ; that part of that mass is represented by legacies, and that what is afterwards given, is given minus what has been before given, and therefore given subject to the prior gift." (Per Campbell, C., 7 H. L. C. 697.)

" But for the preference shown to the heir, it would be clear to common sense that if a testator gives certain legacies, and then gives the remainder of his real and personal estate, he must contemplate the payment of these previous gifts before the rest of his estate is disposed of." (Gyett v. Williams, 2 Jo. & H. 438.)

It is not, of course, essential that the real estate should be directed to be sold ; nor is it essential (as has been sometimes suggested) that the gift of the residue should be to the executor or executors : it is sufficient that the gift of the real estate should be residuary, and that the real and personal estate should be comprised in one gift, whether to trustees or to persons taking beneficially. A gift of the residue of the testator's "*estate*" is of course within the rule.

But if the residuary real estate were given separately from the personal estate, although to the same person, it does not appear that the legacies would be a charge on the real estate.

Previous devise of real estate.—It appears to be settled that the rule in *Greville v. Browne* applies, although there be a spe-

See also *Waln v. Emley*, 26 N. J. Eq. 243, and *Johnson v. Poulson*, 32 id. 390.

In South Carolina it is held that such a residuary clause is not of itself sufficient to charge the real estate : *Laurens v. Read*, 14 Rich. Eq. 245.

The rule is in effect adopted in North Carolina, but the statement of it is somewhat modified. It is not that the legacies are a charge on the lands devised ; but that the legacies must first be taken out in order to determine what is devised or bequeathed by the residuary clause. Therefore if at the testator's death the personal property is sufficient to pay legacies, but before the estate is settled a loss occurs by which it becomes insufficient, it is the loss of the legatees : *Johnson v. Farrell*, 64 N. C. 266 ; *Bynum v. Hill*, 71 N. C. 319. But see *Hart v. Williams*, 77 N. C. 426.

cific devise of part of the real estate intervening between the gift of the legacies and the residuary clause. (*Francis v. Clemow*, Kay 435; *Wheeler v. Howell*, 3 K. & J. 198; see *Greville v. Browne*, 7 H. L. C. 700, 705.) "I had some doubts whether, where real estates had actually been previously devised, so that the term 'residue of real estate' was strictly applicable to what was subsequently" (*qu. previously*) "given, a charge of the legacies could be effectively made by the residuary form only of the devise. I think, however, that *Bench v. Biles*, 4 Madd. 187, seems to have *gone to that length; and I am disposed to follow that authority." (*Francis v. Clemow*, Kay 437.) [*296]

"In reading a devise of real estate to one person and of personal legacies to another, and of the rest and residue of the real and personal property to a third, we may see that there might be a mode of interpreting it *reddendo singula singulis* . . . ; but that is not the natural meaning of the words." (Per Lord Cranworth, 7 H. L. C. 700.)¹

Contrary intention.—But the rule does not extend to charge on the real estate sums which are not given generally as legacies, but as payments directed to be made out of a fund derived exclusively from personal estate. (*Gyett v. Williams*, 2 Jo. & H. 429.)

Conron v. Conron.

While, however, the disposition of the Courts has been to subject residuary real estate to general legacies, the course has also been to relieve specifically devised estates from the effect even of an express charge; and it has been established as a rule of construction that—

RULE. A charge of legacies on the real estate, or *all* the real estate, of the testator, does not, *primâ facie*, charge lands specifically devised. (*Spong v. Spong*, 3 Bligh N. S. 84; *Conron v. Conron*, 7 H. L. C. 168.)

¹ *Moore v. Beckwith*, 14 Ohio St. 135; and so *Hassanclever v. Tucker*, 2 Binn. 525; but see *Gallagher's Appeal*, 48 Penn. St. 123; *Beavan v. Cooper*, 72 N. Y. 317; *Scott v. Stebbins*, 91 id. 605; and see also *Paxson v. Potts*, 2 Green Ch. 322.

“The true rule which I consider to be deducible from the case of *Spong v. Spong* is, that a mere charge of legacies on the real and personal estate (and ‘on *all* the real and personal estate’ must mean exactly the same thing) does not of itself create a charge on any specific devise or bequest. I think that the rule is a very reasonable one, and is likely to be in general conformable to the intentions of testators. When any specific thing is given, it must
*297] be in general understood that the devisee *is meant to take it in its integrity. . . . The question must always be one of intention, but the rule is, that the presumption is against an intention to charge lands specifically devised, and that a mere charge ‘on all my lands’ is not sufficient to rebut that presumption.” (Per Lord Cranworth, *Conron v. Conron*, 7 H. L. C. 190.)

In *Conron v. Conron*, the words were “I charge and encumber *all my estates* of every description, both real and personal, with the following legacies, viz.,” &c., and the executors and legatees were empowered to distrain on any part of the testator’s estate and property of every description for the interest on the legacies:—but it was held that estates specifically devised were not charged.

If the specific devise failed, so that the lands fell into the residue, they would of course be charged.

Exception.—But it has been held that if the testator charges his real estate with *debts and legacies*, inasmuch as the debts are a charge on lands specifically devised, the rule does not apply, and the legacies as well as the debts are a charge on specific devises. (*Maskell v. Farrington*, 1 N. R. 37.)

LEGACIES.

Annuities and Legacies.

RULE. The term "legacies" *primâ facie* comprehends annuities: and "legatee" includes an annuitant. (*Sibley v. Perry*, 7 Ves. 522; *Bromley v. Wright*, 7 Hare 334; *Heath v. Weston*, 3 D. M. G. 601.)¹

Thus if legacies and annuities are given *simpliciter*, and real estate is afterwards devised in trust to pay debts and legacies, the annuities are charged on the real estate. (*Heath v. Weston*, 3 D. M. G. 601.)

So if the residue is directed to be divided among the *legatees* in proportion to the amount of their respective legacies, annuitants are, *primâ facie*, entitled to share in the residue. (*Bromley v. Wright*, 7 Hare 334; *Sibley v. Perry*, 7 Ves. 522.) And where the testator directed all his legatees to contribute one per cent. on their legacies for the benefit of Mrs. W. and her family, annuitants (and also the residuary legatee) were held bound to contribute. (*Ward v. Grey*, 26 B. 485.)

"The word 'legacies' is a proper word to designate legacies given in the shape of annuities as well as those given in the shape of a bequest of a sum payable at once. That being the proper meaning of the word, it lies on those who say that it is not to be so construed to *show, from the context of the will

¹ *Smith v. Fellows*, 131 Mass. 20. The same meaning will be given to the words "pecuniary legacies," unless upon the whole will it appears that the testator used the words in their popular sense as meaning legacies in contradistinction to annuities. *Gaskin v. Rogers*, L. R. 2 Eq. 291. And in general a gift of the interest of a particular sum will not be construed as an annuity though payable annually: *Whitson v. Whitson*, 53 N. Y. 479.

that the testatrix used it in another sense." (Per Knight Bruce, L. J., 6 D. M. G. 606.

And notwithstanding *Nannock v. Horton*, 7 Ves. 391, it appears from *Heath v. Weston*, 3 D. M. G. 601, that the fact that the testator sometimes speaks of "legacies and annuities" is not alone sufficient to show that the term "legacies," when used alone, does not comprehend annuities.

But annuities not given *simpliciter*, but as rent charges payable solely or primarily out of the real estate, do not fall under the term "legacies." (*Shipperdson v. Tower*, 1 Y. & C. C. C. 441.)

Chancey's Case.

If a testator, being at the date of the will indebted to A. in (*e. g.*) the sum of 100*l.*, secured by bond, bequeaths to A. a legacy of 100*l.* or of 500*l.* absolutely, a "presumption" of law arises that the debt was intended to be satisfied by the legacy,¹ which, however, being only a "presumption" and not a rule of construction, may be rebutted by parol evidence (*Wallace v. Pomfret*, 11

¹ The rule that a legacy of a sum equal to or greater than the amount of debt shall be considered as a satisfaction of the debt has met "with marks of disapprobation, and a disposition to restrain its operation, where, from circumstances to be collected from the will, it might be inferred that the testator had a different intention:" *Strong v. Williams*, 12 Mass. 392; and in *Smith v. Smith*, 1 Allen 130, Chapman, J., says: "If nothing were said on the subject, the modern rule of construction would be that a bequest is to be regarded as a bounty and not as a payment of a debt."

In *Williams v. Crary*, 4 Wend. 449, Savage, Ch. J. says: "There are so many exceptions that the rule on this subject seems to be that a legacy shall not be deemed a satisfaction of a debt, unless it appears to have been the intention of the testator that it should so operate." And see also *Clark v. Bogardus*, 12 Wend. 68; *Mulheran v. Gillespie*, 12 id. 351; *Eaton v. Benton*, 2 Hill 579.

In Pennsylvania the doctrine of satisfaction is carried out in *Wesco's Appeal*, 52 Penn. St. 195, but it is not looked upon with favor. The Courts will lay hold of slight circumstances to get rid of the rule: *Horner v. McGaughey*, 62 Penn. St. 191; and see also to the same effect *Harris v. Trust Co.*, 10 R. I. 313; *Edelen v. Dent*, 2 Gill & Johns. 191, and *Gilliam v. Brown*, 43 Miss. 653.

The rule is reversed by statute in Delaware.

Ves. 547).¹ It may also be negatived by construction upon the words of the will: for it is a rule that—

RULE. A direction by the testator that his *debts and legacies* should be paid, is sufficient to rebut the presumption that a debt is satisfied by a legacy. (Chancey's Case, 1 P. Wms. 408; Edmunds v. Low, 2 K. & J. 318; Cole v. Willard, 25 B. 568.)²

"The testator, by the express words of his will, had devised 'that all his debts and legacies should be paid;' and this 100*l.* being then a debt, and the 500*l.* being a legacy, it was as strong as if he had directed that both the debt and legacy should be paid." (Chancey's Case, 1 P. Wms. 410.)

*It is immaterial whether the debts and legacies be directed to be paid out of a particular fund, or the residue [*300 be given after payment of debts and legacies, or the executors directed to pay them, &c.

Direction to pay debts alone.—A direction to pay debts (not debts and legacies) is evidently not so strong an indication of intention, and though important in conjunction with other circumstances (Hales v. Darell, 3 B. 324; Rowe v. Rowe, 2 De G. & Sm. 294), is not conclusive. (Edmunds v. Low, 3 K. & J. 318.)

In Edmunds v. Low, a gift in the will of the residue, after payment of *debts* and of the legacies *thereinbefore* given, was held not to rebut the presumption of satisfaction by a legacy afterwards given by codicil.

On the other hand, in Jefferies v. Michell, 20 B. 15, where the legacy in question was given expressly after payment of debts, the presumption of satisfaction was held to be rebutted. And in Cole

¹ Fetch v. Peckham, 16 Vt. 157; Ziegler v. Eckert, 6 Penn. St. 13; Gilliam v. Brown, 43 Miss. 652.

² Strong v. Williams, 12 Mass. 394; Fort v. Gooding, 9 Barb. 377; Reynolds v. Robinson, 82 N. Y. 103; Edelen v. Dent, 2 Gill & Johns. 185; Owens v. Simpson, 5 Rich. Eq. 420; Cloud v. Clinkinbeard, 8 B. Monr. 398.

In Byrne v. Byrne, 3 S. & R. 61, Yeates, J., doubts whether the presence of a direction to pay debts should affect the question in Pennsylvania.

v. Willard, 25 B. 568, Romily, M. R., was of opinion that a charge of debts, standing alone, was of equal force with a charge of debts and legacies.¹

Parol evidence not admissible.—The inference against satisfaction from a direction to pay debts and legacies being a rule of construction and not a mere presumption, parol evidence is of course not admissible to establish the contrary. (*See Lee v. Pain*, 4 Hare 216.)²

Stock Legacy not Specific.

A specific legacy has some advantages, as it does not abate with pecuniary legacies, and (if to a person *in esse*, and of a subject producing income), carries the income from the testator's death; but the risk of failure from the particular subject not being found among the testator's property at his death outweighs these advantages. The Courts consequently lean against construing legacies to be specific; and it is a rule of construction that—

*301] ***RULE.** A legacy of stock, of whatever denomination, is not *prima facie* specific, but is a general legacy; although the testator may have had stock of the description mentioned sufficient to answer the bequest. (*Simmons v. Vallance*, 4 Bro. C. C. 345; *Purse v. Snaplin*, 1 Atk. 414; *Sibley v. Perry*, 7 Ves. 523.)³

Thus, if the testator having 1000*l.* 8 per cents. or Long Annuities, bequeaths that sum to A., the gift is not adeemed by the sale of the stock in his lifetime, but operates as a direction to the executor to purchase the stock for A. out of the general assets.

¹ In *Cloud v. Clinkinbeard*, 8 B. Monr. 398; *Ford v. Gooding*, 9 Barb. 377; *Owens v. Simpson*, 5 Rich. Eq. 420, it was held to pay debts (only) will take the case out of the rule.

² *Owens v. Simpson*, 5 Rich. Eq. 405; *Cloud v. Clinkinbeard*, 8 B. Monr. 398.

³ *Tift v. Porter*, 4 Seld. 516; *Davis v. Cain*, 1 Ired. Eq. 309; *McGuire v. Evans*, Ired. 5 Eq. 269; *Pearce v. Billings*, 10 R. I. 102; but see *Kunkel v. Macgill*, 56 Md. 120.

The rule is the same whether the gift be of "1000*l.* 3 per cents." or of "1000*l.* in the 3 per cents." (*Webster v. Hale*, 8 Ves. 410.)

The rule seems to extend to bequests of any description of stocks, shares, &c., usually capable of being brought into the market. Thus in *Sleech v. Thorington*, 2 Ves. sen. 560, a bequest in the form, "I give 400*l.* East India Bonds to A. in trust to pay the interest to B., &c.," was held a general legacy.

And in *Robinson v. Addison*, 2 B. 515, where the testator having fifteen and a half canal shares, bequeathed "five and a half shares in the Leeds and Liverpool Canal" to A., five to B., and five to C., the bequests were held not to be specific. It was said (p. 520), "It was further argued that the shares of this canal were so rarely brought to market, that they could not be considered as transferable or purchasable for money, and could not be considered as gifts of particular things which the executors could purchase out of the assets. It is, however, clear that the testator, if he had meant to give only the shares which he then had, might have designated them as "*his*," that the mere circumstance of the testator having at the date of his will a particular property, of equal amount to the bequests of the like property which he has given without designating it as the same, is not a *ground upon which the Court can conclude that the lega- [*302
cies are specific; . . . and the shares, though not frequently sold, are, nevertheless, occasionally bought and sold, and may be had for money."

In *Jeffreys v. Jeffreys*, 3 Atk. 120, a gift of 2702*l.* 3*s.* bank stock, the testator having that particular sum and no more, was held specific. But *qu.* whether even this exact coincidence in amount be a reason for not construing the bequest as a general legacy; the possession of the particular sum may be the motive for fixing the amount of the bequest, but yet the testator may intend to give it in the form of a general legacy.

Reference to particular stock, &c.—But words of description or reference to particular property belonging to the testator exclude the rule.

Thus, the word "*my*" is sufficient to render the legacy specific :

as if the bequest be of "*my stock in the 3 per cents.*," "*my shares*," "*stock belonging to me*," &c. So if the legacy be of "1000*l.* 3 per cent. Consols, or in whatever stock the same *shall be found* invested." (*Hosking v. Nicholls*, 1 Y. & C. C. 478.) So if the legacy be of 1000*l.* Consols *to be sold* for the benefit of the legatee (*Ashton v. Ashton*, 3 P. W. 384), it is to be implied that the gift is of particular stock, and not of stock to be purchased for him.¹

Direction to transfer.—But a direction to the executor to *transfer* the sum of 1000*l.* 3 per cent. Consols to A. within three months from the testator's decease is not a specific legacy. (*Sibley v. Perry*, 7 Ves. 522.) "I have no doubt in private, that directing a transfer of stock he means to give what he has; but there is no case deciding that it is specific, without something marking the specific thing, the very *corpus*." (Per Lord Eldon, *id.* p. 528.)

In *Townsend v. Martin*, 7 Hare 471, a direction, following bequests of sums of stock generally, that if the testator should not at his death have sufficient stock *standing in his name* to answer the legacies, the executors should out of the residuary estate purchase sufficient to *make up the deficiency, was held to *303] render the bequests specific.²

Money legacy out of stock.—A bequest of "1000*l.* Consols out of my 3 per cent. Consols" (*Mullins v. Smith*, 1 Dr. & S. 204), or of "1000*l.* *part of* my 3 per cent. Consols" (*Kirby v. Potter*, 4 Ves. 750), is a legacy of so much *stock* out of stock, and therefore specific.

But a bequest of "1000*l.* out of my 3 per cent. Consols" is construed as a legacy of 1000*l.* sterling, and is not specific but demon-

¹ *Brainard v. Cowdrey*, 16 Conn. 1; *M'Guire v. Evans*, 5 Ired. Eq. 272. So a bequest of "\$1000 standing in my name," *Ludlam's Estate*, 13 Penn St. 189, and a bequest of "all my 250 shares of stock which I hold in the Union Bank": *Blackstone v. Blackstone*, 3 Watts 335; or a bequest of a less number of shares than the testator owned at the date of the will or at his death, accompanied by a pecuniary legacy: *Metcalf v. Framingham Parish*, 128 Mass. 370; or a bequest of stock "or the proceeds if the same should have been sold": *Osborne v. McAlpine*, 4 Redf. 1.

² *M'Guire v. Evans*, 5 Ired. Eq. 269.

strative. (*Kirby v. Potter*, 4 Ves. 748.) “Whenever there is a legacy of a given sum, there must be positive proof that it does not mean *sterling* money, in order to make it specific.” (*Ib.* p. 751.)

Repeated legacies.

It is not possible to determine beforehand when, a legacy being given by codicil to a person taking a prior legacy by the will or another codicil, the latter gift is a mere repetition of or substitution for the former, and when an additional benefit is intended. But in the bare case of a repetition *totidem verbis* of a legacy, the rule is (subject to indications of a contrary intention) that—

RULE. If a legacy of the same amount to the same person be repeated in two separate testamentary instruments, as a will and codicil *primâ facie* the legatee is entitled to both legacies. (*Hooly v. Hatton*, see *Ridges v. Morrison*, 1 Bro. C. C. 389; *Hurst v. Beach*, 5 Madd. 358.)¹

But if the repetition occurs in one and the same testamentary instrument, *primâ facie* the legatee is entitled to one legacy only. (*Garth v. Meyrick*, 1 Bro. C. C. 30; *Holford v. Wood*, 4 Ves. 75; *Manning v. Thesiger*, 3 My. & K. 29.)²

*Thus in *Holford v. Wood*, 4 Ves. 75, amongst a series of legacies and annuities was the following:—“To Thomas Newman I give an annuity of 30*l.* for his life payable quarterly”:—and further on in the will, “I give to Thomas Newman the butler 30*l.* a-year for his life”: and one annuity only was held to be intended. But if one of the two gifts had been by will

¹ *Dewitt v. Yeates*, 10 Johns. 156; *Baby v. Miller*, 2 U. C. K. B. O. S. 101; 1 E. & A. (U. C.) 218; and see the cases collected and reviewed in *Rice v. Boston Port and Seaman's Aid Soc.* 56 N. H. 191.

² *Dewitt v. Yeates*, 10 Johns. 156; *Jones v. Creveling*, 4 Harr. 128; *Creveling v. Jones*, 1 Zab. 573; *Edwards v. Pearson*, 4 Ont. 514; but in this case there were sufficient points of difference between the two bequests to enable the Court to construe them as cumulative.

and the other by codicil, the legatee would have taken two annuities of the amount specified.

A legacy of a *different* amount by a separate instrument is, of course, *prima facie* cumulative, and not a mere substitution. (*Johnstone v. Lord Harrowby*, 1 De G. F. & J. 183.)¹

Legacies by two instruments substitutional.—But it may often be the case that of two legacies given by different instruments, the latter, whether equal to the former or of greater amount, is a repetition of or substitution for the former.²

As in *Russell v. Dickson*, 4 H. L. C. 293, where the testator bequeathed to his wife by will 2000*l.*, then by codicil 3000*l.*, and lastly by another codicil said, “not having time to alter my will I charge my whole estate in her favor with the sum of 20,000*l.*,” it was held that the latter bequest was a substitution for both the former legacies.

So where the amounts are equal, but some circumstances are altered:—as in *Heming v. Clutterbuck*, 1 Bligh N. S. 479, H. L., where the testator gave 500*l.* per annum to his wife by will, and by codicil gave to trustees for her so much as would purchase 500*l.* per annum in Long Annuities, it was held to be a mere alteration in the mode of provision, and that one annuity only was intended. So in *Allen v. Callow*, 3 Ves. 289, where the gift by will was of 500*l.* to the children of A., subject to A.’s life interest, and A. having died, the codicil gave 500*l.* to her surviving children, the latter bequest was held to be a mere substitution on account of the altered state of the family. See also *Lee v. Pain*, 4 Hare 201.

*305] **Repetition of a series of legacies.*—Again, where a series of legacies given by one testamentary instrument is repeated in another with slight variations or additions, the simi-

¹ *Orrick v. Boehm*, 49 Md. 72.

² *Wainwright v. Tuckerman*, 120 Mass. 232. In *Tuckey v. Henderson*, 33 Beav. 174, Romily. M. R., thought the fact that the second instrument was another will, though not revoking the first, a circumstance of some weight in favor of the legacies being substitutional. “This differs from the case of a codicil, a codicil is professedly an addition to the will, but this is professedly a substitution for it.” *Id.* p. 276.

larity of the two sets of gifts may show that the second instrument, *as a whole*, is intended as a substitution for, and not an addition to, the first: of which case examples are—*Moggridge v. Thackwell*, 1 Ves. jun. 472; *Cooté v. Boyd*, 2 Bro. C. C. 521; and *Fraser v. Byng*, 1 R. & My. 90.¹

On the other hand, the context may show that two legacies of the same amount in the same instrument are cumulative, and not substitutional, as if an additional reason be assigned for the second legacy.

Double legacies with the same motive.—If a legacy of the same amount is given to the same person in each of two testamentary instruments, and the *same motive* is assigned for each, a “presumption” of law is raised that it is a mere repetition, and that one legacy only was intended (*Hurst v. Beach*, 5 Madd. 358); but this being a mere presumption, and not a rule of construction, may be rebutted by parol evidence of intention. (Ib.)

But the fact of the legatee being described in each case as “my servant,” does not express a motive, but is descriptive only. (*Roch v. Callen*, 6 Hare 581.)

Parol evidence.—The rule that legacies by two different instruments are *prima facie* cumulative, is a rule of construction, and not a mere “presumption” and parol evidence is not admissible to show that one legacy only was intended. (*Hurst v. Beach*, 5 Madd. 351.)

Whether parol evidence be admissible to show that legacies repeated *totidem verbis* in the *same* instrument were intended to be cumulative, *qu.* Originally the inference in this case against a double legacy was a “presumption” only, adopted from the Civil Law (see *Hooley v. Hatton*, 1 Bro. C. C. 390, n.), and therefore capable of being rebutted by parol evidence. But perhaps the question would now be regarded as one of construction simply upon the language of the instrument, and therefore not admitting of parol evidence.

¹ See also *Tuckey v. Henderson*, 33 Beav. 174; *Rice v. Boston Port and Seamen's Aid Soc.*, 56 N. H. 191.

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*LEACROFT *v.* MAYNARD.

It is a rule of construction, which is applied whether the result is or is not advantageous to the legatee, that—

RULE. An *added* or *substituted* legacy is *prima facie* payable out of the same funds and subject to the same incidents and conditions as the original legacy. (*Leacroft v. Maynard*, 3 Bro. C. C. 232; *Crowder v. Clowes*, 2 Ves. jun. 449; *Johnson v. Lord Harrowby*, Johns. 425, 1 De G. F. & J. 183.)¹

Thus, if the testator by will gives to A. 500*l.*, free of legacy duty, and by a codicil gives to A. 1000*l.* *in lieu of*, or *in addition to*, the legacy given by the will, the bequest made by the codicil is also free of legacy duty. (*Cooper v. Day*, 3 Mer. 154; *Earl of Shaftesbury v. Duke of Marlborough*, 7 Sim. 237; *Fisher v. Brierley*, 30 B. 267.)

“Where a legacy is given expressly in addition to, or in substitution for, one previously given, it is subject to the same incidents and conditions as attach to the original legacy. The ground of this is, that it is assumed that where such words as ‘in lieu of’ or ‘in addition to’ are used, the will is intended to stand *mutatis mutandis*, merely adding or substituting another amount.” (*Johnson v. Lord Harrowby*, Johns. 427.)

A gift of a “further” sum is of course equivalent to an additional sum.

It is immaterial whether the incident in question is attached to the original legacy particularly, or by a general clause: thus a direction that all legacies given by *the will* shall be free of legacy duty, applies to an *additional* legacy given by codicil. (*Earl of Shaftesbury v. Duke of Marlborough*, 7 Sim. 237.)

¹ *Tilden v. Tilden*, 13 Gray 108; *Pike v. Walley*, 15 id. 346; *Condict v. King*, 2 Beas. 381; *Cordes v. Palmer*, 6 Rich. Eq. 207.

Gift to separate use.—The rule applies to the incident of separate use: thus if a legacy be given by will to the *separate use of a married woman, and by codicil a further sum [*307 is given her *in addition* to the legacy given by will, she takes the legacy given by codicil for her separate use. (*Day v. Croft*, 4 B. 561; *Warwick v. Hawkins*, 5 De G. & Sm. 481.)

Gift out of particular funds.—So if a legacy be given to a charity, with a direction that it shall be paid out of the pure personality, and by codicil a *further* or additional legacy is given to the charity, the latter is also payable out of the pure personality, though not expressly so given. (*Johnson v. Lord Harrowby*, 1 De G. F. & J. 183.)

In *Johnson v. Lord Harrowby*, 1 De G. F. & J. 183, the testator by will gave out of his pure personality the sum of 500*l.* to the Literary Association, &c., of Poland, free of legacy duty. By codicil he gave to the Literary Association, &c., of Poland 1000*l.* It was held (but against the decision of Wood, V.-C. (*Johns.* 425)), that the bequest by codicil, though not expressed to be in addition to the prior gift, was also payable out of the pure personality, and free of legacy duty.

Again, if a legacy were given charged on real estate, an additional or substituted legacy would by implication be also charged. In *Leacroft v. Maynard*, 3 Bro. C. C. 232, the testator by will gave to a charity 1000*l.* out of the proceeds of real estate: by codicil he revoked the bequest and *instead* thereof gave to the charity 500*l.*: it was held, that the latter gift was payable out of the same funds as the former, and therefore void.

Gift subject to be divested.—If the original legacy be not absolute, but contingent or defeasible, as, to the legatee if he attains a given age, it appears that the rule will apply, and a legacy given expressly in addition to or substitution for the former legacy will be *prima facie* subject to the same conditions. Thus in *Crowder v. Clowes*, 2 Ves. jun. 449, a legacy of 1000*l.* was given by will to A. to be paid on marriage, the interest to be paid her until marriage, and on her death unmarried the legacy to fall into the residue: by codicil the testator gave to A. a further sum [*308 of 200*l.* in addition to the legacy given by *the will. It

was considered that the additional legacy was defeasible on the death of the legatee unmarried.

But the rule does not apply so as to give to *other persons* an interest in the additional or substituted legacy, who may be entitled under subsequent limitations of the prior legacy. (*Re More's Trusts*, 10 Hare 171; *Mann v. Fuller*, Kay 624.) "Where there is a gift by will to A. for life, and after his decease to B., and then another gift to A. *in addition to* what was before given, there is no authority for carrying on the series of limitations to the latter gift, so as to convert it into a gift to A. for life, and then to the party who was named in the former gift to take after A.'s death. . . . If the former gift were absolute and free of legacy duty, the additional gift has been held to have all the same incidents; so if the former gift is to be lost on a certain event, the additional gift is to be defeated on the same conditions. In no case has it been held, that the latter gift is to go to the parties entitled under the subsequent limitations of the former gift." (*Per Wood, V.-C.*, Kay 626.)

Contrary intention.—The rule appears to be subject to an exception in the case of substituted legacies, viz:—where an intention appears to revoke the prior disposition *in toto*, not merely altering the amount given, but sweeping away the original legacy with its incidents and conditions, and substituting an entirely new gift, although expressly given in lieu of the former. As in *Alexander v. Alexander*, 5 B. 518, where the residue was by will given to trustees in trust as to one-third for A., contingent on his attaining the age of twenty-five, or marrying: and by codicil the testator revoked so much of his said will as related to the distribution of the residue of his estate, and bequeathed to A. 20,000*l.* in lieu of his one-third share thereof. It was held that A. took the latter sum absolutely. "The testator has revoked so much of his will as relates to the distribution of the residue of his estate. The whole of this distribution is therefore gone. He says, I have given the residue subject to a contingency: *809] *I revoke the gift entirely, and in lieu I give an absolute interest in 20,000*l.*" (*Ib.* 4 B. 520.)

But the use of the words "I revoke, &c." the prior gift, does

not prevent the substituted legacy from having the incidents of the original one. (*Cooper v. Day*, 3 Mer. 154; *Fisher v. Brierley*, 30 B. 267.)

In *Chatteris v. Young*, 2 Russ. 183, the testator by will gave a legacy to his daughter, and by codicil, reciting her death, *instead* of the legacies bequeathed to her, gave a legacy to *her husband*. It was held, that the latter was not a substituted legacy, so as to come within the benefit of a clause in the will directing the legacies thereby given to be free of legacy duty.¹

Bequest of a "clear" yearly sum.—A bequest of "an annuity or *clear* yearly sum," or of a "clear annuity or yearly sum," of 100*l.* to A., is a gift of that amount free of legacy duty. (*Haynes v. Haynes*, 3 D. M. G. 590; *Pridie v. Field*, 19 B. 497.)²

But a bequest of so much as will produce a "clear yearly sum" or "clear annuity" of 100*l.* to trustees in trust for several persons in succession, as to A. for life, with remainder to her children at twenty-one, has been held not free of duty; as the relationship of the persons taking in succession might be different, and, therefore, it could not be ascertained at once what would be the total amount of duty payable. (*Sanders v. Kiddell*, 7 Sim. 536; *Pridie v. Field*, 19 B. 497.)

Legacy to Executor.

It is a rule of construction, which however is less strictly observed now than formerly, that—

RULE. A legacy to a person appointed executor is *primâ facie* conditional on his accepting the office. (*Read v. Devaynes*, 2 Cox 285; *Stackpoole v. Howell*, 13 Ves. 417.)³

¹ The rule will not be applied where it would destroy the equality of the distribution among the legatees, which was the leading purpose of the testator: *Pike v. Walley*, 15 Gray 346.

² Re *Cole's Will*, L. R. 8 Eq. 271.

³ In *Bellingslea v. Moore*, 14 Ga. 373, it is held that although the fact that the law of this country allows commissions to an executor greatly weakens the force of the legal presumption which is the foundation of this rule, yet it is not so repugnant to the rule as to repeal it.

*310] *The rule applies both to general and specific legacies; but not to a bequest of the residue. (Griffiths v. Pruett, 11 Sim. 202.)

The rule applies although the legacy be not given to the person as executor, but by name and description (Stackpoole v. Howell, 13 Ves. 417); and although equal legacies be given, to the executors, and to other persons not executors. (Calvert v. Sebbon, 4 B. 222.) And if several legacies be given *primâ facie* it applies to all of them. (Cockerell v. Barber, 2 Russ. 585.)

Contrary intention.—But if any expressions can be found implying an intention to benefit the person, independently of the office imposed on him, the rule has been (in the latter cases) held to be excluded. “The old rules on the matters were very well settled; one rule was, if A. B. was named executor and he had a legacy given to him, he should not take the legacy, if he did not take the office. . . . Now it is said that we are to look to the whole will, in order to come to a conclusion as to the effect of the gift, and that it is by comparison of the mode in which the testator has given to this executor, with the mode in which he has given to others, and with the expressions which he applies to him and them respectively, that we are to determine whether the gift to the executor in this case shall fall within the rule.” (Per Lord Eldon, Cockerell v. Barber, 2 Russ. 599.)¹

Thus, where the legacy was given “to my *friend and partner*, J. P.” (Cockerell v. Barber, 2 Russ. 585), or “to my *friend*, J. S., banker’s clerk and one of the executors of this my will” (Re Denby, 3 De G. F. & J. 350), the legacy was held not annexed to the office. So where the legacy was given to the exe-

¹ In *Jewis v. Lawrence*, L. R. 8 Eq. 345, the testator devised certain real estate to A. “one of my trustees and executors,” and in another clause of the will bequeathed 100*l.* to B. “one of my trustees and executors,” and bequeathed his residuary personal estate to A. and B. upon certain trusts, and appointed A. and B. his executors. James, V.-C., held that the inequality in the subject matter of the two gifts was sufficient to rebut the presumption that the legacy to B. was annexed to his office.

cutors, as a mark of the testator's *respect* for them. (*Burgess v. Burgess*, 1 Coll. 367.)¹

And in *Dix v. Reed*, 1 S. & Stu. 237, a strong case, where the testator gave to his *cousin* A. 50*l.*, and appointed him a joint executor, although legacies of the same amount were given to the other executors, the gift to A. was held *to be in virtue of [*311 relationship, and not annexed to the office.

A legacy by codicil to A., "in case my son shall die in his present malady," is of course not annexed to the office. (*Wildes v. Davies*, 1 Sm. & G. 475.)

Elcock v. Mapp.

If a testator appoints executors, but makes no express disposition of the residue of his personal estate, the executors having by law the property vested in them, are entitled to retain the undisposed part of it, in the case of persons dying on or before September 1, 1830, against the persons entitled under the Statutes of Distributions, and, in the case of persons dying after September 1, 1830, against the crown, though not against the persons (if any) entitled under the Statutes :—unless an intention appears to exclude the executors from such beneficial interest.

But if the personal residue is expressly disposed of upon trusts, which however fail or do not exhaust the property, the case is otherwise. For (1) if the gift is to trustees, who are not the executors, the title of the executors, which is a *legal* one only, is lost by the property being given away from them: (2) if the gift is to the executors, as such, in trust, an intention is shown that they should not claim beneficially; for "in the same character in which they take the property, the trusts are imposed upon them" (per Sir W. Grant, 15 Ves. 416): and (3) although the gift be to the executors *nominatim* as trustees, and not as executors, it is settled according to Lord Eldon's opinion in *Dawson v. Clark*, 18 Ves. 247, that the same rule applies. The rule of construction therefore is that—

* By the Act 11 Geo. 4 & 1 Will. 5, c. 40

¹ So where a testator gave each of his executors 100*l.* "as a remembrance," and called one of them his "friend": *Bubb v. Yelverton*, L. R. 13 Eq. 131.

RULE. If the residuary personal estate is given to trustees, and the trustees are also executors, they *312] *cannot as executors claim any part of the residue beneficially. (*Bishop of Cloyne v. Young*, 2 Ves. sen. 91; *Elcock v. Mapp*, 3 H. L. C. 492; 2 Phill. 793; *Read v. Stedman*, 26 B. 495; *Dacre v. Patrickson*, 1 Dr. & Sm. 182.)¹

"The executor claims the property as incident to the office, and as vested in him by virtue of it, in the absence of any intention to the contrary expressed by the testator. But if the testator gives this same property to the same executor, or to any other person, in trust for some purpose (for what purpose is immaterial) other than the beneficial enjoyment by the executor, he thereby shows an intention inconsistent with this incident to the office, and by so doing destroys it.

". . . . But it is contended, that if the property, instead of being left to the executors in trust, or to third persons in trust, be left to the executors not as such, but in their own names, upon trusts which fail or do not exhaust the property, that those trustees, in their character of executors, are entitled to the residue as incident to their office. I cannot see any principle for this distinction." (*Mapp v. Elcock*, 2 Phill. 796.)

A devise to executors, "to and for the uses, intents, and purposes following, &c." (*Mapp v. Elcock*), is of course a devise upon trust. And "the circumstance that the trusts do not exhaust

¹ *McDonald v. McDonald*, 34 U. C. Q. B. 369. See *Grasser v. Eckart*, 1 Binn. 584. In *Barrs v. Fewkes*, 2 Hem. & M. 60, the gift was of the residue of the real and personal estate to A. "to enable him to carry into effect the purposes of this my will," and A. was appointed executor. Wood, V.-C., held that the expression "to enable him to carry into effect," &c., imported not the motive of the gift merely, but the very object for which the gift was made, and A. therefore took the residue as trustee.

And in *Bird v. Harris*, L. R. 9 Eq. 204, where the testator gave all his real and personal estate to two persons not connected with him by relationship, "in, for and in consideration of" paying over the yearly rents, &c., to his wife, and appointed them executors of his will, James, V.-C., held that the words "in, for and in consideration of" could have no other construction put upon them than that they were equivalent to "for the purpose of."

the whole interest, does not affect the fiduciary character with which the executor has been invested. It only makes him a trustee *pro tanto* for statutory instead of testamentary objects." (3 H. L. C. 509.)¹

If some only of the executors are trustees, or if some trustees only are executors, the rule applies; for the character of trustee being by construction on the will affixed to some or one of the executors, all the executors are trustees. (*White v. Evans*, 4 Ves. 21.) Wherever therefore the residue is given to trustees, the executors cannot claim.

But if particular funds only are given to trustees, *leav- [*313
ing the residue undisposed of, the fact of the executors
being described as trustees in the will does not defeat their claim.
(*Pratt v. Sladden*, 14 Ves. 198.)

Parol evidence.—The rule in *Elcock v. Mapp* is a rule of construction and not a mere "presumption," and parol evidence is therefore not admissible in favor of the executor. "If the will contains express declarations that the executor is to be a trustee, evidence cannot be received against the effect of that declaration." (*Gladding v. Yapp*, 5 Madd. 59.)

Presumption from legacy to executor.—If a legacy be given to a sole executor, or equal legacies to each of several executors, a "presumption" of law is raised against their title to undisposed of residue. (*Farrington v. Knightly*, 1 P. W. 544.) But this,

¹ "Where property is given to a man subject to certain defined trusts, there remains no right in any one but the donee when those trusts are exhausted. Where, however, the estate is given to a man in the character of trustee, without anything to indicate that a beneficial interest is intended, then there is a resulting trust: per *Stuart, V.-C.*, *Clarke v. Hilton*, L. R. 2 Eq. 815. And thus where the gift was of all the personal estate to A., who was one of the executors, "subject to the payment of debts and legacies, and to the trusts hereinafter named," it was held A. took beneficially the surplus after discharging the trusts, although subsequently were written the words, "And upon trust to stand possessed of the said trust moneys in trust to pay," &c. The Vice-Chancellor said the "whole will must be taken together, the words of gift give the whole property subject to the trusts and not upon the trusts," and therefore held that the words "and upon trust," &c., did not attach to the surplus after the trusts were satisfied. *Id.*

being only a presumption, may be rebutted by parol evidence. (*Langham v. Sanford*, 17 Ves. 443.)¹

But unequal legacies to each of several executors, or legacies to some only, do not raise the presumption; for the effect is only a preference *pro tanto*. (*Griffith v. Hamilton*, 12 Ves. 309.) Nor does the gift of a life interest in a fund otherwise disposed of, raise the presumption. (*Granville v. Beaufort*, 1 P. W. 114.)

But a legacy, even to one only of several executors *for his care and trouble*, excludes all from the residue by inference of construction, and not mere presumption; and parol evidence is not admissible to the contrary. (*White v. Evans*, 4 Ves. 21.)

¹ "These three legacies must be payable out of the estate which is said to be given to these three persons beneficially, so that the testator, according to the appellant's contention, was at the same time giving to these three persons part and the whole of the same estate. It was said that these legacies may well have been given for the purpose of putting the executors to that extent on the same footing as the other legatees; but that argument was urged in many cases . . . and it has not succeeded," per Turner, L. J., *Saltmarsh v. Barrett*, 3 De G. F. & J. 286.

• APPENDIX.

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I. p. 46.

Income of Contingent Residuary Devise.

It appears on investigation that the important case of *Hopkins v. Hopkins* (reported, but imperfectly, Ca. Talb. 44 ; 1 Atk. 580 ; 1 Ves. sen. 268), decided that neither a specific *nor a residuary* devise of real estate to the use of an unborn person, or to the use of trustees in trust for an unborn person, carries the rents and profits accruing during the suspense of vesting, but that such intermediate rents descend to the heir-at-law :—thus overruling the dictum of Lord Brougham quoted in the text.

By the will in *Hopkins v. Hopkins* (stated in the original Decree at the Rolls, Reg. Lib. 1733 A. fo. 126), the testator devised a particular estate to certain persons for life, and after their decease upon the trusts limited touching the *residue* of his real estate thereafter devised : and devised *all other* his real estates to trustees and their heirs to the use of an unborn person, with remainders over. He also bequeathed the residue of his personal estate to be laid out in lands to be settled to the uses of his real estate. It was held, that the rents and profits and income of the residuary real and personal estate during the contingency, were neither to be accumulated by the trustees, nor went to any ulterior vested remainderman, but were undisposed of and went to the heir-at-law. (See Lord Talbot's decree, Reg. Lib. 1734 A. fo. 111 ; and the subsequent orders of Lord Hardwicke, Reg. Lib. 1738 A. fo. 367, and Reg. Lib. 1748 A. fo. 644.)

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*II. p. 199.

Bequest to A. and his Children.

In *Audsley v. Horn*, 26 B. 195, Romilly, M. R., was of opinion that according to the tendency of the later decisions, a gift of personal estate to *A. and her children simpliciter*, is a gift to A. for life with remainder to her children. And in *Ward v. Grey*, 26 B. 485, the same judge held that a direction to pay to *A. and her family simpliciter*, operated as a gift to A. for life, with remainder to her children as she should appoint, and in default equally : but this is directly opposed to *Re Parkinson's Trusts*. (1 Sim. N. S. 242, *supra*, p. 90.

It is conceived that, notwithstanding these cases, the rule as at present established requires some aid from the context to convert the gift to the children into a gift in remainder, and that, without such aid, the force of the expressions themselves is to cause the parent and children to take concurrently. The opposite rule, however, if established, would no doubt be a convenient and probably beneficial rule of construction.

WILLS ACT,

7 Will. 4 & 1 Vict. c. 26.

Section 24—33 (Construction &c., Clauses).

XXIV. And be it further enacted, That every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

XXV. And be it further enacted, That unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which *shall fail or be void by reason of the death of *317] 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.

XXVI. And be it further enacted, That a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any 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.

XXVII. And be it further enacted, That a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

XXVIII. And be it further enacted, That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to *pass the fee simple, or other the whole estate or interest which the testator had power to dis- [318
pose of by will in such real estate, unless a contrary intention shall appear by the will.

XXIX. And be it further enacted, That in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail

to such person or issue, or otherwise: Provided, that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if 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.

XXX. And be it further enacted, That where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

XXXI. And be it further enacted, That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to *319] 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.

XXXII. And be it further enacted, That where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

XXXIII. And be it further enacted, That where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

STATUTES OF DISTRIBUTION.

Stat. 22 & 23 Car. 2, c. 10.

Sections, 5-7.

V. Provided always, and be it enacted by the authority aforesaid, That all ordinaries, and every other person who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate, *shall distribute the whole surplusage of such estate or estates in manner and form following; that is to say, one- [*320 third part of the said surplusage to the wife of the intestate, and all the residue by equal portions to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir-at-law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made; and in case any child, other than the heir-at-law, shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution as aforesaid, then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated; but the heir-at-law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent or otherwise from the intestate.

VI. And in case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every the next of kindred of the intestate who are in equal degree, and those who legally represent them.

VII. Provided, that there be no representations admitted among collaterals after brothers' and sisters' children; and in case there be no

wife, then all the said estate to be distributed equally to and amongst
*321] the *children; and in case there be no child, then to the next
of kindred in equal degree of or unto the intestate, and their
legal representatives as aforesaid, and in no other manner whatsoever.

Stat. 1 Jac. 2, cap. 17.

Sect. 7.

VII. Provided also, and it is further enacted, That if after the death of a father any of his children shall die intestate, without wife or children in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her, anything in the last mentioned Acts to the contrary notwithstanding.

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