A

TREATISE

ON THE

LAW

OF

WILLS AND CODICILS.

By WILLIAM ROBERTS,

OF LINCOLN'S INN, ESQ., BARRISTER AT LAW.

SECOND EDITION,

MUCH ENLARGED AND IMPROVED.

IN TWO VOLUMES.

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TO

THE RIGHT HONOURABLE

JOHN, LORD ELDON,

LORD HIGH CHANCELLOR OF GREAT BRITAIN,

&c. &c. &c.

My Lord,

THE terms in which your Lordship has been pleased to express your acceptance of the Dedication of these Volumes, demand my particular acknowledgments.

My acknowledgments, as a member of the profession of the law, are also in an especial manner due to your Lordship, when it is considered that those parts of this Treatise which stand upon the firmest ground of principle and science, are drawn from your Lordship's judgments. Without borrowing largely from that fund, I could never have fulfilled my engagements with the Public; or, perhaps it would be more correct to say, that if the vast and multifarious mass of former doctrines on the subject of Wills had not been reduced to some elementary consistency by the Cases decided within these last ten years in the Court of Chancery, I could never have ventured upon the undertaking.

Under these circumstances a Dedication of the following Work to your Lordship has, I trust, enough in it of propriety to defend it from the imputation of presumption.

It is with the sincerest gratitude, therefore, that I beg to approach your Lordship with this tribute of professional industry, and to request that you will receive it as a testimony of the profound respect with which I am

My Lord,

Your Lordship's much obliged,

And obedient humble Servant,

WILLIAM ROBERTS.

Lincoln's Inn,
Hilary Vacation, 1815.

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SECT. I.

Progress of the Law.

ALIENATIONS to take effect after death, can only be the practice of an advanced period in the progress of society: after the hand that held and maintained the possession is withdrawn, to permit the will of the proprietor to direct the succession, implies a conception of the sacredness of property, and a state of order and security which does not exist in the beginnings of nations (1). It appears doubtful whether among the Romans, before the introduction of the laws of the Twelve Tables, or among the Athenians before the legislation of Solon, the direct testamentary

(1) *Omnino rationi naturali repugnat, alicui jus esse statuendi de rebus suis ita, ut voluntas post mortem valere incipiat; ubi jam velle desiit et mors omnia solvit. Hert. Elem. Polit. pars. 2. sect.* 11. § 53. *Vid. Vinn. Comm. tit. de test. ordin.*

disposition even of moveables was allowed; and among the ancient Germans it appears that the children succeeded to the possessions of the parent, and that he had no power to alienate them by his will. If he had no children, the steps in the order of inheritance and succession were the *patres, patrui, avunculi* (2).

Progress of the *testamenti factio*, in the Roman jurisprudence.

(2) The succession to the heirs of the body, and in case of the defect of such representatives, to the next in proximity of blood, if not a law of nature, seems so to correspond with its dictates, that history hardly carries us back to a time when the notion and admission of this claim did not prevail among mankind. The suggestions of a common feeling appear, therefore, to have made this an universal rule of transmission, and to have established it in communities widely separated by time and place. Thus the representation in the channel of blood and proximity seems to have had its foundation higher than any positive institutions, though to positive institutions we must of course refer to the *modifications* of this rule of succession; which, indeed, has been so variously ordered, that no two nations exactly resemble each other in their institutions regarding it.

That the right of controuling this succession by the private will of the possessor, was the product of an improved period of legislation, there is much concurrent testimony to shew. Till the legislation of Solon, the Athenians did not possess this privilege, as it appears from many authorities, particularly from Plutarch, in his life of Solon, page 196, edit. Bryan, and the orations of Isæus, especially *de Philoctemonis Hereditate;* nor according to Selden *de Success. bon. Hebr. c.* 24. did it exist among the ancient Jews; nor as we learn from Tacitus *de mor. Germ. c.* 20, among the Germans in his day. The tenderness which continued to prevail among the Romans for the legal heir is strongly displayed in their provisions by the laws *Furia*, *Voconia*, and *Falcidia*, and more pointedly perhaps by their remedy of *querela inofficiosi testamenti*, wherever a will was made against the order of natural affection, without reasonable cause.

With respect to the question how far the right of disposition by will existed among the Romans, before the laws of the Twelve Tables, there seems to be much variety of opinion. The text of

If the power of disposing of land by will was exercised by our Anglo-Saxon ancestors, it seems much less

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Justinian propounds the order in which the form of the *testamenti factio* proceeded, which the student will consult, with pleasure, in the Commentary of Vinnius, edited, with notes, by Heineccius, in the title *de Testamentis Ordinandis.* It appears that the most ancient mode of making a testament, among the Romans, was, by converting a man's private will into a public law, for such seems to have been the object and intention of the promulgation or celebration of a testament in the *calatis comitiis*, i. e. in the presence of the Roman people summoned before the Sacerdotal College *per curias.* And, according to Heineccius, these assemblies were not convened specially for the purpose of giving sanction to wills, *sed legum ferendarum magistratuumque creandorum causa immo et ob alia negotia publica, bellum, pacem, judicia, &c.*

Thus was this private disposition by testament of the property of an individual promulged and ratified in the same manner as a public law; and for this reason the *testamenti factio* has, in the text of the imperial law, been said to be *non privati sed publici juris, D.* 28. *c.* 3. and again by Ulpian, it is said, *legatum est, quod legis modo— testamento relinquitur, Ulp. tit.* 24. § 1.

Another form of testament which existed antecedently to the laws of the Twelve Tables, was that called *testamentum procinctum* or *in procinctu*, which was the privilege only of those who were on the eve of going to battle, or *girt* for the war, with the uncertainty on their minds of their ever returning, and was among the immunities in regard to property conferred by the Romans upon the defenders of their country.

But as the *comitia* were held but twice a year, so that a man might be surprised by sickness without having the opportunity of thus solemnizing his last will, and the attendance upon these public assemblies was often difficult or impossible to the aged and infirm; and furthermore, as women were by these forms precluded from making any testament, as not having any communion with these *comitia*, according to Gellius, lib. 5. c. 19, a third method was struck out, which might facilitate the ultimate disposal of private property to all descriptions of persons, otherwise competent; and this last method was called the *testamentum per æs et libram*, which

likely that it originated with themselves, than that they adopted it from those laws which the Roman govern-

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was a fictitious purchase of the family inheritance of heirship, by money weighed in a balance, and tendered by the intended inheritor to the testator, before witnesses.

Thus it is said to be *imago vetusti moris in venditione atque alienatione rerum mancipi, quæ uno verbo, mancipatio dicitur, nimirum ut is in quem hæ res transferebantur, eas emeret domino ære et libra, appenso ἐι νομου χαριν nummo uno.* And it seems that this fictitious proceeding was still retained after the promulgation of the law of the Twelve Tables had authorized the making of wills by the clause of *paterfam. uti legassit &c. ita jus esto;* for it was still regarded as necessary, to raise the will of a private man to a level with the laws of the state, that it should take the shape of a strict legal transaction *inter vivos;* for *testandi de pecunia sua legibus certis facultas est permissa, non autem juris dictionis mutare formam, vel juri publico derogare cuiquam permissum est. C.* 6. 23. 13. The two former methods, by the *testamentum in procinctu*, and *calatis comitiis*, were thrown into total disuse, by the *testamentum per æs et libram;* but this last form of willing again made way for others of a more convenient description.

The methods above-mentioned were referrible to the *jus civile*, or as we express it, the law of the land; but from the edict of the prætor, other forms at length were brought into practice, by virtue of which *jus honorarium*, the *mancipatio*, and the weighing and delivering of money, were dispensed with, and, in their stead, the solemnity of *signing* by seven witnesses, was introduced: the *presence* only and not the *signature* of witnesses being necessary by the *jus civile.*

At length, however, by gradual use and progressive alterations, as the text of Justinian informs us, the *lex prætoria* and the *jus civile* were in some degree incorporated; and a compounded regulation took place, whereby it became requisite to the valid constitution of a will, that the witnesses should be present (the presence of witnesses being the rule of the *jus civile*); that they and also the testator should sign, according to the superadded institution of positive law; and lastly, that in virtue of the prætorian edict, their seals should be affixed, and that the number of witnesses should be seven.

ment had established and left standing in this country. It appears, however, pretty certain, that this testamentary power over land did not survive the Norman conquest, except in particular cities and boroughs, where, by particular favour, the Saxon institutions were suffered to breathe (3): it ceased by the operation of the feudal system of property, which necessarily excluded all voluntary alienations of possessions

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Afterwards, the further solemnity of naming the heir in the testament was added by Justinian, and again taken away by the same emperor, in Nov. 119. c. 9. and at length, the excess of testimony was corrected by the canon law in the pontificate of Alexander the Third, by which it was declared sufficient to prove a testament by two or three witnesses, the parochial minister being added; *improbata constitutione juris civilis de septem testibus adhibendis ut nimis longe recedente ab eo quod scriptum est—in ore duorum vel trium testium stet omne verbum*, *Swinb.* 64. *Deut. c.* 18. *Matth. c.* 18. which reformation obtained the sanction of general usage.

Swinburn says, that this institution has also been reformed by the general custom of this realm, "which distinctly requires no more than two witnesses, so they be free from any just cause of exception;" which observation he repeats in several places of his treatise on wills, on the authority of Linwood, in *Statut. Verb. Prob. de Test. l.* 3. *Provincial Constit. Cant.* Bracton also has the following passage: "*Fieri autem debet testamentum liberi hominis ad minus coram duobus vel pluribus viris legalibus et honestis, clericis vel laicis ad hoc specialiter convocatis, ad probandum testamentum defuncti si opus fuerit, si de testamento dubitatur.*" Bract. lib. 32. fol. 61. but these words import a recommendation, and not an imperative rule; and nothing seems now to be better understood, than that a will of personality needs neither the attestation of witnesses, or the testator's seal or signature; and though written in another hand, yet if proved to have been written according to the testator's instructions, and approved by him, it is a good will to dispose of chattels. Comyns, 452, et seq.

(3) Whether gavelkind lands in Kent were deviseable by custom seems to be a matter in dispute. See the arguments *pro et con.* in Rob. Gavel. 235.

with which personal services and duties were inseparably connected[a]. But with respect to moveables, the testamentary power seems, in this country, with more or less restraint, to have been exerciseable in a very remote period. The ready mode of authenticating the property in goods by the possession, and of transferring the possession by manual delivery, and the usufructuary and revocable quality of terms of years, caused them at an early period to be considered as proper subjects for every kind of alienation. But though testaments of moveables were permitted by the ancient law of England, according to Glanville and Bracton, yet the power extended only to one-third, called the dead man's part; which limitation seemed to prevail in London and York, after it had fallen into disuse in other parts of the kingdom, till at length by several statutes the testamentary power over goods was thrown generally open (4).

[a] Vide 1 Eq. Ca. Abr. 401.

Restraints upon the testamentary power by the customs of York and London, removed by statutes.

(4) By the 4th W. and M. c. 2. persons within the province of York may dispose by will of all their personal estate, in as large and ample a manner as within the province of Canterbury, and elsewhere; and the widows and children, and other kindred of such testator, are barred of their claims under the custom. But the citizens of the cities of York and Chester, who were freemen, inhabiting there, being excepted out of this statute, the 2d and 3d Anne, c. 5, was made to repeal this exception, and to put them upon the same footing, in this respect, as persons within the province of York. And by the 11th G. 1. c. 18, the citizens and freemen of the city of London are also enabled to devise and dispose of their personal estate, in such manner as they shall think fit, except where they enter into any agreement on marriage, or otherwise, that their personal property shall be subject to or distributed by the custom. In cases of intestacy, the property becomes subject to, and distributable according to the custom.

According to the author of the Commentaries, "by the ancient common law of the land, and which continued at the time of Magna Charta, a man's goods were to be divided into three parts, of which one went to his heirs, or lineal descendants, another to his wife, and the third was at his own disposal; or if he died without a wife, he might dispose of one moiety, and the other went to his children. If he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without wife, or issue, the whole was at his own disposal. The shares of the wife and children were called their reasonable parts, and the writ *de rationabili parte bonorum*, was given to recover them.

In the reign of Edward the Third, this right of the wife and children was still held to be the common law, though frequently pleaded as the local custom of Berks, Devon, and other counties; and Sir Henry Finch lays it down expressly to be the general law of the land, in the reign of Charles the First. But the law has since been altered by imperceptible degrees, and the deceased may now by will bequeath the whole of his goods and chattels, though it would be difficult to trace out when this alteration began[b]." (5)

[b] 2 Bl. Com. 491. 2.

(5) This difference in importance between land and goods arose out of the principles of the feudal system. According to the law of Rome, no such difference subsisted. The general representative was the heir, and by that title he succeeded as well to the moveables as immoveables. And when the *whole* substance devolved, the difference was only between him who was appointed heir by

Of the power of bequeathing legacies in the different stages of the Roman law.

the superior, the feudatory often contrived to alienate by a donation by deed, made on the bed of death,

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In virtue of this ordinance, and in prosecution of its spirit, a more liberal interpretation obtained in the construction of testaments, in which from thenceforward the intention of the testator was the principal object of enquiry, and a numerous description of persons whom the rigour of the *jus civilis* had deemed incapable of taking by way of *legacy*, such as the banished, the childless, persons living in celibacy, and strangers, were rendered capable of taking by will, and the circuity and precariousness of a trust were avoided; and, on the other hand, to equalize the advantages respectively belonging to the *legata* and the *fidei-commissa*, instead of the extraordinary and sometimes dilatory process by which the *fidei-commissa* were enforced, the ordinary remedy by the *actio ex testamento*, and even the *rei vindicatio*, in the cases where it applied, were opened to all descriptions of legataries.

Of the *donatio causâ mortis.*

The *donatio causâ mortis* is a title of the civil law, and of our own, to which the attention of the diligent student should be directed. In the text of the Institutes of Justinian, lib. 7, it is thus defined, or rather described; *Mortis causâ donatio est, quæ propter mortis fit suspicionem quum quis ita donat, ut si quid humanitus ei contigisset, haberet is, qui accipit: sin autem super vixisset is qui donavit, reciperet: vel si cum donationis pœnituisset, aut prior decesserit is, cui donatum sit. Hæ mortis causâ donationes ad exemplum legatorum redactæ sunt per omnia. Nam cum precedentibus ambiguum fuerat, utrum donationis, an legati instar eam obtinere oporteret, et utriusque causæ quædam habebat insignia, et alii ad aliud genus eam retrahebant, a nobis constitutum est, ut per omnia fere legatis connumeretur, et sic procedat, quem ad modum nostra constitutio eam formavit. Et in summâ mortis causâ donatio est, quum magis se quis velit habere, quam eum, cui donat, magisque eum, cui donat, quam hæredem suum:* which description the Emperor illustrates by an example from the Odyssey, of the gift of Telemachus to Piræus. (See also other examples of the antiquity of this species of gift in Taylor's Elements of the Civil Law, p. 536-7.)

According to Vinnius, in his Commentaries on this description of the *donatio causâ mortis*, it is not necessary to the constitution thereof, that the giver should be in actual and imminent danger of death, but it is enough if he be moved by the general consideration of

mortis causa; which, being a gift to take effect in point of form, *de presenti*, though its real effect

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mortality, *sola cogitatione mortalitatis ex sorte humana*, provided he expressly declares at the time, that he gives with such expectation and intention, otherwise the gift will be construed a pure and simple *donatio inter vivos*, and, consequently, will not be revocable. The same account of it is given by Swinburn, in the seventh section of his Treatise on Testaments and Wills. But in our courts of equity, the description of this species of donation has been confined within narrower bounds, being limited to those cases where a man lying in extremity, or being surprised with sickness, and having no opportunity to make his will, lest he should die before he can make it, gives with his own hands, his goods to his friends about him. This, says Lord Cowper, if he dies, shall operate as a legacy, but if he recovers, then the property thereof reverts to him." See Gilb. Eq. Rep. 12, 13. Prec. in Chan. 269; and see 3 P. Wms. 358. 1 P. Wms. 405. 442. 1 Vez. jun. 547. The reader, however, will find in Still *v.* Chapman, 2 Bro. C. R. 612. a decision of Lord Thurlow on this subject, conformable to the explanation given in Vinnius and Swinburn, as above-mentioned.

It appears quite clear, according to all the authorities, that there must be a delivery of the thing by the giver in his lifetime; and we observe, that Lord Cowper's expression, in the case of Hedges *v.* Hedges, Prec. in Chan. 269, was "gives with his own hands." And, by Lord Hardwicke, in the case of Shargold *v.* Shargold, 2 Vez. 431, it was said, that the delivery must be *actual*, and that a *symbolical* delivery would not do; for which reason his Lordship held, that a delivery of receipts for S. S. Ann. made in the donor's last illness, and expressly in contemplation of death, was not a good *donatio mortis causâ;* consequently, said his Lordship, this was merely legatory, and amounted to a nuncupative will, and was contrary to the statute of frauds; for if the necessity for delivery be taken from the thing, it remained merely nuncupative.

Upon the same ground, his Lordship held that it was impossible to make a donation *mortis causâ* of stock or annuities, because in their nature they were not capable of *actual* delivery; and that, therefore, there could not be a gift *causâ mortis* of them, without a

was postponed to the death of the grantor, might introduce this ambiguous kind of *testamenti factio*, with

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transfer, or something amounting to a transfer. And upon the same principle it was judged, in Miller *v.* Miller, 3 P. Wms. 356, that a note for 100l. being merely a chose in action, could not be the subject of a *donatio causâ mortis*.

But still, perhaps, if such a delivery be made as, in gifts *inter vivos*, would actually transfer the property in the thing, and give the possession in law, this will be a sufficient delivery to support the act as a *donatio mortis causâ*; for the nature of the thing must be respected in all transfers. Thus in the case above cited, of the gift of the receipts for S. S. Ann. it seemed to be admitted by the Chancellor, that the *transfer* of the stock itself would have been effectual. And, perhaps, Lord Hardwicke designed in the case above cited to deny the efficacy of a *symbolical* delivery only where the thing was susceptible of a *specific* and *manual* delivery. The decision of Lawson *v.* Lawson, 1 P. Wms. 441, wherein a man upon his death-bed had drawn a bill upon a goldsmith, to pay 100l. to A's wife to buy mourning, is an instance of an effectual appointment *in the nature of* a *donatio mortis causâ*; and see Tate *v.* Hilbert, 2 Vez. jun. 111, wherein that decision was approved by Lord Loughborough; his Lordship, at the same time observing, that the report in 2 P. Wms. was incorrect, as it appeared from the Register's book that the direction for mourning was indorsed upon the bill, in the donor's hand-writing. It will be seen also by the cases of Still *v.* Chapman, 2 Bro. C. R. 612, and Snellgrove *v.* Bailey, 3 Atk. 214, that both bank notes and even bonds have been held to be capable of a sufficient delivery to constitute a good *donatio causâ mortis*.

The principal circumstances which distinguish the *donatio mortis causâ* from the *proper legacy*, should be attended to. The points also of resemblance should be carefully marked. And principally, on this head, the ambulatory, imperfect, and revocable nature of both will occur as the most important article in which they agree; and on the other hand, the principal difference between them, seems to consist in the independence of the title of the donee of the gift *causâ mortis*, on the act or consent of the representative. The same grounds of difference distinguished them in the civil law,

less novelty of principle[c]. It seems, indeed, that the consent of the heir was, at first, and for a long continuance, thought necessary to these alienations by deed, in prospect of death; though, according to some writers, this practice was worn out before the statutes of Henry the Eighth[d]. It seems, that soon after the statute of *quia emptores* had concurred with other causes, to render the testamentary power over land as well as moveables an object of universal desire, the

[c] Glanv. lib. 7. c. 1.

[d] See Dal. on Feuds, c. 3. sect. 1, and Spellman's Remains; also Glanv. l. 7. c. 1.

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donatio hæc ab additione hæreditatis, sicut legatum non pendet, sed sola morte confirmatur donantis. It should be observed also, that a *donatio causâ mortis* differs from a legacy in its exemption from the jurisdiction of the ecclesiastical courts, 2 Vez. 437; and again resembles it in its liability to debts upon a deficiency of assets; see Smith *v.* Cason, at the end of Drury *v.* Smith, 1 P. Wms. 406. It is liable to the duties on legacies, imposed by the late acts of parliament; and with the Romans it fell under the restraints of the *lex Falcidia* as well as legacies. They are both liable, according to our laws, to be defeated by creditors.

Finally it may be observed, that the fact of the gift *mortis causâ* is, in our law, to be proved in the same manner as other facts are to be proved; whereas, in the law of the empire, it was a point of resemblance between this gift and a legacy, that the former was necessary to be proved by five witnesses; which was the number necessary to the proof of a codicil, or any instrument of a testamentary operation which was not in strictness a testament according to its definition in the civil law.

If the gift be made and authenticated by a written instrument, without any actual delivery, but the deed or instrument conveys an interest to take effect absolutely in possession at the decease of the donor, this cannot be effectuated as a *donatio causâ mortis*, but there seems to be no reason why it should not operate as a testamentary disposition.

difficulty arising from the necessity of livery of seisin was eluded, by the practice of making feoffments to uses, over which, by the assistance of the courts of equity, wherein declarations and dispositions in respect to those uses were carried into effect, if made upon good consideration, a power of disposing by will might be exercised. And if these creations of uses were adopted from the civil law, we may conjecture that our ancestors were led more easily into the practice, by the notions they had previously learned to entertain of a distinction between the legal and beneficial property, from their reservations of the *dominium directum,* abstracted from the *dominium utile,* in their first feudal donations.

It is well known, however, that by the statute 27 H. 8. c. 10. this method of virtually disposing of land by will was disturbed. For by that statute, the use, as soon as it was created, became the *legal* estate, which was immediately carried to and executed in the *cestui que use,* so that wills lost their operation on the use raised directly upon a feoffment. It was still, however, in the power of individuals to elude the statute, and to keep the legal separate from the beneficial interest, by means of an use raised upon an use, or a second use, which the courts construed to be out of the reach and operation of the act, and thus transferred them to the jurisdiction of equity, under the denomination of trusts. In a very few years afterwards, however, an end was in a great measure put to these artifices, by the statutes of 32 Hen. 8. c. 1. and 34 Hen. 8. c. 5. usually called the statutes of wills.

By these statutes, all persons having any manors, lands, tenements, or hereditaments, in possession, re-

version, or remainder, holden by socage tenure, or in the nature of socage tenure, and having no lands held *in capite*, or by knight's service, were enabled to devise all their lands, or any rents, commons, or profits, out of them, to any person, in fee simple, fee tail, for life, or for years, at their pleasure. Those holding of the king *in capite* by knight's service, or by knight's service and not in chief, or of any common person by knight's service, might devise two parts thereof in three, and no more; the other third part being to descend to the heir, for satisfying the duties of the tenure, and, therefore, the devise of the whole land in such a case would be void. The person holding any such land by knight's service *in capite*, and other lands by socage tenure, might devise two parts of the whole, and no more, or any rent, &c. out of it, at his pleasure. He that held lands of the king by knight's service only, and not *in capite*, as if a mesne lord by knight's service had also other lands held by socage tenure, might devise two parts in three of all the land held by knight's service, or any rent, &c. out of it, and all his socage lands at pleasure. But which disposing power was only to be exercised by a will or testament committed to *writing*, in the *life-time* of the testator.

By the conversion of military tenures into common socage, the statute 12 Car. 2. 24, brought the greatest portion of the lands of this kingdom within the above-mentioned statutes of Hen 8. and made them disposeable by the last wills of such as possessed them in fee simple. By this statute, which, as the title declares, was "for taking away the court of wards and liveries, and tenures *in capite*, and by knight's service, and purveyance, and for settling a revenue upon his ma-

jesty in lieu thereof," all tenures by knight's service of the king, or of any other person, and by knight's service *in capite*, and by socage *in capite* of the king, and the fruits and consequents thereof, are taken away and converted into free and common socage: and it is thereby enacted, that all tenures thereafter to be created by the king, his heirs or successors, upon any grants of any manors, lands, or hereditaments, of any estate of inheritance, at the common law, shall be free and common socage, and not by knight's-service, or *in capite*.

But the tenure by copy of court roll, and the services incident to the same, are untouched by this act of Charles 2. nor do the statutes of Hen. 8. abovementioned extend to them, as they do not come within the description of socage tenure. The tenure in frankalmoign, and the honorary services of grand serjeants, other than of wardship, marriage, and the charges incident to the tenure by knight's service, were likewise unaffected by this act of Charles*.

The loose construction of the statutes of wills.

It appears, however, that there was something to regret in the almost boundless facility which was given to the testamentary power, by the operation of these statutes; in so much that a celebrated writer has remarked, in speaking of the operation of the statute

* This Act made some alterations also in socage tenure. It took away the aids pur file marier, and pur faire fitz chevalier, which were incident to *all* socage tenures. And it relieved soccage in capite from the burthen of the King's primer seizin, and fines of alienation to the King, to both of which socage in capite was equally liable with tenure by Knight's service. See Harg. Co. Litt. 93. c. (3).

of wills, that experience soon shewed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law, which are so nicely constructed, and so artificially connected together, that the least breach in any one of them, disorders, for a time, the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance; for so loose was the construction made upon this act by the courts of law, that bare notes in the hand-writing of another person, were allowed to be good wills within the statute.

It appears by the cases upon this statute, that the testament of lands and tenements ought not only to be in writing, but that it must be committed to writing at the time of making thereof, or at least in the lifetime of the testator; and that it is not sufficient to put it into writing, after the testator's death. But if the will be made by parol, and is afterwards written, and then carried to the testator for his approbation, and he approves of it, it is a good will of lands, under the statutes of Henry the Eighth; and it has been held, that if the testator, when he declared his will by word of mouth, had ordered the same to be written, and the will was accordingly written in his lifetime, the testament was as good as if it had been written at first. But, if a man were on his death-bed, and another came to him, and asked him whether his wife should have his land, to which he answered, yes, and a clerk being present did put this into writing, without any precedent command, or subsequent allowance of the sick person, this was not a good testament of land, according to the exigency of the statute of wills; and if a man declared his will before wit-

nesses, and sent for a notary to write it, and died before he came, and then it was written, this was no good will of lands, though it would have been sufficient, at that time, as a nuncupative will of chattels.

But if a notary took direction from a sick person for his will, and afterwards went away and wrote it, and then brought it again, and read it to the testator, who approved of it, or if it were written from his mouth by the notary, by the direction of the testator himself, although it were not shewn or read to him afterwards, these were held to be valid dispositions of land, under the statutes of Hen. 8. And further, it has been held upon these statutes, that if a notary did only take rude notes or directions from a sick man, which he did agree to, and they were afterwards written fair in his life-time, and not shewn to him again, or not written fair till after his death, this was an effectual will to dispose of lands[e].

In the case of Laurence *v.* Kete[f], we have the sentiments of the judges much at large, respecting the sufficiency of a will under these statutes. A. being sick, said that he had devised all his lands to his wife, for life, and limited several remainders of several parcels of them, and about an hour afterwards expressed a wish that one K. were there to write his will, whereupon the wife, without acquainting her husband with it, sent for K. who, from the mouth of the witnesses who heard the devise, wrote the same; but because they differed in their testimony, touching the limitations of the remainders, he wrote two wills, and this without the privity of the husband, who, before the

[e] Perk. sect. 476, 477. Dyer, 53. 72. Plowd. 345. 4 Rep. 60.
[f] Alleyn Rep. 54.

writing was finished, became senseless, and presently afterwards died.

And thereupon the following points were agreed to by the court, and given in charge to the jury: 1st, That an actual devise by word, is no sufficient ground for a stranger to write the will, but there ought to be an actual desire expressed to have the will written; nor is a bare wishing sufficient; there should be an actual willing. 2. That this desire ought to be expressed in some short space of time after the devise, so that it may be regarded as one continual act; for if the devise be made at one time, and at another time the devisor sends for a person to write his will, a new declaration will be necessary to make it effectual. 3. That an actual desire of the husband that K. were there to write his will, was a sufficient ground for the wife to send for him, though the devisor gave no express directions to do it. 4. That the writing the will from the mouth of witnesses was sufficient, and it need not be from the mouth of the testator. 5. If witnesses agree as to the devise for life, the will stands good for that, though they disagree as to the limitation of the remainders. 6. Though the devisor becomes senseless before the will be written, yet, if it be written before he dies, it is a good will in writing. 7. If a will continue in writing at the time of the death of the testator, though it be lost or burned afterwards, it stands good; but if it be burned at the time of his death, then the devise is void. The next day the jury gave a verdict against the will, because the evidence was not clear as to the testator's desire to send for K. There was a motion for a new trial, upon pretence of partiality in some of the jurors, but the motion did not succeed.

The case of Stephens *v.* Gerrard[s], has been said to have given rise to the clause respecting the signature and attestation of wills in the statute of frauds. Some loose sheets of paper were there produced as the will of Sir Edward Worsley, and a title was set up under them in favour of his natural daughter: they were written by one Baynham, an attorney of Gray's Inn. Sir Edward had not signed them, and there was no evidence offered to prove them published, but that of Baynham; whose evidence, according to Siderfin, made it appear, that Sir Edward had dictated a writing made by him, and had caused it to be interlined, and had said that he intended to write it over again himself, but that in the mean time what was written should be his will, though he refused at that time to sign and publish it as such; and the conclusion of it as it stood was as follows, "in witness whereof I have put my hand and seal to every sheet," but in fact his hand and seal were not put to any one sheet; the court, nevertheless, held this to be a sufficient will, and so the jury found it.

These loose constructions of the statute of wills called for the formal restraints imposed by the 5th and 6th sections of the statute of frauds.

These loose constructions of the statute of wills, which afforded such facilities to designing persons of practising upon the weakness of men on the bed of sickness, or of forging testaments and supporting them by perjury, when the lips of the party were closed for ever, induced the legislature to interpose some additional guards for the protection of these last and most interesting dispositions of property. By the statute of 29 Car. 2. c. 3. it was, therefore, enacted, that "all devises and bequests of any lands or tenements, deviseable either by force of the statute of wills, or by that statute or by force of the custom of Kent,

[s] Sid. 315. 2 Kebl. 128.

or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect."

It was an advantage of the written will that the contents might be concealed from the witnesses.

It is considered by Swinburn among the advantages of a *written* testament, that the testator has thereby an opportunity of concealing the contents from the witnesses, which he cannot do when he makes a *nuncupative* testament. For, says he, (after enumerating many of the motives which may rationally influence the testator to keep those in expectancy ignorant of his last dispositions,) in these and the like cases, after the testator has written his will with his own hand, or procured some other to write the same, he may close up the writing without making the witnesses privy to the contents thereof; and shewing the same to the witnesses, he may say unto them, *This is my last will and testament; or herein is contained my last will,* and this is sufficient.

Nor, continues he, is the instrument the less available, because the witnesses do not know what is contained in the same, in case the witnesses be able to prove the identity of the writing; that is to say, that the will produced, is the very same writing which the testator in his life-time affirmed before them, to be his will: otherwise, the will can have no effect through defect of sufficient proof. The same writer, therefore, recommends, lest the will should fail for want of sufficient proof, when the testator would not have the contents known, that the witnesses should write their

names on the back, or on some part of the testament, or use some other means that might enable them to depose and testify undoubtingly, that the same is the very writing itself, which the testator affirmed to be his will[h].

This advantage exists equally under the statute of Charles.

What Swinburn here recommends in practice, became soon afterwards the law of the land, by the wise enactments of the statute of 29 Car. II. which, while it gave to the declaration of a man's last will the solemn notoriety of a triple attestation, preserved to testators all the advantages of the written form; for though by the statute of Charles, the three witnesses must sign in the presence of the testator, it is no more necessary for them than for the witnesses who were voluntarily called in by a testator to attest the instrument in writing, under the statute of Henry the Eighth, to be privy to the contents of the instrument.

In Peate *v.* Ougley[i], which was after the statute of Charles, a testator produced to the witnesses a paper folded up, and desired them to set their hands to it as witnesses, which they all did in his presence, but they did not see any of the writing, nor did he tell them it was his will, or express what it was: but it was all written with the testator's own hand. It was objected, that this was not a good execution of the will within the statute; for that it was not enough that the witnesses wrote their names, they ought to attest the signing by the testator, or at least the publication of the will; but that the testator neither signed the will in their presence, nor declared it to be his last will before them. On the other side it was insisted,

[h] Swinb. on Test. part. 1. sect. 11. God. O. L. 66.

[i] Com. 197.

that the execution was sufficient within the statute; for that there was no necessity for the witnesses to see the testator write his name; and, if he wrote these words, *signed, sealed,* and *published* as his will, and desired the witnesses to subscribe their names to that, it was a sufficient publication of his will, though the witnesses did not hear him *declare it to be his will.* And Trevor J. inclined, that there was sufficient evidence of the execution.

But the case of Trimmer *v.* Jackson [k] went further, for there the witnesses were so far removed from a knowledge of the *contents,* that they were actually deceived as to the *nature* and *purpose* of the instrument, which they were led to believe, from the words used by the testator at the time of the execution, was a deed and not a will. It was delivered as his act and deed; and the words 'sealed and delivered' were put above the place where the witnesses were to subscribe their names; and in consideration, as it is said, of the inconvenience that was possible to arise in families from its being known that a person had made his will, it was adjudged by the court, that this was a sufficient execution.

According to these cases it not only appears to have been the opinion of the courts, that it was unnecessary that the witnesses should be privy to the contents of the will since the statute of Charles, (as it certainly appears to have been held upon the statute of Henry the Eighth,) but they seem to have carried the allowance beyond the cases, (loose as they appear to have been,) which were determined upon the statute of

[k] Cited by Denison J. in Wallis v. Wallis, 4 Burn. Eccl. L. 127.

wills; for, as we learn from Swinburn, the authorities go no further than to shew, that one of the advantages of the written testament over the nuncupative method, (which was still permitted, where, by the customs of particular places, lands were devisable) was the opportunity it gave to the testator to make an effectual will, without disclosing the contents even to the witnesses, which was a concealment oftentimes of importance to the peace of families; but then the identity of the will ought to be proved: and therefore, it seems to have been a common idea with the writers upon the subject of wills previous to the statute 29 Car. 2., that the nature of the instrument or writing ought to be announced or published by the testator to the parties present.

A reliance upon the security derived from the attestation by three credible witnesses in the presence of the testator, may account for the little importance attributed by some of the judges to the publication of the will by the testator; so little indeed, as to deem it unnecessary for him to announce or declare to the witnesses the nature of the instrument they were to sign.

In the case of Wallis *v.* Wallis[1], wherein both Trimmer *v.* Jackson, and Peate *v.* Ougley were cited, there seems to have been some doubt on the subject of publication. The case, however, though argued only at the assizes, shews the opinion of Mr. Justice Denison, as to the necessity for the witnesses to know what instrument they were signing, to be in correspondence with that of Lord Mansfield, and

[1] 4 Burn. Eccl. L. 127.

the judges who decided the case of Trimmer *v.* Jackson*.

SECTION II.

Testamentary Capacity.

Of the age at which it takes place.

The Statute 34 & 35 Hen. VIII which explains the power of devising lands, excludes from the exercise of it all infants, ideots, femes covert, and persons of nonsane memory. There has been some diversity of opinion concerning the age at which the testamentary capacity, as to personal estate, takes place; but the doctrine that it commences in males at 14, and in females at 12, seems to be most relied on[m]. Of lands no person can make a will till 21, by the words of the statute of wills, unless by the special custom of particular places[n]. And it seems that no custom can enable a male infant to make *any* will before he is 14 years of age[o].

A woman whose husband is banished for life may make a Will and act in every respect as a feme sole.[p]

Capacity of married women.

But regularly, a woman under coverture cannot make a will, either of lands or goods, not even of her

* But observe what was said by Lord Hardwicke as to the necessity for publication. 3 Atk. 161, Ross *v.* Ewer.

A will may be written on any material, or in any language, so as, if it concern property in England, it be framed with the solemnities required by the English law. Swinb. p. 4. S. 28. 1 Vern. 85.

[m] Harg. Co. Litt. 89. b.
[n] Godolph. Orph. Leg. 21.
[o] Law of Ex. 153.
[p] 2 Vern. 104.

paraphernalia[q]; though these last become absolutely her's upon her husband's death, and in the mean time they are not subject to his disposition by will.[r] He may however sell or give them away in his life time; and if he leaves an insufficiency of assets they will be subject to the payment of his debts.[s] It has nevertheless been decided that if the husband pawn the wife's paraphernalia and die leaving a fund sufficient to pay all his debts and to redeem the pledges, she is entitled to have them redeemed out of his personal estate[t]. With the licence and consent of the husband a wife may make testament of her own, and it is said, even of the husband's goods[u]; but he may revoke the same, not only during her life, but, according to Swinburn, after her death, before the will is proved. If, however, he confirm it after her death, he can never afterwards depart from it. But that such an instrument is entitled to be called, in strictness, a will, has been doubted and denied[v]. And without such consent of the husband, the wife has no legal power of making any testamentary disposition of her *own* property, not even of her debts and choses in action, which are not divested out of her by the marriage, and do not survive to the husband. But she may make her husband her executor, and if she do not, and die in his life-time, he is entitled to possess himself of her choses in action, as her administrator.

In equity, however, effect is frequently given to the testamentary dispositions of a wife, as where the husband stipulates that certain personal property shall

[q] viz. her bed, wearing apparel, and ornaments of her person if suitable to her husband's state and quality.

[r] 3 Atk. 394. [s] 1. P. Wms. 730. [t] 3 Atk. 395.

[u] Swinb. 89. [v] 2 Atk. 49.

be enjoyed by the wife separately, it shall be enjoyed by her with all its incidents, whereof the *jus disponendi* is one [w]. And where she has this power over the principal, she must necessarily also have it over its produce and accretions [x].

Of the Goods and Chattels which she has as Executrix to another she may make an executor without her husband's consent [y]; but of such she can make no devise with or without her husband's leave, for they are not deviseable.

Where she makes a will in execution of a power, though this is not in strictness a will, yet it is an act of a testamentary nature, and must be proved in the Spiritual Court, or the legatee cannot entitle himself in a court of law; and the course is not to give probate of the will, but administration with the will annexed, as a testamentary paper [z]. Before the case of Wright *v.* Cadogan [a], it was well established that a *feme covert* might have power to dispose of land by writing, in the nature of a will, so as to bind the heir, by reserving to herself on her marriage such right by way of trust, or a power over an use; but, by that case, the doctrine was carried further; for there, articles having been entered into before marriage whereby it was stipulated by the husband that all the estate of his future wife, which she then had, or which at any time

[w] 3 Bro. C. C. 8. Fettiplace *v.* Gorges.

[x] 2 Vern. 535 Gore *v.* Knight, Prec. in Ch. 255.

[y] 11 Vin Abr. 141.

[z] Dougl. 707, Stone *v.* Forsyth. 3 Atk. 156. Ross *v.* Ewer. 1 Burr 431. Jenkin *v.* Whitehouse 2 Bro. C. R. 392. Cothay *v.* Sydenham.

[a] 6 Bro. P. C. 156.

should descend or devolve upon her, should be conveyed to her own use, and subject to her appointment, it was adjudged that an appointment executed by her in favour of her husband, and her children by him, was a good appointment against the heir, although no conveyance was ever executed, nor any fine levied of the reversion [b].

Mental incapacity, fraud, duress,

No person who is not of a reasonable mind and sane memory can make any disposition by will: therefore an ideot, or person deprived of his faculties by extreme age [c], or by intoxication, while the paroxysm endures, is not of testamentary capacity in the law. For the same obvious reason a lunatic is incapable of disposing of his property by will, except in his lucid intervals, if they occur, and they must be calm and clear intermissions, attended with quietness and freedom of mind*. If a will by a lunatic be rationally

[b] See the notice taken of this case in Doe *v.* Staple, 2 T. R. 684.

[c] 6 Rep. 23 Marquis of Winchester's case.

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*A case some little time ago was determined in the prerogative court relative to the validity of a will which may help to illustrate these points. A will of F. E. Esqr. was propounded by S. S. Spinster, named an executrix therein, and opposed by the widow and son of the testator.

It appeared that Mr. E. was a gentleman of respectable connections, and that family differences had produced a separation by mutual consent between him and Mrs. E. From that time Mr. E. took up his residence in various parts of England, and being in want of a person to superintend his domestic arrangements, he, in May, 1806, made choice of Miss S. for that purpose. He was shortly afterwards seized with a paralytic affection, from the effects of which, added to the increasing infirmities of age, he suffered greatly. Through the interference of his son at this juncture,

drawn up, and the nature of the disorder be such as to afford any reasonable ground to suppose that a lu-

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a reconciliation was effected between the deceased and his wife, and he accordingly invited her to take up her residence with him. In October, 1807, she complied with this invitation, and then found Miss S. officiating in the superintendance of Mr. E's. domestic affairs; but she quitted the house in November following, in consequence of the criminal intimacy which she suspected to exist between Miss S. and Mr. E. Mr. E.'s health declined considerably. The will, it appeared, was drawn up by the deceased, in the summer of 1809. He kept it by him until the 5th of July, 1810, when he ordered his carriage, intending to drive to the house of his friend C. but meeting him on the road, they returned together. They proceeded into Mr. E's library, where he told Mr. C. he had a favour to ask of him, as he was going to make his will, and leave him an executor; and pointing to a drawer in the table, said he would find the will there, adding how necessary it was for every body not to be without a will, but particulary for him. The will was then produced, and purported to devise the testator's freehold property to his son, subject to the settlement made on his marriage. It also gave an annuity of 600l. to Miss S. and any house the testator might reside in at his death, with the furniture, plate, linen, horses, carriages, &c; concluding with a bequest to her of all the rest of his personal property, and appointing her and another executors. Mr. E. then desired Mr. C. to draw up the codicil, appointing himself an additional executor, and giving him and the other executors 500l. each for their trouble, which he accordingly did, and both papers were then executed in the presence of Mr. S. Miss S's father, and another witness.

The validity of these two instruments was opposed by the widow's son upon the two grounds of an undue ascendancy exercised over the testator's mind by Miss S. and his total incapacity, as well at the time of making the will, as before and subsequent to it; and in support of this, a variety of circumstances were adduced. It was stated, that Miss S. had taken advantage of the deceased's infirmity of mind to produce a criminal connection between them; that they afterwards lived in open adultery; that she introduced her father and mother into the house as inmates, and endeavoured to estrange

cid interval may have prevailed, the very act itself furnishes an evidence not easily resisted of that sound

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his affections as much as possible from his son, and his family; that they conspired together to obtain the deceased's property, and often spoke of the will as having been obtained by a plot of their's, and treated the deceased as insane, as in fact he was; that in the spring of 1810, he began to commit the most extravagant acts, purchasing large quantities of poultry, jewellery, &c. for which he had no occasion, destroying the furniture, &c. about the house, ordering dinner at a particular hour, and then insisting upon having it, though raw, two or three hours sooner, and throwing the gravy and sauce over those at the table. Several letters, also, pompously and improperly addressed, and otherwise indicative of insanity, were produced, as having been written to persons with whom he had formerly corresponded in the most accurate manner, and by whom he was esteemed, as in fact he was till then, a man of uncommon judgment. He was shortly afterwards placed in the care of keepers, and in November following, a commission of lunacy having issued, an inquisition was held, and the Jury returned a verdict of insanity without lucid intervals, from the 1st of July preceding, five days prior to the transaction of the will. He was then removed to Dr. Willis's, at Hoxton, where he died in October, 1811.

In reply to this, circumstances were adduced on the part of Miss S. to shew that she possessed the confidence of the deceased, but without any undue means; that his displeasure was very great against his son for not coming to see him, and that he often declared it would be thousands out of his way; that Miss S's connection with the deceased, far from being notorious, was hardly known, and her father was introduced into the house to manage the deceased's farming concerns, with a salary of 40l. per annum, only on account of the deceased's good opinion of his skill in those matters: that the deceased continued of sound mind, managing his affairs, and drawing drafts on his bankers, until the 12th of July, 1810, and even wished Miss S. to go with him the day the will was executed, excusing her solely on account of ill health.

A great mass of evidence was adduced in proof of these different

and disposing mind which is necessary to its validity. As in the case of Cartwright *v.* Cartwright, Michael-

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representations of the case on either side, and the arguments of counsel heard at great length thereon, during three days; it being contended, on the one hand, that there was no proof of undue influence or control over the deceased, but that the will was the spontaneous act of a capable testator; and, on the other hand, that not only was an undue control proved, but also actual and positive incapacity, for a period long antecedent and subsequent to the making of the will, as well as at the very time.

Sir JOHN NICHOLL recapitulated the circumstances of the case. He was of opinion that the acts of extravagance committed by the deceased, coupled with the verdict of the jury upon the inquisition, left no doubt of the deceased's having been afflicted with insanity. Where there was, *prima facie*, no proof of this, the presumption of law was always in favour of the testamentary act; but when it was otherwise, the *onus probandi* was thrown upon the party setting up the act; and the question, therefore, in the present case was, whether the papers propounded were executed by the deceased during a lucid interval. He proceeded to an examination of the doctrine of lucid intervals, as laid down by Lord Thurlow, that positive proof must be shewn of the disorder having been wholly thrown off for the time: there must be a complete lucid interval applying to the particular act in question, for if there was but a single word "sounding the folly," it was conclusive against the presumption of a lucid interval sufficient for legal purposes. Collateral circumstances, however, such as whether the act was a natural disposition, or in favour of persons exercising an undue control, might considerably influence the enquiry, as they were material to shew the probability of the act's being the spontaneous exertion of the deceased's mind; and the present case was, therefore, to be examined upon these principles. He then entered into the private history of the deceased and Miss S., observing that, with all the court's caution in listening to the evidence of servants in the house, still these circumstances must have their weight. They were, however, strongly confirmed by the account given of the deceased's incoherent correspondence; and the very fact of his wishing his wife and son to visit him when living in a state of open prostitu-

mas, 1795, before the delegates. The proposition of Lord Thurlow in the Attorney General *v.* Parnther[d], that where lunacy was once established by clear

[d] 3 Bro. C. C. 441.

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tion with this girl was in itself a proof of insanity. Looking then, at this evidence, it was not only sufficient to throw the burden of proving capacity upon the parties setting up the will, but it likewise proved the influence they exercised over the deceased; and it would be difficult to imagine the evidence that would be sufficient to sustain a will under such circumstances. Mr. S. must have known of his daughter's prostitution; and this, added to his general conduct, did not go to confirm his attestation of the act in question. Mr. J. and Mr. C. were both renouncing executors, and had released their legacies; the latter was also the writer of the codicil in his own favour. It was therefore probable, that they had expectations from the bounty of the executrix; and though this was not sufficient to discredit them, it must necessarily raise the suspicion of bias. There was no reason to believe that the deceased's declarations of having made his will referred to either of the papers in question: and they had the effect of disinheriting his son from one considerable part of his property, only to make an unreasonable provision for a woman with whom he lived in public adultery. The will itself bore strong internal marks of confusion and irregularity, and appeared to have been copied from some other not before the court. It was written very irregularly, with some names partly omitted in places, and others repeated in a varied manner, altogether shewing the deceased's confusion at the time, and, in the language of Lord Thurlow, "sounding his folly." So far, therefore, from any lucid interval being proved, there was every presumption of the continuance of the disorder, a presumption confirmed not only by the general state of the evidence, but also by the contents and appearance of the will itself. The court was, therefore, bound to pronounce against its validity; and considering the active part taken by Miss S. in this transaction, with all its attendant obloquy, the court felt that it would not sufficiently mark its disapprobation of such practices, and hold out a discouragement of them for public example, did it not condemn her in the costs incurred. Costs decreed accordingly.

evidence, the party ought to be restored to as perfect a state of mind as he was in before his disorder, to make a good will, was denied by the present Lord Chancellor, who observed, that we might suppose the strongest mind reduced by the delirium of a fever, or any other cause, to a very inferior degree of general capacity; and yet he might be competent to the making of his will, especially of personal estate[e]. And the rule is clear that there must always be the animus testandi, or the instrument purporting to be a will is of no effect in the law. The parties must therefore be free, and under no compulsion from such threat or violence as may reasonably be supposed to move a constant man. But if, when the fear is past, or the restraint removed, the testator confirms the will, it is made good[f]. So likewise, wills procured to be made by artful misrepresentations and fraudulent contrivance, are void. And the question as to the existence of fraud, in cases of real estate, is properly examinable in courts of law, on an issue of devisavit vel non; but fraud as to a personal will, belongs to the jurisdiction of the spiritual court.

If infancy, non sane memory, ideocy, coverture, or duress exist at the inception of a will, it is absolutely void, though the disability should happen to be removed before the consummation by death, for there must be a good inception, and the party must be qualified when the will is made[g]. But if there be no disability when the will is made, a subsequent loss of intellect will not revoke it. But the will of a woman

[e] 11 Vez. Jun. 11. [f] Swinb. 475.
[g] Plow, 343. Raym. 84. 1 Eq. Ca. Abr. 171. 2.

is revoked by her subsequent coverture, as will be seen in a future part of this work.

How affected by conviction, attainder, outlawry, and self-murder.

A person attainted of treason forfeits lands and goods, and is of course incapable of disposing of them by his will. So a felon, upon attainder, forfeits the fruits of his lands for the year and the day; after which they escheat to the Lord of the fee. But the forfeiture of goods and chattels is absolute, as well in felony as treason; differing from the forfeiture of lands in respect of its commencement, the latter taking place upon the attainder, and not before; the former upon the conviction. It follows, therefore, that if the party dies, before attainder in the one case and conviction in the other, the forfeiture is saved; and his will either of lands or goods is effectual. But if conviction or attainder takes place, the will of the traitor or felon, as to his goods, by the conviction, and as to his real estate, by the attainder, is rendered void; and *that*, although such will was made before either the conviction or attainder. The King's pardon restores the disposing capacity, and the party may afterwards make his will, as if no conviction had taken place: and it seems, that by such pardon, any will made before conviction recovers its former force and effect[h]. Though it may be doubted whether a will or testament made after conviction, would be rendered operative, as not having had a legal and valid inception. The will of a felo de se may, it seems, be effectual, as to his lands, because these are not forfeited but by attainder, which cannot be in this case. But as to his goods and chattels his will is of no effect (1).

[h] Swinb. 97.

(1) Plowd. Comm. Eng. Ed. Hales v. Petit, and observe the subtle grounds on which this point was there reasoned. By the early

An alien enemy without the King's licence to reside in this Country is incapable of making any will. But with such licence, and an alien friend without any such licence, may bequeath personal estate. Either description of alienage incapacitates for *holding* land, and consequently for devising it. But leases of houses for habitation may be held by alien friends, and will pass by their wills[i].

One who is outlawed in a personal action, forfeits his goods, and is therefore incapable of disposing thereof by his will; but it seems he may devise his lands[k]. And it is to be recollected that the wills of traitors, felons, aliens, and outlawed persons, are void only as to the King or Lord of the Fee, who has the right to the lands or goods, by reason of the forfeiture: the will is good as against the *testator himself* and all *other* persons.

As the person devising or bequeathing must be one who is capable of making a will, so the devisee or legatee must also be capable of taking under it; and if he dies before the testator the gift vanishes. If pro-

[i] 1 Bl. Com. 372 Harg. Co. Litt. 2 B. note 8.

[k] Swinb. 107.

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jurisprudence of Rome a will was not only not invalidated by the suicide of the testator, but it was not uncommon for persons to prevent the confiscation of their property which would otherwise follow upon capital punishment by killing themselves, and the validation of their wills under such circumstances according to Tacitus, Annal. lib. 6. s. 29. was the pretium festinandi. But this pretium festinandi was taken away altogether by the later emperors. And the wills of persons committing suicide were only allowed to have effect where the act of self-destruction was occasioned by impatience of pain or loss of reason. Cod. l. 6. tit. 22. sect. 2.

perty be given by will to one and his heirs or executors, neither the heir nor executor are capable of taking originally; if the original object of the gift be dead, there is no person to whom the designation can apply[1].

SECTION III.

Estates by Custom.

Neither the statute of wills nor the statute of frauds extends to copyholds:

IT may be received as settled doctrine, that wills of copyholds stand clear of the statute of frauds as well as of the statute of wills. It has before been observed, that the statutes of Henry VIII. for the full exercise of the testamentary power required the tenure to be in socage, which is not the description of copyhold tenure, and therefore, for that reason the statutes of wills would not apply to this description of estate. Copyholds could not for another reason, be considered as having been embraced within the intention of those statutes, because their purpose was to revive the testamentary power with certain qualifications and restrictions, after the statute made for carrying the possession and legal estate to the use had either suppressed its exercise, or driven it upon new expedients for its preservation: But the statute of uses had not interfered with the uses raised upon surrenders[2], those being properly executed by the admittance, which operated as a new grant thereof by the lord pursuant to the surrender. Neither, indeed, could it be properly said, that copyholds were ever devisable, for a will can have no effect upon them

[1] Plowd. 345. Brett v. Rigden.

[2] 2 Vez. 257.

as a will, so that it was always necessary first to pass the estate by a surrender thereof, into the hands of the lord, to such uses as the surrenderer should, by his last will, appoint, and then his will succeeded to this act as an appointment or declaration of the use[b].

By thus regarding the surrender as the mean whereby the lands themselves are transferred, and the will, as having no specific operation under the statute of wills, but as a mere declaration of an use, or rather an appointment of the person to be admitted upon the surrender, we see the reason (not always indeed approved of) for holding wills of copyhold lands to be out of the statute of frauds, there being no *special* provision applicable to copyhold estates contained therein. Accordingly in Carey *v.* Askew[c], it was held by Sir Lloyd Kenyon, Master of the Rolls, that any testamentary paper would be sufficient to pass copyhold lands; and his Honour said, "he hardly expected to hear it seriously argued; it had been held, that a will received by the ecclesiastical court would govern the surrender of a copyhold. It would be removing landmarks to entertain a doubt upon the subject."

Lords Macclesfield and Hardwicke not satisfied with the reason

Lord Macclesfield[d] admitted the same doctrine as perfectly settled in his time, though certainly not with any approbation of its reasons. He said, that it was plain, that as to the case which had been put of a copyhold surrendered to the use of a will, and afterwards devised by a will attested by one or two witnesses, this had been adjudged to be good, and that

[b] See the case of Royden *v.* Malster, 2 Roll. Rep. 383.
[c] 2 Brown, C. R. 58. [d] 2 P. Wms. 258.

his opinion was, *never to shake any settled resolution touching property or the title of lands,* it being for the common good that these should be certain and known, *however ill-grounded the first resolution might be;* but if that had not been settled it might be more reasonable to say, whena man has surrendered his copyhold to the use of his will, a will of this copyhold shall be so executed, and in such a manner, as by the act of parliament a will of lands ought to be executed.

Agreeable to which opinion of Lord Macclesfield was that of Lord Hardwicke in the Attorney General *v.* Andrews[e], who, after mentioning this established doctrine in respect to wills of copyholds, observed that, perhaps, if those determinations were now originally to be considered, courts of law and equity would not have gone so far; and that it might be wished it were altered, as it is subject to the same inconvenience as the devise of freehold lands.

Same doctrine as to *trusts* of copyholds

The sentiments of Sir Joseph Jekyll seemed to accord with those of Lord Chancellor Macclesfield, on the impropriety of going *one jot farther* than the doctrine had already gone in respect to the devises of copyholds; and, therefore, he took a distinction between a devisee of the *legal* estate in a copyhold, duly surrendered to the use of the will of the surrenderer, (as to which he admitted that the attestation of witnesses was not necessary,) and the devise of a *trust* or *equity of redemption* of a copyhold. This opinion appears in a memorandum of the reporter, in 2 P. Wms. 259. annexed to the case of Wagstaff,

[e] 1 Ves. 225.

v. Wagstaff, which was as follows .—" Memorandum in Hil. vac. 1727, in a cause at the Rolls, his Honour admitted it to be settled, that where a copyhold in fee is surrendered to the use of one's will, such will, though executed in the presence of one or two witnesses, is good, because it passes by the surrender and not by the will, which is only a declaration of the use of the surrender; but that if a copyholder be seised only of the *trust* or *equity of redemption* of the copyhold, and devise such trust, or equity of redemption, there must be three witnesses to the will; for here can be no precedent surrender to the use of the will to pass this trust; and the trust and equity of redemption of all lands of inheritance are within the statute of frauds and perjuries, otherwise great inconvenience would arise therefrom; and it is no prejudice to the lord of a manor to comprise the trust of a copyhold within that statute, because the person who has the legal estate in the copyhold, is tenant to the lord, and liable to answer all the services."

But in Tuffnell *v.* Page, before Lord Hardwicke in 1740, a different opinion, and which is the doctrine as now understood, was maintained by that chancellor on this subject. His Lordship said, he would consider the case in two lights—first, whether the will of a copyholder, unattested by witnesses, was sufficient to declare the uses of a surrender, made to the use of a will; and, secondly, where there is no surrender, as in the case before him, whether such a will was sufficient to pass the trust of the copyhold lands to the plaintiff.

With respect to the consideration of the question

in the first of these lights, his Lordship said, that "where a man was seised of copyhold lands and surrendered to the use of his will, and executed a will, though not attested by witnesses, yet it should direct the uses of the surrender; for the clause in the statute of frauds and perjuries, which required the testator's signing in the presence of three witnesses, and their attestation in his presence, was confined only to such estates as passed by the statute of wills 34 H. 8. c. 5. which was an act to explain one made in the 32d of the same King; and which at the close of the section enacted, that the words, estate of inheritance, in the former statute, should be declared, expounded, taken, and judged of estates of fee simple only, which shewed plainly, that it did not extend to customary estates, and had been so settled ever since the case of the Attorney General *v.* Barnes. This was reported in 2 Vernon, where it was said in page 398, "as to such of the lands as were copyhold, it was agreed they were well appointed, they passing by surrender and not by will, though there were no witnesses to it."

As to the second point, whether the will in question would pass the *trust* of the copyhold lands, his Lordship said, that "where the legal estate was in trustees, the *cestuy que trust* consequently could not surrender, but the lands should, notwithstanding, pass by this devise according to the general rule that equity follows the law: for a copyhold would pass under a will without three witnesses, or where there were no witnesses at all; and if this nicety was not required in passing the legal *estate, a fortiori* it was not in passing the *equitable:* and, therefore, the

cestuy que trust might, by the same kind of instrument, dispose of the trust estate, as if he had the legal estate in him."

Whether an appointment or declaration of the uses of a copyhold surrendered may be without writing?

It has been doubted, whether such testamentary appointment of copyhold lands, after a surrender to the uses thereof, may not be by parol, for if copyholds are not affected either by the statute of wills, or by the clause respecting wills in the statute of frauds, a testamentary disposition of them, as such, seems to be no more necessary to be in writing, than the devises by the custom of particular places which operated independently of the statute of wills, and might, *after* that statute, and until the statute of frauds expressly restrained them, have been made by word of mouth; and if such wills of copyholds be regarded as mere appointments, they are still clear of the first and third clauses of the statute—by the exclusive wording of the first, and by the express exception in the last. And by a late case, Doe d. Cook *v.* Danvers[f], it has been determined that they cannot be regarded as declarations of uses or trusts, so as to be within the 7th section of the same statute.

An attested will of copyhold may be revoked by an unattested will.

As the attestation of three witnesses is not *necessary*, so neither has it any *efficacy* in respect to copyholds; so that if a surrender be made to such uses as the surrenderer shall appoint by his will, and he afterwards make his will, executed and attested according to the statute of frauds, such will is nevertheless subject to be revoked or republished by him by any subsequent testamentary paper, attested by one or two witnesses only, or without any attestation at all[g].

[f] 7 East, 299.

[g] Vid. Burkitt *v.* Burkitt, 2 Vern. 498.

If any mode of execution be prescribed with respect to copyhold it must be observed.

If a surrender be made to the use of a will, to be executed with those or any other solemnities, it is clear that such prescribed requisites must be strictly complied with as in other similar cases[h].

How far such will, though it operates as an appointment or declaration, partakes of the qualities of a will.

Upon the whole it is clear that although a will of copyholds is said to work as a declaration or appointment of the use only, and this is the ground upon which it is held to stand clear of the clauses regarding wills in the statute of frauds, yet it partakes of the quality of a will in many essential particulars; thus it is revocable by alteration or cancelling, and is altogether an ambulatory instrument until the death of the party; so that if the appointee die in the lifetime of the testator, the devise fails; for the act remains incomplete, and the instrument is without operation and mute until the testator's decease.

A will disposing of the equitable estate in customary freeholds must be executed and attested according to the statute of frauds.

But although it seems now to be regarded as settled, that the trust or equity of a copyhold estate will pass by a will not executed or attested according to the statute of frauds, upon the principle of *equitas sequitur legem,* and on the ground that a strictness which had been dispensed with in respect to the *legal* estate in copyholds, ought *a fortiori* to be dispensed with in respect to the *trust* estate in copyholds, yet a different doctrine seems to have obtained concerning the equitable interest of a *customary freehold,* where there exists no custom of the manor for surrendering them to the use of a will. This was so held in the case of Hussey *v.* Grills[i], where Elizabeth Prowse, being seised of a customary estate within the manor of Stoke Climsland in Cornwall, surrendered it to

[h] Vid. Cotton *v.* Layer, 2 P. Wms. 623.

[i] Ambl. 299.

Thomas Jones and his heirs, who afterwards declared the trust to be for Elizabeth Prowse, her heirs, and assigns, and covenanted to surrender to such uses, as she should by deed, executed in the presence of two witnesses, or by her last will appoint. E. Prowse afterwards made her will on the 24th January 1753, in writing, but not attested according to the statute of frauds; (but which seems to be mistakenly reported (3), as the decision and reasoning of the case plainly supposes and requires the will to have been effectual, and consequently executed according to the statute,) and devised the customary estate to Margaret Archer, her heirs and assigns for ever. She afterwards made a codicil in her own handwriting, but unattested, and thereby revoked the devise in her will of the customary estate, and gave it to Margaret Archer for her life only, with remainders over; and the doubt was, whether the codicil was a good revocation of the will, and passed the customary estate.

The Lord Chancellor Hardwicke said, that the question was, whether these customary estates were, in point of conveyance or devise by will, so far like copyholds, that the determinations with respect to the latter shall govern these in like manner and parity of reason. That courts ought to avoid making large and liberal constructions to take cases out of the statute of frauds; which was made to ascertain property, and the words whereof were very extensive. That copyholds were not devisable by will, nothing passing out of the surrenderer till the will was made; and when it was made, the lands did not

(3) The cases in Ambler seem to be a very careless compilation.

pass by the will; the devisee might come and be admitted on the foot of the surrender and will taken together; just as if the name had been inserted in the surrender itself. That the ground of his opinion in Tuffnell *v.* Page, was *equitas sequitur legem.* That customary freeholds and copyholds differed extremely in their nature: the latter being of a base tenure, and by the old common law, held at the will of the lord, though now established on a more firm footing; customary freeholds never were of the base kind. That Jones was a trustee, and the legal estate was in him. There was no evidence that there could be in that manor a surrender of a customary freehold. It was agreed that there never was such. That the foundation of the determination as to copyholds was, that the party might dispose by surrender and will. As there was no method of passing the legal estate of these customary freeholds in that way, there was no reason to hold them out of the statute. And if the legal estate was not so, so was not the trust. There was something, observed his Lordship, arising out of the declaration of trust, which induced him not to make a large and liberal construction; for as two witnesses were required by it to the execution of a deed, it seemed strange to think, that in case of execution by will, it might be on a loose paper, without any witnesses at all.

But where there is a custom for surrendering these equitable estates to the uses of a will they

It has been held, however, in the late case of Cook *v.* Danvers[k] that such customary freeholds where there is a custom for surrendering them to the use of a will are as much out of the statute of frauds as common copyholds; and it should seem that the trust

[k] 7 East, 299. Sup. 40.

also of such estates would, by analogy to the principle of the case of Tuffnell *v.* Page, be considered as out of the statute.

seem to be out of the statute.

It seems scarcely necessary, after the opinions and determination which have been produced, to observe to the reader, that in a devise of a *trust* or *equitable estate* in freehold lands, the formalities of execution and attestation, required by the statute, are as necessary to be observed as in wills disposing of the *legal* estate. There can be no question, said Lord Macclesfield[1], but that a trust of an inheritance could not be devised otherwise than by a will attested by three witnesses, in the same manner as a legal estate; for if the law were otherwise, it would introduce the same inconveniences as to frauds and perjuries as were occasioned before the statute, by a devise of the legal estate in fee simple.

All equitable estates of freehold must be devised by a will executed and attested according to the statute.

Though the necessity of writing imposed by the statute of Charles was already a condition of their validity by the statute of wills, yet this requisition of the second act was not nugatory, since lands that were deviseable by local custom, (for enforcing the testamentary dispositions whereof the register has furnished an appropriate writ[m],) were left untouched by the statutes of Henry (4).

Wills of lands devisable by custom, must be in writing by the express direction of the statute.

[1] 2 P. Wms. 258. [m] *Ex gravi querela.*

(4) But it may still in some certain cases be necessary to resort to the custom of a place; as where it enables an infant *of fourteen*, or, perhaps, a *feme covert*, neither of whom is capable, under the statutes, of devising lands. Vid. 2 And. 12. where it is said that a custom enabling an infant *under* 14, (at which age, and not before, the law supposes some discretion,) would not be good.

SECTION IV.

Estates pur auter Vie.

THE 12th section of the statute of frauds enacts as follows:—" And for the amendment of the law in the particulars following, be it enacted, that from henceforth any estate pur auter vie shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence, and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses; and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in the case of lands in fee simple, and in case there be no *special occupant* thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands."

As by this provision of the statute of frauds these freeholds, held for the lives of others, are made deviseable as fee simple estates, the statute of fraudulent devises*, which vacates devises of land as against speciality creditors, has been clearly held to attach upon this newly (1) deviseable property, in the same

* 3 and 4 W. and M. c. 14.

(1) These estates pur auter vie, could not be devised within the statutes 32 H. 8. c. 1. and 34 and 35 H. 8. c. 5. which last statute explains estates of inheritance to mean estates of fee simple only.—Per Curiam, in Took v. Glascock, 1 Saund. 261. These estates of occupancy were neither devisable nor subject to debts before the statute of frauds. Ragget v. Clerke, 1 Vern. 234.

manner as upon fee simple estates. But as the quality of these estates may be much affected by the terms in which they are granted, being sometimes limited to go to the heirs, and sometimes to the executors, administrators and assigns, which may vary the result as to the operation of testamentary dispositions, it may be useful to take rather a large view of their nature, and the consequences of the several enactments regarding them.

By the common law, where a man was tenant for the life of another, by virtue of a grant to himself only, without mentioning his heirs, and died during the life of him for whose life the estate was holden, in such a case the first occupant, or he who could first get possession of the land, was authorised to keep such possession as long as the cestui que vie lived; and this was called general or common occupancy. But this title of general occupancy has given place to the regulations of the statute 29 Car. 2. c. 3. and the subsequent statute 14 Geo. 2. c. 20. But by the 9th section of the statute last-mentioned, which recites that by the former statute it had been enacted, that estates pur auter vie, whereof no devise should be made, should, in case there should be no special occupant thereof, go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and should be assets in their hands, and that doubts had arisen, where no devise had been made of such estates, to whom the surplus of such estates, after the debts of such deceased owners were fully satisfied, should belong, it is provided, " that such estates, pur auter vie, in case there should be no *special occupant* thereof, of which no devise should have been made, according to the said act for prevention of

frauds and perjuries, or so much thereof as should not have been so devised should go, be applied, and distributed, in the same manner as the personal estate of the testator or intestate."

Wherever the limitation in these grants pur auter vie is to the grantee and his heirs, the heir at common law is the person to take upon the death of the tenant in the life-time of the cestui que vie, and in such a case there never was any room for general occupancy, if there was any heir to take. But in what *character* or *capacity* he takes has been a question on which very great lawyers have held different opinions. Lord C. J. Vaughan in the great case of Holden *v.* Smallbrook[b], held, that if a man demised land to another, and his heirs habendum pur auter vie, or granted a rent in the same manner, though the heir should have the land or rent after the grantee's death, yet he had it not as a *special occupant* (as the common expression was); for if so, such heir would be an *occupant*, which he could not be, but he had it as *heir*, not of a *fee*, but of a *descendible freehold*, and not by way of limitation as a purchase to the heir, but by descent, though some opinions are, that the heir took it by special limitation. But the Chief Justice added, that he did not see how, when land or rent was granted to a man and his heirs, pur auter vie, the heir could take by special limitation after the grantee's death, *when the whole estate was so in the first grantee that he might transfer it to whom he pleased*, so as to deprive him who was intended to take by *special limitation* after the grantee's death.

Lord Vaughan's opinion that this estate comes to the heir by a proper descent.

This reasoning is certainly very powerful, but other

[b] Vaughan, 187.

Judges, though they have adopted the phrase of Lord Vaughan, of descendible freehold, have adhered to the notion of occupancy in the heir, and have denied the inheritable nature of this kind of estate. Thus in Low *v.* Burron[c], Lord Chancellor Talbot held clearly that an estate to one and his heirs pur auter vie may be limited to A. in tail, remainder to B., for in such cases of limitations to the heirs of the first taker, the word *heirs* was only a description of the persons to take as *special occupants* during the life of cestui que vie. These estates are not estates tail (2), for all estates tail are estates of inheritance to which dower is incident, and which must be within the statute de donis; whereas in this kind of estate which is no inheritance, there can be no dower, neither is it within the statute (3). Furthermore an estate tail is not liable to forfeiture, or punishable for waste, the contrary whereof is true of the estate in question.

Again, by the same Chancellor it was held, in Chaplin *v.* Chaplin[d], that where a lease is made to a man and his heirs, during lives, the heir does not take by descent, but as a special occupant; and though it be called a descendible freehold, it is not really a descent, being no more than if there had been a designation of any person by name to

[c] 3 P. Wms. 362. [d] 3 P. Wms. 368.

(2) Therefore, if a freehold lease for lives be limited to A. and the heirs of his body, with remainders over, A. may dispose of the whole, and defeat the remainders, by any conveyance during his life-time, or, as it seems, by his will alone. Doc. dem. Blake *v.* Luxton 6 T. R. 289.

(3) It is plain there can be no occupant of an estate tail, because none can have the estate tail but the issues of the donee, who *must* take by *descent*.

enjoy the estate for three lives, after the death of the father, instead of the heir at law. It has been accordingly holden, that in such a case the parol shall not demur, which is always allowed in the case of a proper descent to an infant. And it is also to be observed, that such a succession to this estate is no descent to toll an entry[e]. Accordingly if a disseisor make a lease to a man and his heirs, during the life of I. S. and the lessee die, living I. S. the entry of the disseisee is not thereby taken away, because he that died seised had but a freehold, and the heirs are added to prevent the occupant[f]. So that from this reasoning it results that this estate is not so properly a descendible freehold, as a freehold limited to go in a course of descent; which limitation prescribes only who shall be the occupant, without changing the nature of the estate into an inheritance (4). Yet Lord Vaughan observes, that the heir of the grantee pur auter vie might certainly recover by a writ of mort-dancester, in case of abatement, which, he says, infallibly proves the heir to take by descent, as succeeding to one who died seised *as of a fee*, though not seised *in fee*; for which he cites Bracton (5). But

[e] Litt. Sect. 387. [f] Co. Litt. 239. a.

(4) It is true the course of succession must certainly follow the inheritable quality of the land. Thus it has been held that where a lease was made to a man and his heirs, during three lives, of lands in Borough English, the youngest son shall inherit this descendible freehold. But there the special occupancy is only regulated as in the other cases, by the descriptive force of the word *heir*, taken secundum subjectam materiam. 2 Freem. 395, 399. Co. Litt. 110. b.

(5) Si autem fiat donatio sic, ad vitam donatoris, donatorio et hæredibus suis; si donatorius præmoriatur hæredes ei succedent, te-

in Walsingham's case, in Plowden, the learned Apprentice stated arguendo that the heir in such a case should not have an assize of mortdancester, and he was not contradicted.

If a man grant an annuity to another to hold to him and his heirs for the term of another's life, and the grantee die during the life of the cestui que vie, his heir shall have it, according to Littleton[g], who nevertheless concludes with a quære de ista materia. Upon which Lord Coke observes, that in the case of land the heir shall have it, to prevent an occupant; and so it is in the case of an annuity, or of any other thing that lies in grant, whereof there can be no occupant (6).

It is worthy of observation, that in Swinnerton's case, in Dyer[h], where a rent was granted by fine to F. to hold to him and his assigns during the life of Cassandra, the grantor's wife, and if it should be behind, quod bene licuit dicto F. et hæredibus suis, durante vitâ dictæ Cassandræ distringere, and F. devised

[g] Sect. 739. [h] Dyer, 252.

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nendum ad vitam donatoris, et per assisam mortis antecessoris recuperabunt, qui obiit ut de feodo. Bract. l. 2. de acquirendo rerum dominio. c. 9.

(6) At law there could be no *general* occupant of a rent; as, if a rent were granted to A. for the life of B., and A. had died, living B., the rent would have determined, 2 Roll. Abr. 150. But there might have been a special occupant. Under the statute of frauds, however, every estate pur auter vie, whether corporeal or incorporeal, is made devisable, and if not devised away, is made assets in the hands of the heir, if limited to the heir, and if not limited to the heir, is made assets in the hands of the executors or administrators of the grantee.

the rent and died, living Cassandra, Dyer was of opinion that the devisee should have it, for by the clause of distress F. had the fee simple determinable upon the death of Cassandra; which seems an extraordinary opinion, and certainly opposed by the resolution in Chudleigh's case[1], and numerous other authorities, wherein it has been uniformly held, and never doubted, that an estate to one and *his heirs*, during the life of I. S. is but an estate for life, upon which a remainder may depend. And the three classes into which a fee is distributed by the very learned reporter, in his own argument, in Walsingham's case, clearly excludes this estate out of any description of a fee; either the fee simple, the fee simple determinable, or the base fee (7).

The question, upon the whole, seems to remain in some uncertainty as to the true nature of the estate where the grant is expressly to a man and his heirs pur auter vie, though the preponderance seems to be on the side of the doctrine which treats it as a freehold to which the heir succeeds as occupant by special designation, and not by regular title of descent.

Whether an executor might be a special occupant.

There has been some controversy on the question, whether a lease, before the statute of frauds, to a man and his executors during the life of another, would go to the executor as a special occupant. Mr. Hargrave

[1] 1 Rep. fo. 4. b.

(7) Plowd. Com. 557. And see Cro. El. 805, where Popham said, that rent granted to one and his heirs for the life of I. S. shall not be devisable by the statutes 32 and 34 H. 8. for it is no fee, and he added, that the greater part of the Judges were of his opinion. But Gawdy and Fenner contra.

has put this matter doubtingly in his notes to Coke Littleton[k] where he says, after citing some authorities the other way, " however some have thought that executors and administrators, if named in the grant, might take an estate pur auter vie, though a freehold, even before the statutes 29 Car. 2. c. 3. and 14 Geo. 2. c. 20. by which they are now entitled." In Westfaling *v.* Westfaling[l], Lord Hardwicke declared his opinion, that executors might take as special occupants; and he further added, that he thought it would be assets in their hands. The same opinion is intimated by him in Williams *v.* Jekyl[m]. And his reason for holding such estate, so limited, to be assets, was, that he thought the executor, by force of his office, could take nothing without its being so.

In the Duke of Devon *v.* Kinton (8), where A. having an estate to him and his *heirs* for three lives, settled it on his daughter and her husband for their lives, remainder to the use of his own *executors* and *administrators*, and after the death of his daughter and her husband, devised the estate to his wife, and died indebted by simple contract, the question being whether the residue of the term should be assets to pay a simple contract creditor, it was so decreed; for being limited to the *executors and administrators* of A. it became personal estate, and he could not devise it exempt from his debts, though due by simple contract.

[k] Hargr. Co. Litt. 41. b.
[l] 3 Atk. 466. [m] 2 Ves. 681.

(8) 2 Vern. 719. but in 2 P. Williams, 360, it appears that the lease was originally granted to trustees.

There appears, indeed, to have been a stronger reason for saying that an *administrator* could not take as a special occupant, since the law will not suffer a freehold to be in suspense, and a person to entitle himself as special occupant must enter immediately on the death of the tenant pur auter vie, which an administrator cannot do, though an executor may[n].

Whether he can take the surplus for his own benefit; and how far the statutes have changed the nature of the estate.

It seems as if the framers of the statute 29 Car. 2. meant to apply the term *special occupant* only to the *heir*, and perhaps with a cautious nicety in the use of the phrase. The words, '*that in case there shall be no special occupant it shall go to the executors and be assets*,' seem virtually to include the case where the grant is express to the executors of the grantee, for if the executor *cannot* take as special occupant, it is as if he had not been named, and then the statute gives it to him for want of a special occupant.

If he *can* take as special occupant, it seems absurd to say that the statute could mean that in that character he should take for his own benefit, or, that if named in the grant he should take for his own benefit, and if not named, that then the estate should be assets in his hands. If he should be held to take as special occupant, by reading the words 'special occupant' in the statute, as if they had been *such* special occupant, and as applying to the heir only, whose case had just been mentioned, the case of the limitation to executors is brought fairly within the statute; and then the construction would be, that if the grant was not to the heirs, the estate should, whether executors and administrators were named or not, go to the executors or administrators as assets. But we

[n] Moor, 664. 907.

have seen that even if such estate limited to executors and administrators were held to be out of the statute altogether, still there is both reason and authority for saying that by force of their office simply, the property coming to them must be assets in their hands.

The statute of 29 Car. 2. c. 3. makes these estates coming to the heir by limitation, and as special occupant, for want of being devised, (and by the same statute they can only be devised by a will attested by three witnesses) assets for specialty creditors; and in the hands of the executors or administrators, where there is no special occupant, assets for both specialty and simple contract creditors. The statute of 14 Geo. 2. c. 20. s. 9. looking to the case where there is no devise or occupancy, and which had been partially provided for by the statute 29 Car. 2. makes the surplus after payment of debts applicable and distributable as personal estate. And when the force of the words "shall be applied and distributed" are properly attended to, there seems to be good ground for inferring that the legislature intended that the executor should not retain this surplus beyond the amount of the debts, as special occupant.

Supposing, under these circumstances a person to make a will, devising the residue of his personalty, but unattested according to the statute of frauds, and therefore not operating immediately upon the dry legal subject, that being still in its nature freehold, though at least to a certain extent under the above-mentioned statutes beneficially applicable as personalty, what is to become, in a court of equity, of the interest after debts paid? Is it to go to the legatee, to the heir,

to the next of kin, or to be retained by the executor?

Such a case presents itself under two aspects: first, suppose that before the statute the executor was, by virtue of such express limitation to executors, a special occupant, and that, the statute having enacted if there was *no* special occupant, the estate should be assets in the hands of the executor or administrator, the case might be regarded as being out of the statute where the executor was named special occupant; in this view of it, it might become necessary to enquire what would have become of the estate in the hands of the executor, as such special occupant.

We have the decided opinion of Lord Cowper[o] upon this subject, who made no difficulty of holding it to be personal estate, though originally granted to a man and his heirs, if it was afterwards by him granted to executors, though it must be remembered that when the same case was before Lord King it appeared to be in trust. In Westfaling *v.* Westfaling, above cited, it appears to have been also the opinion of Lord Hardwicke, that an estate pur auter vie to a man, his executors, administrators, and assigns, was assets to pay debts *before* the statute. And in Oldham *v.* Pickering[p], which was a case before the statute Geo. 2. (as that case is reported in Carthew) Lord Holt seemed to entertain a degree of doubt whether such an estate was not assets to pay legacies. It appears indeed to have been the opinion of the an-

[o] 2 Vern. 719. 2 P. Wms. 380.
[p] 1 Lord Raym. 96. Carth. 376.

notator upon the case of the Duke of Devon *v.* Atkins, in Peere Williams, first edition, that there was an equity to say, that, if the executor or administrator took it as special occupant, the effect of his character as executor or administrator, would fix upon his legal title an equity for those who claim the personal estate, to make him a *trustee*.

It seems, therefore, that the fate of property so circumstanced was not very well settled, independently of the statutes of Charles 2. and George 2. We perceive too, by the recital in the clause relating to this subject, in the statute of Geo. 2. c. 14. that doubts had existed after the provision by the 12th Section of the statute 29 Car. 2. c. 3. as to the persons to take after payment of the debts, and that the clause in question of the 14th Geo. 2. was made to exclude such doubts. By this statute of George 2. therefore it was provided that the surplus should be *applied* and distributed as personal estate. Upon which clause the present Chancellor declared himself to have a strong inclination that the meaning was, that the residuum of such estate was to go with the rest of the personalty, where there was a will, and to the next of kin where there was an intestacy; and that the language of the statute would bear this out, for it would be extraordinary that persons claiming by bequest should not have been attended to, when even upon the statute of Charles 2. Lord Holt doubted as to legacies.

The true state of the question in Ripley *v.* Waterworth [s] was, whether, if notwithstanding the statutes of Car. 2 and Geo. 2. the interest in such an estate comes to the executor in the nature of a free-

[s] 7 Ves. Jun. 425.

hold, though by force of those statutes applicable to a certain extent as personalty, he is not in a court of equity so completely a trustee for the persons entitled to the personal estate, as that a will not *attested by three witnesses*, but disposing of the residue of the personalty, will give to the residuary legatee, after the debts paid, a title to call upon the executor for his benefit. Upon this case Lord Eldon observed, that he could not adopt the principle of considering the estate as personal, to the point of giving creditors a claim upon it, without going farther. His Lordship was of opinion, that after the debts were paid in obedience to the statute, the character of executor still remained in him, whether considered as special occupant or not: that such character raised a trust in *him*, and an interest in *others*. To the extent, therefore, of giving an interest to all, who were in a situation to claim the personal estate, it *was* personal estate.

It is to be observed, that in such a case the heir could have no title; for he could only take as special occupant, and if as special occupant, still as occupant, and there could be no occupancy without a previous vacancy, whereas the estate in the case supposed would be full of the executor. If the executor has it, the great question is, how he has it? is it freehold or personal estate[r]? Is that which by one statute has been made personal to the extent of being assets, and therefore subject to be sold as such upon a *fieri facias*[s], and by another statute distributable under administration out of the spiritual court, still to be considered as in the nature of freehold in the hands of the executor, against

[r] Atkinson. v. Baker, 4 T. R. 231.

[s] See Olderton v. Pickering, 1 Lord Raym. 96. Comb, 291.

any person claiming the personal estate? There is besides great difficulty in saying what shall become of such an estate with this changeling sort of character belonging to it, in case of the death of the executor, if he takes it as special occupant in the nature of a freehold. Such a case would be surrounded with difficulties[t]. Since, however, the statute uses only the expression pur auter vie, not distinguishing between the grant to a man's heirs, and to his executors, in imposing the necessity for three witnesses to validate a devise of it, the residue in the case above alluded to would not pass strictly by the will. But Lord Eldon was of opinion, that in a court of equity the estate was to be considered as belonging to those who take personal estate by an equity attaching upon the character of executor *as* executor. And he resembled it to the case of stock which can properly be disposed of only by a will with two witnesses (9); but which, according to Lord Thurlow, where it is not *so* bequeathed, devolves upon the executor in trust for those who are entitled to the personal estate, under the residuary bequest; the will operating as a direction to the executor how to apply it, though it was not devised by that will[u].

Upon the whole, therefore, as the question now stands, upon the authority of the much reasoned case of Ripley *v.* Waterworth, in equity at least, an estate granted to a man, his executors, administrators,

[t] 7 Vez. 445. 451.
[u] 7 Vez. Jun. 448. 452.

(9) By 33 Geo. 3. c. 28. s. 14. and 35 Geo. 3. c. 14. s. 16. it is provided that all persons possessed of any share or interest in the funds, or any estate therein, may devise the same by will in writing, *attested by two or more credible witnesses.*

and assigns, for the life of another, though devisable as to the legal interest only by a will with three witnesses, is personal estate, or in the nature of personal estate, in the hands of the executor, and the benefit as to the surplus belongs to the legatee under the will as such, though the will is not attested, so as to pass it at law. In a word, it is personal estate as to those claiming as creditors and representatives. But yet the essential character of the estate as a freehold remains, as to other persons, who can only take the legal interest in it by a conveyance applicable to freehold property.

SECTION V.

Powers to be executed by Will.

Powers of appointment to be executed *generally* by *will*, without any directions as to the *mode* in which such will is to be executed, must be executed by a will attested according to the statute of frauds.

WHERE a power is given or reserved by deed to be executed generally by a will, without any words expressing or importing the manner in which such will is to be executed, if the subject of such power is freehold estate, the power will be ill executed by any will not signed by the testator, and not attested by three witnesses by the subscription of their names in his presence, according to all the circumstances required by the statute to give effect to a devise of lands. Lord Macclesfield, in Longford *v.* Eyre[a], much doubted whether the will in that case would have been a good appointment, had it not been executed pursuant to the statute; because, said his lordship, when a power is given to appoint the uses of land by deed or will the will must be intended to be such a one as is proper

[a] 1 P. Wms. 741.

for the disposition of land, and consequently should be subscribed by three witnesses, in the presence of the testator. For this is within all the inconveniences which the statute of frauds was intended to prevent, and the words *in the nature of a will*, mean the same as a will which must therefore be subscribed by witnesses in the presence of the testator. And according to the same chancellor, in Wagstaff *v.* Wagstaff[b], if the *trust* of lands be limited to such persons as a man shall by will appoint, and the *cestui-que-trust* devises these lands by a will executed only by two witnesses, the will is void, and will not operate as an appointment. In confirmation of which, it was said by Sir John Strange, at the Rolls, in introducing his judgment in Jones *v.* Clough[c], that "where the owner of an estate in land, *either in law or equity*, reserves to himself a power of disposing of it to such uses as he by will shall appoint, that must be by such a will as within the statute of frauds would be proper for a devise of lands; otherwise the statute would be entirely evaded."

And the same doctrine holds in respect to *trust* estates.

But if the power extends over personal as well as real property, though a will made in execution of the whole power should fail as to the land for want of a sufficient attestation, it may nevertheless be a good execution of the power with respect to the personalty. Thus, where a man by his will had given several shares in the Sun-fire Office to his daughter, and after her decease to such persons as she should by her will direct, and had also devised real and personal estate in Jamaica, in moieties, the one moiety to Frances for life, and after her decease, to such person as she should by will direct, the other moiety

But if such power extends to personal as well as real estate, and the will be unexecuted to pass *real*, it may nevertheless be effectual to pass personal estate.

[b] 2 P. Wms. 258. [c] 2 Vez. 366.

to another person, in like manner, and the daughter, by her will reciting that of her father, disposed of the Sun-fire shares, and also by the same will devised the real estate, but the will was not duly executed to pass real estate, being attested by two witnesses only, Lord Chancellor Thurlow held that the will being sufficient to pass the personal estate, was so far a good execution of the power[d].

It has been said that if an agreement be entered into, to charge certain lands with a sum of money for the benefit of certain persons named, in such shares as a *third* person shall direct by his last will, such will need not be executed as the statute requires for passing real estate; but if one or more having the inheritance in them of certain lands, agree that *one of them* shall have power to charge the same with any sum by his last will, this power can only be well executed by a will with three witnesses[e]. This doctrine however seems very refined, and the case was one in which compassion may have had some effect.

If the owner of an estate reserves to himself, or gives to another, a power to appoint by will generally, the execution of the power must be by a will executed as the statute prescribes, with the regular attestation of three witnesses[f]. But if the subject of the disposition be personal only, then although the power be required in terms to be exercised by will *duly executed,* such words will import no solemnity which the subject itself does not require; the words

[d] Duff *v.* Dalzell, 1 Bro. C. R. 147. et vide Powell *v.* Beresford, 2 Lord Raym. 1282.

[e] Jones *v.* Clough. 2 Vez. 365. [f] 9 Mod. 485, by Lord Hardwicke.

duly executed must refer to the nature of the act, and the nature of the thing which is intended to pass by it[g].

And although the subject of the power be real estate, yet when the power is given generally, without any specification or direction as to the instrument or mode by which it is to be executed, it has been doubted whether the execution of it by will must be made as the statute directs with respect to real estate.

In the case of Sayle *v.* Freeland and others reported among the Chancery cases in Ventris[h], and referred to by Sir John Strange, in Jones *v.* Clough[i], the bill was to redeem a mortgage made by the father of the defendant, or to be foreclosed. The defendants, by guardian, answered, stating that their grandfather was seised in fee, and made a settlement, whereby he entailed the estate, but with a power of revocation by any *writing published under his hand and seal, in the presence of three witnesses;* and the case was that he made his *will* under his hand and seal, wherein he recited his power (2), and declared that he revoked the settlement; but the will had but two witnesses, who subscribed their names, though a third was

[g] Poulson *v.* Wellington, 533, P. Wms.
[h] 2 Vent. 350. [i] Vez. 365.

(2) That a power may be exercised without reciting it. See 1 Atk. 559. Molton *v.* Hutchinson, ib. 441, Robert *v.* Morgan. But see as to the question whether it will be executed by the general words of a will. 3 Vez. jun. 467, Langham *v.* Nenney. 2 Bro. C. C. 297, Andrews *v.* Emmet. 4 Vez. jun. 60, Croft *v.* Slee.

actually present: the testator died, and the lands descended to the father, who made the mortgage; the defendants claimed by virtue of the entail. But the Chancellor decreed, that the mortgage money should be paid; and first, he said, there was an execution of the power *in strictness*, for the third witness was *present*, though he did not subscribe. But, secondly, if there had not been in strictness a good execution of the power, equity would help it in such a little circumstance, where the owner of the estate had fully declared his intention; further adding, that there was a difference where a man had power to make leases, &c. which would charge and incumber a third person's estate, which sort of powers were to have a rigid construction; but where the power was to dispose of a man's own estate, it was to have all imaginable favour. Here, we observe, that the power was to be exercised by a *writing*, and not necessarily by a *will*, executed in the presence of three witnesses; and although the party chose to execute the power by a writing in the form of a will, and that will not such a one as could have a testamentary operation under the statute of frauds, yet it was not the less a writing published under hand and seal in the presence of witnesses. It has been clearly held by Lord Chief Justice Hale [k], that if a power not requiring to be executed in that manner were to be executed by a bargain and sale, the deed need not be enrolled. And it may be contended on grounds of analogy to that decision, that because the donee of a general power chuses to execute it by an instrument in the shape of a will, he does not oblige himself to make it agreeably to the forms required by the statute.

[k] Raym. 239. Ingram *v.* Parker.

A man cannot by *will* reserve a power of diposing of real estate by a future unattested will or codicil.

Though a man by first passing the land by a sufficient conveyance, may empower himself to make a future disposition thereof by a writing, with one or two witnesses; and under such a power a will, or writing purporting to be a will, if attested according to the terms of the power, will be a good instrumentary execution of the power (3); yet it has, upon very satisfactory reasons, been determined, that a person cannot by *will* enable himself to make any future disposition of land by any instrument whatever, not executed and attested as the statute of frauds requires, in respect to wills of lands. If a will affects to reserve any power of disposition, such reservation is purely negative in its effect; it *does nothing;* unless perhaps it may serve as a positive expression of the non-effectiveness of the will itself as to certain

(3) For in such a case the disposition is not testamentary in its origin, but is to be regarded as merely supplemental to, or as directing the operation of the conveyance from which the power springs. But whatever terms the creator of the power chuses to subject it to, they must in general be strictly complied with. This doctrine is well laid down in Hawkins *v.* Kemp, 3 East, 410. The terms of the power required that the revocation should be by deed or instrument in writing, executed in the presence of, and attested by, three credible witnesses, and enrolled in one of His Majesty's courts of record at Westminster, and with the consent of H's wife, his father, father-in-law, and several trustees, being in all nine persons. The C. J. said that every one of these required circumstances, unessential and unimportant, except as they were required by the creators of the power, could only be satisfied by a strict and precise performance. They were incapable of substitution, because these requisitions had no spirit in them which could be otherwise satisfied. See Mansell *v.* Mansell, Wilm. 36. See also Digges's case, 1 Rep. 173. Bath and Montague's case, 3 Ch. Ca. 55. Kibbet *v.* Lee, Hob. 312. Thayer *v.* Thayer, Palm, 112. Ward *v.* Lenthall, 1 Sid. 143.

subjects, or beyond certain limits. Such lands as a testator does not actually pass or dispose of by a present declaration of his mind, remain in him to be passed or disposed of by a future conveyance or will; but by such only as are competent in law, by the perfection of their respective executions, to the gift or transfer of the property, according to its nature and requisites. And this rule obtains equally in respect to legal and trust estates; for trust estates are as much within the statute of frauds, with regard to the formalities requisite to the perfection of a will, as legal estates, since the same mischiefs would follow from the omission in the one case as the other.

If an instrument be not intended to have effect till the death of the party, it is testamentary in its operation and quality, whatever may be its form.

It is established that an instrument, whatever is its form, whether it be a deed poll or indenture, is testamentary in its operation and quality, if it be intended not to operate till the death of the party who made it[1]. The circumstance, and not the form, must decide the character of the instrument. Thus, therefore, the deed in the case of Habergham *v.* Vincent[m] could have no other operation than as a testamentary paper; and presented itself, under this *general* character, in three distinct lights—as a codicil—as an exercise of the power reserved by the will—or as an integral and original part of the will itself, by incorporation into its substance.

A codicil has a *distinct* commencement, and though it is said to be a part of the will, yet it becomes so by *first acting* upon the will, and in a manner drawing it down to the date of its own publication; and can

[1] Moor 177. 2 Leon, part 4, 159, 166. Audley's case, Dyer 166, *a* Greene *v.* Proude, 1 Mod. 177.

[m] 204. And see Hamfield *v.* Habingham, 10 Ves. Jun. 281.

have no operation upon *freehold* estate, either *as part* of the will, or *by its own efficiency,* unless it be attested as the statute directs.

Difference between a conveyance to uses and a will, in respect to the legality of reserving a power of future disposition.

As an exercise of a power of appointment, it is met by the rule, that a testator cannot by his will reserve a right to devise freehold estate by a future testamentary instrument, not attested according to the statute of frauds, however practicable this may be under the uses of a conveyance. Where there is a conveyance, and a power is reserved under the uses thereof, the estate is parted with, the land is gone, and the power, which is in truth only an executory use, being collateral to the land, may be limited to be executed by any instrument whatever; by a *deed* or writing, with or without witnesses: for its *specific* operation is not in question, where the terms of the conveyance reserving the power have defined the mode of its execution; though, as we have seen, if it be reserved to be executed by a will in general terms, the party will be understood to have intended a *proper* will, according to the statute. But by his *will,* a man parts with nothing before his death, till which time his will is ambulatory, incomplete, and revocable; he has the same absolute dominion he had before; and if by any subsequent act he parts with any portion of his estate, whether it be a part of that already devised, or a part affected to be specially reserved for his future appointment, he parts with it *as owner,* and not *instrumentally,* and by virtue of an *original,* and not a *derivative* power.

Every paper to which a will, duly attested,

As to the third point, the truth seems to be, that every paper to which a will refers must be incorporated *originally* into the will itself, if real property is

refers, if it comprise a disposition of *real* property, to be effectual as a testamentary paper, must either be incorporated originally into the will, or be executed according to the statute; and such paper, to be so incorporated, must be distinctly referred to and described in such will.

to be affected by it, or it can avail nothing, unless it is itself executed according to the statute of frauds. And further, the rule is, that an instrument properly attested, to incorporate into itself another instrument, not attested, must describe it so as to manifest distinctly what the paper is that is meant to be incorporated, in such way as that the court can be under no mistake[a]. It did not appear to the court, in Habergham *v.* Vincent, that the second instrument, although testamentary in its nature, could be incorporated into the will; which referred to nothing actually in existence, but to an intention merely; and it has been sufficiently shewn, that the will could create no power with a special mode of execution. In that case, Mr. Justice Wilson said, that he believed it to be true, and he had found no case to the contrary, that if a testator in his will refers expressly to any paper *already written*, and has so described it that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, such paper makes part of the will, whether executed or not; and by such reference he does the same, as if he had actually incorporated it, because words of relation have a stronger operation than any other. But the difference between that case, and the reference to a future intention, is striking: in the former, said the judge, there is a precise intention mentioned at the time of making the will; for the paper makes out the intention at the time: but when a man declares he will in some future paper do something, he says, he will make a will as far as his intention is then known to himself, but he will take time to consider what he will do in future.

With respect, however, to the copyhold estate,

[a] Smart *v.* Prujean, 6 Vez. jun. 565.

which was a subject of the dispositions in the case of Habergham *v.* Vincent, it was held quite clear, by the Chancellor and Judges, upon the doctrine a little before stated, that as the deed poll was capable of being regarded as a testamentary paper, it was sufficient to pass the copyholds. And from the principles of the reasoning just produced, as a testamentary paper it must have operated as a *codicil;* for it could neither be incorporated into the will as an original part of it, or operate by virtue of the power affected to be reserved by the will.

SECTION VI.

Wills charging Lands.

By a will duly executed, charging land *generally* with legacies, a testator enables himself to lay any number of *additional legacies* on the land, by a subsequent testamentary disposition *unexecuted.*

WE observe, that in the above-mentioned case of Habergham *v.* Vincent, the counsel for the surviving trustee endeavoured to maintain the competency of the testator, by a will executed according to the statute, to reserve a power of future disposition of land by an instrument not perfected as the statute directs, by analogy to the case of a general charge of legacies on lands by a will duly executed; whereby it has been held*, that a testator enables himself to charge the land with any number of additional legacies, by a subsequent instrument not attested so as to pass lands. This, indeed, seems to be established doctrine with respect to legacies, which Lord Hardwicke said

* Masters *v.* Masters, 1 P. Wms. 423. and Brudenell *v.* Boughton, 2 Atk. 274. and see the late case of Rose *v.* Cunningham, 12 Ves. Jun. 29.

was attended with no greater inconvenience than arose from a man's charging his lands by will with the payment of his *debts*, which, doubtless, would extend to all the debts contracted during his life. It was insisted, however, that the statute was equally defeated by the privilege of charging land with legacies or debts to any extent by an unsolemn will, where the land has been generally charged by a previous attested will, as by a power of appointing reserved by a will; for, as to debts it was said, that by a bond, creating a voluntary debt, a testator might circuitously dispose of the whole value of his estate; so likewise, after having generally charged legacies upon his estate by an attested will, he might devise away the whole of his property by any testamentary paper, by creating a charge equal to its value.

But, in reply to this reasoning, it was said, by the Lord Chancellor, "that it was supposed to be Sir Joseph Jekyll's opinion in Masters *v.* Masters, that it might be supported as a power, reserved to the testator, to increase the charge by a future act. That could not be the ground of his opinion. There was a manifest incongruity in the supposition of a power, reserved by a man's own will, which cannot begin to operate till all power in him ceases. The observation made by Mr. Justice Wilson was unanswerable, that it is not a personal privilege; and that no man can reserve a power to act against the forms which the law has imposed. Therefore, if it were to pass by a testamentary act, such act must have all the solemnities which the law has directed.

"But in a correct MS. note in his Lordship's pos-

session, Lord Hardwicke had stated the ground of the determination to be the analogy to the case of debts. His Lordship added, that the cases to which he had alluded, were none of them cases of a primary, substantive, independent charge upon the real estate, but a charge upon it in aid of the personal, which was *primarily* charged. Such a charge, whether for debts or legacies, was necessarily uncertain in extent, not merely because the testator could not ascertain what might be the amount of his future engagements, but because the amount of the personal estate was fluctuating.

"A charge for legacies, therefore, (his Lordship said,) must be uncertain as to its extent; not merely because the testator could not ascertain what might be the amount of his future engagements, but because the amount of the personal estate was fluctuating. Whatever affects the primary fund, varies the amount of the charge. Therefore, though given by a will duly executed, they are revocable by a will not so executed; for the charge upon the land was only for the deficiency of the personal to answer the legacies. If the legacies were taken away, the land would not be affected. If they were increased they would affect the real by diminishing the personal, which it was in the power of the owner to do all his life. It was obvious therefore, that the statute of frauds did not affect the question as to legacies, because it did not prevent a man from creating by will, a fluctuating charge upon real, in aid of personal property. But that, said his Lordship, could bear no application to a devise of the land itself, or a reserved part of the realty not disposed of; nor, as he conceived, to

an original charge upon the land, which he should think could not be revoked by a second informal will. If ever such a case arose, it would be a new question."

A sum of money devised out of land is part of the land in equity, and such disposition is within the statute of frauds.

From Brudenell *v.* Boughton[b], so often referred to in the above-mentioned case of Habergham *v.* Vincent, we collect the following useful distinctions upon the subject. If a sum of money be given *originally* and *primarily* out of the land, such a devise requires as much the solemnities of execution prescribed by the statute, as a devise of the land itself; because the money is regarded in a court of equity as *part of* the land, since it can only be raised by sale or disposition of part of the land; and this is considered as analogous to the rule of law, that a devise of the rents and profits is a devise of the land itself. And if money be so charged upon land by a will with the due solemnities, a subsequent will unattested, or attested by one or two witnesses only, cannot revoke or subtract the charge. But where land is made subject to legacies generally, such legacies are nevertheless to be considered as primarily attaching upon the personal estate, so that if there are personal assets sufficient, the land will be exempt, for it is only a collateral security; and by a consequence in reasoning, if the will be revoked as to the personalty, the object of the collateral security is gone, and the land remains no longer charged. The legacies given by the first will may be withdrawn by a second unexecuted according to the statute; and by such second will, other legacies may be substituted of a different amount; or, without changing or modifying the legacies first given, additional

[b] 2 Atk. 267.

ones may be given either to the same or different persons[c].

If money be directed to be laid out in land, the person to whom the *entire* interest in the land would belong under the will, if purchased, may, before the investiture, elect to take it either as money or land, i. e. as personal or real estate. If such devisee makes his will, and describes such interest as money, it will pass without attestation[d]; but without such indication of intention to treat it as money, it remains real, and the will, to pass it, must be attested[e].

But the person to whom the land, if purchased, would belong, may act upon the fund as real or personal estate.

The great point to be attended to in considering the cases of general charge, is, that by the first will executed to pass and affect real property according to the requisitions of the statute, the land is effectually made an auxiliary and collateral fund to the personal property in respect of legacies; and that to this indefinite extent it becomes a pledge, and impressed with the character of personal estate. But it is to be observed, that if a will, properly attested, contains a direction to sell real estates, and out of the produce to pay legacies, such direction does not so stamp this character of personal estate upon the *whole*, or produce so complete and *ultimate* a conversion of the land into personalty, as that the surplus, after the legacies are satisfied, may pass by an unattested codicil. To produce this effect, the testator ought, in a will executed and attested so as to pass freehold estate, to manifest a clear intention to have the whole actually sold, or, at least, should in such will decidedly shew that he contemplates the surplus as personal estate, and intends to

A direction by will to sell lands for certain purposes, does not so ultimately change the character of the property, as that the surplus, after the particular objects are satisfied, may pass by an unattested codicil.

To effect this absolute conversion, a clear intention ought to be demonstrated.

[c] Vid. Hannis *v.* Packer, Ambl. 556.
[d] 3 P. Wms. 221. note c. [e] Ibid.

bring the *whole* within that description of property. To this limit the cases cited in Sheddon *v.* Goodrich[f], seem to have carried and confirmed the doctrine. What is not *absolutely* converted, either in law or equity, but is only directed to be sold to answer a particular purpose, as to pay legacies, for which the testator has directed certain conveyances to be made, retains, as to the surplus, its character of real estate: for the particular purpose to which the produce is destined the conversion into personal estate takes place, but as between the personal and real representatives it remains real.

If the object for which the conversion was to be made, does not come into existence, and thus no reason arises for any conversion to answer the purposes of the will, the estate *descends*, in the view of a court of equity, *as real*, to the heir at law.

Such being the doctrine on this subject in a court of equity, it follows, that if, after directing an estate to be sold for the payment of *particular* legacies by a will duly executed and attested, a testator might, by an unattested codicil, dispose of the surplus of his property, either the consistency of the courts of equity, which to other purposes have considered such surplus as real, or the positive restrictions of the legislature, would be violated.

If, therefore, an estate were directed to be sold, and all the debts and legacies generally to be paid out of the produce, it is clear that this would amount only to that sort of general charge which has been so much above considered; and, though pecuniary legacies generally given by an unattested codi-

[f] 8 Ves. jun. 481.

cil, would, according to the above principles, attach as charges *secondarily* upon the land, yet the surplus could not *eo nomine* be disposed of by such unsolemn instrument.

Where a testator shews both the *real* and *personal* estate to be equally in his contemplation, as the funds out of which the legacies are to be satisfied, a revocation effectual as to the personalty, but insufficient as to the real for want of being attested according to the statute, will leave the *land* still subject to the charge.

But if a testator, by a will duly executed to pass lands, directs the whole of his *real* and *personal* estate to be sold, and out of the produce thereof certain legacies to be paid, and then by an unattested codicil in terms revokes his will, which revocation, from the want of solemnity, can only operate upon the previous dispositions of the personal estate, a very nice and curious question may arise, whether the legacies are to be considered as gone by the partial failure of the fund, or as remaining charged on the real estate. In the above cited case of Sheddon *v.* Goodrich, this was one of the points, and one on which the present Chancellor expressed a painful degree of difficulty and doubt. The distinction stated by his Lordship appears to be in substance as follows:

Where a testator, in general terms, subjects his real estate to his general legacies, or charges his legacies generally upon his real and personal property, inasmuch as the primary and direct source from which the legacies are to come, will be the *personal* estate (2) the land being regarded in equity as only

(2) The general rule is clear, that the personal estate is liable in the first instance to the payment of debts. But this general rule supposes, that the engagement upon which the debt arose, was primarily a personal contract; in which case, the personal estate, as having received the benefit, becomes the proper fund out of which the payment should be drawn; so that if money be borrowed, or a debt be any way incurred, and a mortgage made without bond or covenant accompanying it, yet the mortgage makes it no more than

secondarily and ***eventually*** charged as a collateral security to the personal estate, if the principal fund

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a specialty debt in equity, and the land comes only in aid of the personal obligation upon the simple contract.

The rule also supposes, that it was originally the personal contract of the testator himself, for if an equity of redemption has descended, and then the mortgage is transferred, and the heir covenants to pay the money, and dies; still as the mortgage was not originally his, the land, upon the second descent, must bear its own burthen, and notwithstanding such personal contract of the immediate heir, his personal assets will, upon his decease, be only *secondarily* liable.

The same doctrine holds if the equity of redemption comes by purchase instead of descent. As it was not originally the debt of the purchaser, his heir will not be entitled to be exonerated out of his personal assets; and the order of charge will not be varied, if the purchaser should covenant with the mortgagee, for still it was not primarily his own debt, and his personal contract is considered as being only auxiliary; nor if he covenants with his vendor to save him harmless from the mortgage, for still the purchaser of the equity of redemption is considered as having bought the estate, subject to the charge and with the burthen upon it, to which his covenant has relation as to its principal, and indeed he takes upon himself no more by such covenant than would have been without it laid upon him by a court of equity.

By the majority of the cases, it would appear, that when the debt was originally the debt of the testator his personal assets will not be exempted, except by declaration plain, or necessary implication, contained in, or arising from the will; and that mere parol or extrinsic evidence cannot be admitted in opposition to the above rule. It is agreed that a testator may, if he please, bequeath his personal estate, as against his heir or devisee, clear of debts, but it is left by the cases somewhat uncertain what mode of expression will suffice for this purpose. However, it is settled, that merely charging the real estate, or even creating a term for payment of debts, is not an exemption of the personal. The personal estate may be said to be first subject. 2. The estates devised for the payment of debts. 3. The estates descended, and this though the

is afterwards withdrawn, the rule of *accessorium sequitur principale* seems to apply; and as the land was charged only to help the deficiency of the personal, this latter fund being *withdrawn*, and not failing through *insufficiency*, the testator must be presumed in law to have altered his will as to the legacies. But where a testator shews an intention to bring the real and personal estates into one fund, by directing a sale of both, and the legacies to be paid out of the produce, he seems to have both funds *equally* in contemplation, and not as in the other case, (according to the construction the law puts upon the intention,) to mean primarily and originally a mere personal gift, to be assisted out of the real property if the personal fails. The distinction runs into great subtilty; but is there any distinction *less* subtle that will reconcile the authorities?

The court cannot see the intention of the testator with respect to his real property, unless he expresses it by a will executed according to the statute.

It seems that the effect of the statute of frauds is to prevent the court from *seeing* the intention of the testator to dispose of the real estate (3), if he has not

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estates are subject to a *general* charge for the payment of debts. 4. Real estates specifically devised, subject to and generally charged with the payment of debts. The Reader will find all the authorities on this subject in Mr. Coxe's note to Evelyn *v.* Evelyn, 2 P. Wms. 659, and the note of Mr. Sanders to Galton *v.* Hancock, 2 Atk. 438, to which may be added the cases of Hamilton *v.* Worley, 2 Vez. Jun. 62. Woods *v.* Huntingford, 3 Vez. Jun. 120. Buller *v.* Buller, 5 Vez. Jun. 517. Waring *v.* Ward, 5 Vez. Jun. 670. 7 Vez. Jun. 332.

(3) Thus in Buckeridge *v.* Ingram, 2 Vez. Jun. 652. the Master of the Rolls (the late Lord Alvanley) observed, "that he *could not read the will* without the word 'real,' in it; but he *could say*, for the statute enabled him, and he was bound to say, that if a man, by a will unattested, gives both real and personal estate, *he never*

done it with the solemnities enjoined by the statute; for in Sheddon *v.* Goodrich, the codicil declared an intention to make a new disposition of the real as well as the personal; but as it could only have the effect, for want of execution, of revoking the charge of the personal, the land was construed, notwithstanding the contrary intention expressed, to remain onerated, upon the principle of the distinction above stated, between the case where legacies are charged upon a mixed fund, and where they are wholly issuable out of the personal in the first place, the real estate being meant only to come in aid as a supplemental and secondary resource. And this a testator will be construed to mean, unless he plainly expresses or indicates a contrary intention[g].

In the case of Buckeridge *v.* Ingram[h], where a testator, by a will duly executed, gave an annuity to his daughter, charged on all his estates, both real and personal, and by codicil not attested, gave his real and personal estate to his mother for life, the personal estate only was held by this new disposition to be discharged from the annuity; or, in other words, the annuity was revoked as to the personal estate, but remained a charge upon the real; and the present Chancellor seems to have approved of that judgment[i]; who says that "Lord Alvanley, as he understood upon conversing with him, proceed-

[g] Vide Ancaster *v.* Mayer, 1 Bro. C. R. 454.
[h] 2 Vez. Jun. 652. [i] 8 Vez. Jun. 500.

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meant to give the real at all." In Sheddon *v.* Goodrich, Lord Eldon noticed the accuracy with which Lord Alvanley expressed himself as to that point.

ed upon this, that it was not the case of a legacy given, as in Brudenell *v.* Boughton, and that legacy altered, modified, or extinguished by a subsequent testamentary paper; but a charge created upon two funds; and the testator, by a subsequent paper, withdrew, not the gift of the thing, but one of the funds, which by the former paper was made liable to the payment of that charge, still leaving a subsisting demand; for, being given out of the real as well as the personal estate, the gift out of the real remained though that out of the personal was gone; not because the thing given was destroyed, but the fund out of which it was given." If the presumption of adding any thing to his Lordship's remarks on the point in Buckeridge *v.* Ingram, may be excused, it might be suggested, that the *power of distress* accompanying the annuity in that case, seemed to mark the real property as an *original* fund in the testator's contemplation for producing the annuity.

Devise of a rent out of land must be by will, attested by three witnesses.

In the early case of Hyde *v.* Hyde[k], which appears to have been the first case upon this subject, Lord Chancellor Cowper observed, that these legacies charged upon land by an unattested codicil, were not devised *out* of the land like a rent, but were only secured by land, which before was well devised. And the same Chancellor clearly held, that a rent out of freehold would not pass but by a will attested by three witnesses. Mr. Justice Buller[l] put the case as to rents strongly thus, "It is clear upon the statute, that a rent cannot pass without three witnesses; for the statute says, '*lands and tenements,*' and a rent

[k] 1 Eq. Abr. 409. [l] 2 Ves. Jun. 232.

is a tenement; and if a tenement could pass without witnesses, it would be in direct opposition to the act." Whatever comes properly within the description of a tenement, or, to use the words of the Master of the Rolls in Buckeridge *v.* Ingram[m], wherever a perpetual inheritance is granted, which arises out of land, or is in any degree connected with, or "exerciseable within it, it is that sort of property which the law denominates real, and cannot pass without three witnesses." It seems not to be doubted, therefore, but that tolls[n], where they are not for terms of years only, navigation shares[o], commons, the profit of a stallage, petty customs[p], market, fair, or piscary, which are the subjects of dower[q], are within the clauses respecting the execution and revocation of wills. But in Stafford *v.* Buckley[r], Lord Hardwicke held an annuity in fee, granted out of the 4½ *per cent.* duties, upon goods exported from the West Indies, to be a *personal* hereditament; and in Lady Holderness *v.* the Marquis of Carmarthen[s], it was held by Lord Thurlow, that an annuity charged upon the post-office, till a sum to be laid out in land should be paid, was a personal annuity; and the inference is, that such property may be passed by a will not attested by three witnesses.

Same doctrine as to tolls, navigation shares, commons, profits of a stallage, petty customs, market, fair, piscary.

[m] 2 Vez. Jun. 663-4. [n] 2 Blackst. Com. 20.

[o] Drybutter *v.* Bartholomew, 2 P. Wms. 127. Buckeridge *v.* Ingram, 2 Vez. Jun. 652.

[p] Mayor of Yarmouth *v.* Eaton, 3 Burr. 1402. Negus *v.* Coulter, Ambl. 367.

[q] Co. Litt. 19, 20. [r] 2 Vez. 170. [s] 1 Bro. C. R. 377.

SECTION VII.

Attendant Terms.

TERMS of years will pass (1) by a will unattested; but terms attendant on the inheritance, are, as to the equitable interest in them, within the statute, though the legal estate is exempt from its operation. The case of Whitechurch *v.* Whitechurch * will explain this point. Edward Whitechurch took a mortgage of Batcomb Lodge from one Bisse, for 500 years, to commence from the making, for securing the sum of 200l. and interest, and afterwards took another security of the same lands from Bisse, the mortgagor, for 1000 years, in the name of another person, but in trust for himself, to commence also from the making. After this Edward Whitechurch purchased the inheritance of the premises in his own name, and having no wife or issue male, made his will entirely in his own hand-writing, whereby he devised the premises to his nephew, being the son of his younger brother Joseph Whitechurch, for his life, remainder

Terms attendant upon the inheritance are within the statute.

* 2 P. Wms. 236.

(1) But they cannot be *created* but by a will attested, because the *creation* of a term affects the *real estate*. The statute of frauds takes notice of all lands devisable by the statute of wills or by the custom of Kent, and which shews that only freeholds of inheritance are within it, for terms of years are not within the statute of wills, nor devisable by custom. Attorney-General *v.* Graves, Ambl. 155.

to his son Edward Whitechurch, and to the heirs male of his body for ever, and made his brother, Joseph Whitechurch, his executor and residuary legatee.

It happened that this will, (though intended to be perfected as such) by reason of the testator's sudden death, had no date, nor any name subscribed thereto, nor was the same attested, but the executor had proved it in the spiritual court, and assented to the devise to the nephew; whereupon the elder brother's daughter, who was heir to the testator, brought her bill, in order to compel the executor and the devisee to assign over the term to her.

It was objected for the defendants, that the executor had assented to the devise, and that the will, though not attested by three witnesses, was, however, good at law to pass this term of 500 years, which was a subsisting term, and not merged in the inheritance, by reason of the intermediate term, and which intermediate term operated as a grant of the reversion, and not as a grant of a future interest, (for it was admitted, that a future interest would not prevent a merger); but this grant of 1000 years, being to commence from the making, did pass the reversion for 1000 years; which was acceded to by the court.

Then if this will would pass the term at law, and was agreeable to the intention of the party, it was said to be very hard that equity should interpose to disappoint the will, especially when it was in favour of so near a relation as a nephew of the testator, and one of his own name, and all this for the sake of one

not more nearly related; and who, on her marriage, would probably change her name. It was furthermore added, that in all cases between volunteers, (as the heir and devisee were here) he that had the law on his side used to prevail.

But it was decreed by the Master of the Rolls, that as this was a term which would have *attended the inheritance*, and in equity have gone to the heir and not to the executor, in which respect it was to be considered *as part* of the inheritance; so the will which was not attested by three witnesses, as the law required it to be when land was to pass, should not carry this term; that though it was true, such a will as in the present case would be sufficient to pass a term in gross, yet it should not pass a trust of a term attendant on an inheritance. That a will not attested as the statute of frauds requires, should not pass any estate of which the heir, as *heir*, would otherwise have had the benefit. That if the devisee of the land had brought a bill against the executor and heir, to have compelled the executor to consent to this devise, a court of equity would not have decreed it for the devisee; and if so, the voluntary act of the executor's consenting would not alter the case, for at that rate it would be in the power of the executor to make it a good or a void devise, just as he should think proper. Besides, the court observed, that it was the intention of the testator in the present case, not to pass the term *only*, but also to convey the inheritance which was expressly disposed of by the will, to the nephew for life, remainder to his first and other sons in tail. Though as to this, it was said to be extremely hard, that because quite so much as was intended could not pass, therefore, the devisee should be de-

prived of that which might lawfully pass, and which was a less estate than was intended him; or, because *all* could not pass, therefore nothing should. However, for the above reasons, the court decreed the devisee and executor to join in assigning the term to the plaintiff, the testator's heir at law, but no costs on either side; this decree was afterwards affirmed on an appeal by the Lords Commissioners Gilbert and Raymond.

When this cause was reconsidered on the appeal before the Lords Commissioners Gilbert and Raymond[b], Gilbert Baron was of opinion, that this was a term attending the inheritance, and to protect the same from intermediate incumbrances, and that an unmerged term in the same person is in him in nature of a trustee to attend the inheritance, and that it would be very dangerous to all the inheritances in England, if unmerged terms should be taken to be terms in gross in the owners of the inheritances, and pass as such.

Now, in the principal case, if this should be construed a term in gross, then it was such a chattel interest as might pass by the will, though all the solemnities required by the statute were not observed; but if it was a term annexed unto, and attending the inheritance, it could not pass by this will in any other manner than the inheritance would pass. That it had been allowed at the bar, that the term for two thousand years was annexed to the inheritance, but it was said, that the term for five hundred years was not; but no reason was given why there should be

[b] 9 Mod. 127.

such a difference between these two terms, that one should, and the other should not attend the inheritance; and certainly it could never be said with any colour of reason, that, where a mortgagee of a term of years purchased the inheritance, that such term, when in himself and unmerged, should go and descend in a course different from the inheritance; for it was the constant and uniform construction in that court, that such a term shall be annexed to, and protect the inheritance, and attend the same; and it would be a dangerous construction in equity to make the inheritance and the term separate and distinct estates in one person*.

But Lord Commissioner Raymond differed from Baron Gilbert in the view which he took of this doctrine. He was of opinion, that where a term comes to an executor, by implication, as a chattel interest, or to a devisee by a general devise of all his chattels; or where it vests in an administrator, generally, for want of a will; in such cases, the heir at law would be competent to apply to this court to have the term assigned to another, to attend and protect the inheritance; but that, since it was agreed on all hands that the term passed at law, it was a question, whether that court could take it from him to whom it was expressly devised, in favour of the heir at law, who was a volunteer as well as the devisee?

That it was true, where a term was *expressly limited to attend the inheritance,* there, though the testator likewise *expressly* devised it to another, it would not pass; but where it attended the inherit-

* Et vide Villiers *v.* Villiers, 2 Atk. 71.

ance only by construction or operation of law, or in an equitable notion, as a term brought in and assigned by creditors, or terms raised for children's portions, or for other particular purposes; there, if the testator *expressly* devised such terms, they would pass. For where a man had a term for years, which only by intendment of law attended the inheritance, certainly he had a power to sever such a term from the inheritance; and if he should assign it to one man, and mortgage the inheritance to another, in such case the term should not attend the inheritance, but it became a term in gross; and why should not a man have the like power to do the same thing by will, if he thought fit. But as in that will there was no apparent intention, that the testator designed to pass this term as a separate interest from the inheritance, though there were sufficient words to pass it in general; it was to be considered, whether such *general* words should, after the death of the testator, sever that term from the inheritance, which attended and protected it in notion of equity, before such devise was made.

Comments on the doctrine laid down by Lord Commissioner Raymond in Whitechurch v. Whitechurch.

The distinctions taken by Lord Commissioner Raymond may be more readily understood, by being stated as follows: a term of years may have become attendant upon the inheritance after all the express purposes of its creation are satisfied, by consequence and operation of law; or, after such satisfaction, it may have expressly received this ulterior destination by actual assignment for this purpose. If a term be in the predicament first above supposed, and a person, having in himself such term unmerged, by reason of an intervening reversionary term outstanding, or by reason of the legal estate in the inheritance being in another for his benefit, *expressly devises* the term by

a will capable only of passing *chattel* interests, the term will be severed from its *accidental* connection with the freehold, and will go to the devisee as a beneficial interest, or, in other words, will pass in equity as well as at law. But if it be not so *expressly* devised, the heir at law will be entitled beneficially to the term for the protection of the inheritance; or, in other words, the equity in the term will descend as *a part* of the inheritance for want of an execution of the will sufficient to pass freehold estates.

But supposing such satisfied term to have once received an express destination to attend upon the inheritance, then it seemed to the Lord Commissioner to be immaterial whether it were *expressly* and *by name* devised by the testator, or included under a *general devise of his chattels*, or suffered to devolve to the executor or administrator; it being that judge's opinion, that where such *express* limitation had been made, it would not pass by a will unattested, though the testator *expressly devised it to another.*

The whole of this doctrine of the Lord Commissioner, who delivered his opinion to the effect last above-mentioned, turned upon a distinction between a term assigned upon an *express declaration of trust*, to attend the inheritance, and a term *constructively so attendant* by implication and operation of equity. But the case of Willoughby *v.* Willoughby[d], has clearly negatived any such distinction between estates expressly made attendant upon the inheritance, and those so considered by construction of equity. And in the same case it was also laid down by Lord Hardwicke,

[d] 1 T. R. 763.

that the term, in *whatever* manner it may have become attendant, may be *disannexed* and turned into a term in gross at any time, by the owner of the inheritance, if he particularizes his intention so to disannex it.

SECTION VIII.

Things annexed to the Freehold.

As to wills affecting things annexed to or growing upon the freehold.

A WILL must operate upon the testator's property according to the state it is found in at his death. Unless an actual severance has taken place in the life-time of the testator, he is incapable by his will, *unattested,* of *devising* the appendages of the freehold, in separation from the subject to which they adhere. And, therefore, according to Perkins, title Devises, from whom Swinburn [a] has copied the doctrine, those things, which after the death descend to the heir of the deceased, and not to his executor, cannot be devised by testament, except in cases where it is lawful to devise lands, tenements, or hereditaments. So the law stood before the statute of frauds, and so I apprehend it remains in relation to the new requisites to a devise of freeholds introduced by that statute. And this rule extends to things which belong to the realty by simple annexation to the freehold which may not be devised away by a will unattested, unless they were separated before the death of the testator; of which description are doors and windows, and even furnaces, ovens, tables and benches, if fixed and mortised in the earth; and so, in general, are all those

[a] Part 3. sect. 6.

appendages of the freehold, which a tenant cannot remove or destroy without being guilty of waste[b].

Trees.

If a man seised in fee of lands bequeath, by will sufficient only to carry personal estate, all his trees growing upon his land at the time of his death, such devise is void. But if he devise away the corn growing upon the same land at the time of his death, such devise will be good by a will unattested. The trees are parcel of the freehold till actually severed; and, unless devised away by a will applicable to freehold, descend, together with the land, to the heir: but the corn which was sown by the testator shall go to the legatee of his personal estate, as goods and chattels[c]. If there is no personal bequest which will apply to it, then an express devise of the lands themselves, though no mention is made of the corn, will give it to the devisee; as the law holds, in such case, that the intention of the testator was to pass the land, together with its fruits[d]. But if there is neither bequest of the corn, nor devise of the land, it will go to the executor or administrator, and not to the heir[e].

Corn growing.

Thus, it has been always held, that if a man be seised of land in right of his wife, and sow the land, and devise the corn growing thereon, and die before the corn be reaped, the legatee shall have the corn, and not the wife. The reason of the law in which particular is, that the corn is *fructus industrialis*, and he who sows it has a kind of property in it divided

[b] 4 Rep. 64. and see Lawton v. Lawton, 3 Atk. 12.

[c] Fisher v. Forbes, 2 Eq. Ca. Abr. 392.

[d] Winch 51. Cro. El. 61, 461. Roll. Abr. 727. and see Cox v. Godsalve, 6 East. 604. n.

[e] Gilb. Evid. 247.

from the land gained by the *very act of sowing it*[r]. But if one joint-tenant sows the land, and dies before it is reaped, the corn survives with the land (1), because he gained no exclusive property by the act of sowing it; for he had no exclusive property in the land. But if A. seised of land, sow it with corn, and then convey it to B. for life, remainder to C. for life, and then B. die before the corn is reaped, C. shall have it, and not the executors of B. though his estate was uncertain, for the reason of industry and charge fails. And if B. and C. both die, then the lessor who sowed the corn shall have it (2).

Grass and herbage.

But the law is otherwise in respect to trees, and also the grass and herbage not separated from the ground at the time of the death of the testator; for this is not *fructus industrialis;* and, therefore, as a tenant for life cannot by a will properly executed to pass freehold estate make any disposition thereof to operate after his death, so neither can the owner of the land in fee simple pass it in separation from the land by a will executed only to pass chattel and personal property. And it will be the same if the na-

[r] Hob. 132.

(1) Cro. El. 61. Dyer, 316. *a.* But if one of the joint-tenants occupies the land alone, by the consent of the other, and takes the profits alone to his own use, it seems that if he sows the land, he may devise the standing corn away from the survivor, as *fructus industrialis*, and such devise will be good and effectual, without witnesses; for it is said, that such assent to his sole occupation of the land amounts to a lease at will, and, as such, gives a title to emblements; but such assent by the companion must be express and positive. Cro. El. 314.

(2) Cro. El. 61. For the doctrine as to emblements, see Perk.

tural product is increased by the sowing of hay-seed, or other assistances of cultivation [e].

With respect to heir-looms (3) which by custom have gone with a house, they cannot be devised separately *by the owner of the fee simple, even by a will executed to pass freehold estates;* for the will does not take effect till after the death of the testator; and by his death the heir-looms, by ancient custom, are vested in the heir; and the law prefers the custom to the devise [h]. Heir-looms.

Deer in a real ancient park, fish in a pond, doves in a dovehouse, and things in the like situation, though personal chattels, are so appropriated to the inheritance that they accompany the land wherever it vests, whether by descent or purchase [i]: and so the charters, court rolls, and muniments of the estate, pass together with the land [k]. In like manner monuments, coats of armour, ensigns, and escutcheons, go to the heir in the nature of heir-looms: but the owner may, *during his life,* sell and dispose of these things if he please, as he may of the trees on the estate; and he is at liberty, as being complete owner, to do any injury to them without being accountable.

Pictures, plate, books, and furniture cannot be

[e] Co. Litt. 185. *b.* [h] Roll Abr. 727.
[i] Co. Litt. 8. [k] Bro. tit. chattels, 18.

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sect. 530. Co. Litt. 41. 45. Hob. 132. Roll. Abr. 727. Gilb. Evid. 246. Com. Dig. tit. Biens, G. 1. c. 2.

(3) *Loom* is a word of Saxon original, signifying limb or member. Spelm. Gloss. 277.

perpetuated in a course of descent, or made to go with the family mansion. When they are left, as is often the case, to be enjoyed by those who shall be in possession of the family residence, as far as law or equity will permit, the absolute interest, subject to the interest for life which may be created in them, will vest in the person who is entitled to the *first* estate of inheritance, whether in tail or in fee, and upon his death will devolve upon his personal representatives[1].

SECTION IX.

Mortgages.

Mortgages, in equitable consideration, are not within the clauses respecting wills in the statute of frauds.

WE have seen, a little above, in the case of attendant terms, an instance wherein chattel interests in land, though devisable *at law* by a will not executed and attested according to the statute, are from the particular view taken of them in courts of equity, deemed by those tribunals to be as much the objects of the requisitions of the statute as estates of inheritance. The converse of the doctrine holds in respect to *mortgages;* this interest being regarded in courts of *equity* as entirely *personal,* a will unattested seems clearly to be capable of passing the beneficial right to the land; so that the devisee, under such a will of the land mortgaged, would be permitted by the court to use the name of the heir to compel payment of the money, or make the pledged estate his own by fore-

[1] 1 Bro. C. C. 274. 3 Bro. C. C. 101., and see the Note subjoined to the Precedent in the Appendix where this provision occurs.

closure. In equitable contemplation the *estate* in the land remains in the mortgagor, while, in respect to the interest of the mortgagee, the land takes the character of personalty as following the nature of the debt, to which it is a collateral security; in so much that if a mortgagee, after making his will, forecloses the mortgage, or obtains a release of the equity of redemption, the mortgaged lands will not pass inclusively, under the general words, lands, tenements, and hereditaments, contained in the will, but will go as an *acquisition*, or *purchase* subsequent to the will, to the testator's heir at law [a].

In the consideration of equity, therefore, mortgages do not seem, as to the beneficial interest, to be within the words 'lands and tenements,' in the fifth clause of the statute; nor will such interest in general pass by a devise of lands, tenements, and hereditaments (1). But if a mortgagee by

[a] Vide Casborne *v.* Scarfe, 1 Atk. 605. Sir Litton Strode *v.* Lady Russell, 2 Vern. 621. Winn *v.* Littleton, 1 Vern. 3. 2 Vent. 351. 3 P. Wms. 62.

(1) 2 Vern. 621. L. being seized of several manors and lands, and also of mortgages in fee, which were forfeited, and of a great personal estate, having no issue, made his will, and after devising part to his wife for life, and other legacies, "gave all other *his lands*, *tenements*, and *hereditaments*, out of settlement, to his nephew." And one of the questions in the case was, whether these mortgages passed by the will under the general words, *lands*, *tenements*, and *hereditaments*? It was held by the Lord Chancellor, the Master of the Rolls, Lord Chief Justice Trevor, and Justice Tracy, that the mortgages in fee, though forfeited when the will was made, did not pass by these general words. But the decree in that case, as it is stated in the Register's book, B. 1707, fol. 510, takes no notice of any mortgages, except those whereof the testator,

SECTION X.

Election in Equity.

An unexecuted will is not even of force to raise a case of *election* against a person taking a benefit in the personal estate by the same will.

IT is to be observed, that a will of real property, not executed and attested as the statute directs, is classed among those acts which the law holds *to all intents and purposes void;* so that neither courts of equity nor law will pay regard to the intention of the testator, unless he has given it effect in the manner dictated by the legislature. Upon this principle such unexecuted will is not even of force in a court of equity to raise a case of election against a person taking a benefit in the personal estate[a]. In Hearle v. Greenbank[b], D. W. devised all his freehold, copyhold and real estate, whatsoever, and wheresoever, and all his leasehold estate, to two trustees, their heirs, executors, administrators and assigns, in

[a] 7 Vez. jun. 372. [b] 1 Vez. 198.

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unless by the manner therein prescribed; but seeing that it would not sufficiently answer the intent of the legislature if confined to land, it adds a prohibition as to personal estate, that it should not be given to be laid out in the purchase of lands. But was there no other way whereby the interest in land might come to a charitable use? Money due on mortgage was a charge and incumbrance on the land, the payment of which depended on the pleasure and ability of the mortgagor; therefore, parliament had by express words taken in that by a third clause; the words of which, if they did not extend to mortgages, he was at a loss to know for what purpose they were put in. The meaning was, that you shall not give to a charitable use that which is or *may be* a charge upon land, though not so at the time of the gift.

trust, to apply the residue, after paying their own charges to the separate use of his daughter M. W., a married woman, during her life, to be at her disposal; not subject to the debts or controul of her husband; her receipts to be good, and to be permitted by deed or writing, executed in the presence of three or more witnesses, notwithstanding her coverture, to give and dispose of all his freehold, copyhold, and leasehold estate, as she should think fit; and he gave to the same trustees, whom he made joint executors, his personal estate, in trust, for the sole and separate use of M. W., and to be at her disposal, and not subject to the debts or controul of the husband. M. W., then under the age of twenty-one, but above seventeen, made her will, and thereby, in pursuance of her power in her father's will, gave 8000*l.* to her daughter Mary, when she attained the age of twenty-one; she then devised the residue of her real and personal estate to the plaintiffs, the two Hearles, their heirs, executors, and administrators, for ever.

The bill was brought by the plaintiffs to have the appointment made by M. W. of the real estate in their favour established; but the court considering the will to be void by reason of the nonage of the mother, adjudged it a bad execution of the power. Then the question arose, whether the heir at law could take the legacy of 8000*l.* under the will, which was well devised, (the testatrix being of a capacity to dispose of personalty), and at the same time claim the lands by descent, against the appointment, or was put to an election, upon the rule of not disputing a will in any part under which you claim. And the case for the heir was thus put at the bar. It was said, that the rule was true, when properly understood,

that wherever a person claims under a will, and by the same will, *properly executed,* land or any thing else is devised to another, which the testator had not a title to, the person claiming under the will shall not dispute the title; since the will manifests the intent how the whole should go; but that this rule did not go to make good what was in effect *no will:* that the case under consideration was one in which there was *no will;* it was not the case of a will impeached for want of title in the testator; it was like a devise to a charitable use, since the statute; it was not want of title, but want of capacity to make any will at all of real estate.

To this distinction the Chancellor seemed to accede. His Lordship observed, that as to the equity of the plaintiffs from the claim of the 8000*l.*, it was true, it was determined in Noys *v.* Mordaunt[c], that if lands in fee were given to one child, and to another lands entailed, it is meant they should release to each other, and the court had gone farther since—to the case of a personal legacy. But still he was of opinion, that this differed from all those cases, and that the heir at law was not obliged to make her election, for in the case before him *the will was void;* and that where the obligation arose from the *insufficiency of the execution,* or *invalidity* of the will, there was no case where the legatee was obliged to make an election; for there was *no will* of the land.

And his Lordship put the case of a devise by a testator of a legacy to his heir at law, and of the real estate to another; where, if the will be

[c] 2 Vern. 581.

not executed according to the statute of frauds for the real estate, the court will not oblige the heir at law, upon accepting the legacy, to give up the land. That such a case differed from Noys *v.* Mordaunt, in the reason of the thing; there the testator devised some lands which were, and others which were not, his own; and the court said, that the devisee should suffer the lands to pass, as if they were the devisor's own. But in the principal case, whether the lands were the testator's own or not, they could not pass by the will.

But in Boughton *v.* Boughton[a], a distinction was taken as to this point, by the same Chancellor who determined Hearle *v.* Greenbank, which has been recognized and confirmed by subsequent authorities, though with some remarks upon its refinement and subtilty. In this case of Boughton *v.* Boughton, it was held that a legacy to an heir, *upon the express condition* that he did not dispute the will, would put the heir to an election, either to accept the legacy, or the lands devised away, although the will was not executed according to the statute. The case was as follows: A freeman of London devised his real estate to his younger son, Stephen Boughton, and all his personal estate among his children; among the rest, 1,200*l.* upon some contingencies to Grace, the daughter of his eldest son; adding this clause, "if any child or children of mine, or any in their right, or any who may receive benefit by my will, shall any way litigate, dispute, or controvert the whole, or any part thereof, or the codicils thereto belonging, or not give such discharges as my will requires, or not comply with the

But if in such unexecuted will there is a legacy to the heir, *upon condition* that he did not dispute the will, he is put to his election.

[a] 2 Vez. 12.

whole, and all and every condition and conditions therein contained, both as to real and personal estate, such child or children, so far as it relates to them severally, shall forfeit all claim and pretence whatever under my will, and shall have no more than the orphanage part of the personal estate I die possessed of; revoking what I gave to them, I give it to my residuary legatees;" the testator underwrote to this instrument an attestation in the common form, but it was not subscribed either by himself or by any witness: there was a codicil, without date, but signed by him, therein taking notice of and reciting, that in further consideration of this his last will, he made a codicil thereto, and gave directions therein.

Grace, by the death of her father, became heir at law to her grandfather, and so entitled to whatever he left to descend, or which ought to descend, from the invalidity of his disposition. She being an infant of tender years, this bill was brought by Stephen, the youngest son of the testator, and devisee of his real estate, in order that she might make her election, whether she would have the 1,200*l.*, or the land which happened to descend to her; for that she could not claim both; but, if she chose the legacy, she must let the real estate go according to the intent. The point is so particular, and the Chancellor's judgment so luminous and discriminating, that I have thought it best for the reader to lay it before him at some length.

His Lordship said, he was satisfied that the infant ought not to take the benefit of the personal legacy, without at some time or other waiving any right to the descended lands; and that it was very different from

Hearle *v.* Greenbank. The testator had made one instrument, in which he had used words, expressions, and clauses, relative both to real and personal estate; and in it was contained a clause, importing in words, though not by force of the instrument, to be a devise of the real to the plaintiff, giving 1,200*l.* to his grand-daughter, and taking upon him to dispose of his whole personal estate among his children, who would not be bound thereby, as he was a freeman. He then added the express clause which was the sole ground of distinction between this and other cases; and in the codicil, took notice of that very instrument as a will. The codicil was signed, and put that difficulty, which otherwise might have arisen from the imperfection of the instrument, out of the question. But notwithstanding this, it was a will only by force of the instrument, to pass *personal* estate; for neither the will or codicil was so executed as to pass real estate.

The plaintiff insisted, that the defendant, having a legacy by the will, which was undoubtedly good, should have no benefit thereof, unless she suffered the disposition of the land to take effect. In Noys *v.* Mordaunt[e], (which was the first case) the testator was disposing of land. The subsequent cases, till Streatfield *v.* Streatfield[f], were all of a devise of real estate. Had the rule gone no further, but been confined to real estate, this objection had never risen, because the instrument must be effectual, as well to one real estate as another; so that if they had both been real estates, this difficulty could never have arisen so as to make the point come into question. Lord Talbot

[e] 2 Vern. 581. [f] Cas. Temp. Talb. 176.

went so far as, where the will comprised both real and personal estate, and the land, to which one child was entitled in tail, was thereby given to another, and a personal legacy to the tenant in tail, to consider it as an implied intent, that whoever took by that will, should comply with the whole; so that he put the party to an election; but neither in Jenkins *v.* Jenkins, nor in Streatfield *v.* Streatfield, was there a question of the *defect of the instrument.*

Then came Hearle *v.* Greenbank, which was the first case, in which the difficulty arose upon the *defect of the instrument.* In which case his opinion was, that there was no ground for the court to imply a condition to abide by a will of land, when there was, in fact, no will; and that it would be dangerous to break in upon the statute of frauds, by making an estate to pass by an instrument not sufficient to pass real estate; and *that*, not by the words of the testator, but by a condition implied by construction of the court; therefore, it could not be, nor was it warranted by any precedent, for it was only guessing at the intent of the testator, who might leave it with that very view. But the question was, whether the case before him did not differ from that by reason of the express clause in the will. It had been very candidly admitted, that if there was no devise of a real estate, but a personal legacy was given on an express condition, that the legatee should not enjoy it, unless within a certain time he conveyed a real estate, whether coming from the testator or not, he should not enjoy it but on those terms; the lands not passing by force of the will, but by the operation of the particular clause stipulating the condition. The legatee had it in his power either to part with the land, or

not; if he chose not to part with the land, he forfeited the condition; for any lawful condition might be annexed.

The case might be put a little farther, his Lordship said, (though it was almost the same as the present) as, suppose in the same instrument there was a devise both of real and personal estate, the will executed only to pass the personal, and not the real; but a condition annexed that the personal legatee should permit the same persons, to whom the land was given, to hold to them and their heirs: the condition annexed would take place, though the devise was void as to the lands according to the statute of frauds; for the legatee could not take it in contradiction to the testator's words; and the devise in the principal case amounted to the same, as if the testator had annexed a condition to permit Stephen to enjoy the land. The court must put a reasonable construction, which was, that none of the devisees should receive any benefit by the will, unless they suffered the whole instrument to take effect; not having regard to the validity or force of it, according to the statute of frauds, but to the clauses and expressions used. In Hearle *v.* Greenbank, there was no condition expressed in the will; it rested singly on the construction the court was to make, upon the implied condition that those claiming benefit by it should suffer the whole to take effect; and then it must necessarily refer to the validity of the will; for it was rightly argued, that the will could not be read so as to support a disposition of real estate, not being an instrument for that purpose.

In that case, when the court was to make such a construction by implication from the force of the in-

strument itself, the court must see the will, and could not take notice that it was a will of real estate; but in the case before him, where there was such a condition annexed to a personal legacy, the court must consider every part of that legacy, whether it had relation to real estate or not. You must read the whole will respecting the personal legacy, let it relate to what it will; which was a substantial difference, his Lordship said, and would prevent his going so far as to break in upon the statute of frauds, and at the same time would attain natural justice, which required, as far as might be, such construction to be made, otherwise the intent of the testator might be overturned.

But as there might be a difficulty how to carry the will into execution, (for being an infant of tender years, she could not judge for herself, nor could the master judge for her, it being on several contingencies, so that until she came of age, no election could be made,) his Lordship said, the plaintiff must till she attained her age receive the rents and profits of the estate, subject to further order of the court, but must be restrained from committing waste. If the infant should elect to have the land, then whatever the plaintiff should be entitled to as his orphanage part of the testator's personal estate, would be liable to make satisfaction for what he should have received out of the rents and profits of the real, as the court should direct.

The distinction taken by Lord Hardwicke, between the cases of Hearle *v.* Greenbank, and Boughton *v.* Boughton, was recognized and adopted by Lord

Kenyon, in Carey *v.* Askew (1), and of which the Chancellor gave the following account, as to the point now under consideration, from his own note. "I have looked at my own note of Carey *v.* Askew. Lord Kenyon there said, the distinction was settled, and was not to be unsettled, that if a pecuniary legacy was bequeathed by an unattested will, under an *express condition* to give up a real estate, by that unattested will attempted to be disposed of, such condition being expressed in the body of the will, it was a case of election, and he could not take the legacy without complying with the express condition. But Lord Kenyon also took it to be settled, as Lord Hardwicke has adjudged, that, if there was nothing in the will, but a mere devise of real estate, the will was not capable of being read as to that part; and unless the legacy was given so that the testator said expressly, that the legatee should not take, unless that condition was complied with, it was not a case of election. The reason of that distinction, if it were *res integra*, is questionable."

(1) The case is reported in 2 Brown, C. C. 58; but the point under consideration in the text only appears to have made a part of it, by the notes of it referred to by the counsel for the heir at law, and by the Chancellor, in Sheddon *v.* Goodrich, 8 Ves. jun. 481.

SECTION XI.

Signature and Subscription.

Of the signature of the testator, and the subscription of the witnesses.

IT shall be my next business to enquire into the state of the law on the essentials held requisite in regard to the signature of the testator, and the subscription of the witnesses. The formalities required are, 1st, that the will be in writing;—2d, that it be signed by the devisor, or some other in his presence, and by his direction;—and 3d, that it be attested and subscribed in his presence, by three or more credible witnesses.

What is a sufficient signing.

If the language made use of by the legislature, were to be understood in its natural and usual sense, it would seem that there could be no great contention in regard to the meaning of the words 'shall be signed by the devisor,' which are generally considered as importing the actual and formal subscription of the name of the party at the bottom of the instrument. And by directing this to be done in the presence of three witnesses, the statute at first view seems to require that the attestators should have ocular evidence of the act of signing performed by the testator.

Very soon, however, after the legislature had thought fit to place these guards about a dying man, in this last and important act, courts of justice yielding to the popular bent towards freedom and facility in all alienations of property, instead of strictly executing the intention of parliament, seem to have studied to frustrate its caution.

In the case of Lemayne *v.* Stanley (1), which was determined about four years after the statute was passed, the solemnity of signing was treated with very little regard. Stanley, seised in fee, wrote his will with his own hand, beginning thus, " In the name of God, Amen. I, John Stanley, make this my last will and testament," and he thereby devised the lands in question, and put his seal, but did not subscribe his name; but three witnesses subscribed the will in his presence. And whether this was a good will to pass land within the statute of frauds was the question. After several arguments, it was adjudged by the whole court, consisting of North Chief Justice, and Wyndham, Levinz, and Charlton, Justices, to be a good will; for being written by himself (2), and his name being in the will, it was a sufficient signing within the statute, which did not appoint *where* the will should be signed, at the top, bottom, or margin, and that therefore a signing in any part was sufficient. And soon after, in the 37th year of the same King, the doctrine was stated still more loosely by Lord Chief Justice Jefferies, who the report[a] says, seemed to hold, that a will written all by a testator's own hand, and acknowledged in the presence of three credible witnesses, would be within the intention of

It has been held a sufficient signing if a will be written by a testator's own hand, with his name inserted.

[a] Anon. Skin. 227.

(1) 3 Lev. 1.; and again in the case of Hilton *v.* King, Lord North and Levinz agreed, that it was immaterial, whether the signing be at the top or bottom of the will, for the statute doth not say subscribed, but signed by the testator.

(2) The Emperors Theodosius and Valentinian allowed every holograph testament to be available, though made without witnesses, Novell. Theod. lib. 2. tit. 4.

the statute, though it were not signed by him according to the words of the act. And this doctrine has been acceded to as settled whenever it has since come under consideration. So in Stokes *v.* Moor[b], the case of an agreement was said to be like that of wills, upon which it was said to have been determined, that the testator's writing his name in the introduction of the will, was a good signing within the statute. And in the late case of Coles *v.* Trecothic (3), Lord Eldon took notice, that it had been often held in respect to wills, that if a testator begins his will with the formal introduction of "I, A. B. do make this my last will," it was a sufficient signing.

But if the testator *begins* to sign in *regular form*, and does not complete it, the statute, as it seems, is not satisfied.

In Right *v.* Price[c] there was an appearance of greater strictness. According to which case it appears that if the testator *shews an intention* to subscribe the will in regular form, by beginning to write his name at the bottom, but being overtaken by weakness or incapacity, before he has completed such intention, he becomes incapable of executing his purpose, the will is not sufficiently signed within the act. In that case, a will had been prepared in five sheets, and a seal affixed to the last, and, likewise, the form of attestation was

[b] Dougl. 241.

[c] 1 P. Wms. 771. note and vide supra, 122.

(3) 9 Vez. jun. 249.—But his Lordship seemed to think, that for this formal introduction to be a sufficient signing, it should be one simultaneous act, and that the whole act or intended instrument should be in the contemplation of the testator at the time of his writing such formal introduction. And in this view it may deserve consideration, how far, if a will be written on different pieces of paper, or at different times, such a formal beginning will be equivalent to a regular signing.

written upon it, and the will was read over to the testator, who set his mark to the two first sheets, and attempted to set it to the third; but being unable from the weakness of his hand, he said, "he could not do it, but that it was his will." And on the following day, being asked if he would sign his will, he said, "he would," and attempted again to sign the two remaining sheets, but was not able to do it. The case was decided upon another ground, but the Court of King's Bench seemed to be of opinion, that this was not a sufficient signing; for the testator, when he signed the two first sheets, had an intention of signing the others; he did not, therefore, mean the signature to the two first sheets, as the signature of the whole will; and consequently there never was a signature of the whole, but only a beginning to sign.

In Lemayne *v.* Stanley, the writing of the name in the introduction of the will, was all the signing contemplated by the testator, and as far as such a mode could be held a literal accomplishment of the statute, his intention in respect to his will was completed, his mind being in no suspense, nor looking to any further or future act of authentication. But in Right *v.* Price, the testator expressly announced an intention to authorize the instrument in a regular and solemn way, and therefore his will seemed to be inchoate until this was done: why it was not done was to be explained; and so the case could only be established by those parol proofs, which it was the object of the statute to exclude.

Whether sealing is signing.

In the case of Lemayne *v.* Stanley, above cited, three of the judges, including the chief, were of opinion, that the testator, by *putting his seal* to the will, had sufficiently signed within the statute, for they

said that the signum was no more than a mark, and sealing was a sufficient mark that it was his will.

In Warneford *v.* Warneford[d], which, after a long interval seems to have been the next case in which this question came to be considered, it is said to have been held by Lord Raymond, on an issue out of chancery of *devisavit vel non*, that *sealing* a will was a *signing* within the statute of frauds. We are to observe, that in Lemayne *v.* Stanley, the opinion of the judges must be regarded as spoken *obiter*, the case being decided on the ground of the sufficiency of the insertion of the name in a will, written by the testator; and the point in Strange, as stated only in a short note, was agitated at *nisi prius* only. But this doctrine was ill received in the subsequent case of Smith *v.* Evans[e], wherein Lord Chief Baron Parker, Baron Clive, and Baron Smith, (in the absence of Baron Legg) are stated to have said, that the opinion of the three judges in Lemayne *v.* Stanley was very strange; for that if it were so, it would be very easy for one person to forge another man's will, by only forging the names of any two persons dead, for he would have no occasion to forge the testator's hand.

And the same judges declared, that if the same thing should come into question again, they would not hold that *sealing* a will *only*, was a sufficient signing within the statute. The Chief Baron seems to have been less resolved on the same question, in the opinion delivered by him in Ellis *v.* Smith[f], in which he thus expressed himself: "As to the point,

[d] 2 Strange, 764. [e] 1 Wils. 313.
[f] Reported in 1 Vez. jun. 11.

whether sealing be signing; I own I think it is not; for the character and hand-writing are necessary, and were designed to prevent or detect frauds and impositions. But, however, said his Lordship, as in some cases it has been thrown out *obiter*, and in one case decreed, that it is equal to signing, I shall submit my opinion." But Willes C. J. said decidedly in the same case, that he did not think *sealing* was to be considered as *signing*; and he added, that he declared so then, because, if that question ever came before him, he should not think himself precluded from weighing it thoroughly, and decreeing, that it was not signing, notwithstanding the *obiter dicta*, which in many cases were *nunquam dicta*, but barely the words of the reporters; for, upon examination, he found that many of the sayings ascribed to that great man, Lord Chief Justice Holt, were never said by him (4).

The opinion of Sir John Strange, Master of the Rolls, was on this point agreeable to that declared by the Chief Justice. He observed, that he was not convinced that sealing was signing; for sealing *identified* nothing; it carried no character; and most seals were affixed by the stationers, who prepared the paper. Lord Hardwicke did not, according to the report, speak, in this case, as to the question of sealing; but in a case which had been determined by him two years before [r], his Lordship had expressed himself in stronger language to the same effect with the Lord

[r] Grayson *v.* Atkinson, 2 Vez. 459.

(4) See Show. 69. Lea *v.* Libb, where Lord Holt is *said* to have held sealing to be a signing.

Chief Justice Willes and Sir J. Strange: he then declared, that the statute, by requiring the will to be signed, undoubtedly meant some evidence to arise from the hand-writing; then how could it be said, that putting a seal to it, would be a sufficient signing? for any one may put a seal; no particular evidence arises from a seal; common seals are alike; no certainty or guard therefore arises from thence."

Whether making a mark, where the party is unable to write, is a sufficient signing or subscribing.

Till a late case it was a considerable doubt with the profession, whether, if a testator or witness, could not write his name, he might satisfy the statute by making his mark. In Lemayne *v.* Stanley, as it is reported in Freeman [h], it is said that the court were of opinion, that it was not necessary for the testator to write his name, for some cannot write, and then their mark is a sufficient signing. But this opinion, though entitled to great deference, as being stated to have been that of the court and not of a single judge, yet as being uncalled for by the facts of the case, must be regarded as extra-judicial. Hudson's case [i], which was determined about a year after Lemayne and Stanley, where two witnesses swore that J. S. the testator did not publish the writing as his will, but that A. B. guided his hand, and J. S. made his mark, but said nothing, is too mixed a case to be admitted as an authority to this point.

The observations made by Sir John Strange in the above cited case of Ellis *v.* Smith, on the question as to sealing, do certainly seem as strongly to apply to

[h] Freem. Rep. 538. and see 17th Vez. jun. 459.

[i] Skin. 79.

a testator's mark, for it identifies nothing: it carries no character. But in the late case of Harrison *v.* Harrison [k], it was decided by Lord Eldon, that the attestation of a devise by a mark, was good within the statute; and as the statute requires the attestators to *subscribe,* and the testator to *sign,* it may be thought that the principle of this determination is applicable *a fortiori* to the signature of the testator himself, since the word 'subscribe' seems much more forcibly to point to the actual hand-writing, than 'sign,' which, without any strain upon its grammatical sense, though, perhaps, not without some sacrifice of its popular and usual acceptation, might be deemed to be satisfied by *any symbol* of the testator's consent and ratification (5).

In the above-mentioned case of Harrison *v.* Harrison, the question was made upon a bill by devisees against the heir, whether the will was duly executed to pass real estate according to the statute of frauds, one only of the witnesses having subscribed his name, the two other having attested by setting their marks respectively. Lord Chancellor Eldon observed, that upon inquiry from Mr. Serjeant Hill, he had found, that there was a special case reserved in the Court of Common Pleas, upon the question, whether a will devising real estate was well executed, one of the witnesses being a marksman; and it was held clearly

[k] 8 Vez. jun. 185.

(5) The counsel for the plaintiff is stated to have adverted to the difference of expression in the statute, with reference to the witnesses and the devisor; and to have remarked the difficulty of making the proof, in case of the witnesses being dead.

sufficient. It was a case of Gurney *v.* Corbet, in 1710, in a note-book, which was the property of Mr. Justice Burnet. His Lordship said, he thought there might have been a great deal of argument upon it originally. But upon this authority the plaintiff must take a decree. In a few months afterwards the same point was determined by Sir William Grant, Master of the Rolls, in Addy *v.* Grix[1], agreeably to the decision of the Chancellor in Harrison *v.* Harrison, and it therefore seems now to be at rest (6).

It is sufficient if the witnesses attest upon the *acknowledgment* by the testator of his signature, without seeing him *actually sign.*

It seems to be fairly inferrible from the decision in Lemayne *v.* Stanley, that the court were of opinion, that it was not necessary that the witnesses should attest the very act of signing, but that an acknowledgment by the testator, that the act of signing was done by him, was sufficient for them to attest; for since not the sealing, but the writing over the will, with the testator's name in it, was the ground of the decision, the witnesses must have seen this done, if it was judged insufficient for them to attest upon the acknowledgment of the testator; but this was not so found by the jury, or it would have put an end to all controversy upon the case; and if the witnesses did

[1] 8 Vez. jun. 504.

(6) According to the report of the case of Lemayne *v.* Stanley, in Freeman, the court were of opinion, that if the testator had his name on a stamp, it would be enough if he impressed his name instead of writing it. And in Strange *v.* Barnard, 2 Bro. C. C. 585. it was held, that stamping was equivalent to sealing. By the civil law, if a testator could not write, he was not admitted to make his mark, but an eighth subscribing witness (seven being the ordinary legal number) was called in to subscribe in the place of the testator. C. 6. 23. 1.

not attest the writing of the whole will by the testator, their attestation could only go to his acknowledgment of his signature. This point, however, seemed to exist in some doubt during a long time after the statute was passed. In Dormer *v.* Thurland[m], where the will was not signed by the testator in the presence of the witnesses, but he acknowledged it to be his hand, and declared it to be his will in their presence, Lord Chancellor King inclined to think that the will was good, but ordered the point to be reserved, and made a case for further consideration (7).

However, in a case[n], which came before the Master of the Rolls (Sir J. Jekyll) a few years afterwards, the will was held good, though the witnesses did not see the testator sign it, but he owned it before them to be his hand. And the reporter adds, that on his mentioning this opinion of the Master of the Rolls to Mr. Justice Fortescue Aland, he said it was the common practice; that he had twice or thrice ruled it so upon evidence on the circuit; and that it was sufficient if one of the three subscribing witnesses swore that the testator acknowledged the signing to be his own hand-writing.

Sir Joseph Jekyll had delivered a similar opinion, a little before, in a case of Smith *v.* Codron, cited by

[m] 2 P. Wms. 506. [n] Stonehouse *v.* Evelyn, 3 P. Wms. 252.

(7) But the judges of B. R. on argument held the will void, as a charge, for want of being sealed according to the direction of the power.

Lord Hardwicke, in Grayson *v.* Atkinson*. In that case A. had signed and published a will in the presence of two persons who had attested it in his presence; then a third person was called in, and the testator, shewing him his name, told him that that was his hand, and bid him witness it, which he did, and subscribed his name in the testator's presence; and the testator, two hours after, told him that the paper he had subscribed was his will. His Honour held this to be a good execution.

But in the instructive case of Grayson *v.* Atkinson, above referred to, this point came fully under the consideration of Lord Hardwicke. The bill was to establish a will against an heir at law, who, by his answer raised the doubt, whether, as all the witnesses did not see the testator sign, though *he* saw *them* all sign, this was a good attestation within the statute. The Chancellor, adverting to the argument of the counsel for the defendant, in which they had insisted that the word '*attested*' superadded to '*subscribed*,' imported that the attestators should witness the very act of signing, and that the testator's acknowledging that act to have been done by him, and that it was his hand-writing, was not sufficient to enable them to attest, but that it should be an attestation of the thing itself, and not of the acknowledgment, observed "that certainly there must be an attestation of the thing in some sense, but the question was, whether, if they attest on the acknowledgment of the testator that that was his hand-writing, that was not an attestation of the act, and whether it was not to be construed agreeably to the rules of law and evidence,

* 2 Ves. 455.

according to which all other attestation and signing might be proved. At the time of making that act of parliament, and ever since, if a bond or deed was executed and signed, and afterwards the witnesses were called in, and before the witnesses, the person making it, acknowledged the signature to be his hand-writing, that was always considered as an evidence of signing by the person executing, and was an attestation of it by them.

"It is true," said his Lordship, "there is some difference between the case of a *deed* and a *will* in this respect, because signing is not necessary to a deed, but sealing is; and I do not know that it was ever held, that acknowledging the sealing without witnesses has been sufficient (8). But, nevertheless, that is the rule of evidence in respect to signing. If it were in the case of a note, or declaration of trust, or any other instrument not requiring the solemnities of a deed, but bare signing, if that instrument be attested by witnesses, proving that they were called in, and that the party took up the instrument, and said, that was his hand, such would be a sufficient attestation of the signing by him. That is the rule of evidence. Considering, therefore, the words of the act of parliament, it seems, that if the testator having signed the will, did, before the attestators, declare and acknowledge he had so done, and that the

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(8) But if the hand-writing to a deed be proved, the sealing and delivery may be presumed: if, therefore, the signature to a deed be acknowledged to an attestator, the rest seems to follow, see Grellier v. Neale and others, Peake, Ni. Pr. Ca. 146. See also Parke v. Mears, 2 Bos. et Pull. 217.

signature was his hand, that might be sufficient to make the attestation good."

The case of Ellis *v.* Smith[p], came on in 1754, which was about two years after Grayson *v.* Atkinson, and here the Lord Chancellor Hardwicke was assisted by Sir John Strange, Master of the Rolls, Willes Chief Justice of B. R. and Parker Chief Baron. The form in which the question is reported to have been put, was, whether a testator's declaration before three witnesses, that it was his will, was equivalent to signing it before them, and constituted a good will within the 5th section. The determination of Grayson *v.* Atkinson by Lord Hardwicke, was in this case mentioned by the Master of the Rolls, as an authority full to the point upon the first question; and his Honour said, that to determine otherwise at that time, would introduce confusion and uncertainty, and sap the foundation of much property which rested on former decrees.

The court was unanimous, in holding such acknowledgment by a testator to the attestators of his will, to be good within the statute; and the Chief Justice declared, that his opinion was virtually supported by those cases which had decided the attestation and subscription of the witnesses *at different times*, to be good; for then, a testator is presumed to write his name only before one, and to acknowledge it to be his hand to the remaining two; and why should not his acknowledgment to the three be equally good? The Chancellor also observed that those cases supported the one before him from their *direct similitude*, and

[p] 1 Ves. jun. 11.

not from any consequential reasoning; for he apprehended that the determination in all those cases was grounded on this, that a declaration by the testator was good; for if he signed three times, there were three executions, and none could be good within the statute (9).

The late case of Addy *v.* Grix[q], shews it to be the present sense of the courts, that this point is settled. The bill was filed to carry into execution a devise of real estate in trust to be sold. One of the witnesses, by his depositions, stated, that he did not see the testator execute, but that the testator took the will in his hand, and said the will, and also his name, were of his hand-writing. The Master of the Rolls, without difficulty, admitted the sufficiency of the attestation.

[q] 8 Vez. jun. 504.

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(9) The reporter has added a note, wherein he questions the propriety of this dictum of Lord Hardwicke, which had first fallen from the Lord Chief Justice; observing that it was hard to say that such declaration or acknowledgment would be sufficient in any case where *actual signing* would not do. But it is to be observed, that the acknowledgment or declaration is not supposed to stand in the place of, or be equivalent to a distinct act of signing, but to give effect to the attestation of the act of signing already done. See the case of Westbeech *v.* Kennedy, 1 Vesey and Beames, 362, to which case a note is added, which, it may be as well to apprise the reader, contains a number of cases not connected with the point in question.

SECTION XII.

Formality of Publication.

THE acknowledgment of the signing to the three subscribing witnesses, seems, according to the principles on which many cases have been decided, to comprise the efficacy of what the law means to express by the *publication* of the will; the manner of effectuating which, was often a judicial question before the statute of frauds. The term itself, *publication,* seems never to have borne any very precise or appropriate meaning, or to have indicated any certain and fixed form. After the statute of wills had established the direct testamentary power, accompanied with the obligation of declaring the will by writing, these parliamentary wills were thought to require a very slight degree of formal publication superadded to the solemnity and durability of writing and the cases shew, that, before the statute of frauds, very little, if any, verbal formality was thought necessary to accompany the written declaration.

Thus, a very few years before the statute of Charles was enacted, it was resolved, in the King's Bench, by the whole court, on a trial at bar in an issue out of Chancery, 1st, that if a man draws up his own will, and sends it to counsel to be advised of the legality of it, this is no will, unless it had a publication after he received it back from his counsel: but, 2d, that if after the will came from the counsel with

alterations made by him, the party put his seal to it, or *subscribed* his name, or wrote upon it, 'this is my will,' though there were no witnesses to it, yet this was a good publication, because by any of those expressions, the testator declared his intent that it should be his will[a]. In Peate *v.* Ougley[b], Sir John Hollis mentioned a case determined by Lord Shaftesbury, before the 29 Car. 2. in which, though the testator wrote his will with his own hand, and also these words '*signed, sealed and published in the presence of,*' and no witnesses had subscribed it, it was held a sufficient publication. And in the principal case, because these words, *signed, sealed and published in the presence of,* were written at the top of the will for want of room below, in the testator's own hand, and then the names of the three witnesses were subscribed, though one witness (the other two witnesses being dead) deposed, that himself and the other two witnesses were called up in the night, and sent for to the testator's bed-chamber, who produced a paper folded up, and desired him and the others to set their hands as witnesses to it, which they all three did in his presence, but *without seeing any of the writing,* or *being told by the testator it was his will,* or *what it was,* but that he believed it to be the same paper, because his name was there, and the names of the other witnesses, and he never witnessed any other paper for the testator; this was held to be a sufficient publication of the will, after the statute of 29 Car. 2. In Ross *v.* Ewer[c] Lord Hardwicke mentioned a case of a Mr. Windham in the court of K. B.

[a] Bartlett *v.* Ransden, et al. Trin. 15 Car. 2. B. R. Vin. Abr. tit. Dev. (N. 2.) pl. 16.

[b] Vin. Abr. tit. Dev. (N. 7.) pl. 12.

[c] Atk. 161.

which was a trial at bar, upon the will of his uncle, wherein the only question was whether the testator *published* it; there was no doubt of his having executed it in the presence of three witnesses, or of their having attested it in his presence; which shewed, his Lordship said, that *publication* is, in the eye of the law, an *essential* part of the execution of a will, and not a mere matter of form.

The point therefore seems subject to some doubt, whether *publication* is to be considered as a mere vague term, expressing generally the act of authenticating and announcing the veritable will of a testator, but depending as to the mode by which it is to be effectuated on the particular ceremonies and solemnities prescribed by the legislature, or as implying a specific obligation upon the testator *beyond* the execution and attestation of the will according to the statute of frauds. If any positive declaration by the testator that it is his will, be necessary to constitute a sufficient publication since the statute, it does not seem that the mere acknowledgment of the signing can operate as an equivalent; for the *acknowledgment* of the signing, unless the testator at the same time acknowledge his will, cannot be more extensive in effect than the *act* of signing in the presence of the witnesses. Upon the whole, however, we are to consider that, great as is the weight of Lord Hardwicke's opinion, it was delivered on this point in Ross *v.* Ewer, gratuitously and extrajudicially; whereas the cases of Peate *v.* Ougley, Trimmer *v.* Jackson, Stonehouse *v.* Evelyn, and others, which have been cited for the contrary doctrine, are direct authorities.

Section XIII.

Wills interrupted and resumed.

A will, though it be proceeded in at *different times*, and often suspended and resumed, will need only one execution.

IT is established by the agreement of all the cases, that a testator may make his will at different times, if the subsequent writing takes up and continues the former; and it matters not by how long intervals these acts are separated; they will compose one entire instrument, if the first purpose appears to have proceeded to its accomplishment, though with many pauses and resumptions. Thus[a], where an illiterate person made and signed his will, in which there was a devise of lands, and at a subsequent period added more to it *on the same sheet of paper,* and declared that he did not thereby mean to disannul any part of his former devise and disposition, and signed it, and then took the sheet of paper in his hand, and declared it to be his last will and testament in the presence of three witnesses, and desired the witnesses to attest it, which they did in his presence, this was held to be one entire will, though made at different times, and to be attested agreeably to the statute of frauds; or, in other words, the additional writing was held to be part of *one entire will,* and not a *codicil,* and the execution and attestation to be an *original* publication, and not a *re*-publication.

But where the will was written on different pieces

[a] Carleton *v.* Griffin, 1 Burr. 549. Carth. 37. arguendo, and, as it seems, agreed to by Dolben, J.

Of the execution of a will written on *different pieces of paper.*

of paper, it was holden, that the witnesses ought to see *all* the pieces of paper, or the will was not properly attested. Thus, in ejectment[b], where the special verdict set forth, that J. D. made his will in 1670, with two witnesses who subscribed their names in his presence; and in 1679, made a codicil, and thereby confirmed his will in what was not altered, and inserted some new bequests, and there were two witnesses to it, one of whom had witnessed the will, and the other was a new one, the only point was whether these made together three witnesses to the will, to satisfy the statute of frauds; but the court decided against the devise, because the third witness was not a witness to the first will. There was no entire instrument attested by three witnesses (1). And if the additional writing

[b] 2 Mod. 263.

(1) The reader should compare this case of Lea *v.* Libb, with Bond *v.* Seawell, 3 Burr. 1773. Blackst. 407. 422. 454. in which latter case it was proved, that C. made his will, consisting of two sheets of paper, all of his own hand-writing, and signed his name at the bottom of each page; and that he also made a codicil of his own hand-writing upon one single sheet, and then called in H. and shewed him both the sheets of his will, and his signature to every page thereof, and told him that *that* was his will, and then he shewed H. the codicil, and desired him to attest both the will and codicil: which he did in the presence of the testator, and then went out of the room. V. and L. came in immediately afterwards, and the testator shewed them the codicil, and *the last sheet of his will*, and sealed both before them. C. then took each of them up severally, as his act and deed for the purposes therein mentioned. Then the witnesses attested the same in the testator's presence, but *never saw the first sheet of the will; nor was that sheet produced to them; nor was the same nor any other paper upon the table; both* the sheets of the will were found *with the codicil* in the testator's bureau, after his death; all wrapped up in one piece of paper; but the two

were not a resumption and continuation of the former, but a distinct act and disposition by way of codicil, it might operate as a republication of the will as to lands, if both the will and codicil were attested, respectively, according to the statute; but if the will were not so executed and attested, the codicil would not help the

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sheets of the will were not pinned together: and the question upon these facts was whether this will was duly executed according to the statute of frauds?

After three several arguments before the court of King's Bench, and one argument before all the judges in the Exchequer Chamber, Lord Mansfield delivered the judgment. His Lordship said, that the question made at the trial, and submitted by the case, as it stood, turned upon the solemnity of the execution, and they were of opinion, that the due execution of this will could not be come at, in the method wherein the matter was then put; that if this were considered as a special verdict, they thought *it was defectively found as to the point of the legal execution of the will.* But that every presumption ought to be made by a jury in favour of such a will, when there was no doubt of the testator's intention, and that they all thought the circumstances sufficient to *presume*, that the first sheet was in the room; and that the jury ought to have been so directed; but upon a special verdict, nothing could be presumed; therefore, they were all of opinion, that it ought to be tried over again; and if the jury should be of opinion, *that it was then in the room*, they ought to find for the will generally, and they ought to presume from the circumstances proved that it *was* then in the room.

The case of Lea *v.* Libb was also on a special verdict, and, therefore, no facts could be presumed; but it does not seem that the case afforded the same ground of presumption, as that of Bond *v.* Seawell, in which last case there were *three witnesses*, if any, to the *whole* will, for the question was not as to the complement of witnesses, but whether the *whole* will, (the first sheet not having been seen by them,) was covered by the attestation; whereas, in Lea *v.* Libb, it was necessary to make the will and codicil

defect, although it had the requisites of the statute, for what was bad in its *creation*, could not be made good by any thing *ex post facto*, and the operation of a codicil, where it is a republication, is only to set up the will in its *original state and efficacy*, making it, *as far as it is efficient in itself by the solemnities of its execution and legal compass of expression*, reach to the date of the codicil, and embrace intermediate acquisitions.

Thus a testator[c] devised his lands to trustees and their heirs, in trust for maintaining and providing for the poor scholars of a college in Cambridge, and for other charities, and the will was written with his own hand, but had no witnesses, and afterwards he made a codicil, which was duly executed and subcribed by four witnesses, wherein he recited and took notice of the will. And one of the questions in the case was, whether the codicil was a good publication of the will within the statute of frauds? It was contended on behalf of the devisees, that the codicil, taking notice of the will, and being duly executed, made the will valid in the same manner as if it had been affixed to the will at the execution thereof, for the law would construe it as a part of the will, and its being laid in a different place signified nothing.

[c] Attorney General *v.* Barnes, 2 Vern. 597. Prec. in Ch. 270.

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one instrument, before the attestation could be held sufficient, for to neither, and to no part of either, were there three witnesses; and if they were *distinct* instruments, it seems, according to the authorities, that each ought to have been attested by three witnesses, to have been valid within the statute.

But it was held, that the will was void, for though there were three subscribing witnesses to the *codicil*, yet that would not support the *will*.

Of the difference between a writing in continuation of a will formerly begun, and a republication.

This difference between the relation which a codicil bears to a will, once completed according to the then existing intention, and that which subsists between the interrupted stages of one entire testamentary act, is not difficult to understand as a proposition, though very difficult to explain by example, or apply in practice. Upon this distinction, however, will, it seems, depend the question, whether or not, the *first* act of testamentary disposition will require to be executed and attested according to the statute.

But whether the *subsequent* writing be considered as a republication by way of codicil, or as the conclusion of something already begun, as in the case just mentioned of Carleton *v.* Griffin, it appears quite clear, upon the principles of Habergham *v.* Vincent, already discussed, and the doctrines of other cases, that such *subsequent* writing to be effectual to pass land, must be executed and attested as the statute directs, in the case of devises of lands.

That the subscription of the witnesses need not take notice that they attested in the testator's presence.

It was early decided that a will of lands was good where the three witnesses subscribed their names, at several times, without being present at once together[d]. And though the witnesses must subscribe the will in the presence of the testator, it is not necessary that in such subscription *notice* should be taken of the *fact of its having been done in the presence of*

[d] Freem. 486. Anon. 2 Cha. Ca. 109. Anon.

SECTION XIV.

Qualification of Witnesses.

IN Hudson's case, reported in Skinner[a], it was proved that the witnesses had been dealt with; upon which it was urged by the counsel, that if the witnesses were not to be believed, then there would not be three witnesses to the will, and so no will within the statute; to which Chief Justice Pemberton answered, that if there were three witnesses to a will, whereof one was a thief, or person not credible, yet the words of the statute being satisfied, and he having collateral proof to fortify the will, he would direct the jury to find it a good will. By which it should seem, we ought to understand his Lordship to mean, that if there was nothing at the time of the attestation to impeach the competency of the witnesses, they must be regarded as credible witnesses at that time, within the proper interpretation of the word *credible*, as used by the statute. But if a witness be *convicted* of felony, and so rendered infamous, at the time of his subscribing the will, it seems not to have been doubted, but that the will was invalid, for defect of a sufficient attestation.

What offences disqualify.

Crimes which stigmatize a man with infamy, when convicted thereof, such as treason, felony, conspiracy at the suit of the crown, perjury, forgery, barratry, attaint of false verdict, and which disqualify him for giving evidence upon a trial in a court of justice, disqualify him also for becoming a subscrib-

[a] 79.

ing witness to a will[b]. It seems, indeed, to have been formerly a notion, that every offence for which a man had been caused or even sentenced to be set in the pillory, on account of the infamy of the punishment, rendered him incapable of giving testimony[c]; but more modern cases have established, that the infamy of the *crime* only, and not the infamy of the *punishment*, is the ground of disqualification; and according to the present doctrine, persons who have suffered an infamous punishment, unless the offence for which it was inflicted on them, was of the species of *crimen falsi*, or other crime of an infamous nature, are not disabled from giving their testimony in a court of justice, however much their credit with the jury may be affected by such a fact. Before the statute of the thirty-first of this King[d], persons convicted of petit larceny were judged not to be credible witnesses to attest a will under the statute of frauds. And in the case wherein this was held, the rule was also laid down in strong and clear terms, that it is the crime and not the punishment which makes a man infamous, and vitiates his testimony[e].

It is the infamy of the *offence*, and not of the *punishment*, which disqualifies.

If a man be sentenced to the pillory for a treasonable libel, or slanderous words on government, he is not rendered incapable of becoming a witness in court, and is therefore a credible witness to a will; but if he be convicted of barratry[f], which is an *infamous*

[b] Com. Dig. tit. Temoigne. A. 2.

[c] Co. Litt. 6. b.

[d] By stat. 31 Geo. 3. c. 35, it is enacted, that no person shall be an incompetent witness, by reason of a conviction of petit larceny.

[e] Pendock *v.* Mackinder, Willes, 665. 2 Wils. 182. And see Rex *v.* Ford, 2 Salk. 690. 5 Mod. 15.

[f] The offence of stirring up suits and quarrels among His Majesty's subjects.

offence, though he be sentenced only to be *fined*, he is rendered incompetent as a witness in court, and unqualified, it is conceived, as a *credible* witness, to attest under the statute[s]. Ideots and madmen, and children under the age of common knowledge, who are incapable of discerning or estimating truth, are clearly in a state of legal incompetency to prove a fact, and therefore, can never be regarded as capable of attesting a will, so as to answer what the statute intends by such attestation. And generally, I apprehend, it may safely be concluded, that whatever incapacitates a man as a witness at common law, is an objection to the sufficiency of his attestation as a credible witness, within the meaning of the statute; for 'credible,' in the place in which it stands in this statute, cannot well be received in any other sense than 'competent;' the word in its popular sense being incapable of any constant test or standard, according to which a testator could make his choice of witnesses with any confidence in the validity of their attestation.

The word 'credible' as it is used by the statute must be understood in the sense of competent.

Upon the same principle, if the competency, after being lost, has been restored before the attestation, the credit required by the statute has also been re-established, and the attestation will be good. Thus the King's pardon, after a conviction of perjury, or other offence at common law, qualifies the party to attest a will, though, as it should seem, it would be otherwise in the case of a conviction of perjury, on the statute of 5 El. c. 9 (1). And such restoration to

[s] Charter v. Hawkins, 3 Lev. 426. Rex v. Ford, 2 Salk. 690.

(1) If a man be convicted of perjury upon the statute, he cannot be restored to credit by the King's pardon; for by the statute, it is part of the judgment, that the convict be infamous, and lose

competency would come too late, as I apprehend, between the time of attestation and examination in court (2).

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the credit of his testimony; nothing therefore but a reversal of the judgment, or a statute pardon will, in that case, suffice to restore the competency. Rex *v.* Crosby, 2 Salk. 689, and Rex *v.* Ford, ibid. 690. 3 Salk. 155.

Of the qualification of the attesting witnesses in the civil law.

(2) By the laws of the empire, those persons only were capable of attesting a will, who were themselves legally capable of making a will. No persons under puberty, or insane, or mute, or deaf, or prodigal interdicted the use of his own property, or such as the law had judged reprobate or infamous, or had rendered intestable, could be admitted as witnesses to a will. I. 2. 10. 6. D. 28. 1. 20. Neither could women be witnesses to regular or perfect wills: the law admitting them in all matters, whether civil or criminal, when the nature of the case was such that other evidence could not be obtained, but not when there was a choice of testimony, as in making wills, and solemnizing other public acts. Their testimony was admitted in proof of a fact, but not to give validity to a solemn instrument. See this particularity of the civil law explained, and the whole of this title of the Institutes '*qui testes esse possunt*' well commented upon by Vinnius, edit. Hein. 297.

The witnesses by the civil law must be credible, and idoneous, *at the time* of the will's being made, and according to the humanity of that system, as well as of our own, every one was presumed to be fit as a witness, unless the contrary was made to appear. D. 22. 5. 2. It is to be observed too, that *all* the witnesses ought to be fit, or *idoneous*, for the whole will was rendered null and void by the insufficiency of *any one* of the witnesses. C. 6. 23. 12. unless a codicillary clause were added, that if it were not valid as a will, it should be valid as a codicil.

If a madman attested in a lucid interval, his attestation was good, and so was that of a prodigal, if, before attesting, he had returned *ad bonos mores*. The integrity and freedom of the witnesses was a great point in the imperial law; in so much, that no person could be a witness to a testament, who was under the power of the testator; and though any number of persons might be admitted witnesses out of the same family, to a will in which the family was not interested, yet if a son of a family gave away his military es-

By the law of Rome no *hæres scriptus* or appointed heir could be admitted a witness to the testament by which he was so appointed, nor could the testimony of any one who was in subjection to such heir, or of his father, to whom he himself was in subjection, or of his brothers, if they were under the power of the same father, be admitted; but the testimony of legataries, and of those who were allied to them, or in subjection to them, was admissible[h]; which was a doctrine, not perfectly agreeable to the *general rule* of the civil law, that no one should be permitted to give testimony in his own cause[i]. Nor is the consistency of that rule saved by the reason given for the admission of such testimony, *viz.* that legataries were particular and not universal successors, and that a testament might be valid without them; whereas the appointment of an heir, was of the essence and constitution of a perfect testament (3), and formed the

[h] I. 2. 10. 10. 11. [i] Cod. 4. 20. 10.

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tate, or *peculium*, after leaving the army, neither the father, nor any one under the power of the father, could be a witness to the testament. In excuse for which rules of exclusion, the extent of the paternal authority among the Romans should be remembered; and, indeed, so adjusted to one another do the several parts of the system of the Roman jurisprudence appear to be, that the student will have considered them with little advantage in a view to the illustration of such of our own laws as have been copied from them, or are in affinity with them, unless he has found time and possessed curiosity to make that great work of human policy a distinct and specific branch of his studies.

(3) The exactest definition of a Roman testament has been thought to be this—*the appointment of an executor or testamentary heir, made according to the formalities prescribed by law.* Domat. lib. 1. t. 1. sect. 1. and see D. 28. 5. 1.

principal feature of distinction between that and a codicil (4), or a *donatio causa mortis.*

In the spiritual courts of this kingdom, to which the sole cognizance of the validity of wills belongs, where they relate to personal estate, the rule always was, that no legatee could give his testimony in *foro contradictorio,* in support of the validity of the will, till he had released his legacy or received the value thereof, and in case of payment, the executor of the supposed will was called upon to release all title to any future claim upon such legatee, who might otherwise be obliged to refund if the will were set aside: (5) The same rule prevailed in our courts of common law with

Of the rule of the spiritual and common law courts, where the witness was a legatee or devisee.

(4) There is no difference in our law, *as to publication,* between codicils and wills; but codicils are said by Justinian, *nullam solemnitatem* ordinationis *desiderare:* which Vinnius comments upon with disapprobation, as not being consonant to the Theodosian code; and complains of the *jejuna quorundam distinctio inter solemnitatem ordinationis et probationis.* Heineccius, however, maintains the distinction thus: *In testamentis condendis testibus opus erat talibus quibuscum olim fuerat testamenti factio in comitiis calatis, quia jure vetustissimo lex erat populi suffragiis perlata, jure novo solemnis mancipiatio hæreditatis. Omnia ergo hic solemnia. At codicilli erant epistolæ. Quis epistolis testes adhibet? quis in iis solemnitatem requirit? valebat hujusmodi epistola, etiam non obsignata, dum de ejus fide constaret: quia enixæ voluntatis preces ad omnem successionis speciem porrectæ videbantur. Testes ergo adhibebantur ab iis, qui nuncupative fidei committebant. Postea autem in scriptis codicillis intestatorum testium opus erat præsentia per L. 1. C. Theod. de test. et codicill. non solemnitatis causa, sed ut testantium successiones sine aliqua captione serventur. Ergo non solemnitatis causa adhibendi, sed probationis causa. Nec aliud voluit Theodosius dum in omnibus codicillis testes requisivit. Vin. Com. lib. 2. tit. 25.*

(5) In the late case of Lees v. Summersgill, 17 Vez. jun. 508. the statute 25 G. 2. c. 6. which has made such release unnecessary, by making void the legacy given to the subscribing witness, was held to extend to wills of personal estate.

respect to the inadmissibility of the testimony of a devisee or person benefited under a will of real estate, to establish its validity; and it appears from the case of Anstey *v.* Dowsing[k], that, if a legatee, who was a witness to a will, refused either to renounce or to receive a sum of money in lieu of his legacy, he could not be compelled by law to devest himself of his interest, and while his interest continued, his testimony was useless.

J. T. made his will, by which he disposed of his real estate, and gave to one J. H. and his wife, 10*l.* each for mourning, with an annuity of 20*l.* to E. H. the wife of J. H. The will was attested as the statute directs, by three witnesses, whereof J. H. was one. The legacies, and satisfaction for the annuity were tendered and refused. And the question upon the special verdict was, whether, or not, the will was well attested according to the statute of frauds. The judges of the King's Bench were unanimously of opinion, that a right to devise lands depended upon the powers given by the statutes, the particulars of which were, that a will of lands should be in writing, signed and attested by three *credible* witnesses in the presence of the devisor: that these were checks to prevent men from being imposed upon: and certainly meant that the witnesses to a will, (who are required to be *credible*) should not be persons entitled to any benefit under that will. And that, therefore, J. H. was not a good witness[l].

It seems also, that the question was started in this case, whether a benefit to a witness at the time of his

[k] Vid. Harris, Inst. Just. lib. 2. tit. 10. s. 11.

[l] Strange 1254.

attestation, should annul his testimony, though, at, or after the testator's death, he should become disinterested by a release of his legacy, or the receipt of the value thereof, and that it was held, that the condition of the witness, *at the time of his attestation*, must be regarded; and that if interested *then*, he could not be a good witness. The doubts and objections agitated in this and in other cases[m], occasioned the statute 25 G. 2. c. 16[n]. to be passed, whereby the contests concerning the force and obligation of the word '*credible*' in respect to the attestation of persons benefited under the will, were finally composed.

Of the opposition in sentiment between Lords Mansfield and Camden, on the import and exigency of the word '*credible*' in the statute.

The inquisitive student, however, will still recur to the perusal of Lord Mansfield's[o] and Lord Camden's arguments[p] on the opposite sides of the question, concerning the import and exigency of the words 'credible witnesses,' used by the statute. He will find Lord Mansfield strenuously of opinion, that though a witness might be entitled to a benefit under a will at the time of the attestation, yet if he became disinterested *before his examination*, his testimony was restored, and the will was supported by his attestation. In his Lordship's judgment, the word '*credible*' could have no meaning beyond '*competent*,' without leading to great absurdities; and in this *general* exposition of the word, Lord Camden coincided, but their difference was this: Lord Mansfield would understand '*competency*' to imply nothing more than what was *tacitly*

[m] Hilliard v. Jennings, Com. Rep. 91. and 7 Bac. Abr. edit. Gwyllim, 329. Price v. Lloyd, 1 Vez. 503. 2 Vez. 374.

[n] See this stat. in the Appendix.

[o] Wyndham v. Chetwynd, 1 Burr. 414.

[p] Hindon v. Kersey, 4 Burn. Eccl. L. 97.

contained in the word witness by itself, (no man being a witness unless he is competent to give his testimony); so that it appeared to his Lordship that the competency was to be seen and adjudged of *at the time, and with reference to the time of examination in court.* Whereas according to Lord Camden the *credibility,* i. e. *competency,* must be regarded as it stood at the time of the attestation. By Lord Mansfield's explanation of the force of the word *credible,* it became a dead letter, and, therefore, his Lordship reduced himself to the necessity of supporting his argument, by supposing the word '*credible,*' to have slipped in through the inadvertency of the framers of the statute, which he denied to be the production of Lord Hale, any further than, perhaps, as being compiled from some of his loose notes unskilfully digested.

His Lordship adverted to the rule of testimony in the Ecclesiastical Courts, and at the common law, where a release payment or tender made the testimony of the witness good. Nice objections of a remote interest, which could not be paid or released, though they hold in other cases, were not enough to disqualify a witness in the case of a will. Thus, parishioners, he said, might prove a devise to the poor of the parish for ever. Interest was no positive disability; it only afforded a *presumption of bias,* and on that ground rendered a witness incompetent; but still, it was *only presumption,* and presumptions only stood till the contrary was made apparent; if the bias were removed, the presumption ceased. That nothing could be more reasonable than to allow this objection of interest to be purged *by matter*

subsequent to the attestation, and previous to the trial.

Lord Camden, on the other hand, in the case of Hindon *v.* Kersey, argued, that the word '*credible*' imported a *necessary* and *substantial* qualification of a witness *at the time of his attestation.* And that if the witness was incompetent *at that time,* nothing *ex post facto* could restore the validity of his attestation; neither could such devisee, or person taking a benefit under the will, be received as a witness for other devisees under the same will: the objection was irremovable, and the *whole* instrument, as far as it concerned real property, was void.

He was of opinion, that the novelty introduced by the statute was the *attestation,* the method of *proving* which was left standing upon the old common law principles; as that one witness might prove what all the three had attested; and, though that witness must be a subscriber, yet that was owing to the general common law rule, that the best evidence must be produced. He considered, therefore, that the statute had principally in view the *quality* of the witnesses *at the time of the attestation* (6). That a will was

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(6) In Brograve *v.* Winder, 2 Vez. jun. 636, an objection was taken to the competence of one of the witnesses to the will, as being interested *at the time of his examination;* but as he had no interest *at the time of the execution of the will and death of the testator,* the Lord Chancellor, without argument, held him to be a good witness.

It may be as well to observe here, that a legatee may be a witness to impeach a will, as in such a case he swears against his own interest. Salk. 691. And before the statute 25 G. 2. c. 6. he was

the only instrument which required to be attested by subscribing witnesses at the time of execution; while leases, marriage agreements, declarations, and assignments of trusts, were only required to be in writing and signed. Those were all *transactions of health,* and protected by valuable considerations, and antecedent treaties. The power of a court of equity was thought sufficient to meet every fraud that could be practised in those cases; but a will was often executed suddenly in a last sickness, and sometimes in the article of death; and the great question to be asked in such case was this,—was the testator in his senses when he made the will[q]? and consequently the time of the execution was the critical minute which required guard and protection. An act so solemn, and often calling for a laborious recollection and investigation, executed at such a time, was pregnant with suspicion. What then, his Lordship said, was the employment of the witnesses? It was to inspect and judge of the testator's sanity before they attested, and if he was not capable they ought to refuse to attest. In other cases, the witnesses were *passive;* here they were *active,* and in truth the principal parties to the transaction. THE TESTATOR WAS INTRUSTED TO THEIR CARE.

The design of the statute was to prevent wills from being made, which ought not to have

[q] Vid. Doe. on dem. Walker *v.* Stephenson, 3 Esp. Ni. P. Ca. 284.

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a good subscribing witness where he took the same legacy by a former will, for then it was indifferent to him which will prevailed, 1 Burr. 427. Lord Ailesbury's case.

been made, and *always operates silently by intestacy*. It is true, continued the Chief Justice, the design of the statute was to prevent fraud; and though no suspicion of fraud appeared in the case before him, *yet the statute had prescribed a certain method,* which every one ought to pursue to prevent fraud[r]. As to the minuteness of the interest, as there was no positive law which was able to define the quantity of interest which should have no influence upon men's minds, it was better to leave the rule inflexible than to permit it to be bent by the discretion of the judge.

Both these cases came before the respective judges, after the statute 25 G. 2. c. 6. had passed; and that of Wyndham *v.* Chetwynd appears to have fallen precisely within the second clause of that statute, the subscribing witness being a creditor, and the will having charged the debts upon the land; probably, however, the suit had commenced in Chancery before the 6th of May, 1751, and so came within the 8th section of the same statute, which left the cases, which were in litigation before that time, to be adjudged and determined as if that statute had never been made.

The case of Doe dem. Hindon *v.* Kersey, in which, the devise being to trustees to dispose of the rents to the poor of a township, the subscribing witnesses were interested as possessing property rated to the poor in that township, was clearly not within the statute 25 G. 2. c. 6.

[r] Vid. in Lea *v.* Libb, Carth. 37. the words of the court.

It will occur to the attentive reader, however, that, although Lord Mansfield was supported by all his brothers, and Lord Camden was over-ruled by those who sat with him, the legislature shewed their sense of the subject to agree with the policy and principles of Lord Camden's reasoning, by extinguishing the interest of the subscribing witness, where he took an interest as devisee or legatee, *at the moment of the attestation.* By this provision of the legislature by their second act, they seem to have declared their intention by the first; and still, in their alteration of the law, regarding the time of the attestation as the particular juncture to which the qualification related, they have made the interest of the individual a sacrifice to the will.

SECTION XV.

Time and Manner of making the Attestation.

That it is enough if the testator *might* see the witnesses whether he *did* actually see them or not.

UPON a feigned issue, tried in the Court of Common Pleas, the question was, whether the will was made according to the statute of frauds? for the testator had desired the witnesses to go into another room, seven yards distant, to attest it, in which there was a window broken, through which the testator might see them. The Court said, the statute required attesting in his presence, to prevent obtruding another will in the place of the true one. It is enough if the testator *might* see, it is not necessary that he *should actually see them* signing; for, at that rate, if a man should turn his back, or look off, it would vitiate the will. Here the signing was in the view of the testator; he *might* have seen it, and that is enough. And they compared it to the case, where the testator lay sick in bed, with the curtain drawn[a], while the witnesses subscribed.

On a trial at bar, where the question was, whether the witnesses to a will had pursued the directions of the statute of frauds, in the manner of subscribing their names, it was resolved, that where the testator lay in a bed in one room, and the witnesses went through a small passage into another room, and there set their names at a table in the middle of the room, and opposite to the door, and both that, and the door of the room where the testator lay, were open, so

[a] Shires v. Glascock, 2 Salk. 688.

that he *might* see them subscribe their names if he would, though there was no positive proof that he *did* see them subscribe their names, there was a sufficient subscribing within the meaning of the statute; because, *it was possible* that the testator *might* see them subscribe; and the court held, that if the witnesses subscribed their names in the same room where the testator lay, though the curtains of the bed were drawn close, it was a good subscribing within this statute[b] (1).

A similar doctrine was maintained by Lord Thurlow in the court of Chancery, in a case circumstanced as follows[c]: Honora Jenkins having a power, though covert, to make a writing in the nature of a will, ordered the will to be prepared, and went to her attorney's office to execute it. Being asthmatical, and the

[b] Davy and Nicholas *v.* Smith, 3 Salk. 395.
[c] Casson *v.* Dade, 1 Bro. C. C. 99.

(1) The notion of the civil lawyers was more rigid and cautious in this respect. The attestation ought to be in *conspectu testatoris*; and further, *non est satis, ut quidam tradiderunt, testes oculatos esse, si testatorem ipsi non videant; forte velo, aut cortina interjecta conspectum adimente, licet vocem ejus audiant: sed necesse est ut faciem ejus videant, ne qua fraus fiat, alio forte subornato, qui vocem testatoris imitando simulet.* *Vinn. Com.* 1. *lib.* 2. *tit.* 10. And Vinnius was of opinion, that a *blind man* (de quo nihil traditum est) could not be a witness because he could not satisfy the law, which required that the testator should be seen by the witnesses, and that they should be able to recognize the testator's signature. The English law, however, is clearly otherwise in this respect, as an acknowledgment of the signing has been held sufficient, as appears above; and it has been adjudged, that it is not necessary to the execution by a blind man that the will should be read over to him in the presence of the subscribing witnesses. Longchamp *v.* Fish, 2 N. R. 415.

office very hot, she retired to her carriage to execute the will, the witnesses attending her; after having seen the execution they returned into the office to attest it; and the carriage was put back to the window of the office, through which, it was sworn by a person in the carriage, that the testatrix might see what passed. Immediately after the attestation, the witness took the will to her, which she folded up and put into her pocket. The Lord Chancellor inclined very strongly to think the will well executed, and the above-mentioned case of Shires and Glascock, was relied upon as an authority. Mr. Arden pressed for an issue, but finding the Lord Chancellor's opinion very decidedly against him, he declined it.

In Broderick *v.* Broderick [a], where the testator devised lands to J. S. and his heirs, and duly subscribed his will in the presence of three witnesses, who went down stairs into another room, and attested the will there, which was *out of the presence of the testator*, the relief afforded to the heir against a release obtained from him by the devisee, under a false assurance that the will was sufficiently executed, was a necessary consequence of the opinion of the Chancellor [b], that the devise was void for want of an execution conformable to the statute. And it was in vain contended for the devisee, that the will, as to the devisor, was *executed*, and that the form of subscribing in the presence of the testator, was only directed by the statute of frauds, to prevent a rash disinherison of the heir; but that since the execution of the will was fully proved, though the circumstan-

[a] 1 P. Wms. 239. [b] Lord Harcourt.

ces required by the statute had not been observed, yet it was the plain intention of the testator, that the devisee should have the estate; and that the devisee having the legal estate, it would be hard to take it from him in equity, and by those means to dispose of the estate against the intent of the testator from the devisee, for want of a ceremony, when the *end* of that ceremony was answered, by its being made to appear, undoubtedly, that the testator did sign and seal this will.

Nor will the subscription of the witnesses in the *same room* always satisfy the statute, or necessarily imply it to be in the testator's presence; for, as was observed by Lord Chancellor Macclesfield, in Longford *v.* Eyre[f], it might be done in a corner of the room in a clandestine and fraudulent way, and then it would not be a subscribing in the testator's presence. But his Lordship further said, that as it was sworn by the witness, that he subscribed the will at the testator's request, and in the same room, that could not be fraudulent, and was well enough.

In a late case, in the King's Bench, it was laid down by the Chief Justice, that it was not necessary that the devisor should actually see the witnesses subscribe: as in favour of attestation it was to be presumed, that if the testator might see he did see. But his Lordship added, that if we get beyond the rule which requires that the witnesses should be actually within reach of the organs of sight, we shall be giving effect to an attestation out of the devisor's pre-

[f] 1 P. Wms. 740.

[g] Doe lessee of Wright *v.* Manifold, 1 Maule and Selwyn, 294.

sence, as to which the rule is, that when the devisor cannot, by possibility, see the act doing, it is done out of his presence.

Thus, therefore, the law upon this subject seems sufficiently settled upon this distinction, that if the attesting witnesses subscribe the will in such a situation with respect to the testator, as that it was not possible for him to have seen the act done by them, such will is void as to real estate for the defect of solemnity in its execution; but if their situation was such as to afford the testator the opportunity of seeing them subscribe, if he chose, their attestation under such circumstances will be good and valid, although in point of fact they may not have been seen by the testator in the very act of subscribing their names.

It is not enough that the testator is corporally present, he must possess his faculties so as to have a mental knowledge of the fact.

The mere corporal presence, however, of the testator, unless his mind and faculties also are present, will not satisfy the statute on this point; for there must be a mental knowledge of the fact, so that, as a subscription clandestinely made in a corner of the same room with the testator was not, on this account, a sufficient attestation, so neither would such subscription in the same room suffice, if the percipience and intelligence of the testator were gone so as to constitute it an act done without his knowledge. On this principle was founded the decision of Right *v.* Price[b], in which case, the form of an attestation was written on the second sheet, and the witnesses put their names to it in the room where the testator lay; but he was in a state of insensibility: and the question was, whether this will was duly executed for passing lands according to the statute of frauds?

[b] Doug. 241.

In support of the will it was argued, that insensibility was something short of death, and if the testator was alive, it could not be said that the will was not attested in his presence. That the question was, whether the testator, having done all that was necessary on his part, and the attestation having been made according to the words of the statute, a fair transaction should be set aside, because a formality required, according to an implied intention of the legislature, has not been complied with; that it did not appear but that the testator might, by possibility, have opened his eyes, while the witnesses were subscribing their names; which, according to the law as laid down in Shires and Glascock, would have been sufficient.

But the court said, that they would lean in support of a fair will, and not defeat it for a slip in form, where the *meaning* of the statute had been complied with; this was the principle of Shires and Glascock's case, and other cases of that sort. But the case then before the court was not one where there was a measuring cast and room for presumption. All the witnesses knew, at the time of the attestation, that the testator was insensible. He was a log, and totally absent as to all mental qualities. That it was usual, in precedents of wills, to say, that the witnesses subscribed at the request of the testator; that indeed was not expressly required by the statute, but the practice shewed the general understanding, and that the nature of the thing implied a request. The attestation in the testator's presence was as essential as his signature, and all must be done while he was in a capacity to dispose of his property. In this case, the testator could not know whether the will that he

had begun to sign was that which the witnesses attested; he was dead to all purposes or power of conveying his property.

Whether an acknowledgment by the subscribing witness to the testator would be sufficient.

It seems not to have been judicially decided, whether an acknowledgment by a subscribing witness to the testator of his hand-writing to the attestation, would be sufficient. In the case of Risley *v.* Temple[1], the facts were, that the testator lying sick in bed, made his will, and signed, sealed, and published it, in the presence of three witnesses, but, being tired, ordered them to go and subscribe it in another room. They went into another room, out of the presence and sight of the testator, and subscribed their names, and then returned and owned their names to the testator, who looked upon the will, and said, '*they have done well.*' But this point was not spoken to in the case according to the report.

It is very plain, however, that to hold such an acknowledgment sufficient, would be in direct opposition to the words of the statute, which, though it does not by the 5th section require the *signature of the testator himself* to be in the presence of the witnesses, does yet expressly direct the *subscription of the witnesses* to be in the testator's presence. And it seems little to be doubted, but that, agreeably to the greater regard for the words of the statute, which now seems to prevail in our courts of justice, such an acknowledgment by a subscribing witness, of his hand-writing to the attestation, made to the testator, after making the subscription out of his sight and presence,

[1] Skin. 107.

would be deemed an insufficient compliance with the statute.

That the witnesses may subscribe at different times.

It has been shewn, that a testator may *write,* and we shall now make it appear from the authorities, that he may *publish* his will at different times, or, in other words, that an attestation made by the witnesses respectively at three different times, if in the presence of the testator, satisfies the law (2). The

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(2) It may be interesting to compare our own with the civil law upon this article. In an early period of the Roman jurisprudence, it was held, that a testament ought to be made *uno contextu,* without any foreign act intervening, and the witnesses were likewise required to attest, without separating, or even discontinuing the act of subscribing, till all was complete. And, indeed, it does not seem that the witnesses were ever released from the necessity of subscribing at one time and in each other's presence. In favour, however, of certain unavoidable interruptions, the Emperor Justinian limited and explained the generality with which the rule had been expressed. In the Sixth Book of the code, tit. 23. 28. the qualification of the doctrine is thus propounded: *cum antiquitas testamenta fieri voluerit nullo actu interveniente, et hujusmodi verborum compositio non rite. interpretata pene in perniciem, et testantium et testamentorum processerit: sancimus in tempore quo testamentum conditur, vel codicillus nascitur, vel ultima quædam dispositio secundum pristinam observationem celebratur (nihil enim ex ea penitus immutandum esse censemus), ea quidem quæ minime necessaria sunt, nullo procedere modo, quippe causa subtilissima proposita, ea quæ superflua sunt minime debent intercedere. Si quid autem necessarium evenerit; et ipsum corpus laborantis respiciens contigerit, id est, vel victus necessarii, vel potionis oblatio, vel medicaminis datio, vel impositio, quibus relictis ipsa sanitas testatoris periclitatur, vel si quis necessarius naturæ usus ad depositionem superflui ponderis immineat, vel testatori vel testibus, non esse ex hac causa testamentum subvertendum, licet morbus comitialis, (quod et*

two leading cases to establish this point are, Cook *v.* Parsons[k], and Jones *v.* Lake[l]. The first of which cases was decided upon a bill of review to reverse a decree of Lord Nottingham in 1682, for a sale of lands subjected by the will to the payment of debts. The lands were devised by the testator to trustees, and their heirs, to set and to farm let, and out of the rents (without saying profits) to pay his debts; and all his debts and legacies being first paid, he gave the surplus to F. S.

[k] Prec. Ch. 185. [l] 2 Atk. 176.

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factum esse comperimus) uni ex testibus contigerit: sed eo, quod urget et imminet, repleto, vel deposito, iterum solita per testamenti factionem adimpleri. Et si quidem a testatore aliquid fiat testibus pauliper separatis, cum coram his facere aliquid naturale testator erubescat, *iterum introductis consequentia factionis testamenti procedere.*

The phrase '*uno contextu*' is not to be understood as relating to the composition of the will, (which it seems might be taken up and prosecuted at intervals, according to the necessary interruptions of business, and as the leisure of the party allowed; as was said to be the law with us, in Carleton *v.* Griffin, above cited) but to the mode of publishing and solemnizing the will, by the formal *nuncupatio testamenti*, or *declaratio voluntatis* to the witness, with the ceremonies of subscribing and sealing by them, and the signing by the testator, which ought all to be done at one time, that is to say, *uno actus contextu*, without the intervention of any act or business foreign to the purpose which the parties were met together upon, which, unless it happened on the natural and necessary occasions alluded to in the passage from the code above extracted, would vitiate the testament, as being inconsistent with the solemnity of its celebration. Thus Vinnius translates '*uno contextu*' into the Greek by μια ὑφη, and αδιαλειπτος, as being applicable not to the composition of the will, but to the publication of it; which is plainly the sense of it, as it stands accompanied in the text of the institutes, "*et testes quidem eorumque præsentia, uno contextu, testamenti celebrandi gratia, &c.*"

This will was written with the testator's own hand, as was proved; and was published in the presence of three witnesses, at three several times, and they all attested it in his presence, but he did not sign it in the presence of the second witness, but only owned the signing to be his hand, and desired him to attest the will, as was proved by that witness. The testator died, leaving an infant heir, and the land was decreed to be sold, and no day given the infant to shew cause against it. One of the objections to the decree was—that this was no good will within the statute of frauds and perjuries, because not attested by all the witnesses at *one* time, and that one of them did not see the testator sign, but only hear him own that it was his hand.

But the Lord Keeper held a publication of a will before three witnesses, *though at several times*, to be sufficient, and thought the writing of the will with the testator's own hand (3), a sufficient signing within the statute, though not subscribed nor sealed by him, but doubted whether acknowledging the subscription to be his own would suffice (4).

In Jones *v.* Lake, the case upon the special verdict was thus; the testator signed and executed his will in December, 1735, in the presence of *two witnesses*, who attested the same in his presence; afterwards, in

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(3) According to the Code 6. 23. 28. the writing of the will with the testator's own hand, dispensed with his signing; but it was added as a condition, *et hoc specialiter in scriptura reposuerit, quod hoc sua manu confecit*; and it dispensed with no other solemnity.

(4) This question has been already discussed, and shewn to have been otherwise determined.

the year 1739, he with his pen went over his name, in the presence of a *third witness,* who subscribed his name *in the testator's presence,* and at his request: and the question was, whether this was a due execution within the statute. For the heir at law it was argued, that the statute requiring three witnesses to subscribe in the testator's presence, must intend *they should be all present together;* otherwise, there was not that degree of evidence which the statute requires; for an attestation of three witnesses, at different times, *has only the weight of one witness.* Witnesses to a will not only attest the due execution of the will, but likewise the capacity of the testator at the time of execution. A man may be sane at the time *two* witnesses attest, and insane when the *third* attests. It cannot be considered as a will, till the third witness has signed, for that completes the act. The will was dated in 1735; suppose lands to be purchased after the date, and before the attestation by the third witness, would the lands pass? "certainly not."

On the other hand, it was argued for the devisee, that a will executed before three witnesses, *though at three different times,* was good; the statute not requiring they should *all* be present at the *same* time. That the requisites under the statute were, that the testator should sign in the presence of three witnesses at least, and that they should attest in his presence. It would therefore be adding new requisites which the act did not mention, and in effect be making a new law.

The Lord Chief Justice Lee said, the case depended upon the words of the statute. The requisites in the

statute, were, that *three witnesses should attest his signing*, but it did not direct that three witnesses should be *all present at the same time.* Here, said the Chief Justice, you have the oath of three attesting witnesses. This is the degree of evidence required by the statute. And the same credit is given to three persons at different times, as at the same time. We cannot carry the requisites farther than the statute directs. The act is silent as to this particular. It would therefore be making a new requisite. The signing is the same act reiterated. The testator went over his name again, and declared it to be his last will. Judgment was accordingly given against the heir at law.

The judges, in the case of Ellis *v.* Smith,[m] admitted the authority of these cases, and drew from them an inference in favour of the validity of the testator's acknowledgment to the witnesses of his hand-writing to the signature of the will. "To strengthen the authorities I have already mentioned, said the Lord Chief Baron Parker, I shall take notice of the cases which allow the witnesses to subscribe at different times; and I think they support the admission of the declaration in question; since the testator is not supposed to run over his name before every witness, but having signed before one to *acknowledge* it only before the rest (5). The same conclusion was drawn by Lord Chancellor Hardwicke, Sir John Strange, Master of the Rolls,

[m] 1 Vez. jun. 11.

(5) In Jones *v.* Lake, (the last case produced,) the testator did run over his name again; but the principle of the decision implied the sufficiency of an attestation, made at three distinct times.

and Lord Chief Justice Willes. The last of whom observed, that the authorities not in point supported the decree more strongly than those in point, for they allowed the attestation and subscription of the witnesses at different times to be good; and the testator is presumed to write his name only before one, and to acknowledge it to be his hand to the remaining two. And in the opinion of the Master of the Rolls, to permit the witnesses to attest at several times, was to admit the asseveration of the testator that it was his will, to be equivalent to signing it before the witnesses; to which Lord Hardwicke added, that he differed from those who thought that the cases which had been mentioned, only supported the case before the court, by consequential reasoning; he thought them directly in point.

It is to be observed, however, that these decisions, in the opinion of the whole court, went too far, and opened the way to frauds, and particularly the Chief Justice observed with great force, that "he had known one man swear, that he did not see the testator sign, and the other two swear that he signed it before the three; so might one man swear, that when he attested the will, the testator was insane; another, that he was sane; and thus an inlet was given to great frauds and impositions. But when they attested it *simul et semel*, they were a check upon each other, and such frauds were prevented (6); nay, said his Lordship, I think

(6) This was certainly the doctrine of the civil law, from which the framers of the statute in question borrowed, in making this provision for preventing the forgery of wills. We have shewn that the words '*uno contextu*' related to the complex ceremony of publication, which was necessary to be done by a *continued* act. The

a *parol* disposition *before three,* full as solemn an act as a will in writing, attested by three *separatim.*" He admitted, however, that the decisions were the other way, and that the point was established.

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attestation, therefore, which was an essential part of the publication, was necessary to be done by the witnesses, *simul et semel,* at the same time, at the same place, and in sight of each other; not meaning, of course, by the *same* time, *eodem instanti,* but *uno actus contextu,* at one juncture, without break or interruption *, as the text of the Code (6. 23. 21.) well explains it, distinguishing at the same time between the act of making and that of celebrating and publishing the will, to which last-mentioned act the words '*uno contextu*' are shewn to be alone applicable. *In omnibus autem testamentis quæ presentibus vel absentibus testibus dictantur, superfluum est* uno, eodemque tempore *exigere testatorem, et testes adhibere, et dictare suum arbitrium, et* finire testamentum; *sed licet alio tempore dictatum, scriptumve proferatur testamentum, sufficiet uno* [*tempore*] *eodemque die, nullo actu* [*extraneo*] *interveniente, testes omnes, videlicet simul, nec diversis* [*temporibus*] *scribere, signareque testamentum. Finem autem testamenti subscriptiones, et signacula testium esse decernimus.* This exactness with respect to the simultaneous performance of the act of publication was retained out of the civil law, or *jus civilis,* when the civil and prætorian law were reduced into agreement, as I have before shewn: for the efficacious form of a will, as ultimately established, was a tripartite constitution. The *necessity* of witnesses, and their *presence* at *one* and the *same* time, was founded on the *jus civilis*—the *subscriptions* by the testator and the witnesses were enjoined by the imperial constitutions—the *sealing* and the *number* of the witnesses, were settled by the edict of the Prætor.

* *All* solemn legal acts and ceremonies were necessary, by the civil law, to be executed without interruption, the common phrase to express which was, '*uno* contextu *absolvi.*'

Section XVI.

Evidence of the Attestation.

IT has been already made to appear, that a will of lands may be sufficiently established in a court of justice, as to the testator's signature, by proof of his acknowledgment thereof. It will be proper now to consider, what is sufficient *proof* of the due *attestation* of such a will, according to the directions of the statute. We have seen that upon a question before the court, whether or not it should be left to a jury, to determine as to the fact of a due attestation in the presence of the testator, where all the witnesses were dead, it was clearly held, that such question was proper for the decision of a jury, who might found their verdict upon mere circumstances and probabilities[a].

In the courts of common law, where a will of lands is produced, it is usual to call but one witness to prove it; but that is said only to be the case where no objection is made on the part of the heir, who is entitled to have all the witnesses examined, yet in such case the heir himself must produce the other witnesses, for the devisee need produce only one, if that one can prove all that is requisite to establish the validity of the will[b]. He must prove that the testator signed, in the presence of himself and the other witnesses, or that he acknowledged his signature to each of them, and that each of the witnesses subscribed in his pre-

In the courts of common law, *one* of the subscribing witnesses may prove the attestation by the others.

And if *all* the witnesses deny their signatures, still the devisee may go in-

[a] Hands v. James, 2 Com. Rep. 530. Croft v. Pawlet, 2 Str. 1109. Bruce v. Smith, Willes 1.

[b] Gilb. Eject. Sect. 8. Holt Rep. 742. Dayrell v. Glascock. Ball, N.P. 264. 1 Esp. N.P. Rep. 391.

to circumstances to prove the due execution of the will.

sence. Where the witnesses have signed separately, as one can only prove his own act, they ought all to be called. If the two other witnesses be called by the heir, and refuse to verify their attestation, still the proof of their hand-writing will be enough, if one of the three can prove the other circumstances of the execution. Indeed, it has been held, that if they *all* swear that the will was *not* duly executed, the devisee may yet go into circumstances to prove the due execution[c]. And if an attesting witness to a will impeach its validity on the ground of fraud, and accuse other subscribing witnesses who are dead, of being accomplices in the fraud, it is competent to the person claiming under the will, to give evidence of their general good character[d].

Whether the evidence of the subscribing witnesses can be received against their own attestation.

It appears, and with the greatest reason, that the evidence of subscribing witnesses against their own attestation has always been received, if received, with the utmost reluctance; and the courts have, on the other hand, been very ready to admit counter-testimony to establish the will against such suspicious and discordant depositions. In Lowe *v.* Jolliffe[e], which was tried at bar, upon an issue of *devisavit vel non* out of Chancery, the three subscribing witnesses to the testator's will, and the two surviving witnesses to the codicil, and a dozen servants of the testator, all swore him to be utterly incapable of making a will, or of transacting any other business, at the time of making his supposed will and codicil, or at any intermediate time. But this evidence was opposed by the depositions of several of the nobility and principal gentry of the county where the testator resided, who

[c] Pike *v.* Badmering. Strange 1096.

[d] 1 Blackst. 365, 416. [e] 3 Burr. 1244, and see 6 East, 195.

had frequently and familiarly conversed with him, during the whole period, and some on the very day on which the will was made; and also of two eminent physicians who attended him, and who all swore to his entire sanity and more than ordinary intellectual vigour (1).

The counsel for the plaintiff also examined to the like purpose the attorney, a person of unblemished reputation, who drew the will; and read the deposition of the attorney, by whom the codicil was drawn and witnessed, (he being dead, and his testimony perpetuated in chancery), who spoke very circumstantially to the very sound understanding of the testator, and his prudent and cautious conduct in dictating the contents of his codicil. Upon the whole, it appeared to be a very black conspiracy, to set aside the will, without any foundation whatsoever; the defendant's witnesses being so materially contradicted, and some of them so contradicting themselves, that the jury, after a trial of fifteen hours, brought in a verdict for the plaintiff, to establish the validity of the will and codicil, after an absence of five minutes. Lord Mansfield then declared himself fully persuaded, that all the defendant's witnesses, except one, being nineteen in number, were grossly and wilfully perjured; and called for the subscribing witnesses, in order to commit them in court, but they had withdrawn themselves. A prosecution of some of them for perjury was strongly recommended by the court; and the three testamentary witnesses were afterwards convicted, and sentenced, each of them, to be imprisoned for six months, to

(1) See some observations of Sir William Grant, the present Master of the Rolls, in Burrows *v.* Locke. 10 Vez. Junr. 474.

stand twice in the pillory, with a paper on their heads, denoting their crime, once at Westminster Hall Gate, and once at Charing Cross, and to be transported for seven years.

It is observable that, although the testimony of these subscribing witnesses against their own attestation was *ultimately discredited,* no doubt was entertained of their competency; as was remarked by the late Lord Chief Justice Kenyon, in commenting upon this case, in Bent *v.* Baker (2) who entirely approved of Mr. Justice Buller's distinction in this respect between *negotiable* and *other* instruments. So that the observation of Mr. Justice Yates, in the case of Alexander *v.* Clayton[a], viz. that "the witnesses ought not to have been admitted to give evidence against their own attestation," seems to have been too strong for the present doctrine, or perhaps incorrectly stated by the reporter.

It is one thing to offer testimony to destroy the validity of an instrument attested by one's own signature and subscription, and another to deny the *fact* of one's own attestation. Lowe *v.* Jolliffe, as above cited, is an example of the admissibility of the former species of testimony as well as of its liability to be impugned. It is plain, upon principles, that a man ought to be admitted to deny what appears to be his own attestation; for to exclude him on a ground of inconsistency and contradiction, is to take for granted against him what is itself a primary object of

[a] 4 Burr. 2224.

(2) 3 T. R. 34. and see the reasons for this distinction in Mr. J. Buller's opinion, pronounced by him in the same case.

proof. But it is equally clear, that his denial may be discredited and overthrown by the counter-testimony of the other witnesses, and that the will may be established against such a denial. Thus in the case of Alexander *v.* Clayton, mentioned above, Mr. Justice Yates observed, that there were many cases where one of the witnesses had supported a will, by swearing that the other two had attested, though they both denied it. And upon the same occasion it was said by Lord Mansfield, "that he had known several cases, both upon bonds and wills, where the attestation of witnesses had been supported by the evidence of the other witness, against that of the attesting witnesses who had denied their own attestation. It would be, added his Lordship, of terrible consequence, if witnesses to wills were to be tampered with to deny their own attestation."

Of the doctrine laid down generally by Lord Mansfield, in Walton *v.* Shelley.

Thus, therefore, the law appears to be well settled and discriminated upon these important points of evidence; and it is to be observed, that the present consideration is confined to the case of subscribing witnesses; and that therefore there is nothing in what has been stated, or produced, which contradicts the maxim of law, as it was recognised, or decided upon in Walton and others *v.* Shelley*, that *no man shall be suffered to give evidence to invalidate his* OWN *instrument;* nor does it seem that Lord Mansfield, in pronouncing his judgment in that case, laid down the rule with greater latitude than accords with the settled distinction, *as to the testimony of subscribing witnesses*, above adverted to. "What strikes me," said his Lordship, "is the rule of law, founded upon

* 1 T. R. 296.

public policy, which I take to be this—that no PARTY who has signed a *paper* or *deed*, shall ever be permitted to give testimony to invalidate that instrument which he has signed." Now it is plain, that a subscribing witness to a deed or will, is in neither case, by force of such subscription, a PARTY to the instrument.

A distinction between the attestation of wills and deeds, in respect to the point under consideration.

It is true, indeed, that the admission of a subscribing witness to a will to invalidate *that* instrument, forms a stronger case than where such witness comes to destroy the validity of a *deed* which he has attested; since, in the latter instance, he attested only the execution, and not the intrinsic or general validity of the instrument; but in the former, the testamentary capacity of the testator, as well as his formal execution, is verified by the subscription of the witness; not to mention also that such subscription is essential to the constitution and perfection of the instrument itself, so that in giving testimony against the validity of the will which he has attested, he comes to overthrow that which he himself was *actively* and *instrumentally* concerned in establishing.

And between *negotiable* instruments and *other* instruments.

It seems probable, therefore, that the consideration of these peculiarities, belonging to the attestation of wills, suggested to Lord Kenyon a foundation for the resemblance, which, in the case of Adams *v.* Lingard[f], his Lordship appeared to think there existed between the case of an indorser of a bill and a subscribing witness to a will, as to the admissibility of their evidence to overthrow the instrument to which they had given credit by their signature. In

[f] Peake Ni. Pr. Ca. 117.

Adams *v.* Lingard, which was the case, of an indorser of a bill, the late Chief Justice said, that he wished the point to be settled in the House of Lords, being then of opinion, that the indorser was a witness proper to be heard, and other judges being of a contrary opinion. He then mentioned a case which was before Sir Joseph Jekyll, many years before, and another, which had been decided since, meaning that of Lowe *v.* Jolliffe above stated, wherein his Lordship said, it had been determined at a trial at bar, that three subscribing witnesses to an instrument might be permitted to deny the validity of it.

But when the question came before the court on a motion for a new trial (his Lordship still adhering to his former opinion) it was said by Buller J. that "the case before them was very different from that of witnesses to a will. The indorser had passed that *negotiable* instrument to the plaintiff as a good and valid security, and it would be attended with consequences most injurious to society, if these securities might be cut down by the persons passing them; it was only for two men to conspire together to cheat all the world." It is remarkable, that in the much considered case of Bent *v.* Baker, which was determined three years before that of Adams *v.* Lingard, Lord Kenyon expressed his entire acquiescence in the distinction as to this point, between negotiable instruments, and deeds and wills.

Of the proof to establish a will of lands in courts of equity.

The reader has been shewn above, that the testimony of one of the three witnesses is enough to prove a will of lands, in a court of common law. He will find the same rule of evidence laid down in early cases with respect to the mode of establishing a will

in the courts of equity. Thus in the case of Longford *v.* Eyre[g], Lord Macclesfield makes the following observation: "The proper way of examining a witness to prove a will as to lands, is, that the witness should not only prove the executing the will by the testator, and his own subscribing it in the presence of the testator, but likewise, that the rest of the witnesses subscribed their names in the presence of the testator; and then *one witness proves the full execution of the will,* since he proves that the testator executed it, and likewise, that the three witnesses subscribed it in his presence."

The settled rule now is, that *all* the witnesses, if living, must be examined.

But in the case of Townsend *v.* Ives[h], which came on about twenty-five years afterwards in the Court of Chancery, where the bill was preferred by the legatees, whose legacies were charged on the real estate, to have the will established, the rule was peremptorily laid down, that ALL the witnesses, if living, must be examined, to prove a will of lands. Thus also Lord Camden, in the above cited case of Hindon *v.* Kersey, in speaking first of the method of proof in a court of common law, says, "one witness is sufficient to prove what all the three have attested; and though that witness must be a *subscriber,* yet that is owing to the general common law rule, that where a witness has subscribed an instrument, he must always be produced, *because he is the best evidence.* This we see in common experience; for after the *first* witness has been examined, the will is always read." But the same judge speaking afterwards of the course of the Court of Chancery in this respect, expresses himself thus: "Sanity is the great

[g] 1 P. Wms. 741. [h] 1 Wils. 1748.

fact which the witness has to speak to, when he comes to prove the attestation; and that is the true reason why a will can never be proved as an exhibit *viva voce* in Chancery, though a deed may; for there must be liberty to cross-examine to this fact of sanity. From the same consideration it is become the invariable practice of that Court, never to establish a will, unless all the witnesses are examined; because the heir has a right to proof of sanity from every one of those, whom the statute has placed about his ancestor."[j]

If one of the witnesses be *dead*, proof of his hand-writing may be read.

But if one of the witnesses be dead, a will may be read, on proof of his hand-writing, though this must be accompanied by positive and satisfactory proof, that he *is* dead. Thus in Bishop *v.* Burton[k], the plaintiff being put to prove the will, the proof was of the hands of the devisor, and of two of the subscribing witnesses, who were proved to be dead; and as to J. B. the third subscribing witness, the witness deposed, that he was credibly informed in the country where he lived, and believed it to be true, that he died two years before, and believed his name subscribed was his proper hand-writing. But the Court was of opinion, that *that* was not sufficient proof to have the will read in evidence.

Whether the hand-writing may be proved

In Grayson *v.* Atkinson[l], an objection was made for the defendant, that one of the witnesses being beyond sea, and the others not having sworn that the

[j] See Ogle *v.* Cook, 1 Vez. 177. all must be examined or a reason given why any one is not. And see Harris *v.* Ingledew, 3 P. Wms. 92. But in Powell *v.* Cleaver, 2 Bro. C. C. 504. Lord Thurlow said the practice had been so; but he doubted whether the rule had ever been laid down so largely.

[k] Comyns Rep. 614. [l] 1 Vez. 459.

where a witness is beyond sea.

testator acknowledged his hand-writing to the third, who was abroad, and there being no proof about him, the will could not be established: on the other side it was contended, that the same credit was to be given to his hand-writing *as if dead.* But the Lord Chancellor Hardwicke doubted thereof, and said, "he did not know that it had been determined, that the same credit was to be given to the hand-writing of a witness beyond sea, as if dead, because it was not necessary to presume the impossibility of getting at him, and he was apprehensive fraud might be used." (3)

In the case of Lord Carrington *v.* Payne[m], however, a question was made, whether, one of the witnesses to the will being abroad, in Jamaica, it was necessary to send out a commission to examine him. His hand-writing was proved; and the other two witnesses were examined. Lord Alvanley, then the Master of the Rolls, held that it was not necessary to have his examination; but that *it was the same as if he was dead.* But his Honour seemed to found this resolution on the submission of the heir, who, he observed, did not make a point of it. He mentioned a case, however, where one of the

[m] 5 Vez. jun. 411.

(3) To obviate the inconvenience which may arise from the death of witnesses a bill may be filed in a court of equity to perpetuate the testimony, in which the complainant prays leave to examine the witnesses, to the end that their testimony may be preserved and perpetuated. The object of the bill is to preserve testimony for future litigation, and is properly brought when the party is in undisturbed possession, and where he has no present opportunity of proving the will against the heir at law.

witnesses being in India, it was held not necessary, but very dangerous, to send the original will abroad. And where, in another case before Lord Chancellor Thurlow, it was argued that one of the witnesses to the will was abroad, his Lordship said[a], he doubted whether the rule had ever been laid down so largely as, that the will *could not* be proved, without examining *all* the witnesses, although the *practice* has been to examine all.

The hand-writing of a witness, who since the subscription has become insane, may be proved.

This rule has been relaxed in other instances, where, to have rigidly adhered to it, would have imposed impossibilities upon persons coming into equity to establish these instruments. As, where a witness to a will of real estate had since become insane, proof of the hand-writing of such witness was allowed[b]. And in a very late case at the Rolls, proof even of the hand-writing was dispensed with, in the case of an old will, which appeared by the date to have been made 30 years before, the testator having been dead above 20 years, and no account being to be obtained of one of the subscribing witnesses. The hand-writing of two of the witnesses was proved: and his Honour observed, that he did not see how a will could be distinguished from a deed as to this point; only that the former, not having effect till the death, wanted a kind of authentication which the other had. That was from the nature of the subject. But he thought the proof sufficient in that case; for in a late case (3) in the Court of King's Bench, an

And in the case of an old will, where no account can be given of a witness, proof of the hand-writing may be dispensed with.

[a] 2 Bro. C. C. 504. [b] Bennet *v.* Taylor, 9 Vez. jun. 381.

(4) Cunliff *v.* Sefton, 2 East. 183. where in an action upon a bond, evidence was offered that diligent inquiry had been made

inquiry of just the same kind was held sufficient, which excluded the question. In that case they had made all inquiry, and could hear nothing of the witness.

SECTION XVII.

Personalty.

WITH respect to personal estate, except the will be made and proved according to the forms required by the 19th, 20th, and 21st sections of the statute, to validate the nuncupative testament, or where it is the case of soldiers in actual military service, (who by virtue of the 23d section of the said statute, may still make nuncupative wills without the necessity of observing the forms to which nuncupative testaments are subjected by the preceding clauses,) all testamentary dispositions thereof must, since the statute of frauds, be in writing.

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after one of the subscribing witnesses, at the places of residence of the obligor and obligee, and that no account could be obtained of such a person, who he was, where he lived, or of any circumstance relating to him, it was held sufficient to let in proof of the *hand-writing of the other subscribing witness*, who had since become interested as administratrix to the obligee, and was a plaintiff on the record.

The Ecclesiastical Courts, to whose jurisdiction the establishment of personal testaments appertain, require no ceremonies in the publication thereof, or the subscription of any witnesses to attest the same. Swinburn seems to have considered it necessary, indeed, that a testament of chattels should be published in the presence of two sufficient witnesses [a]; and Bracton [b] appears to have held the same opinion; or rather, according to Sir William Blackstone, to have copied implicitly the rule of the civil law. For it is not to be doubted, but, that a will of personal estate, if written in the testator's own hand, though it has neither his name nor seal to it, *nor witnesses present at its publication,* is effectual, provided the handwriting can be sufficiently proved [c]. And though it be written by another person, by the testator's direction, without even having been signed by the testator, if it can be shewn to have been made according to such instructions, and to have received the approbation of the testator, it will be effectual to pass the personal estate [d].

Of proving a will in the common and solemn form.

The proof of the will may be in two forms, of which the one is called the vulgar or common, the other is termed the solemn form, or form of law. If the will be not contested, the executor or administrator *durante minore ætate,* or *durante absentia,* or *cum testamento annexo,* may prove it by his own oath, or as it is said, in some dioceses in York, with the additional oath of *one* witness, before the ordinary or his surrogate. But if the validity of the will

[a] Vid. Swinb. on Wills, pt. 1. sect. 3. [b] Lib. 2. c. 26.
[c] Godolph. O. L. p. 1. c. 21.
[d] Limbery *v.* Mason and Hide, Comyns, 452. Gilb. Rep. 260.

be disputed, it then becomes necessary to prove and establish the will in the solemn way, or, as Swinburn expresses it, in form of law; that is, *per testes,* in the presence of such persons as would be interested if the deceased had died *intestate.* Two witnesses must then be sworn and examined upon interrogatories administered by the adverse party. Between which two forms of proving a will, there is a substantial difference of effect, for after an informal proof the executor may be compelled again to prove the will in due form of law, which may be inconvenient if the witnesses are dead in the mean time. The executor may, therefore, if he please, for greater safety, if he himself have an interest in the will, elect to have the will proved in the more solemn form [e], and in such case he must cite the persons who would be interested under an intestacy, to be present at the probation thereof. If the will is only proved in the *common form,* it may at any time within 30 years be disputed [f], but if the solemn form be pursued, and no adverse proceedings are instituted within the time limited for appeals, the will is liable to no future controversy [g].

When a will is proved by the probation of the more formal or solemn kind above alluded to, the civil law rule of establishing all proof upon the testimony of two witnesses, is followed in our Ecclesiastical Courts. And such witnesses must be able, at least, to depose, that the testator declared the writing produced to be his last will and testament, unless where the will or codicil was written by the testator

[e] Burn. Eccl. L. 208.
[f] Godolph. O. L. 62.
[g] 4 Burn. Eccl. L. 207.

himself; in which case, as has been above observed, the validity thereof may be established upon proof of the hand-writing only, but it ought to be by the evidence of such as have seen him write[h]; and though this evidence ought, in general, to be given by two witnesses, yet, if there be one subscribing witness, who appears to attest the fact of the identity of the will, the testimony of a single witness is said to be sufficient. And where the will has been wholly written by the testator, and there are corroborating circumstances, the clear testimony of one witness has prevailed in the spiritual court. The general necessity for the evidence of two witnesses is borrowed from the Roman law; the maxim of which is, that one witness alone cannot be heard, or, in other words, is no witness at all[i]. "*Unius responsio testis omnino non audiatur* (1)."

Of the general necessity for two witnesses to establish a fact in the Ecclesiastical Courts.

We have seen, that notwithstanding the rule of the Roman law, that *nemo testis esse debet in propria causa*, legataries were permitted to give evidence in support of a will, upon the distinction between particular and universal successors; but that by the practice of the Ecclesiastical Courts of this kingdom, no

[h] See the case of Eagleton *v.* Kingston, 8 Vez. jun. 438.

[i] See the case of Thwaites *v.* Smith, 1 P. Wms. 13.

(1) Cod. 4. 20. 9. Where the Ecclesiastical Court proceeds in a matter merely spiritual, or confined to their own jurisdiction, no prohibition lies, if their proceedings are contrary to common law; as if they refuse the testimony of one witness. But if they disallow the proof of a temporal matter, by one witness, though such temporal matter be incident to a matter within their jurisdiction, a prohibition lies from the temporal courts. 1 Show. 158, 172. Shatter *v.* Friend, and see H. H. C. L. 5th edit. and the note (q) by the Editor.

legatee could be received to give his testimony to establish a will of personal estate, until his interest had been removed by his receipt of the value of his legacy, or until he had renounced it, and discharged the executor.[k]

Of the form of the testament.

But as to the *form* of the instrument itself, the Ecclesiastical Courts are not scrupulous. A memorandum or scrap of paper, written[l] by a person in contemplation of death, and with a design to make it operative after that event, may be proved in that court as testamentary; and, if so received, it seems a court of equity will support it. A string of examples might be cited to illustrate this observation; many were produced in the case of Limbery and Mason *v.* Hyde;[m] among which that of Loveday *v.* Claridge is strong to the purpose.

Determinations of the Ecclesiastical Courts on this subject.

The testator intending to make his will, pulled a paper out of his pocket, and wrote down some things with ink, some with a pencil, and though it had no conclusion, but appeared to be a draft which he intended afterwards to finish, (for it was not signed, but had at the end a calculation of his effects, an account of his tea-table, and an order to pay a dividend of stocks;) yet it was held to be a will.

Thus too, in a case where a woman possessed of considerable real and personal property, wrote a letter to an attorney, her friend, giving him an account how she would dispose of the same, and in her ignorant way, added, "*please not to put this rigmaroll*

[k] Vide supra, p. 135.

[l] Vid. Cox *v.* Basset, 3 Vez. jun. 158.

[m] Com. 452. and see Downing *v.* Townsend, Ambler 280. 592.

in till I find it correct—this only by way of memorandum in case I should go off suddenly," and the testatrix survived the writing of that letter three or four months, but took no further steps therein, Sir George Hay was of opinion, that, under the circumstances, such letter could not operate as the will of the deceased; but on an appeal, the Court of Delegates reversed his sentence.

In Cobbold *v.* Bowes, a gentleman gave instructions to his attorney to prepare his will for the disposition of his real and personal estate. The will was accordingly prepared; settled by the testator and engrossed for execution with the usual clauses of attestation. This will was of considerable length, and at the left-hand corner of each sheet of paper was the word '*witnesses.*' Upon the death of the deceased, the will was found with his name subscribed to each sheet, and, opposite to the seal, on the last sheet, but not witnessed. Dr. Calvert, the then judge of the Prerogative Court, was of opinion, that the deceased, *by permitting the clause of attestation to remain,* had bound himself down to a formal execution, and therefore pronounced against the will; but on appeal, the Court of Delegates reversed such sentence, and thereby rendered the will valid as to personal property (2).

To the same effect was that of Wright *v.* Walthoe, cited in Limbery *v.* Mason[a], where therewere three

[a] Com. 452.

(2) See these cases more at large in a note by the Reporter to the case of Matthews *v.* Warner, 4 Vez. jun. 200.

testamentary schedules, whereof one was without date; to the second the words '*in witness*' were subjoined; and the third concluded abruptly; yet being written by the testator, they were declared to be his will. In the same manner, and about the same time, *viz.* in the year 1711, in a case of Worlick *v.* Pollett, before the Delegates, where the testatrix had sent for a person to make her will, and given him instructions for the same, and the will was accordingly drawn, read to, and approved by her, and declared by her to be her last will, and three witnesses were sent to see her execute, the words signed and sealed being already written, but she died before any other execution, it was held a good will before the Delegates, who affirmed the first sentence which had been reversed upon an appeal.

And again, in a cause of Brown *v.* Heath, determined in 1721, where a will of real and personal estate was prepared in order to be executed, though there were several blanks in it, and the testator died before execution; yet it was held a good will of the personal estate, and though more was intended to be done, yet it was adjudged that it should be good for what was done.

But the later determinations at Doctors Commons seem tending to establish a stricter doctrine. It now appears to be agreed, that if a testator leaves an instrument, which, upon the face of it, carries evidence of an intention in the framer to perfect it by some further solemnity, which he died without having superadded, having had afterwards sufficient time and health and recollection to complete it, such paper may be inferred not to have been

intended to operate as it stood, and the omission to perfect it may ground a presumption of a change of mind in the deceased. Thus, also, where a person had written a paper, purporting to be a disposition of his property, to which a clause of attestation was added, but not filled up, sentence has been pronounced for an intestacy upon an inference, from this omission, of change of intention.

Griffin *v.* Griffin (3), determined at the Commons a few years ago, was decided upon similar principles. Richard Griffin executed a testamentary paper, dated 27th September 1777. On the 18th of January 1789, he began a paper, and having written no more than the commencement of what he meant to do, being called away to dinner, he locked up the paper. On the 27th of the same month he died suddenly, while sitting on the bench as a justice of the peace. The questions were, whether this unfinished paper was a revocation of the former paper executed in 1777: or, whether it was to be established substantively, and conjunctively with the former paper. It was determined, that the unfinished paper could have no effect; the testator having lived eight days after making it, in health and capable of business; and not having concluded it, the presumption of law, even if there had been no other paper, would have been, that he never meant to finish it; or that it was intended only as a draft for consideration; and the case was still stronger as there was an executed paper.

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(3) Cited in Matthews *v.* Warner, 4 Vez. jun. 197. note (a) and see *ex parte* Fearon 5 Vez. jun. 644.

The same doctrine is recognized by Lord Eldon, in the late case of Coles *v.* Trecothic[a], who thus expresses himself on the point: "The observation is just, that as to personal estate, if it appear upon the will, that something more was intended to be done, and the party was not arrested by sickness or death, that is not held a signing of the will." It seems, therefore, to be now understood, that not *every* scrap of paper which a man writes in contemplation of death, making mention of intended dispositions of his personal property, will be received in the Ecclesiastical Court as testamentary; but it must appear, and that from the paper itself, and not from extrinsic evidence, that the writer intended the paper to operate as it stood when it was written, without contemplating any *farther act* to be done to give to it its perfection and full authenticity; and this intention, every such paper, if it contains dispositions of personal property prospectively to the decease of the party, will be held to import, unless by its mode of expression or manner of execution, it discloses a suspended intention in the party framing it.

Of the principle on which the Courts act in receiving or rejecting informal papers as testamentary.

But the further act intended to be done, must be such as denotes a suspension of the actual intention to make an operative disposition. In the case of the will of William Huntingdon, the late dissenting minister of Providence Chapel in Gray's-Inn-Lane, an attorney had taken down the dispositions of his property from the mouth of the testator, and afterwards read them over to him, and the same were approved by him, and a fair copy directed to be made

[a] 9 Ves. jun. 249.

and brought to him the next morning to be executed as a will, but the testator died in the course of the night. Dr. Nicholl held this circumstance, of the direction to the attorney to make a fair copy, and bring it next morning to be executed, as conclusive of his having fully made up his mind on the subject of his will, and accordingly pronounced for the validity of the testamentary paper, and refused the application on the part of the next of kin, to have the costs paid out of the estate.

It seems hardly necessary to say, (the proposition being implied in what has gone before,) that the paper must appear to be written with the actual design of disposing after death of the property in question. There must be the *animus testandi*, which is rendered in the Touchstone[p], by the expressions of "a mind to dispose—a firm resolution and advised determination to make a testament; for it is, says that book, the *mind*, not the *words*, which doth give life to the testament." Therefore, continues the same author, "if a man rashly, unadvisedly, incidentally, jestingly, or boastingly, and not seriously, write to say, that such a one shall be his executor, or have all his goods, or that he will give to such a one such a thing; this is no testament, nor to be regarded" (4). Upon the

[p] 404.

(4) A case recently decided at the Commons, raised the question of the *animus testandi* upon a very singular state of facts. It was a proceeding relative to the will of T. N. deceased, an attorney, which was propounded on the part of his two children, who were the universal legatees named in it, and opposed by the widow. N. had been in habits of intimacy with K., they having frequent occasion to transact business together, the former as the solicitor,

whole, therefore, the mind and intention seems to be every thing—the manner nothing. Insomuch, that if

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and the latter as the steward of Sir C. M. Upon these occasions they were in the habit of ridiculing the general prolixity of legal instruments, and of trying their skill in framing them with the greatest possible brevity. On the 30th of July 1803, (the date of the will in question,) N. and K. dined together, and after dinner K. handed a paper into N.'s hands, saying, "it was his will, and asking him if it was not a valid one." N. answered, that it was a very good will, and immediately took a sheet of paper and wrote the will in question in these terms: "I leave my property between my two children; I hope that they will be virtuous and independent, and that they will worship God and not black coats." He then signed it, and giving it to K. said, "There, there is as good a will as I shall probably ever make." After he was gone, K. signed his name as a witness, and put the paper among some papers of his own. N., who was then a widower, afterwards married the defendant.

In the testator's last illness, K., who stated himself to have forgotten the transaction in question, urged him to make his will, to which he answered that "he did not know but that the law would make as good a disposal of his property as he should; but that when he got better he would, in compliance with the desire of his friend, make his will."

N. died of this illness, and the paper in question was the only paper of a testamentary kind found among his papers. Sir J. Nicholl was of opinion, that if the above facts were to be received on the evidence of K., he must pronounce against the will, as wanting the *animus testandi.* He was of opinion that the evidence ought to be received. The evidence of such a witness, however, when in derogation of his own act, should be received with extreme caution. The testator did not appear to intend that it should be witnessed by K., and gave no directions for its preservation. Neither does it appear that he ever made any mention of the paper in question; and his declarations, during his illness, rather indicated an intention to die intestate unless he got better. The court, therefore, though exercising every caution as to the evidence of a witness in derogation of his own act, felt itself bound to pronounce against the will.

a testator, by a paper, subsequent to his will, says he has bequeathed personal property, which in fact he has not bequeathed, the paper may be proved as testamentary, and the property may pass by it[q]. And even an indorsement on a note, "I give this note to A." it is said may be proved as testamentary[r]. But it is worthy of observation, that where a testator had left five testamentary papers, inconsistent with each other, and probate of all had been granted in the Spiritual Court, Lord Eldon regretted that there was no solemnity necessary for personal estate, and observed that he thought it would be expedient to apply the provisions of the statute of frauds to this description of property[s].

Dispositions by nuncupative testaments, where the estate bequeathed exceeds the value of 30*l.*, are laid by the statute of frauds under many restraints. The clauses of the statute relating to the matter, are as follow:

Nuncupative wills.

"XIX. And for prevention of fraudulent practices, in setting up nuncupative wills, which have been the occasion of much perjury, (2) be it enacted by the authority aforesaid, That, from and after the aforesaid four and twentieth day of June, no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof; (3) nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or

Explained by 4 Ann. c. 16. s. 14.

[q] 6 Vez. jun. 397.

[r] 4 Vez. jun. 565. Chaworth *v.* Beech, and see 3 Vez. jun. 160.

[s] 5 Vez. jun. 280. Beauchamp *v.* Lord Hardwicke, 4 Vez. jun. 208.

some of them, bear witness, that such was his will, or to that effect; (4) nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days, or more, next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

"XX. And be it further enacted, That after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.

Probates of nuncupative wills.

"XXI. And be it further enacted, That no letters testamentary, or probate of any nuncupative will, shall pass the seal of any court, till fourteen days at the least after the deccase of the testator be fully expired; (2) nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same, if they please."

Sir William Blackstone observes[t] that the legislature has provided against frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself has fallen into disuse; and is hardly ever heard of but in the only instance where favour ought to be shewn to it,—when the testator is surprised by

[t] Comm. 2 vol. 500.

sudden and violent sickness. The testamentary words must be spoken with an intent to bequeath, and, as the same learned writer observes, not in any loose idle discourse; for he must require the bye-standers to bear witness of such his intention. The will must be made at home, or among his family or friends, unless by unavoidable accident, to prevent impositions by strangers. It must be in his last sickness; for if he recovers, he may alter his dispositions, and has time to make a written will. It must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses; nor yet too hastily and without notice, lest the family of the testator should be put to inconvenience or surprize.

And of the degree of evidence.

It is to be remarked, that the words in this clause are, that "no nuncupative will shall be good, that is not *proved by the oaths of three witnesses at the least,* that were present at the making thereof;: whereby the construction is excluded, which, we have seen, has allowed the publication of a written will of lands to be established by the proof of any one of the three subscribing witnesses. Dr. Shallmer[a], by will in writing gave 200*l.* to the parish of St. Clement Danes: and afterwards, Prew, the reader, coming to pray with him, his wife put him in mind to give 200*l.* more towards the charges of building their church: at which, though Dr. Shallmer was at first disturbed, yet afterwards, he said he would give it, and bid Prew take notice of it; and the next day bid Prew remember what he had said to him the day before, and died that day. Within three or four days after, the Doc-

[a] Phillips *v.* the Parish of St. Clement Danes, 1 Eq. Ca. Abr. 404.

tor's widow put down a memorandum in writing of the said last devise, and so did her maid. Prew died about a month afterwards, and amongst his papers was found a memorandum of his own writing, dated three weeks after the Doctor's death, of what the Doctor said to him about the 200*l.* and purporting that he had put it in writing the same day it was spoken; but that writing which was mentioned to be made the same day it was spoken, did not appear; and these memorandums did not precisely agree.

About a year afterwards, on the application of the parish to the Commissioners of Charitable Uses, and their producing these memorandums and proofs by Mrs. Shallmer and her maid, they decreed the 200*l.* But on exception taken by the executors, the decree was discharged of this 200*l.* and the Lord Chancellor held it not good, because it was not proved by the oath of three witnesses: for though Mrs. Shallmer and her maid had made proof, yet Prew was dead, and the statute in that branch requires not only three to be present, but that the *proof* shall be by the *oath* of three witnesses.

A nuncupative will not be pleadable till probate.

Until probate has been obtained of a nuncupative will, it cannot be set up in pleading against the administrator, as appears by the case of Verhorn *v.* Brewen[x], where an administrator brought a bill to discover and have an account of the intestate's estate; and the defendant pleaded, that the supposed intestate made a *nuncupative will,* and another person executor; to whom he was accountable, and not to the plaintiff, as administrator. But it was decreed, that though there were such a nuncupative will, yet it was

[x] 1 Chan. Ca. 192.

not pleadable against an administrator before it was proved.

Of *altering* a written will by a nuncupative disposition.

No nuncupative disposition, though made and published with the due formalities prescribed by the 19th and 20th sections, can make any alteration in a written will, by reason of the restriction in this particular contained in the 22d clause of the statute. Yet if a legacy given by a written will has lapsed, or was void for some legal objection, such legacy might be the subject of a nuncupative disposition. Thus, where one G. S. (5) on the 2d of September, 1679, made his will in writing, and appointed E., his wife, his executrix, and gave all the residuum of his estate, after some legacies paid, to her, and the wife died in the testator's life-time, who afterwards made a nuncupative codicil, and gave to another all that he had given to his wife, and died, and the single question was, whether this nuncupative codicil was allowable, notwithstanding the 22d section of the statute of frauds; it was resolved by Sir Hugh Wyndham, Justice, Sir Thomas Raymond, and several civilians joined in the commission, that the nuncupative codicil was good; for, by the death of the wife before the testator, the devise of the residue was totally void, and so there was no will as to that part.

The nuncupative codicil was, therefore, in the foregoing case, a new disposition as to the residue, because, as to so much there was no will, its operation being determined. And it was objected, that, by the same reason, if any part of a will in writing was made

(5) Sir Thomas Raymond, 334. before the Delegates at Serjeant's Inn, December 9, 1679.

by force or fraud, the thing so given and specified in that part, may be devised by a nuncupative codicil, and so the will might be altered contrary to the words of the statute: but it was answered by the Court, that if such part of a will was *so* obtained, it was no part of the will, and so such codicil would be no alteration of what was not, but would be an original will for so much. And they further said, that if A. be possessed of an estate of 1000*l.* and by will in writing, gives a part of it as 500*l.* to B. he might give the residue by a nuncupative will, so as he did not change the executor.

It has been held, that a disposition, not valid as a nuncupative will, for want of the observance of the formalities required by the statute, may be supported as a trust in equity. The case cited in support of which proposition, is that of Nab *v.* Nab[y], where a daughter, having deposited 180*l.* in the hands of her mother, made her will, and gave several legacies, and made her mother executrix, but took no notice of the 180*l.*; but afterwards, by word of mouth, desired her mother, if she thought fit, to give the 180*l.* to her niece; and on a bill filed by the niece for this sum, it was proved in the cause, for the plaintiff, that the daughter, after making the will, had said, she had left her niece 180*l.* as a legacy, but the parol declaration of the daughter appeared only by the answer of the mother upon oath.

It was agreed, that this was not good as a nuncupative will, being above 30*l.* and not reduced into writing within six days after the speaking, as the statute of frauds requires. But the mother was decreed to be a trustee for the niece. I find no other case that comes up to this doctrine, and, perhaps, the courts

[y] 10 Mod. 403. Gilb. Eq. Rep. 146.

will not hereafter, if the point should arise, be disposed to be guided by a single precedent, so opposite to that feeling of regret which, of late, they uniformly express in being forced into a departure from the plain and wholesome provisions of the statute, by the stress of authorities.

Of soldiers' and seamen's wills.

By the 23d section of this statute, soldiers in actual military service, and mariners and seamen at sea, are excepted out of the clauses restraining the testamentary power, in respect to personal estate. Soldiers may still, therefore, make nuncupative wills, or revocations of personal estate, and dispose of their goods, wages, and other chattels, without the forms required by the law in other cases. And by statute 5th William 3. c. 21. sect. 6. the probate of any common soldier, was and continues to be exempted from the duties imposed by that act. With respect to seamen, however, the power of making nuncupative wills left to them by the statute of frauds in the unfettered state in which it stood previously to that statute, has been laid under restrictive provisions by subsequent statutes, for their better security and protection against fraud and imposition. The regulations which regard this object will be found in the abstracts of the statutes, 26 Geo. 3. cap. 63. and 32 Geo. 3. cap. 34. subjoined to this volume, for the convenience of reference.

Section XVIII.

Charitable Uses.

Statutes of mortmain.

A GIFT in mortmain was a phrase signifying a donation of lands or tenements to corporations, sole or aggregate, and implying that by such a gift as well

the fruits of tenure due for such property to the Lord of the fee, as the services due out of such fees for the defence of the realm, became extinguished and lost, and the lands were as unproductive as if they were in the hands of a dead man. By Magna Charta it was therefore provided, that "it should not be lawful for any one to give his lands to any religious house, and to take the same again to hold of the same house; nor should it be lawful to any house of religion to take the lands of any, and to lease the same to him from whom they received it. And if any from thenceforth should give his lands to any religious house, and thereupon be convict, the gift should be utterly void, and the land should accrue to the Lord of the fee."

A great many subsequent statutes became necessary to defeat the devices of the ecclesiastics, (who, in early times, were the persons most learned in the law,) the object of which was to elude restraints which went in a great measure to cut up the sources of their wealth and accumulations. Thus the statute de religiosis, 7 Ed. 1. st. 2. after reciting the prevailing artifices whereby the former prohibition had been evaded, ordained that "no person, religious or other, whatsoever he be, should buy or sell any lands or tenements under the colour of gift or lease, or receive by reason of any other title, whatsoever it be, or by any other craft or engine, lands or tenements, under pain of forfeiture of the same." But this statute being held to extend only to gifts, alienations, and other conveyances, the ecclesiastics evaded it, by pretending title to the land which they were desirous of obtaining, and so recovering it in an action, by collusion with the tenant[a]. By the 13th Ed. 1. c. 32. they were precluded from acquiring lands by

[a] 2 Inst. 75.

purchase, gift, lease, or *recovery;* whereupon they resorted to the method of causing the lands to be conveyed to other persons and their heirs, to the use of them and their successors; which answered for some time, till by the statute 15 Ric. 2. c. 5. this was also enacted to be mortmain, and within the forfeiture of the statute de religiosis. But as the statute of Richard was held only to extend to *corporations*, the statute 23 H. 8. c. 10. carried the prohibition to parish churches, chapels, guilds, fraternities, commonalties, companies, or brotherhoods, without corporation.

But it still continued to be held[b] that lands might be given to any persons and their heirs, for the finding of a preacher, maintenance of a school, relief of maimed soldiers, sustenance of poor people, reparation of churches, highways, bridges, causeways, discharging the poor inhabitants of a town of common charges, for the making of a stock for poor labourers in husbandry and poor apprentices, and for the marriage of poor virgins, or for any other *charitable uses*. And it was further held, that by obtaining proper licences from those who would be entitled to the forfeiture (1), alienations in mortmain might still be made, as appears from the preamble of the stat. de

[b] 1 Rep. 26.

(1) These grants in mortmain were never avoided so as to let in the heirs at law; but the title by the forfeiture was given to the King or the mesne lords. The Statute of Wills, 32 H. 8. c. 1. gave a general power of devising, but the explanatory act, 34 H. 8. c. 5. excepted corporations; so that devises to corporations were *void*, and could not be dispensed with by *licence;* and by consequence let in the *heir*, from the passing of the stat. of 34 H. 8. c. 5. to the 43 El. c. 4. except where there happened to be a custom for devising in mortmain. See the Year Book, 45 Ed. 3. 26.

religiosis[c]. The Kings of England for the most part grounded their pretensions to this power of licensing on the right, asserted by them to be inherent in the crown, to dispense with Acts of Parliament: which dispensing power was found to produce such dangerous consequences in the exercise thereof by James II. that in the first year of the reign of William it was enacted, that no dispensation by non obstante to any statute should be allowed, but that the same should be held void and of none effect, except a dispensation be allowed in such statute[d]. But by the subsequent statute 7 and 8 William 3. c. 37. power to licence in mortmain was expressly given to the crown, and the 2d and 3d Anne, c. 11. enabled any person, by deed enrolled, to give to the corporation for augmenting the maintenance of the poorer clergy, lands or goods, without licence.

By the 43 El. c. 14. special provision was made by Commissioners, to be named by the Lord Chancellor or Chancellor of the duchy of Lancaster, within the county palatine, to enquire by the oaths of twelve men into all charitable gifts and appointments, and the management and application of them, and to make orders and decrees concerning their administration: which statute was construed to supply all defects of assurances, where the donor was of a capacity to dispose, and had an estate in any way disposeable by him: as if a copyholder disposed of copyhold lands to a charitable use, without surrender, or tenant in tail conveyed without fine, or a reversion was granted without attornment, all such like defects were sup-

[c] 2 Inst. 74. and see the statutes 18 Ed. 3. st. 3. c. 3. 17 Car. 2. c. 3.

[d] 4 Hawk. P. C. 348. Harg. Co. Litt. 120. n.

plied by this statute, and considered as good by way of appointment (2).

Charitable gifts; favour shewn to them.

The Court of Chancery will relieve by original bill upon a gift to charitable uses within the statute; and, proceeding on the principle of the statute, has shewn great favour to charitable donations. Thus a legacy given *generally* to a *public charity* has been considered as sufficiently certain, and the executors have received the directions of the Court as to the disposal of it[e]. And where a charge of 1000*l.* on a manor was to be applied to such charitable uses as the testator had by writing under his hand directed, equity supported the bequest, though no such writing was found[f]. Thus also where there was a gift of the residue of personal estate to such charitable uses as the *executor* should appoint, though the executor died in the life-time of the testatrix, the devise was carried into effect[g]. And a devise to charitable uses, declaring no use, has been supported; in which case the King appoints under his sign manual[h]. So also where the charity has been against the policy of law, the same prerogative holds; as where it was

[e] 1 Bro. C. C. 13. Widmore *v.* the Governors of Queen Anne's bounty.

[f] 1 Vern. 224. Attorney General *v.* Syderfin.

[g] 3 Bro. C. C. 517. Moggridge *v.* Thackwell.

[h] Ambler 712. Attorney General *v.* Herrick.

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(2) That devises to corporations were under that statute considered good by way of appointment, See Hob. 136. Moor, 888. 1 Lev. 284. But note that the words 'limit and appoint' in the statute did not carry the legal estate, but operated only as a gift of the utile dominium, to bind the legal estate in the hands of the heir.

to establish a jesuba to teach the Jewish religion[i]; or to educate poor children in the Roman Catholic faith[k]. And where a charity has been so given as that there can be no objects of it, it seems that the Court will order a different scheme to be laid before it[l]. Thus where a trust was created for the propagation of the Christian religion, among the natives of New England, there being no infidels to convert within the intended limits, and the colleges which were appointed to administer the charity having become subject to a foreign power, the master was directed to propose a plan de novo for the application of the produce of the estates according to the general intentions of the testator[m]. Thus also, upon the same principle of favour, where a residue of personalty is left to charitable uses, which proves to be more than sufficient for the object, if it appear to be the testator's intention to dispose of the whole surplus that way, the remainder will be applied to similar purposes[n]. The Court is also very indulgent to charity cases in matter of form. Thus where the information prays a wrong relief, the Court will give such relief as will do justice[o], and holds out its assistanee to charities under circumstances in which it would not give relief in ordinary

[i] Ambl. 228. Da Costa *v.* De Pas. Reg. lib. A. 1754, fol. 309.

[k] 7 Vez. Jun. 490. Cary *v.* Abbot.

[l] 3 Bro. C. C. 166. Attorney General *v.* Oglander.

[m] 3 Bro. C. C. 171. Attorney General *v.* the City of London.

[n] 3 Bro. C. C. 373. Attorney General *v.* the Earl of Winchelsea. See this doctrine of cy pres as applied to the execution of a charitable use, where the express object fails, in 7 Vez. Jun. 324. Bishop of Hereford *v.* Adams, 11 Vez. Jun. 367. Attorney General *v.* Whitely; and see Digest xxxiii. Tit. 2. de usu et usufructu legatorum.

[o] 1 Vez. 12. 43. 413. 11 Vez. Jun. 247.

cases [p], and often gives the relators costs beyond the taxed costs [q].

The statute 9 Geo. 2. c. 36. enacts, "that from the June 24, 1736, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled, to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever; unless such gift, conveyance, appointment, or settlement of any such lands, tenements, or hereditaments, sum or sums of money, or personal estate (other than stocks in the public funds) be made by deed, indented, sealed, and delivered, in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor, (including the days of the execution and death) and be enrolled in his Majesty's High Court of Chancery, within six calendar months next after the execution thereof; Statute of Geo. 2. called the Mortmain Act.

[p] 11 Vez. Jun. 367. And as to the extent and comprehension of the term 'charity' in a proper legal sense, and what description of objects are brought within the same indulgence, see 10 Vez. Jun. 522. Morice v. Bishop of Durham, and the case of Downing College, in Wilmot's opinions and judgments. See also Duke, Ch. 10. sect. 2. for the adjudged cases on the great enabling statute, 43 El. c. 4. wherein the writer expounds what is a good charitable use within that statute. See also Poph. 139.

[q] 7 Vez. Jun. 425.

and unless such stocks be transferred in the public books usually kept for the transfer of stocks, six calendar months at least before the death of such grantor or donor, (including the days of the transfer and death) and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him." And by the 3d section, all gifts or transfers made in any other manner or form than is directed by this statute, are declared to be void. By the 2nd section, gifts or transfers for valuable consideration actually paid, and bona fide made, are excepted. The 4th section provides that the Act shall not extend to make void the dispensations of any lands, tenements, or hereditaments, or of any personal estate to be laid out in the purchase of any lands, tenements, or hereditaments, which shall be made in any other manner or form than by this Act is directed, to or in trust for either of the two universities, or any of the colleges or houses of learning within either of the said universities, or to or in trust for the colleges of Eton, Winchester, or Westminster, for the better support and maintenance of the scholars only upon the foundations of the same colleges. But by the succeeding section these colleges are restrained from holding or enjoying more advowsons than shall be equal in number to a moiety of the fellows or persons stiled or reputed as fellows, or where there are no fellows or persons reputed as fellows, to a moiety of the students on the foundation, not computing advowsons given for the better support of the headships of any of the said colleges in the number.

In the case before Lord Hardwicke, of the Attorney General *v.* Weymouth[r], his Lordship stated with great distinctness the purview of the statute. "It is insisted," said his Lordship, "that the true intention of the Act was, according to its title, to restrain the disposition of lands, whereby they became unalienable; and that this was the only intention of the Act. But I think the intention of the Act is taken up much too short; for the title is no part of the Act, and has often been determined not to be so, nor ought it to be taken into consideration in the construction of this Act; for originally there were no titles to the Acts, but only a petition and the king's answer; and the Judges thereupon drew up the Act into form, and then added the title; and the title does not pass through the same forms as the Act itself, but the speaker, after the Act is passed, mentions the title, and puts the question upon it: and therefore the meaning of this Act is not to be inferred from the title, but we must consider the Act itself. It first takes notice that gifts and alienations of lands in mortmain are prohibited by divers wholesome laws, as prejudicial to the common utility; and then it proceeds, that nevertheless this public mischief has greatly increased, by many large and improvident alienations or dispositions, made by languishing or dying persons, or by other persons, to uses called charitable, to take place after their death, to the disherison of their lawful heirs. The reason of this statute was to hinder gifts by dying persons out of a pretended or mistaken notion of religion, as thinking it might be for the benefit of their souls, to give their lands to charities, which they paid no regard to in their life-time; and therefore

Lord Hardwicke's exposition of the purview of the Mortmain Act.

[r] Ambl. 20. and see the Collectanea Juridica, 433.

the Act of Parliament has not absolutely prohibited the disposition of land to charitable uses, but left it to be done by deed executed a year before the death of the grantor, and enrolled within six months after execution. The legislature blended the two inconveniences together: the act of languishing and dying persons and the disherison of heirs" (3).

Devise of lands to be sold, and the money to go to a charity, within this act.

In this case of the Attorney General *v.* Lord Weymouth, the devise was of land to be sold, and the residue of the money after payment of debts, &c. was to go to a charity. And though such a devise does in contemplation of equity usually convert the real into personal property, yet as the statute had expressly provided not only that lands themselves should not be given to charitable uses, but that they should not be charged or incumbered for such purposes, a devise of lands to be sold and the money to be laid out in charitable uses, was considered as within *both* prohibitions, for here the lands were devised expressly for the ultimate object of a charity, and furthermore these lands were charged for a charitable use. It was to be considered too, that it was a gift of the rents and profits till a sale; and how long such sale might be postponed nobody knew; for no man had a right to compel the trustees to sell, if they paid the debts and legacies, but the charity; so that being a devise of the rents and profits it was in effect a devise of the

(3) The statutes of mortmain, and the law as to perpetuities, were sufficient before the statute, 43 El. c. 4. to prevent lands from being rendered unalienable. The 43 El. c. 4. revived the power as to charitable uses; and for preventing the abuse of this only method remaining of granting in perpetuity, the statute 9 G. 2. c. 36. was enacted.

lands themselves. And as to the devise of the money arising from the sale, it was not thought necessary to the determination of the question upon the statute, to say whether it should be considered as a devise of the land or of money. If the Act were not in the way, the persons intitled to the residue might come and pray to have the land in that Court instead of the money, and might have retained it as land; and as the testator had given them the profits till sale, he had made them owners in equity of the estates. But it was not necessary to rely upon these grounds, since, whether the thing devised were considered as land or money, for the reasons above-mentioned the devise was void.

Mortgages, terms of years, and money secured on tolls or rates, not devisable in mortmain.

So likewise although a mortgage is considered as personal estate in equity, and a term of years is personal both at law and in equity, yet a devise of such subjects for a charitable use is not good within this statute, the words being, that the *lands* shall not be conveyed or settled *for any estate or interest whatsoever, or any ways charged or incumbered in trust or for the benefit of any charitable use*[s]. So neither can money secured upon tolls or by assignment of poor rates or county rates, pass under a bequest to a charity, for they all come out of the realty[t], and the same doctrine has prevailed in respect to a lease under the Crown of the right to lay mooring chains in the river Thames[u].

Money given to be

Money given to be laid out in lands is within the

[s] 2 Vez. 44. Att. Gen. v. Meyrick. Ambl. 155. Att. Gen. v. Graves.

[t] 10 Vez. Jun. 41. French v. Squire.

[u] Ambl. 367. Negus v. Coulson.

laid out in lands, within the words of the act. Exceptions.

words of the Act; but where a bequest was made to charitable uses to be secured by the purchase of lands of inheritance *or otherwise*, it was determined that such devise was good by force of the words *or otherwise*. For if a devise in a will is in the disjunctive and leave to the executors two methods of doing a particular thing, the one lawful and the other prohibited by law, the Court cannot say, that because one method is unlawful, the other is so too, and therefore the whole bequest is void. If one is lawful that *must* be pursued and take effect. And though some stress at the bar was laid upon the words in the will directing the benefit to be *for ever*, yet the Lord Chancellor would not allow any weight to the objection; and he mentioned that there might be annuities not payable out of land that might have probable continuance in perpetuum, as Sir Thomas White's charity, which was a disposition of money to be employed in continual rotation in loans of several sums to poor tradesmen for stated periods; and any man might by will give a perpetual charity in this manner at this day. And the words heirs and assigns import no necessity for a purchase of lands; upon which part of the argument his Lordship said he would suppose that an obligor bound himself, his heirs, executors, and administrators, in a sum of money to a Papist, who obtained judgment on the bond and took out an *elegit*, in such case it had been held at the assizes that the Papist could not maintain ejectment, and yet the bond was good to bind the person of the obligor and his representatives, but not to charge his lands, or his heirs who represented him in his landed capacity.

Money bequeathed to the corporation of Queen Anne's bounty, because, by the 16th rule of that cor-

poration, it is to be placed out in the public funds till laid out in proper purchases of *lands*, was in one case held within the Act[w]. But in Grayson *v.* Atkinson[x], where a testator gave 40*l.* to be applied towards procuring Queen Anne's bounty; and till that could be obtained the interest of the same was to go towards augmenting the curate's salary; though the rule of the commissioners of the bounty was, that if any body will give 200*l.* they will add 200*l.* more, the whole to be laid out in land; Lord Hardwicke thought it hard to extend the statute of mortmain to that case; and as the testator had not expressly directed the money to be laid out in land, he would consider it as a legacy of money, and direct it to be laid out in the funds; which, he said, would not prevent the end designed of procuring the Queen's bounty; for the commissioners might, nevertheless, lay out their proportion of the augmentation money in land: the secretary to the commissioners having reported that though the rule was as above stated, yet there was another rule or bye-law—that the donations of testators should have effect.

Upon similar principles to those which prevailed in the last-mentioned cases, it has been determined (4) that where a man devised money to a charity, and

[w] Ambler, 637. Widmore *v.* Woodroffe. [x] 2 Ves. 454.

(4) Grimmett *v.* Grimmett, Ambl. 210. Collectanea Juridica 1 Vol. 454. But in the case of Grieves *v.* Case, 4 Bro. C. C. 67. Ashhurst and Eyre, Lords Commissioners, held that a direction to place money *at interest*, until an eligible purchase of land could be made, was holden to be within the statute. And they observed that Grimmett *v.* Grimmett turned upon a very nice criticism of the expression.

directed it to be laid out in the public funds, till the whole could be laid out in lands to the satisfaction of his trustees, such devise was not within the statute under consideration: for though, if a person directed money to be laid out in lands to a charitable use, it would be void, yet in this case the Court would order the money to be placed in the funds till the purchase was made. And so also where a man gave it in such a manner as that the land to be purchased was the final end of the thing given, yet where there was sufficient room for the Court to say there was a discretionary power in the trustees to lay out the money one way or another, either in the funds or in lands, such devise ought to be held good upon the same principle on which the case of Soresby *v.* Hollins was decided. Here the direction was to lay out the money in the funds until it could be laid out in lands to the satisfaction of the trustees. When could that be? Not while the statute of 9 Geo. 2. was in force. To do so would be to act in opposition to their trust. And in a late case in the King's Bench where there was a devise to trustees, of land to be applied by them and their successors, and the ministers for the time being of a Methodist congregation, as they should from time to time think fit; it was clearly held not within the statute, and that the trustees might recover at law, however the Court of Chancery might afterwards direct the application of the fund[y].

A devise for the support or repair of what is already in mortmain, good.

To support that which at the time of the will was in mortmain, having been originally given before the statute, is held to be a legitimate object of a will; as where a bequest was made of 200*l.* to repair a free

[y] 6 East, 328. Doe on dem. Toone and West *v.* Copestake.

chapel[a]; but ground cannot be purchased for the purpose of erection[a]. It has also been decided that where before the statute a testator devised the whole profits of an estate to a charity, if the rents at any time after the statute should be increased, they must go to the increase of the charity[b].

But in a case[c] where money was given to build a church where a chapel stood, and the Bishop dissented, the same favouring maxims which seem to have prevailed in many other cases where the object has failed, were not adopted by Sir Lloyd Kenyon, Master of the Rolls, who refused to apply the money towards repairing, or otherwise, saying that the intention must be implicitly followed, or nothing could be done. And in the case of Mog *v.* the President of Bath Hospital[d], though Lord Hardwicke said, that since the statute of mortmain, 9 Geo. 2. c. 36. he had endeavoured to give charitable legacies effect as far as he could (5); yet he would not set up new rules

[a] Ambl. 651. Harris *v.* Barnes, same *v.* Nash.

[a] Ambl. 751. Att. Gen. *v.* Hyde. 3 Bro. C. C. 588.

[b] Ambl. 190. Att. Gen. *v.* Johnson. Ambl. 201. Same *v.* Sparks, and see 7 Vez. Jun. 340.

[c] 1 Bro. C. C. 444. Att. Gen. *v.* Bishop of Oxford. See also 2 Bro. C. C. 428.

[d] 2 Vez. 52.

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(5) Where a sum of money was left towards establishing a school, Lord Loughborough thought that though under this disposition he could not direct any part to be laid out in land or building, yet the master might teach in his own house or in the church. And he ordered a scheme to be laid before the Master in Chancery which would not include the application of any part of the dividends to the purchase or renting of land. 4 Bro. C. C. 526. Att. Gen. *v.* Williams.

Assets not marshalled in favour of a charity.

to avoid that statute. And his Lordship refused to marshal assets in favour of a charity, or, in other words, to throw the debts and legacies on the real estate, in order that the personal estate might be applied to the charitable use[e]. And though in the Attorney General *v.* Caldwell[f], where a testator willed the residue of his personal estate consisting of his effects, annuities, *mortgages,* bonds, and notes, to be sold, and the produce given to a charity, the devise of the mortgages being void, the court ordered them, as being part of the residue only, to be first applied in payment of debts, so as to leave a larger fund for the charity, yet Sir Lloyd Kenyon, in a subsequent case[g] declared he could not recognize the distinction between a specific gift of a mortgage, and a gift of a residue in which it is comprised. In both cases it was an interest in land which could not pass by the statute, but must go in favour of the parties legally intitled to the benefit of it. And he ordered the debts, legacies, and costs of the suit, to be paid out of the testator's general personal estate, and out of the monies secured upon mortgage pro rata, and the residue of the mortgages to go to the next of kin.

It never has been doubted since the statute of Geo. 2. that a plain direction in a will to purchase land for a charitable use is void by the statute. But a bequest of money to be laid out in repairing what was already in mortmain, or even in building upon land already consecrated and appropriated, as in or towards re-building a church or a parsonage-house, has been determined to be clear of the statute

[e] 2 Vez. 52. Ambl. 614. 4 Bro. C. C. 153. [f] Ambl. 635.
[g] Att. Gen. *v.* Earl of Winchelsea, 3 Bro. C. C. 373.

above-mentioned[h]. And it seems that if a bequest of money be made, to be disposed of to a charitable use, leaving the mode of disposition undefined, there is nothing in the statute to restrain the trustees from laying out the money in the purchase of land, since by the 2nd section of the last-mentioned statute, purchases for valuable consideration are expressly saved. But if there is occasion for coming into a Court of Equity for direction, that Court will not direct a purchase of land. Lord Hardwicke's opinion, as expressed by him in the case of Vaughan *v.* Farrer[i], was, that a bequest of money for *erecting* a hospital or school, was not within the mortmain Act; because it did not necessarily follow that any new purchase of land should be made for the purpose, which might have been equally well accomplished by building upon land already in mortmain, or by a gift of land, or by hiring a house. In another case[k] it was said that such a bequest to erect a school was good if any piece of ground already in mortmain, or as a mere gift from private generosity, could be procured. But in a subsequent case[l] where the circumstance of there actually being a piece of land in mortmain in the parish where the charity was to be erected was much insisted upon, Lord Apsley, Chancellor, said, that directions in a will to erect a school-house in general imports an intention to purchase; and though it appears that there is a vacant piece of ground in the parish, the will does not point at that piece of ground. It does not say to repair or build a

Where the mode of disposition is undefined, it seems a purchase may be made for value by the trustees.

[h] 2 Vez. 189. N. Brodie *v.* the Duke of Chandos, 1 Bro. C. C. 444.

[i] 2 Vez. 187. [k] Att. Gen. *v.* Bowles, 2 Vez. Jun. 547.

[l] Att. Gen. *v.* Hyde, Ambler, 751.

school-house on that piece of ground. And his Lordship dismissed the information.

A bequest to *erect* imports a purchase.

Other cases have been equally opposed to Vaughan *v.* Farrer, and the Attorney General *v.* Bowles. And the doctrine seems now to be settled that a bequest to *erect*[m] a charitable foundation imports prima facie, that land is to be bought, unless the testator by his will manifests his purpose that it is to be otherwise procured, or expressly adverts to land already in mortmain[n]. The case of Chapman *v.* Brown[o], in which there was a trust for building or purchasing a chapel, where it might appear to the executors to be most wanted, and if any overplus, it was to go to a faithful gospel minister, not exceeding 20*l.* per annum, and if any further surplus, for such charitable uses as the executors should think proper; though standing by itself, a bequest of a residue to such charitable purposes as the executors should think proper was a good bequest, yet the whole trust was declared void: for the bequest to purchase was clearly void by the words of the Act; the trust to *build* had been also established to be within the Act; that bequest therefore fell to the ground: then the bequest on behalf of the minister, as being clearly intended for a minister of the chapel so directed to be built, could not stand as the thing failed with which it was inseparably connected[p]. And lastly, although standing

[m] Lord Hardwicke seemed to think that to *erect* might be taken as meaning to found or endow.

[n] 8 Vez. Jun. 191. Att. Gen. *v.* Parsons; and see 3 Bro. C. C. 588.

[o] 6 Vez. Jun. 191.

[p] 1 Vez. 534. Att. Gen. *v.* Whorwood. See 10 Vez. Jun. 534.

by itself, a bequest of a residue to be employed in such charitable purposes as the executors shall think proper is a good bequest; and supposing it had been legal to bestow the money as testatrix had directed in the two first instances, after such purposes had been answered, there would have been a good bequest of this residue, yet as the prior bequest had failed which was to constitute this residue, and as it was impossible to ascertain how much would have been employed in building the chapel, and no direction could be framed for the master to proceed upon on a reference to him, the testatrix having given no ground for inferring what kind of chapel was intended, this ulterior bequest was held to be void for uncertainty; and the real estate was decreed to the heir at law, and the personal to the next of kin (6).

How general charitable bequests, without any specification of the objects, are dealt with in equity.

And what the legal notion is of charitable purposes.

Where property is left generally in trust for charitable uses without defining them, the Court of Chancery will uphold such a trust as a valid bequest, but then the application either by the trustees, or the Crown, must be to purposes expressed in the statute 43 El. c. 9. or purposes analogous. If the charitable purposes are defined in the will, they must be such as the law recognizes as charitable purposes. But a bequest in trust for such objects of benevolence and liberality as the trustee in his own discretion should most approve, cannot be supported as a charitable

(6) The trust of an annuity for a charity charged upon a devised estate being held void under this statute, it was ruled that the annuity did not pass by the residuary disposition, but sunk for the benefit of the specific devisees, 12 Vez. Jun. 497. But note, there was an express exception out of the residue of what he had before disposed of.

person shall have any child or children under the age of 21 years, and not married at the time of his death, it shall be lawful for the father of such child or children, whether born at the time of the decease of such father, or at that time in ventre sa mere, or whether such father be within the age of 21 years or at full age, by his deed executed in his life-time, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner, and from time to time, as he shall think fit, to dispose of the custody and tuition of such child or children, during such time as he or they shall respectively remain under the age of 21 years, or any lesser time, to any person or persons, in possession or remainder, other than popish recusants: and such persons to whom the custody of such child shall be so disposed or devised, may maintain an action of ravishment of ward or trespass against any person who shall wrongfully take away or detain any such child, for the recovery of such child, and recover damages for the same, in the same action for the use and benefit of such child. And such person to whom the custody of such child shall be so disposed or devised, may take into his custody to the use of such child, the profits of all lands, tenements and hereditaments of such child, and also the custody, tuition, and management of the goods, chattels, and personal estate of such child till his or her age of 21 years, or any less time, according to such disposition aforesaid, and may bring such actions in relation thereto, as by law a guardian in common socage may do.

Before entering upon the consideration of this statute of Charles, it seems proper to make a few ob-

servations on the guardianships at common law and by custom.

Guardians at common law and by custom.

By the custom of the province of York (which custom the statute of 12 Car. 2, being general, does of course controul wherever they are in opposition) the father, by his last will and testament, might for a time commit the tuition of his child and the custody of his person; which testament and appointment was to be confirmed by the ordinary, who was to carry the same into execution. And upon the omission of the father to exercise his power, the mother might, after his death, make a similar appointment. And as the statute confines the power of appointing a testamentary guardian to the father only, the custom still operates within its local extent, to give an authority to the mother in respect to the personal estate (to which only the custom extends) which she would not possess by virtue of the statute. The statute of Charles the second has no negative words to restrain the custom in this respect.

By the same statute whereby the father's power of appointing a guardian of his children by will was created, the tenure by knight's service, out of which the guardianship by chivalry arose, was abolished, and with it fell to the ground this dominion of lords over the heirs of their tenants, which was as inconsistent with the rights and duties of nature, as the principles of rational and liberal policy. For this guardian was not accountable for the profits made of the infant's land during the wardship; and though he is said to have been subject to the duty of maintaining the infant, it does not well appear by what means he

was to be compelled so to do, in a manner agreeable to the fortune and rank of such infant. This guardianship existed rather for the interest and profit of the guardian, than as a trust for the benefit of the ward, and was saleable, transferable, and transmissible like any other property.

The other descriptions of guardianship by nature —by nurture—and that arising out of socage tenure, still subsist, though very little is now heard of them in our courts, since this office is usually assigned under the statute above-mentioned; and where that is neglected to be done, the jurisdiction of the Lord Chancellor, now established, though of dubious and obscure origin, is generally resorted to. These three last-mentioned kinds of guardianship are all exercised with a responsibility for the profits of the estate. If an estate were left to an infant, his parent, by the common law, might be his guardian by nature. And even while the tenure by knight's service continued, the father, claiming this guardianship by nature, was entitled to the custody of the infant's *person*, even against the lord in chivalry, which was a privilege not given by the law to the mother when happening to be guardian by nature, as she might in some cases be. The father and mother may also be the guardians by nurture, where that species of guardianship is let in by the want of any other superior claims, for it only takes place where the infant is without any other guardian. This extends no further than to the custody, and government of the infant's person, and determines at 14 in both males and females; when, if no other guardian is appointed by the choice of the infant or otherwise, the interval between 14

and 21 seems to fall under the guardianship by nature; as appears likewise to be the case after the guardianship by socage expires, which is also at 14 in both males and females.

The guardianship in socage can only take place on a descent like the guardianship by chivalry, and arises only where the infant is seised of lands, or other hereditaments lying in tenure. The title to it is in such only of the infant's next of blood as cannot be inheritors, according to the laws of descent in real property, to the socage estate, and is not restricted to the whole blood. And the quality which principally distinguishes this guardianship from the guardianship in chivalry is, that it is a personal trust wholly for the benefit and interest of the infant. The power of this guardian over personal estate has been doubted; but the learned annotator on the treatise of equity has observed, that the custody of the person should seem to draw after it the custody of every description of property for which the law has not otherwise provided: which idea, he adds, receives countenance from the instance of copyholds and inheritances not lying in tenure being placed by the law in the hands of this guardian; and he further remarks that this opinion is strongly confirmed by the manner in which the 12 Car. 2. c. 24. regulates the powers of the guardian which it enables a father to appoint, for that statute authorizes such guardian to take the custody of the infant's personal estate, as well as of his lands, tenements, and hereditaments, and provides that he may bring such action or actions in relation thereto, as by law a guardian in common socage might do [*]. Yet, there is an expression of Lord Chief Justice

[*] Fonbl. Treat. Eq. 3d. Ed. p. 242.

Vaughan[b] which conveys a different opinion; for, speaking of the guardian under the statute, he says, "this new guardian hath the custody not only of the lands descended or left by the father, but of lands and goods any way acquired or purchased by the infant, which the guardian in socage had not."

But this guardianship, as all others which might otherwise take place at the death of the father, is superseded by the exercise of the power given him by the statute 12 Car. 2. c. 24. which professedly proceeds upon the model of the guardianship by socage.

Testamentary appointment.

Under this statute it is clear upon the words that none but the father can appoint, and it is held equally clear according to the sense, that the guardian appointed by him cannot appoint another guardian; for it is a personal trust, and not assignable[c].

The power as to its objects is held to be confined to *legitimate* children, (in which are included those in ventre sa mere,) and by the words of the statute these must be under 21, and unmarried, at the decease of the father. It extends not to illegitimate children, though such, if females, have been held to be within the statute of Philip and Mary (2).

[b] Vaugh. 186. [c] Vaugh. 179.

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(2) See Strange, 1162, Rex v. Corneforth. But the court will, unless there is some objection, adopt the nomination of the father. 2 Bro. C. C. 583. Ward v. St. Paul, and note. So it seems also if the appointment be not made agreeably to the statute. Dick. 527. May v. May.

If the will be made merely for naming a guardian under this statute, and for no other purpose, such will need not be proved in the spiritual court; for as in such case the appointment takes effect solely by force of the statute, the temporal courts are the proper judges thereof[d]. But if the will contains also dispositions of the personalty, it seems that the whole will must be proved, which probate will be effectual so far as the personalty is concerned, but of no avail in respect to the appointment of guardian. And it seems to be immaterial by what words the appointment is signified, if the meaning sufficiently appears[e].

Probate not necessary to the validity of the appointment under the statute.

If the father exercises his power of appointment under the statute by deed, as he may, yet it has been held that such disposition by deed may be revoked by will[f]. But no appointment can be revoked by a subsequent testamentary appointment, unless it be executed according to the statute, or directly import to be a revocation; which has been determined in analogy to the cases on this part of the statute of frauds[g].

Appointment may be made by deed.

And such appointment is revocable by will.

But such will must be executed as the statute directs.

Where the appointment has been made, the guardianship shall not be determined by the marriage of the infant before 21, for the statute declares that such guardianship shall continue during the time that he shall remain under 21. The father, though under age himself, may appoint by virtue of this statute, and though he could not devise the land in trust for the

Infancy of the parties.

[d] 1 Vent. 207. Lady Chester's Case. [e] Swinb. p. 3. c. 12.

[f] Finch's Rep. 323. Lord Shaftesbury *v.* Hannam.

[g] Vid. post. Revocation of Wills. Chap. II. sect. 1.

infant directly, yet the land will follow as an incident by law attending upon the custody of the heir[k].

Remedies. The guardian when regularly appointed under this statute takes place of all other guardians, and may have a writ of ravishment of ward if the infant be taken from him, as the guardian by knight's service, or by socage, might have had at common law, and shall recover damages as for the ward's benefit[l].

This guardian being constituted upon the model of the socage guardian, and coming in the place of the father, has an interest joined with his trust, though not an interest for himself[k]. But though it was agreed in the case of Parry *v.* Hodgson[l], that a testamentary guardian by the statute, until the infant was 21 years, had the same interest as a guardian in socage till the infant was 14; yet it was holden that a testamentary guardian could not make a lease of the infant's land, but that such lease was absolutely void.

Powers of a testamentary guardian. It seems he may pay out of the rents and profits the interest of any real incumbrance, and even the principal of a mortgage[m], but it has been held that he is not compellable to apply the profits of the infant's estate to pay off the bond debts of the ancestor[n]. Nor can he, without the direction of the court, convert the real into personal or the personal into real estate[o]. He is subject to an action of account as soon as his guardianship is at an end, but not before, for

[k] Vaughan, 187.

[l] See the case of Mr. J. Eyre *v.* the Countess of Shaftesbury, 2 P. Wms. 103.

[k] Vaughan, 181. 2 P. Wms. 122.

[l] 2 Wils. 129. 135.

[m] Prec. in Ch. 137.

[n] 2 Vern. 606.

[o] 1 Vern. 403. 438.

the rule of the common law is, that an action of account does not lie while the guardianship continues. However, in equity, the infant may, by prochein ami, sue his guardian for an account during the minority. That court, it is said, often gives extrajudicial directions for an infant, and hears a person as amicus curiæ. And it was observed, by Lord Hardwicke, that in Lord Macclesfield's time, in the case of Lord Dudley, a stranger came and complained of the abuse of the infant's estate by the guardian; and upon this application, and his undertaking to pay the costs, the court directed the master to examine the receiver's accounts, and see whether the infant was wronged or not[p]. By the statute 4 Anne, c. 16. actions of account may be brought against the executors or administrators of guardians. But a guardian is entitled to all his reasonable costs and expences; and, therefore, he ought not to be charged as receiver, because then it seems he would lose these costs and expences, but as guardian, by name; for costs, it is said, are in general allowed only to guardians or bailiffs, as such, and not to mere receivers[q].

[p] Earl of Pomfret v. Lord Windsor, 2 Vez. 484. See also 2 P. Wms. 119. 3 Atk. 625.

[q] 1 Freem. 178. 1 Leo. 219. and see the statute 4 Anne, c. 16. sec. 27.

SECTION XX.

Statute of fraudulent Devises.

A DEBTOR by specialties might, by devising his lands, have deprived his specialty creditors of all remedy against this part of his property, until the statute 3 and 4 William and Mary, c. 14. was passed. But by this statute, "reciting that it was not reasonable or just that by the practice or contrivance of any debtors their creditors should be defrauded of their just debts, it was enacted that all wills and testaments, limitations, dispositions, and appointments of or concerning any manors, messuages, lands, tenements, and hereditaments, or of any rent, profit, term, or charge out of the same, whereof any person, at the time of his or her decease, should be seised in fee simple in possession, reversion, or remainder, or have power to dispose of the same by his or her last will and testament thereafter to be made, should be deemed and taken, only as against such creditor or creditors as aforesaid, his, her, or their heirs, successors, executors, administrators, and assigns, and every of them, to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect."

And by section 3. "for the means that such creditors may be enabled to recover their said debts," it was enacted, "that in the cases before-mentioned, every such creditor or creditors should and might have and maintain his, her, or their action of debt upon his, her, or their said bonds and specialties, against the heir and heirs at law of such obligor or obligors, and such devisee or devisees jointly, and

such devisee or devisees should be liable and chargeable for a false plea by him or them pleaded, or for not confessing the lands or tenements to him descended."

And by section 4. it was enacted, "that where there should be any limitation or appointment, devise or disposition, of or concerning any manors, &c. for the raising or payment of any real and just debt or debts, or any portion or portions, sum or sums of money, for any child or children of any person other than the heir at law, according to or in pursuance of any marriage contract, or agreement in writing, bona fide made before such marriage, the same and every of them should be in full force; and the same manors, &c. should be holden and enjoyed by every such person or persons, his, her, and their heirs, executors, administrators, and assigns, for whom the said limitation, appointment, devise, or disposition was made, and by his, her, and their trustee or trustees, his, her, and their heirs, executors, administrators, and assigns, for such estate or interest as should be so limited or appointed, devised or disposed, until such debt or debts, portion or portions, should be raised, paid, and satisfied."

And, lastly, it was enacted, "that all and every devisee and devisees made liable by that act, should be liable and chargeable in the same manner as the heir at law, by force of that act, notwithstanding the lands, tenements, and hereditaments to him or them devised should be aliened before the action brought."

This statute, in respect to this part of its provisions, may be considered as suppletory to that of the

13 Elizabeth, c. 5. against fraudulent conveyances, and as designed to extend the remedy to fraudulent devises.

It has been determined that an action of covenant does not come within the remedy given by this statute, which is confined to cases of debt; for though the word specialties is used as well as bonds, yet when the means of recovery are provided, the intention of the statute is plainly confined to debts, and those specialties on which an action of debt lies. The statute speaks throughout of debts, and a breach of covenant cannot be considered as a debt. The statute prescribes the means by which such creditors shall recover their debts, and in prescribing those means it only gives the action of debt[a].

Of the excepting clause, saving devises and dispositions for payment of debts.

This Act contains, as appears from what has been above recited, a clause saving the effect of such devises and dispositions as are for the payment of debts, which clause has been held to operate simply as an exception, leaving the case of a devise for the above purpose, as well as provisions of portions for children in pursuance of marriage contracts, entirely unaffected, and open to the same remedy and resort as before the statute[b]. Since at common law there was no remedy against a devisee for payment of debts, such a case always was and still continues to be, since the statute, the subject of equitable jurisdiction, and accordingly the assets are equitably distributable, that is, equally and pari passu amongst all the creditors, whether by specialty or simple contract.

[a] 7 East 128. Wilson v. Knubley.

[b] 2 Atk. 292. Plunket v. Penson.

A devise for payment of debts out of the rents and profits only, has been clearly held within the exception[c]. And it appears to have been the opinion of Lord C. J. Willes, that by virtue of the above-mentioned clause, a devise for the payment of any particular debt upon simple contract is a good devise against bond creditors[d].

Extends to charges of debts in equity.

If a devise for payment of debts does not provide for it in a practicable manner, the case is not within the exception[e]. But since the case of Bailey *v.* Ekins[f], the rule appears to be settled, that if the provision made by the will for the payment of debts be effectual, either at law or *in equity*, the case is out of the statute: so that if the will, instead of breaking the descent by a regular devise, only charges the estate with the debts of the testator, this provision is good notwithstanding the statute of fraudulent devises, and a court of equity will act upon it; which is the same thing as to say that the interest so provided, and which equity draws out of the mass going to the heir, is distributable as equitable assets, among all the creditors equally, and without any regard to the precedency of specialty creditors.

Assets—whether equitable or legal.

Lord Hardwicke in Plunket *v.* Penson[g], seemed to be of opinion, that it was necessary the descent should be broken to make the assets equitable; and that if the estate were suffered to descend charged to the heir, or if the heir were made the

[c] 2 Atk. 104. Ridout *v.* Earl of Plymouth.

[d] Willes 524. Gott *v.* Atkinson.

[e] 2 Brown, Ch. Rep. 614.

[f] 7 Vez. Jun. 319. and see 8 Vez. Jun. 26. Shephard *v.* Lutwidge.

[g] 2 Atk. 290.

others, then the action should be against the heir and devisees jointly, charging the heir both as heir and devisee. Supposing the estate be limited to several in succession by the devise, it seems proper to make them all defendants in respect of their estates; as where property is devised to go in strict settlement, making a tenant for a life, with remainder to trustees to preserve contingent remainders, remainder to the first and other sons of the tenant for life in tail; it would be prudent, if not absolutely necessary, to make the heir together with the tenant for life, the trustees to preserve, and the son or sons of the tenant for life, parties; and as the sons do not claim by descent, the parol could not demur. It is said, indeed, to be the general rule that where a devise is fraudulent under this statute, and the heir thereby becomes subject to the action, together with the devisee, by virtue thereof, if such heir is an infant the parol cannot demur[k].

Of the estate pur auter vie under this statute.

In respect to estates pur auter vie it should be observed, that as by the statute of frauds, 29 Car. 2. c. 3. sect. 12. an estate pur auter vie, which comes to the heir as special occupant, is made assets by descent and devisable by a will in writing signed by the devisor, and attested in his presence by three or more witnesses; so a devise of such an estate is also held to come within the statute of fraudulent devises, and to be void against specialty creditors[l].

[k] See 1 Vez. 27. Beaumont v. Thorp, and as to the mode of pleading by the heir and devisee, see Gott v. Atkinson, Willes, 527.

[l] See 3 Atk. 465. Westfaling v. Westfaling.

CHAP. II.

REVOCATION OF WILLS.

SECTION I.

Construction of Sect. 6. of the Statute of Frauds.

BEFORE the statute of 29 Car. 2. wills in writing of real estates might be revoked by parol; and, indeed, after that statute, such power would still have existed, (as we may conclude in analogy to the doctrine of holding written agreements revocable by parol notwithstanding the 4th section,) if by the 6th and 22nd sections, special provisions had not been made to prevent it. Thus it is held in regard to the 12 Car. 2. c. 24. giving power to the father to appoint a guardian of his child, that the appointment under that statute may still be revoked by an instrument made *expressly* for that purpose without any attestation; because no positive provision was made against it by that statute [a].

Much has been said on the difference in the penning of the 5th section of the statute respecting the execution of a will of lands, and of the succeeding section which prescribes and restricts the methods of

[a] See 7 Ves. Jun. 376, 377. ex parte Ilchester, ante, 239.

revocation. At the end of the case of Right *v.* Price[1] in Douglas's Reports, the learned Reporter has added a note, in which he has animadverted upon the difference in the language in the two clauses, which he attributes to inaccuracy in the composition of the Act; and it cannot be denied, that the variation in the terms, where the same principle must have governed, seems hardly explainable, but by imputing a mistake to the legislature. By the 5th section, the testator is not required *to sign in the presence of the subscribing witnesses,* but the subscribing witnesses are called upon to attest *in the presence of the testator.* And Mr. Douglas observes in the note alluded to, that he believes it is universally understood, that, to satisfy this 5th section, a testator must sign in the presence of the witness.

But by what has been above produced to the reader on this subject, it must have sufficiently appeared to him, that such actual signature, in the presence of the witnesses, is not held to be requisite, and that it is enough, if the testator acknowledges his handwriting to the signature, or publishes and declares it to be his will, when the witnesses subscribe their attestations.

By the clause respecting revocations, the subscription of the witnesses is not expressly directed, while, on the other hand, the signing by the testator in the presence of the witnesses, is positively prescribed. The clause runs as follows: "And moreover, no devise in writing of lands, tenements, or hereditaments, nor any clause thereof, shall at any time, after the

[1] Dougl. 241.

said four-and-twentieth day of June, be revocable, otherwise than by some other will, or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements, shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated by the testator, or by his directions in manner aforesaid, or unless the same be altered by some other will, or codicil, in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding."

Of the grammatical reading of the language of this section, whereby it is brought into agreement with the provisions of the preceding clause.

It may reasonably be inferred to have been the intention of the legislature, to impose the same obligation as to the formalities of execution, on all wills properly so called, whether original or coming in the place of others antecedently made. The construction, therefore, which has been put upon the language of the revocation clause, has brought the two sections into equality in this respect, and thus imparted consistency and simplicity to the scheme of the statutory restrictions upon the execution of wills. In conformity to this plan of construction, as it had been judged a sufficient compliance with the requisitions of the *fifth clause*, if the testator *acknowledged* his signing, without *actually executing it in the presence of* the witnesses, it became important so to read the *sixth section*, which requires *signing in the presence of the witnesses*, as to bring it into agreement with the preceding section. The courts, therefore, have read the concluding words of the sixth section, *will, or codicil, or any other writing, signed in the pre-*

sence of three witnesses, so as to detach the words "will or codicil" from the succeeding words, "or any other writing," coupling these last words with the words which immediately follow, viz. "signed in the presence of three witnesses."

Of the legal distinctions founded upon this construction.

Thus they have applied the requisition of a "signing in the presence of three witnesses," to the *proximum antecedens* only, "or any other writing," and again coupling the succeeding phrase "declaring the same" with the words immediately before it, have made therewith this complete sentence, "*or any other writing of the devisor, signed in the presence of three or four witnesses, declaring the same.*" At the same time the words "will or codicil" were understood to import a will or codicil executed and perfected according to the requisitions of the foregoing section[e]. Interpreting the language of the 6th clause, upon these principles of construction, the law which arises upon it is this; that a will or codicil, in order to revoke a former will, must be executed with the same solemnities as the original will, that is, it should be signed by the testator, or by his directions, and subscribed by three witnesses, in his presence. And if such subsequent writing, accompanied with all the formalities requisite to a perfect will of lands, under the 5th clause, make a fresh disposition of the property, inconsistent with the dispositions thereof by a former will, it is a plain revocation without any express declaration of intention to revoke. So if a writing, not duly attested according to the 5th section, contain an express declaration of intention to revoke, and furthermore, be actually signed in the presence

[e] Ellis v. Smith, 1 Ves. jun. 11. Hoyle v. Clarke, 218.

of three or more witnesses, such instrument is an effectual revocation, and the witnesses need not, as in the case of a substantive disposing will, under the 5th section, subscribe their names to the instrument, in the presence of the testator.

SECTION II.

Methods of Revocation (1).

THERE are two general heads under which all the smaller varieties on the subject of the revocation of wills may be included—revocations express, and revocations implied. A revocation may be said to be express, either when the testator, by a subsequent writing signed by him in the presence of three or more witnesses (2), declares a present intention (3) to re-

(1) A man cannot make an irrevocable will, or bind himself so as to give up or take from himself this power of revocation. Swinb. p. 7. sect. 14.

(2) Though to revoke a will by an instrument of declaration according to the statute, such instrument must be signed in the presence of three witnesses, yet it has been held that it is enough if the witnesses sign, and it is not necessary that they should express in their attestation the fact of the signing by the testator in their presence, for their actual subscription is adopted only for the purpose of facilitating their recollection of the circumstance. 8 Vin. Abr. tit. Devise, 142. pl. 3. And indeed it has been said there is no absolute *necessity* for the witnesses to the testator's signing to subscribe at all. Vin. Abr. tit. Dev. (R) 4. pl. 3. Townsend v. Pearce, per Eyre and Parker J.

(3) The expression of an executory or future intention to revoke, does not operate as a revocation. Vid. infra 237.

voke, according to the construction above considered, whereby the latter part of the 6th clause is disconnected from the words 'will and codicil;' or, secondly, by a will executed with the solemnities required by the 5th section of the statute, viz. by the signature of the testator, and the subscription of three witnesses *in his presence*: which latter mode may, it should seem, be properly considered as an express revocation, because, if a man after having made a will of lands, makes another will inconsistent with the former, and gives to it the form of a substantive independent instrument, he may be said to have explicitly and expressly revoked the preceding will, since he has himself declared that the will last made is his will, at the time actually present, and by consequence that it is to take place of every different disposition of an earlier date; or, thirdly, by cancelling, tearing, or obliterating such will by the testator himself, or by his direction or consent.

Under the 2nd general head may be classed, all those revocations which arise by the construction or inference of intention, which the law founds upon the collateral acts of a testator after making his will: and which are not within the reach of the statute of frauds.

It has been shewn, that according to the prevailing opinion, if an instrument be designed as a will, and is not made *merely* for the purpose of revoking a former will of the same lands, it will not have that effect unless it be completed as the statute directs in respect to a will of lands, although it be signed in the presence of three witnesses*; because, being intended as a will,

* Eggleston v. Speke, Carth. 81.

and to revoke as such, it cannot revoke but *as* a will, and by virtue of that mode which in the first part of the 6th clause is pointed out. And indeed, where a testator designs to revoke a former will by an instrument making new dispositions of his property, he discovers only a conditional intention to revoke; or, in other words, his intention to revoke is so coupled in appearance with his new testamentary act, that, unless he completes such testamentary act by observing the formalities requisite to its perfection, he is not looked upon in law as manifesting a deliberate purpose of revoking.

A will, though rendered inoperative by extrinsic circumstances, may revoke a former will.

But although the doctrine seems now to be settled as it was laid down in the case of Limbery *v.* Mason[b], viz. that if a testator designs to revoke by a new will, unless the instrument be effectual to operate *as a will*, it shall not amount to a revocation; yet the words "shall be effectual to operate as a will" must be taken, as has been before observed, with reference only to those requisites to its validity which have been made necessary to it by the 5th clause of the statute; since if properly executed and attested to pass freehold lands according to the statute, though it should be prevented from operating by the incapacity of the devisee, or any other matter dehors[c] the will, the former will is nevertheless revoked by it (4).

[b] Com. 454.

[c] Roper *v.* Radcliffe, in dom. Proc. 1 Bro. P. C. 450. Vin. tit. Dev. (R. 3) pl. 2. in Notis.

(4) 8 Vez. jun. 370. per Lord Alvanley, et vid. Montague *v.* Jeffereys Moor, 4 Roll. Abr. 615. so a will devising lands in fee to the heir at law, though void as to the purposes of a will, yet operates as a revocation if attested according to the statute, per Lord Hardwicke, in Ellis *v.* Smith, 1 Vez. jun. 17.

In the case of Onions *v.* Tyrer[4], the testator by his second will disposed of the same lands to the same purposes as by the former, though to different trustees; the first will was executed and attested according to the 5th section; the second will, though subscribed by the testator and attested by three witnesses, was not subscribed by those witnesses in the presence of the testator: it was therefore invalid as a will of lands, but was executed agreeably to one of the modes of making a valid revocation prescribed by the 6th section of the statute. In that case the Chancellor observed upon the circumstance of the dispositions in both instruments being the same (5), by which it was demonstrated that the testator did not mean to revoke the dispositions of the same lands made by his first will; but his Lordship intimated that his judgment would not have been altered if the same lands had been given to *other* persons by the second will; taking, as it is presumed, the broad ground, that a will of lands is not to be revoked by a subsequent will, unless such subsequent will is effectual *as a will* under the statute; and the law seems now to be well settled, that though the dispositions of the second will be ever so inconsistent with those of the first, the first will shall stand unrevoked unless the second be signed by the testator, and also subscribed by three witnesses in his presence. The same consequence still holds though the second will contain an express revoking clause, and is also signed in the presence of three witnesses; for the revocation is then considered as

[4] 1 P. Wms. 342.

(5) See the decree containing the reasons on which it was founded, stated from the register in Mr. Coxe's note to the case.

being made in subserviency to the disposing part of the will; which being ineffectual, as not being subscribed by the witnesses in the testator's presence, the accessary must follow the fate of the principal. But where the revoking clause has not this connection with the disposing part of the will, as where the dispositions relate to other lands without affecting the subjects of the first will, or where the second will is only of personal estate, there seems to be no reason why, if it contain an express revoking clause, and be signed by the testator in the presence of three witnesses, it should not revoke an antecedent will of lands; and such seems to have been the opinion of Lord Chancellor Cowper, in the above-mentioned case of Onions v. Tyrer (6).

SECTION III.

Inconsistent Dispositions.

CONCERNING the operation of a subsequent will of lands, with the ceremonies prescribed by the 5th section, as a revocation of a preceding will, it is material to be observed, that such effect is not produced by the subsequent will, merely as being the *last* will, unless its dispositions of the property are incapable of standing with those of the preceding will: and where

(6) See the same doctrine and reasonings applied to the question of revocation upon the statute of 12 Car. 2. c. 24. 7 Vez. jun. 18. ex parte Ilchester.

there is any such inconsistency, the revocation produced thereby is confined in its extent to the subjects of the inconsistent dispositions. This seems to be well established in Hitchins *v.* Bassett[a], where the case upon the special verdict was as follows:—Sir Henry Killigrew was seised in fee of the lands in question, and on the 12th of November, 1644, made his will in writing, whereby, (amongst other hereditaments,) he devised the premises to Mrs. Jane Berkely (his near kinswoman) for life, with remainder over to Henry Killigrew (testator's natural son) in tail, and made the said Mrs. Berkely sole executrix. They further found that afterwards, in 1645, the testator made another will in writing; but what was contained in the last-mentioned will, or what was its purport and effect, the jurors were ignorant. The argument for the heir at law, and in support of the last will as a total revocation of the first, rested mainly upon the construction of the maxim—that a man could not die with two wills; which the counsel on that side interpreted to mean, that if a man, after having made a will of lands, makes and executes another will, calling it his last will and testament, and giving it the form and language of a substantive independent will, it must necessarily be a total revocation of the preceding will. It was admitted that a man might make several wills of particular subjects, but then they ought to be confined in expression to those particular subjects; for however different the subjects, yet if the subsequent will was published generally as a man's *last will and testament*, it must be held to be a revocation of the former will. It was also true that a testator might make as many codicils as he pleased, but there was a

[a] 1 Show. 265. 2 Salk. 591.

wide difference between wills and codicils, a codicil being an accessary to a will and not destructive, but confirmatory thereof. It was observed also, on the same side, that where a man makes several wills expressly of different particular things, these together make but one will, though written upon different papers. But that as the jury had found that the testator had made another will, this must be taken to mean a general testament; and it must be understood to mean a different will, for if it had been a duplicate to be sure it would not be a revocation, but then it ought to be idem and not aliud testamentum. And upon the whole they concluded, that if the testator did in fact make a second will, not correspondent in omnibus with the first, and purporting to be his *last will and testament,* it was necessarily a total revocation (1).

These arguments were answered on the other side by denying the construction put upon the civil law maxim, 'that a man can die with but one will.' They said, that the true construction of that maxim was, that where two devises of the same thing were made, the last must stand, but that two wills might well stand together as to such devises or bequests as are not inconsistent. That there was no ground for presuming that the last will in this case, though a complete will, contained any thing inconsistent with the devise in the first will, under which the lessor of the plaintiff claimed. The Court (in Trinity term, 4 W. and M.) gave judgment for the plaintiff, and a writ of error being afterwards brought in Parliament, that

(1) The same line of argument was taken and pursued by the late Mr. Serjeant Hill in arguing the case of Goodright v. Harwood, Cowp. 89.

judgment was affirmed. And since this case the point appears to have been considered as settled, that a second substantive independent will, properly executed, as a will of lands, is not, merely as such, a total revocation of a former will, but only so far as it is inconsistent with it; though it must be owned that Sir Matthew Hale, when he sat as Chief Baron in the Exchequer, seemed to be of opinion on the same case[b], that such subsequent independent will, though not importing in express terms a revocation of the former, nor passing any land, would amount in construction of law to a revocation (2). That great Judge, it is true, expressed himself in favour of the first will, but then it was on the ground of there being no finding by the jury of the contents of the second will, so that it did not appear but that the second will was a *confirmation* of the first.

The rule, however, is now established, that the contents of such second will must be found, and the contents so found must appear to be inconsistent with the dispositions of the former will, to operate as a revo-

[b] Seymour et Ux. v. Rosworthy. Hard. 376.

(2) In arguing the case of Hitchins v. Bassett, it would seem as if Serjeant Maynard meant to concede that where the second will appears to have appointed an executor, it might be considered as that sort of distinct, substantive, independent will, which must revoke a former will in toto; but I find no authority for such a concession, and I conceive that the law is at this time clearly held otherwise. It was holden (before the statute of frauds) that if a man made his will, and devised his land to J. S. and afterwards purchased the manor of D. and afterwards wrote in his will that J. D. should be his executor, this was no new publication to make the lands pass. Vin. tit. Devise (Z) S per Popham, C. J. And the principle in this respect is the same as to republication and revocation.

cation; and that if part is inconsistent and part is consistent, the first will shall only be revoked pro tanto, and to the extent of these discordant dispositions.

The case of Hitchins *v.* Bassett received confirmation from the subsequent case of Goodright *v.* Harwood [e], which passed through three stages of adjudication. The jury found by their special verdict that J. Lacy made two wills, both duly attested so as to pass freehold estates; and that the disposition made by the second will, which was eight years after the first, was different from the disposition in the prior will, but in what particulars was unknown to the Jurors: and the Jurors did not find that the testator cancelled the first will, or that the defendant destroyed the second. It was contended for the defendant in the writ of error, that the grounds of the decision in Hitchins *v.* Bassett were in his favour, for that that case was decided against the effect of the second will as a revocation of the first, because there was no proof whatever of any change of intention in the testator, or even that the second will did any way affect or concern the testator's lands. But that in the present case it was found that the second will was attested by three witnesses, that it did relate to lands, and indeed to the very estate in question, because the testator had no other real estate. And that as it had been expressly found that the disposition in 1756 was different from the disposition in 1748, that finding amounted to a finding of an express revocation of the first will.

But Lord Mansfield, after stating the rule that a

[e] 3 Wils. 497. Cowp. 87. 7 Bro. P. C. 344.

subsequent devise of land must be inconsistent with a prior devise of the same land, or the first will would stand as a good subsisting devise, observed that it was not found that the second will was in any particular repugnant to or inconsistent with the first. Had the defendant destroyed the second will there might have been good ground to presume such inconsistency or repugnance, and the jury might have found the fact of revocation. His Lordship added, that there was no variation in substance between this case and that of Hitchins *v.* Bassett. That, properly speaking, *another* will could not exist without there being a difference, for if it were exactly the same it would be no more than a duplicate or republication of the first will. That the Jury, therefore, in finding it to be another will, said, ex vi termini, that it was different; but as they had not found in what that difference consisted, the Court could not presume that there was any inconsistency in the dispositions of the two wills, and by consequence they could not say that the first will was revoked.

This doctrine is in itself so rational, and so founded on authorities, that one is surprised at seeing the question renewed, and again disputed at so late a period; but even these cases did not prevent the point from coming again into discussion, with a trifling variation in the circumstances, about five years ago, in the case of Thomas *v.* Evans[a]; in which, a person made his will, whereby he bequeathed his personal estate to his mother, and, after several intermediate limitations, devised the ultimate remainder to T. Upon his having afterwards acquired other

[a] 2 East, 488.

estates, some by purchase and some by devise, and the bequest to his mother having lapsed by her death, the testator made a second will disposing by name of the property which had been so devised to him, and then added, "as to the rest of my real and personal estate I intend to dispose of it by a codicil hereafter to be made to this my will." This was determined to be no revocation of the former will. It was not necessary to suppose the words intimating the future intention to be meant to embrace the real property before devised, as the testator had acquired estates since the first will, which were not included in the second, and which might satisfy the words by which the future intention was expressed; but admitting these words to include the real property devised by the will, still it did not appear that the disposition intended to be made of it would be *inconsistent* with the former devise; and even supposing it to be intended to be inconsistent, yet an express *intention* to revoke would not operate as an actual revocation; for, as was truly observed at the bar and on the bench, what would not have been a revocation by parol before the statute would not be so since, though reduced into writing with all the formalities of the statute, and it had been decided that a bare intention to revoke, though expressed by parol, was no revocation before the statute, unless the testator declared that he did revoke his will(3).

Express intention to revoke no actual revocation.

(3) Cranvel *v.* Saunders, Cro. Jac. 497. where it was resolved by the court, that if a man makes his will, in writing, of land, and afterwards upon communication says, that "he has made his will, but it shall not stand," or "I will alter my will," these words are not any revocation of the will, being in a future sense, and only a declaration of what he *intends* to do. Aliter, if he says I do revoke it, or in any other manner declares his purpose to revoke it in presenti. But if a testator declare his intention by

Inconsistency between the will and subsequent acts.

As a second will is no revocation of the first, any further than as it is inconsistent therewith, so neither does a testator by acting in any other manner upon the property which he has already devised by his will, revoke the will by such act beyond the extent of that necessary inference which is created by the inconsistency between the will and his subsequent conduct. Thus in an early case[s] where a man having issue two sons by several venters, devised his lands to F. his eldest son, in tail male, remainder to the heirs male of W. his younger son, and for default of issue to his own right heirs; and afterwards made a lease to W. for 30 years, to begin after his the testator's death, and died: it was resolved that this lease made to W. was not a revocation of the whole devise, but quoad the term only. And the same point was agreed to on the bench and at the bar, in Montague *v.* Jeffrys[t]. But this doctrine is carried to its fullest extent in the case of Lamb *v.* Parker[s]. There Edward Parker by his will devised to his younger son W. Parker a messuage for 99 years, if three lives therein mentioned lived so long, yielding and paying an annuity of 50*l.* to his sister, who was the plaintiff, for her life. The testator afterwards demised the same messuage to one L. for 99 years, if three lives, named in such demise, should so long live, yielding and paying 50*l.* per annum, to the testator, his heirs

[s] Cro. Car. 23. Hodgkinson *v.* Wood. Ann. prim. Car. Reg.

[t] Vin. tit. Dev. (u). [s] 2 Vern. 495.

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patol to revoke his will, and that upon his arriving at such a place he will execute his intention, and in his going thither he is murdered, it has been said that the intended revocation shall take place. 1 Roll. Abr. 614. 7 Ves. jun. 371.

and assigns. The question was whether this demise to L. was a revocation of the devise to W. and consequently of the annuity payable to the plaintiff.

The cause was first heard at the Rolls, and then held to be a revocation; but upon appeal to the Lord Keeper [h], the contrary was adjudged and upon the following grounds.—That by the lease to L. the term of 99 years commenced immediately in the life-time of the testator; whereas the term to W. was to commence from the testator's death; and though both were determinable for three lives, and possibly L.'s three lives might happen to live the longest, yet, that a reversionary interest passed which would carry the rent reserved on L.'s lease. The ground of this species of revocation is, as is above observed, the inconsistency of the posterior Act, and the inference of intention arising from such inconsistency. Proceeding, therefore, upon this principle, a lease made subsequent to the will of the devised land, for the benefit of the same person to whom the fee had been devised, and to commence upon the decease of the testator, was in Coke *v.* Bullock [i], adjudged a revocation in toto. Had it been to a stranger, it was agreed, it would only have been a revocation pro tanto (4).

Grant of a less interest than was given by the will, to the same person.

To a stranger.

[h] Sir Martin Wright. [i] Cro. Jac. 49.

(4) A distinction was here adverted to by Walmsley J. which is clearly not law, as the law is now settled, viz. that though in the case of a lease to a stranger after a will made, such lease, if it comprehend part only of the same lands, is only a revocation for such part; yet if it embrace the entire lands, though it is partial only in respect to the estate, it is a *total* revocation, as extending specifically over the whole subject matter.

With a different commencement.

And it was likewise agreed that if the lease had been granted to begin presently, or futurely in the life-time of the devisor, it would have been no revocation, for then it might have stood with the will.

Upon this distinction in respect to the time of the commencement, the case of Baxter *v.* Dyer[k], determined by the present Chancellor is in accordance with the last-mentioned case of Coke *v.* Bullock. In Baxter *v.* Dyer, the testatrix, after devising lands to Sir John Dyer, and his heirs, borrowed from the devisee a sum of money, and mortgaged the devised estate to him, by a conveyance in fee, and upon the ground that mortgages are in equity considered not as conveyances of the estate, but as mere pledges thereof by way of security, this subsequent mortgage, *although it was made to the same person to whom the estate itself had been devised,* was held to be no revocation. As in Coke *v.* Bullock the lease was to begin in the life-time of the testator, and might have terminated before his death; so in this case the pledge was to take place in the testatrix's life-time, while it was hers, and at her own disposal, and the object might have been answered in her life-time. It was therefore held to be no revocation. And the Chancellor, after stating that the case of Harkness *v.* Bayley[l], had been misreported, produced a note which he himself had made of it, wherein a feature of inconsistency between the will and the posterior acts of the parties appeared, by attending to which, the principle of that case might be reconciled with his decision of the case before him; for it appeared that after the mother's devise in fee to the

[k] 5 Ves. jun. 656. [l] Prec. in Chan. 514.

daughter, the son joined the mother in a conveyance of the estate for 500 years to the daughter, with a proviso that if the mother or son should pay during the life of the mother 100*l.* a year to the daughter, and the son after the mother's death should pay 4000*l.* to his sister, then the term should cease and be void, and the son moreover covenanted with the sister to pay 4000*l.* to his sister after the mother's death, and also with the mother to pay the annual 100*l.* to his sister during the mother's life. This conveyance was clearly inconsistent with the devise, and it was also clear that the mother intended the estate to descend to the son.

The settled law therefore upon these cases is, that a will is not to be revoked but by necessary implication, so that where the subsequent will or posterior act is consistent with a prior will, or with any part of it, such prior will remains valid in part or in all according to the extent to which the dispositions of the party can be effectuated without contradiction or discordancy. But where two inconsistent wills are produced of the same date, or both without date, neither of which can be proved to be last executed, they are both necessarily, and by the common law, void for uncertainty so far as they are inconsistent, and supposing no act of the testator subsequent to the wills to have explained and reconciled them, the heir at law[m] is let in. Though according to the case last cited in the margin, either will is subject to be confirmed by a subsequent act or declaration of the testator. Which judgment appears to stand on a very reasonable and intelligible principle. Since a will

Where there are two inconsistent wills of the same date, they are both void for uncertainty.

[m] 5 Bro. P. C. 57. Phipps v. Earl of Anglesea, 7 Bac. Ab. 327.

cannot be said to be revoked by a will till the death of the testator. And the act of the testator only operates to decide which is his *last* will, and not to produce the effect of an implied or parol republication, of which, since the statute of frauds, there is authority and reason for doubting the possibility, as I shall endeavour to shew in its proper place.

SECTION IV.

Imperfect Acts and Instruments.

IT is manifest that these cases of inconsistent wills turn principally upon the intention of the testator; but we must observe that a will perfected as the statute requires is not subject to be overturned by loose and conjectural inferences of an alteration of mind in the testator. The cases have reduced the doctrine to a regular system. The statute itself has limited the mode whereby a will may be expressly revoked; and one of the modes prescribed by the statute is by a subsequent will, which, we have seen, should, to produce that effect according to the force given by construction to the word "will," where it occurs in the 6th section, be perfected with the formalities required by the preceding section. But this construction of the language of the 6th section seems to have given to it no enabling efficacy, in respect to the operation of a will, since if the words "will or codicil" had not been excepted out of the restraint put

upon the power of revoking, it should seem that the statute must either have been construed not to extend to the case of a subsequent will; or to have enacted that a will once perfected, though made 20 years before the testator's death, must be taken as his last will, if remaining uncancelled, notwithstanding a subsequent will should be made within a month before the decease of the testator, with all the circumstances constituting a perfect will.

No intention can be inferred from a will of lands not executed according to the statute.

As the law now stands, it has been shewn, that a new substantive will, unless it be executed as the 5th section directs, will not revoke a former will; which rule seems to arise justly out of the principle of intention; for an intention to revoke a first will by a second can only be properly inferred from a legal, valid, and perfect disposition of the same property; which accords with the rule of the civil law, "Tunc prius testamentum rumpitur cum posterius perfectum est(1)." In truth, since the statute of frauds, there can be no will in contemplation of law that has not been executed with the formalities made necessary by that statute. It is a mere nullity(2), affording no ground of inconsistency from which to infer even a

(1) See the case of the Earl of Ilchester, 7 Vez. jun. 348. that a testamentary appointment of a guardian, by virtue of the 12 Ch. 2. c. 24. is not revoked by a subsequent testamentary appointment, which is not substantively perfected by the attestation of two witnesses, according to that statute.

(2) Equally so in all courts. Thus in equity, a will of lands, unattested according to the statute, and containing a bequest of personalty to the heir, will not put him to his election, which is a striking instance to shew the absolute nullity of such a devise in the view of the courts of equity.

But other legal acts, though instrumentally inoperative, may nevertheless revoke a will.

change of intention. But in general an instrumental act of a testator, inconsistent with the dispositions of his prior will, even though such act may be rendered inoperative by the want of certain legal requisites to its validity, will effect a revocation. For though, in the case of a subsequent *will*, the courts will not take any notice of its existence as to any devise of land, if not duly executed and attested, yet in the other cases of invalid instrumental acts, they are respected as indications of intention though specifically inoperative. And, indeed, if a will devising land be executed and attested so as to have an existence as a will, though from circumstances extrinsic it be rendered void, it may still effect a revocation, as in the case before-mentioned of a will devising land in fee to the heir at law [a].

And if a will be properly executed, though by circumstances extrinsic it is prevented from operating, it may nevertheless revoke a prior will.

If a testator leaves at his death a dozen wills, and only one executed and attested so as to pass real estate, such will, whatever may be its date, is properly his *last* will as to this part of his property. And as a man can have no will but his *last* will, there can be no other *will* from which any intention of the testator, inconsistent with the dispositions of his operative will, can be inferred (3); but if a testator affects to do something instrumentally, which fails from the omission of some circumstances with which it ought

[a] Vid. Ellis v. Smith, 1 Ves. jun. 17. and note (2) in the preceding page.

(3) This is strongly put by Sir Wm. Grant in giving his opinion in the case ex parte Ilchester. "It is not competent for a person to express an intention, as to land, by such an instrument." 7 Ves. jun. 378.

to be accompanied, and which, if effectuated, would by its specific operation revoke a prior will, the courts will take notice of such imperfect instrument, and construe it a revocation as much as if it had been rendered effectual to its purpose. For it will not be supposed that a nugatory act was intended to be done, when that act was professedly to have immediate perfection: whereas in the case of an unexecuted will, which is made in prospect of death, and with regard to a future condition of things, it is reasonable to suppose it to be left purposely unfinished and inoperative, to be adopted or not on the approach of extremities, as the state of the testator's affairs and connexions may at that season determine his inclinations.

Imperfect instruments of conveyance.

Upon the above-mentioned principles, the imperfect conveyances by a deed of feoffment without livery of seisin, and by a deed of bargain and sale of the freehold without such enrolment as is required by the statute in that case provided[b], though specifically inoperative, are nevertheless effectual revocations. So, before the statute taking away attornment, a grant of a reversion without attornment was a revocation of an antecedent will devising the same property (4).

[b] 1 Roll. Abr. 615. Vin. Dev. (P) pl. 6. Went. Off. Ex. 22. 3 Atk. 803.

(4) Went. Off. Ex. 22. So where a tenant to the præcipe is made towards suffering a recovery, and no other proceedings are had, a previous will is nevertheless revoked. Vid. Harmood v. Oglander, 6 Ves. jun. 199.

Power of appointment ill executed.

Whether a deed intended to operate as an appointment of uses, but incapable of operating as a valid appointment, either from a deficiency of power in the party executing the deed, or a neglect of some ceremony made necessary to the efficacy of the appointment by the person granting the power, can be operative as a revocation, seems to be left, by the case of Shove *v.* Pincke[c], in a considerable degree of uncertainty. If we look to the judgment and certificate[d], it is plain that this point cannot be considered as judicially decided by this case. Lord Kenyon indeed observed, that even supposing the appointment made in that case to be an inadequate conveyance for the purpose for which it was intended, still, if it demonstrated an intention to revoke the will, it amounted in law to a revocation (5). He added, that if it were necessary to decide the point, he did not see why it might not operate as a grant of the reversion. But although the late Chief Justice seemed clearly to be of opinion, that a void appointment would have the effect of revoking a prior disposition by will of the same property, such effect was not, as far as appears by the report, at all adverted to by the other judges, and in the certificate mention was only

[c] 5 T. R. 124. [d] 5 T. R. 310.

(5) In the cases of feoffment without livery, and bargain and sale without enrolment, the instrument itself is complete, and there is no intrinsic defect in it, but something subsequent is wanting to its specific operation. Between these cases therefore, and that of an appointment informally executed, or without authority, there is a difference; the informality in this latter case being in the instrument itself.

made of the operation of the deed as a grant of the reversion, or as a covenant to stand seised to uses (6).

The failure of the appointment in the case of Shove *v.* Pincke arose from the defect of a power to make it, the power originally reserved having been exercised without a fresh reservation (7), but there does not appear to be any sound distinction between such a case and one wherein the failure happens by reason of an omission of any ceremony, made necessary by the person creating the power, to its valid execution. Supposing the revocation to be produced by inference of intention, it is plain that the attempt, whether the failure arise from one cause or the other, affords an equal inference of intention (8).

Of grants to persons under disabilities.

It has been long a settled point, that a grant made to a person incapable of taking under it, may nevertheless operate as a revocation of a will. Thus, where a man[e], after having made his will in November, 1739, and thereby given all his real and personal estate to his brother, by a deed poll made in November, 1740, gave and granted to his wife all his substance which

[e] 3 Atk. 72. Beard *v.* Beard.

(6) See the observations made upon this case by Lord Alvanley, in the important case of the Earl of Ilchester, 7 Vez. jun. 374.

(7) For this point see the leading case of Heli *v.* Bond, 1 Eq. Ca. Abr. 342.

(8) The instrument endeavoured to be set up in Clymer *v.* Littler, 3 Burr. 1244. had no definite legal character, or specific tendency, and was therefore insufficient to ground any inference of intention, besides that it laboured under a suspicion of forgery.

he then had, or thereafter might have, it was decreed that the grant was void, because the law would not permit a man to make a grant or conveyance to his wife in his life-time; neither would a court of equity suffer a wife to take the whole of a husband's estate beneficially, in his life-time, for it could not be in the nature of a provision, when it comprehended all the husband was entitled to. Yet as being an act inconsistent with and repugnant to the will, though not strictly legal, it amounted to a revocation. It produced, therefore, an intestacy as to the legacies: and though the appointment of the brother as executor remained unrevoked, yet the revocation of the legacies given to him made him a trustee in equity for the next of kin.

In the same manner a subsequent devise to a person incapable of taking under it is a revocation of a prior will; as was determined in the case of Roper *v.* Radcliffe[f], in the House of Lords, where lands were given, by the second will, to a papist. And the same effect has been adjudged to wills devising an estate to the poor of the parish[g], and to a corporation[h].

But in these cases of invalid instruments it does not seem to be so correct a construction of their operation, to ascribe their revoking efficacy to the indication they afford of an *intention* to *revoke*, as to the indication they afford of an intention to do that which

[f] In dom. proc. 1 Bro. P. C. 450. 10 Mod. 233. 2 Abr. Eq. Ca. 771.

[g] Frenche's case, cited in Montague's case, Vin. tit. Dev. (O) 4. and 10 Mod. 94.

[h] Vin. tit. Dev. (O) 5.

by a positive rule of law is an act of revocation (9). For unless the act if done so as to be effectual to its purpose would have the effect of revoking, an ineffectual attempt to do the act could not produce such a consequence; and, as it will appear hereafter, this effect of these acts themselves, when executed completely, cannot for the most part be satisfactorily explained on the principle of intention.

SECTION V.

Acts procured to be done by Fraud or Compulsion.

WHERE a deed is void as being covenously made, it seems clearly held to be incapable of operating as a revocation, for it is a complete nullity. And, in a court of equity, a deed obtained by fraud or by compulsion has, in a case before Lord Thurlow, been held equally inoperative against a subsisting will. His Lordship observed, that the reason against admitting such an instrument to have the effect of a revocation was strong in that court, since when application is made by the proper party it will be ordered to be delivered up, and where a deed is

(9) Lord Hardwicke expresses this opinion in the case of Hick v. Mors, Ambl. 216. and Abney v. Miller, 2 Atk. 598. and again more pointedly in Sparrow v. Hardcastle, of which the reader will find an accurate note in 7 T. R. 416. where his Lordship says that "these imperfect conveyances are revocations, because they import an intention of altering *the condition of the estate.*"

ordered to be delivered up it is implicitly declared to be *no* deed (1).

The case just cited of Hawes *v.* Wyatt was first decided by the late Lord Alvanley, when Master of the Rolls, in favour of the revoking effect of the deed; and his decision was reversed, upon appeal, by the late Lord Chancellor Thurlow. It appears, however, that Lord Alvanley, when, as Lord Chief Justice of the Common Pleas, he sat with the Chancellor in the case ex parte Ilchester[a], remained of his original opinion[b]. He observed, that in that case the son, who was the testator, after the conveyance to his father, went abroad; that during his life he never intimated any intention to quarrel with it; that the bill was filed to set it aside upon such an exertion of parental authority, as, that that court would not permit an instrument so framed to stand; his Lordship allowed that the deed could not operate against the heirs of the son; yet "he was of opinion it would revoke the will, for the son thought it was actually revoked, and that therefore to permit it to stand would be against principle; that though Lord Thurlow differed from him, he believed Hick *v.* Mors[c] was not adverted to, but that there was the authority of Lord Hardwicke that such an instrument was sufficient to revoke a will."

It does not however, in the only report of the case of Hick *v.* Mors, distinctly appear that any fraudulent

[a] 7 Vez. jun. 348. [b] Ibid. 374. [c] Ambl. 216.

(1) See the case of Hawes *v.* Wyatt, 3 Bro. C. C. 156. It seems also to be held in this court that a deed executed by mistake is no revocation of a will, vid. 6 Vez. jun. 215. and See post tit. '*mistake.*'

means were taken to induce the testator to execute the revoking instrument. The words of the reporter are, " he was prevailed upon ;" and to be sure the facts of the case induce a suspicion of improper influence. No fraudulent arts or undue influence, however, are stated to have been used, nor are any such distinctly alluded to by Lord Hardwicke, who refers the case to that class of cases above considered, where imperfect conveyances have been held to revoke antecedent wills. Stripped of any colouring of fraud, the case was simply this : A testator covenanted by indenture to levy a fine, and in the deed specified the use of the future fine to be to H. for 1000 years, which fine was accordingly levied ; he afterwards made his will, properly attested, and devised the fee of the same premises to H. and in the year following executed a fresh covenant by indenture, reciting the first, declaring a new and different use of the fine, viz. to H. in fee ; and whether by this the will was revoked was the question. But whether the second indenture of covenant was good as to the new use of the fine may be questioned, since if a precedent indenture be made to direct the uses of an assurance, and the assurance follows, the Touchstone says, that the conusor or recoveree cannot by any act of his, subsequent to such assurance, change or avoid the prior use[a]. The second indenture might, therefore, have been regarded as inoperative, and was probably attacked on that ground, for that seems to have been the view in which it presented itself to the court.

It is, to be sure, somewhat difficult to apprehend how a deed which is void, as being fraudulently, sur-

[a] Vid. Touchst. Ch. on Uses, Sect. 5.

reptitiously, or coercively obtained, and so not moving from the will, or speaking the real sense of the party, should yet revoke a previous act deliberately and formally done. Where a part only of a deed is liable to the imputation of fraud, there may be good reason for holding the other uncorrupted part a revocation of a prior testamentary disposition, as far as it is inconsistent with it. The understanding does certainly struggle against giving to an act admitted to be invalid against the person performing it, on account of the fraud or compulsion accompanying it, an operation destructive of a prior act voluntarily and considerately performed. It is true however that, in giving his opinion in the case last mentioned, Lord Hardwicke observed, that it was not like the case of a conveyance by covin, which would make it not the testator's deed *at law;* and which, his Lordship said, would be a *nullity*. There is, to be sure, a difference between the case of a deed void at law for covin to which non est factum may be pleaded, and that of a deed liable to be set aside by cancelling or directing a reconveyance, on account of the fraud or compulsion used in obtaining it. But it seems reasonable for a court of equity to act upon its own maxims, in analogy to the rules of law; and if that which in that court is treated as deserving of being frustrated and rescinded, on account of the turpitude of the intent and contrivance, were, nevertheless, to be considered as capable of the collateral effect of revoking a will, this, as it seems, would scarcely be reconcileable with the rule of equitas sequitur legem.

Section VI.

Subsequent Conveyances.

THE general rule that where, after making a will, the testator executes any legal conveyance of the devised property, the will is revoked, has long been established. This rule seems to rest upon technical grounds, and in regarding its whole extent we shall find that the inference of *intention* to revoke by no means affords a satisfactory foundation for it. The true reason seems to be that which Lord Hardwicke gives in Sparrow *v.* Hardcastle, " that the estate being gone by the conveyance, the will has lost the subject of its operation."

The alteration of the devised estate by the act of the devisor himself is a case of daily occurrence, and admits of some distinctions of great nicety. It will be proper to begin with some examples illustrative of the general rule.

A recovery by tenant in tail, after making his will, to his own use in fee, is a revocation. And this, though the party declares he does it to confirm his will.

If a tenant in tail makes his will and devises his land, and then by bargain and sale enrolled makes a tenant to the præcipe, against whom a common recovery is suffered to the use of the testator in fee, this is a revocation of the will[a]. And it was said by Lord Hardwicke to have been holden that where a man, after making his will, thinking he had only an estate tail, suffered a recovery to confirm the will, such act by the

[a] Dister *v.* Dister, 3 Lev. 108. see also to the same point, Marwood *v.* Turner, 3 P. Wms. 163. Edit. Coxe.

testator was a revocation instead of a confirmation of the will[b].

So also if a testator, after having made his will, levy a fine to such uses as he shall by deed or will appoint, and die without making any new will, the will made prior to the fine is thereby revoked[c].

A feoffment by a tenant in fee, after making his will, to his own use in fee, is a revocation.

So is an effectual recovery.

And if a tenant in fee simple devises his lands, and before his death makes a feoffment of those lands to another, to the use of himself and his heirs, though this to many purposes is no alteration of the estate, for he is absolute owner as he was before, yet it is a revocation[d]. And where a tenant for life, remainder to trustees to support contingent remainders, remainder to his first and other sons in tail, with reversion to himself in fee, made his will disposing of the reversion, and afterwards suffered a recovery and limited the use to himself in fee, this though an ineffectual recovery, was nevertheless a revocation of the will (1).

Conveyance upon a special trust, or for a particular purpose, how far a revocation.

The apparent hardship of this rule has occasioned some struggles to resist its application, where it has been most obviously opposed to the testator's intention. Thus it has been often contended that where the alteration of the estate was only for an express particular and partial purpose, not affecting the sub-

[b] Per Lord Hardwicke in Sparrow *v.* Hardcastle, 7 T. R. 416. note.

[c] Doe and Dilnot and others *v.* Dilnot, 2 N. R. 401.

[d] 1 Roll. Abr. 615.

(1) 3 Wils. 6. Darley *v.* Darley, and see the remarks made upon this case by the late Lord Loughborough in Brydges *v.* the Duchess of Chandos, 2 Vez. jun. 430.

stantial and beneficial interest given by the will, the will should not be affected by it. Upon this ground, in Sparrow *v.* Hardcastle, it was endeavoured to be maintained that the conveyance being designed for a particular purpose, viz. to create a trust for the benefit of a person named in it, subject to which the trust declared was to the grantor and his heirs, it was the same as if he had left it to result, and so much of the trust as remained in him would pass by the will; but Lord Hardwicke rejected this reasoning, and declared his opinion to be, that if a man seised of a real estate devised it, and afterwards conveyed the legal estate, though only upon a special trust, yet as he granted the whole legal estate, it was a total revocation of the will.

Lord Lincoln's case (2), which was decided by Lord Somers, is a strong authority to the same point; and, as was observed in Sparrow *v.* Hardcastle, there could not be a more special case. Edward Earl of Lincoln had mortgaged the manor of S. to Wynn by a conveyance in fee, and afterwards by will, in default of issue male of his own body, devised it to Sir Francis Clinton (who was to succeed to the title) for his life, with remainder to his first and other sons in tail, with remainders over. The Earl having afterwards taken a fancy to one Mrs. Calvert, and having some notion he might marry her, (though it was proved in the cause there never was any intention in the lady or her relations respecting such marriage, nor any treaty about it)

(2) Show. P. C. 154. 1 Eq. Ca. Abr. 411. 2 Freeman, 202. and said by Lord Hardwicke in Sparrow *v.* Hardcastle, vid. 7 T. R. 418. in Not. to be well reported in Fitz Gibbon, 241. which was in general a book of no authority.

made a lease and release of the devised premises to trustees, to the use of himself and his heirs till the said intended marriage should take effect, then as to part in trust for Mrs. Calvert and her heirs, in lieu of dower, and as to the rest in trust that the trustees should sell it, to disencumber the part limited to Mrs. Calvert, and to pay the surplus of the monies to his executors and administrators. Nothing was afterwards done towards the marriage, and sometime after the will the Earl died without making any alteration of it, leaving his honours to descend to Sir Francis Clinton, who had but a small estate, if any, and who died soon afterwards. The plaintiff, the eldest son of Sir Francis, brought his bill to have a redemption of the mortgage and a conveyance of the estate. And the defendants, who were cousins and co-heirs of the testator, brought their cross bill to be allowed to redeem and to have the estate conveyed to them.

The question was, whether the lease and release by the testator was a revocation; and though it was plain he did not intend, in the event which happened, to revoke his will, and though by the release the estate was limited until the marriage (which it did not appear was ever seriously either in *his* contemplation or in that of the lady) to continue in the testator just as before; the will was nevertheless held to be revoked. It is to be observed that the conversion of this estate into an equitable interest by the mortgage in fee, was the circumstance which brought this case into the court of equity, and that there was nothing in it of peculiarity which varied the effect of it in the view of that court; so that the doctrine of equitas sequitur legem was entirely applicable to it; and as by the rule of law, if this had been a legal estate the will would

have been revoked, there was no reason why a court of equity should proceed on a different rule in determining the case. The decree was confirmed in the House of Lords by a majority of two lords only.

Where that which is done to an equitable estate, would, if the estate were legal, pass it out of one person to another, such act is a revocation in equity, upon the rule of equitas sequitur legem.

The deeds executed in the above case were such as, had the estate been *legal,* would have passed the estate out of the testator, and wherever that is the case, the will is revoked at law (3). Upon the principle of analogy, therefore, and of that uniformity in the rules regarding property which is so important to be preserved, a court of equity was bound to follow the authorities of the common law courts in the decision of the case just cited, whatever inconvenience to the parties, or repugnancy to common feelings, might be the consequence: and in this view, that is, in reference to the consistency and generality of an artificial system of reasoning, there does not appear to be that absurdity in the case of Lord Lincoln which has been charged upon it by a great judge[e].

If the estate is parted with but for a moment, and the same

But by a case of great importance, which has lately been decided in K. B.[f] on a writ of error from the Common Pleas, whose judgment the superior court confirmed, the general rule may be considered as es-

[e] Lord Mansfield, Doug. 722.

[f] 7 T. R. 399. 1 Bos. and Pull. 576. Goodtitle on dem. Holford and others *v.* Otway.

(3) The uses of the intended settlement were certainly inconsistent with the will; but that made no part of the reason for holding the will to be revoked by the lease and release; it was so held solely upon the ground that the devised estate was for a moment parted with and put out of the testator, notwithstanding the old estate was taken back by the same conveyance.

m... ...ollowing: That where a person
t... ... devises it, and afterwards conveys
... ...state, though but for an instant, as
... a seisin to serve an use, and though he
... ...e same estate to the same use as before,
... ...s left to result to him so as to be de-
... ...om him either in the paternal or maternal
... ... was before, yet the conveyance operates as
... ...evocation of the will. And though the object
... ...e conveyance be ever so partial or minute, and
... ...der such object be certain or contingent, the
... ...e consequence of a total revocation flows from the
... ...ere act of parting with the estate. And from the authority of this case together with that of Lord Lincoln above cited, the conclusion is, that whether such estate be legal or only equitable, the same mode of acting upon it by passing it out of the testator, or if that cannot be strictly said of an equitable interest, by doing that with respect to it, which, if it were a legal estate, would pass it out of him but for a moment, will produce the same consequence of a total revocation.

In the case last referred to, A. being seised of certain estates in fee simple, agreed by his marriage articles to settle the same so as to secure his intended wife's jointure, and the portions of younger children, and then upon his eldest son and his heirs male. He afterwards devised the same estates, in case he should happen to die without leaving any issue of his body living at his decease, subject to any jointure he might make to trustees, for a term of 500 years, upon the trusts therein after declared, and subject thereto he devised all his real estate to B. The testator afterwards conveyed the same estates by lease and release

to releasees, to the use of himself and his heirs, till the marriage, and then to uses correspondent to the various purposes expressed in the marriage articles, and for default of issue, subject to a term for securing his wife's jointure, to himself in fee. The testator married accordingly, and died without issue. And whether his will was revoked by the settlement was the question.

Those who argued against the revocation contended that the intention of the testator was evidently not to revoke the will, and that as this intention appeared, without any resort to extrinsic evidence, from the instruments themselves, the court was bound to give it effect. That though in point of form an estate did pass out of the testator to the releasees, yet that was but a momentary effect of the conveyance, for by the limitation of the use to himself, and his heirs, till the marriage, he was still in of his old use; and the only operative part of the settlement was that which limited the uses according to the articles, in an event in which the will was to have no operation. That this was a very different case from a feoffment and refeoffment, where there was a complete alienation of the land, and an entire new estate was taken back by purchase. That the doctrine must have been originally founded upon an intent to revoke, either expressed, or necessarily to be implied by law from the inconsistency of the two dispositions: but that in the case before the court, the two instruments were not only not inconsistent, but the one referred to and confirmed the other, and the settlement was only made in pursuance of the articles. That in all the cases of total revocations implied from subsequent instruments, the devisor changed the whole estate, or the dispositions

were inconsistent; but that in the case under consideration there was no inconsistency, nor was the estate changed as to that part of it on which the will was to operate; for the operation of the will was confined to the old fee-simple, which by the limitation in the settlement was returned back to the testator. There was it was said no new modelling of the estate, for the acts which took place subsequently to his will were in the testator's contemplation at the time; so that the question was broadly this,—whether where the intention was manifestly against a revocation, the instrumental mode of carrying the intention into effect should nevertheless produce the legal consequence of a revocation.

But the Court decided, that as the testator parted with the estate, notwithstanding the old use resulted to him again, still the conveyance operated as a revocation of the will, because *it drew out of the testator the subject matter upon which the will was to operate.*

Such a series of well-considered cases have concurred in establishing this particular doctrine on the subject of revocation by a subsequent conveyance, that the general rule, as laid down in the preceding pages, may now be considered as finally at rest (4). It seems a little extraordinary, indeed, that, when once it had been received in all the courts as a rule, that a conveyance by a testator of the devised *lands* to the use of himself, and his heirs for ever, was a total re-

(4) See Vawser v. Jeffrey, 16 Ves. Jun. 519. By Sir W. Grant, the question is no longer open to controversy.

vocation of his will, it should afterwards be contended, that a conveyance of the fee to particular uses, and for a partial purpose, was not a revocation beyond those uses, or the exigency of that partial purpose.

Of the necessity for the testator's being seised at the time of making his will, and continuing so to the time of his death.

The rule respecting the revocation of wills, does not in this instance rest upon the intent to revoke, but is best accounted for by considering that the testator must actually have the interest in him, which he attempts to devise, at the time of making his will: and that as the will is inchoate at the time of making it, and consummate by the death, it must have a potential existence during the interval, and by consequence the interest on which it is to operate must uninterruptedly continue, during the whole period, in the testator.

Some great lawyers (5) have grounded the reason of the necessity which exists for the testator's being seised of the lands at the time of his making his will, upon the words of the statutes 32 and 34 Hen. 8. viz. "that every person *having* lands, may devise them;" later authorites have with greater correctness held, that this rule is older than the abovementioned statutes of Henry the 8th: for according to all the precedents, the inefficacy of a will to pass lands, whereof the testator was not seised at the time of making and publishing it, applied as well to devises by custom, as to wills authorized by the statutes

(5) See the case of Brett *v.* Rigden, Plowd. 344. where Lord Dyer grounds the reason of this rule upon the force of the word 'having,' in the stat. 32 H. 8. and see Butler and Baker's case, 3 Rep. 31. and Strange, 27.

were inconsistent; but that in the c[illegible]e of Bunker deration there was no inconsistenc[illegible]bserved that it changed as to that part of it or[illegible]erein it was uni- operate; for the operation o[illegible]as seised in fee, and the old fee-simple, which [illegible] his will, to be abso- tlement was returned be[illegible]visor of lands should be it was said no new [illegible] *of his making his will* (6). acts which took pl[illegible] the testator's c[illegible] *testator devises all his lands, and* question was [illegible] *purchases other lands, and dies without* tion was r[illegible] *will or republishing his former will,* mental [illegible] *purchased lands will not pass.* Serjeant shou[illegible] *Lovelace, in the case of Brett v. Rigden, supposed* a[illegible] *the effect to be different where the devise was of lands specifically mentioned and intended to be pur-*

[illegible] *Rep. temp.* Holt, 246. 1 Salk, 237. Fitz Gibbon, 232.

(6) Rastall, 274. where the devise was by force of the custom. And see the Writ ex gravi querela, in Fitzherbert, which sets out the custom; and where it is described not as a general authority to devise terras et tenementa, but tenementa *sua*. So that, as the custom is there set forth if they are not *sua* at the time of the devise, they are out of the custom, and the will cannot be rendered effectual by it. But it is proper in this place to apprise the student of the present liberal sense of the courts in respect to the nature and extent of the interest of which a testator must be possessed to qualify him to devise his estate. Modern decisions have extended the power of testamentary disposition to contingent and executory interests, where the person who is to take is certain, so that the same would be descendible if not devised. Roe *v.* Jones, 1 H. Bl. 30. and 3 D. T. R. 88. in which last case Lord Kenyon said that the word '*having*,' in the statute, must be understood to mean '*having an interest*,' and his Lordship distinguished between such a contingent interest and a mere possibility, or a mere expectation or hope of succession, as that of an heir from his ancestor. And see Fearne's Cont. Rem. 5th Ed. 463, et seq.

Contingent and executory interests are devisable.

...use in such case the intent was manifest ...position was in the above-mentioned ...v. Cook, denied to be law by the ... added that he had looked into the ...gin, and had found nothing in ...ition.

...n devise land, and be afterwards dis- ... and then die, the devise is void and can- ... be made good; because the disseisin has turned the estate to a right, which is only a chose in action (8), and cannot be devised away[e]; therefore, says the book, it was held a good plea against the devise, that

A right of entry not devisable.

[e] Bro. Tit. Devise, pl. 15. cites 39 H. 6. 18.

(7) In the case of Nannock *v.* Horton, 7 Ves. Jun. 399. it seemed to be the opinion of the present Chancellor, that a specific devise of personal estate, which the testator was never possessed of, might operate as a direction to the executor to purchase.

But where a real estate is *contracted* to be purchased, courts of Equity consider the estate as in the purchaser from the execution of the contract; and therefore, as a consequence of this maxim, it will be presently shewn, that a will disposing of the estate, before the contract is performed by a conveyance, is effectual to pass the interest, and is not revoked by a subsequent conveyance either to the purchaser and his heirs, or to a trustee for the purchaser and his heirs. So where personal estate is impressed with the character of real estate, by being agreed to be sold, and the money to be laid out in land to be settled, the person to take the ultimate reversion under such settlement, may devise it by his will, and the estate, though purchased *after the will*, will go in Equity according to such devise. See the case of the Attorney General *v.* Vigor, 8 Ves. Jun. 256.

(8) See the case of Goodright *v.* Forrester, 8 East, 552. The fine of a tenant for life displaces and divests the estate of the remainder man or reversioner, leaving in him only a right of entry, to be exercised either immediately for the forfeiture, or within five

the devisor did not die seised of those lands; but the book goes on further and makes a question, whether if a man be disseised, and then make his will devising his lands, and afterwards re-enter into the lands, it be a good plea to say that the testator had nothing in the lands at the time of the devise. His Lordship then gave it as his opinion that in such a case the re-entry (9) would purge the disseisin, and that the testator would be, to all intents and purposes, by relation, in from the beginning (10). His Lordship also further observed, that a will was a disposition from the time of

But if after disseisin an entry be made, the disseisin is purged, and the ti-

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years after the natural determination of the preceding estate. And the effect of the statute 4 Hen. 7. is only to save to all the remainder men, their respective rights of entry within five years after their respective titles successsively accrue, without being prejudiced, the one by the other's laches. *But such right of entry is not devisable*, though it may be released. Shep. Touchst. 325. Lit. Sect. 347. Co. Litt. 48. b. 214. a. 266. a. Perk. Sect. 86. [edit. 1642.] And see per Lord Eldon, 8 Vez. Jun. 282. Attorney General v. Vigor.

That the fine divests the remainder, see Litt. Sect. 416. and Fowes *v.* Salisbury, Hard. 401—2. It is also clearly held that though the remainder man is at liberty to enter presently for the forfeiture, still he has a future right of entry unaffected by that present right, which may be exercised within five years after the determination of the antecedent interest, by the death of the tenant for life. The Court thought in the case above cited, that such right of entry did not come within the description of the word *interest* in 34—35 H. 8. c. 514. and that the remainder man could not be considered as *having an interest* in the thing at the time of his devise; for an executory interest was a very different thing from a *right of entry* for revesting a divested estate.

(9) But if the testator had died out of the possession it seems clear that the will could have had no effect upon it, and see 11 Mod. 128. et 1 Bos. et Pull. 602. by Eyre C. J.

(10) 38 Hen. 6. 27. and 19 Hen. 6. 17. Observe what is said of this doctrine by the present Chancellor in 8 Vez. Jun. 282.

making it, and he looked upon this to be Lord Coke's opinion in Butler and Baker's case (11).

tle relates, and the lands pass by a w'l prior to the assesin.

Thus too in Arthur *v.* Bokenham[h], in the Common Pleas, Lord Chief Justice Trevor held that the making of a will is the foundation, and an instant incipient disposition, so that if the devisor have not the land (12)

[h] Rep. Temp. Holt, 750.

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(11) To prove that a devise was a present disposition to take effect in futuro Lord Holt instanced a case in Lord Bridgman's time, wherein, there having been a devise to two persons, and their heirs, and one of them dying in the testator's life-time, it was held that the survivor should take the whole. Perhaps this view of the operation of a will of lands as an *actual* disposition to take effect and become executed upon the death of the devisor, was in some measure the reason of Lord Kenyon's dictum in Doe *v.* Luxton, 6 T. R. 293. that a person entitled to an estate, pur auter vie, under a grant to him, and the heirs of his body, with remainders over, may cut off the remainders, and make a complete disposition of the whole estate by his *will* alone. It appears in the case of Campbell *v.* Sandys, 1 Schoales and Lefroy's Rep. 294. that this opinion of Lord Kenyon was not agreeable to the sentiments of Lord Redesdale, who observed that he could find no decision that at all warranted that opinion. His Lordship declared himself to think that on principle a will could not have that effect. But it is nevertheless to be observed that his Lordship appeared to ground his objection to the principle on a view of the nature and operation of a will a little different from that which was taken of it by Lord Holt, Lord Trevor, Lord Mansfield, and Lord Loughborough, as appears by the text. For Lord Redesdale does not seem so much to regard it as a disposition, or appointment of the lands in the nature of a conveyance to a particular devisee, as the mere designation of the special heir, against the right of the person to whom the property would otherwise devolve.

What operation a will has at the time of making it.

(12) It has been observed in a former note, that it is not meant that the possession, or an executed interest in the land, should be in the testator, it is enough if he have a present interest, though

at the time, it will not pass (13). And the interest must continue in him till his death, or it cannot receive its consummation.

Difference as to lands, and personal estate.

In the case of Harwood *v.* Goodright[1], Lord Mansfield adopts and further illustrates the same reason

[1] Cowp. 90. 3 Burr. 1497.

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to commence in futuro, or to depend upon a contingency; but a bare expectation as that of an heir, will not suffice, as was observed by Lord Holt, in the above cited case of Bunter *v.* Cooke.

Of the resemblance between wills and conveyances to uses.

(13) Lord Trevor took notice of the resemblance between wills and conveyances to uses, and observed, that no one could raise a use in land which he had not at the time of the conveyance; as, where a father covenanted to stand seised of land which he should afterwards purchase to the use of himself for life, and afterwards to the use of his youngest son and his heirs, and then purchased the land and died, and the question was, whether the eldest or the youngest son should take, it was resolved that no use could arise to the youngest son, as the father had not the land at the time of making the conveyance; and his Lordship put the distinction well between that case and where a man covenants that he will purchase land by such a time, and then levy a fine thereof to such and such uses. When the land is purchased, and the fine levied, the uses arise upon the fine, and not on the deed, and the deed is only evidence of his intention that such uses shall arise, if no uses are declared at the time of levying the fine, for at that time he might declare other uses.

A very material distinction as to the force of the residuary clause in respect of personal and real estate, results from this doctrine of considering a will of land, as to its immediate effect, as a species of inchoate conveyance by way of appointment, viz. if a legacy of personalty lapses, the subject passes with the residue to the residuary legatee; but if a devise of real estate, which is always specific, lapses, it goes to the heir, and not to the residuary devisee. But if, *at the time of the devise*, the person intended is not in existence, the subject of the devise, if real property, will go to the residuary devisee. See Doe on dem. Stewart *v.* Sheffield, 13 East. 526. See 1 Vez. 481. 8 Vez. Jun. 25.

for the revocation of wills by a subsequent conveyance of the property. "Though as to personal estate," said his Lordship, "the law of England has adopted the rules of the Roman testament, yet a devise of *lands* in England is considered in a different light from a Roman will; for a will in the civil law was an institution of the heir; but a devise in England is an appointment of particular lands to a particular devisee, and is considered as being in the nature of a conveyance by way of appointment; upon which principle it is that no man can devise lands which he has not at the date of such conveyance. It does not turn upon the construction of the statute of Henry 8th, which says, that 'any person having lands, &c. may devise.' For the same rule held before the statute where lands were devisable by custom. It is upon the same principle that there have been revocations determined contrary to the intent of the testator, as where he has afterwards made a feoffment or the like, because that has been construed a new appointment."

Which turns upon the distinction between the nature of a will according to the civil law, and the law of England.

These decisions, said the late Lord Chancellor Loughborough, result from fair, legal, that is, fair, systematical reasoning, and do not depend upon any captious nicety. The objections to them arise from considering the disposition, by testament, of land, in the same view as the Roman testament was considered, or wills of personal estate, which is not a just manner of considering what the law of England permits to be a disposition of land by will. It is not an indefinite disposition of all a man may be possessed of at his death, as is the case with bequests of personal property. A disposition of land by will is no more than an appointment of the person who shall take the speci-

fic land at the death of the person making it. It is so far testamentary that it is fluctuating, ambulatory, and does not take effect till after the death; but it is in the nature of a conveyance, as being an appointment of the *specific* estate (14). And therefore that course of determinations, which, with some attempts to break in upon it, has been established, and fully established, by Bunker *v.* Cooke, and Arthur *v.* Bockenham, has been wisely determined; and not determined upon the literal construction of the statute of wills, but upon the nature of the instrument[k].

All devises of land are specific.

After-purchased copyholds do not pass by the antecedent will.

The rule is the same in respect to copyholds purchased by a testator after making his will; they will not pass by the general words of the antecedent will, unless indeed, after they are so purchased, they are surrendered to the uses already declared by the last will and testament, as was done in Heylin *v.* Heylin[l], where the will was held to be republished by the words of the surrender. But in Warde *v.* Warde[m], where the testator Thomas Warde, by his will, *reciting that he was seised of a copyhold estate,* (when the fact was not so,) devised all his real estate, &c. and afterwards purchased a copyhold estate, and surrendered it thus, viz. "to such uses as I by my last will *shall* appoint;" the will was held not to operate upon this property.

Except where the will is republished by a surrender.

[k] Brydges *v.* Chandos, 2 Vez. Jun. 427.
[l] Cowp. 130. [m] Ambl. 299.

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(14) Every gift of land, even a general residuary devise is specific. See 7 Vez. 147. Ibid. 399. because a man can devise only what he has at the time of devising. See the case of Hill *v.* Cock, 1 Ves. and Beames, 175.

Still, however, if a testator *is possessed of the property at the time of making his will,* the surrender will be operative if made after the will. And in such a case, even if the surrender made after the will, be to such uses as the surrenderer *shall* by his last will appoint, the copyhold will nevertheless pass by the antecedent will,[a] if the words of such will be general enough to comprehend it. So the law stands with regard to the cases wherein the surrender is made *after* the making of the will.

It is clearly established that, in all cases, a surrender to the use of a will, to be availing, must be made while the person so surrendering has the legal property. Thus, if the surrenderee of a copyhold, before his admittance, surrenders to the use of his will, and is afterwards admitted, such surrender is of no effect, and cannot be made good by a subsequent admittance. And it matters not whether the will were before or after admittance (15).

If a man, after making his will, surrender his copyhold not to the use of his will but to new and other uses, his will is revoked, although he die before any admittance in pursuance of such surrender; and it has been held that even a covenant to surrender will

[a] 1 T. R. 435. Spring and Titcher *v.* Biles. N.

(15) Doe dem. Tofield *v.* Tofield, 11 East. 246. But in favor of a surrenderee under a valid surrender the admittance has relation to the surrender, so as to make the estate pass in the same course of descent; and so as to give the same right of dower and custom, which would have attached had the admittance followed immediately upon the surrender: because these are acts of law which are helped by relation: but relation, and other fictions of law, will not make good the acts of parties otherwise invalid. 3 Rep. 29. a.

produce the same effect[o]. But if after having surrendered to the use of his will, a copyholder in fee surrenders to new and particular uses, with reversion to himself in fee, it has been held that he may devise the reversion, without any fresh surrender to the use of his will[p].

SECTION VII.

Of subsequent dealings with the Estate in Equity.

IT has already been shewn that equity preserves an analogy in respect to the effect given to a testator's acts, as operating to revoke his will, and that therefore any disposition or disturbance of the estate, which at law would have produced a revocation, will be followed by the same consequence where the subject is equitable. But if, after a will disposing of an equitable estate, the testator takes a conveyance to himself and his heirs, of the legal estate, this is no revocation of the will (1). For nothing here passes out of the testator, and what he has subsequently acquired is, at least in consideration of equity, nothing new, in as much as in the view of a court of equity, he had the complete

If a man having an equitable estate makes his will and afterwards takes a conveyance of the legal estate to himself and his heirs, it is no revocation.

[o] Vawser v. Jeffrey, 16 Ves. Jun. 519.

[p] Thrustout d. Gower, v. Cunningham, 2 Blackst. 1046.

(1) By Lord Hardwicke, in Parsons v. Freeman, 3 Atk. 741. and by Lord Loughborough in Brydges v. Chandos, 2 Ves. Jun. 429. and see the case cited by Lord Loughborough from Roll. Abr. 616. pl. 3. Cestui que use before the statute of uses, devises; afterwards the feoffees make a feoffment of the land to the use of the devisor; and after the statute the devisor dies, the land shall pass by the devise. And see Watts v. Fullarton, Dougl. 691.

estate before, and therefore that judicature does not regard the property as at all altered.

But if this case be reversed, and the facts be supposed to be, that a man seised of a legal estate makes his will, and then conveys the estate to another in trust for himself, and his heirs, the will is clearly revoked in law, because the subject of the devise is parted with, and the estate which is subsequently acquired in equity, is a totally new estate, and therefore not included in the will[a].

But if, having the legal estate, he devises it, and then passes it to trustees for himself and his heirs, the devise is revoked.

In Parsons *v.* Freeman[b], it was agreed by the marriage articles, that the wife's lands, of which she was seised in tail, should be conveyed to the intended husband in fee; they married; the husband made his will, and devised these lands: and afterwards the husband and wife suffered a recovery of the same lands to such uses, and for such estates, as they should jointly appoint; and, in default of appointment, to the use of the husband and his heirs. She died without appointing, and it was decided by Lord Hardwicke, that the will was revoked; his Lordship at the same time admitting, that, if the husband had only taken the legal estate by the recovery, to execute it into the equitable estate, it would have been no revocation; but in the case as it stood, *new uses* were created, and though no appointment was made, yet, the fee was by the recovery taken differently qualified[c].

If, where the legal estate is called in after a will made, any new use is engrafted upon it, the will is revoked.

So where a man having bound himself by articles, makes his will, devising so much as the articles were not intended to operate upon, and

[a] Ibid. [b] 3 Atk. 74 1.

[c] Et vid. Tickner *v.* Tickner, cited 3 Atk. 741. 1 Wils. 308.

then conveys his legal estate upon trusts, by way of settlement in execution of the articles. Upon the principle of the decision in the decisive case of Goodtitle *v.* Otway, above cited, such a conveyance in trust as last-mentioned, would be a complete revocation of the will. The case of Williams *v.* Owen[d], which was decided at the Rolls in 1795, a few years before Goodtitle *v.* Holford, certainly proceeded upon a contrary doctrine: but that case has been considered as open to great doubt, since the decision of the case of Goodtitle *v.* Holford.

Comments on the cases of Williams *v.* Owen, and Brydges *v.* Duchess of Chandos.

The case of Williams *v.* Owen was shortly this: a man being seised in fee, by articles prior to marriage, covenanted to convey his estate to trustees, to the use of himself for life, remainder in trust to secure an annuity to his wife in bar of dower; remainder to trustees for a term to raise portions; remainder to the sons and daughters successively in tail; remainder to his own right heirs. He afterwards made his will, and devised the reversion in fee in the event of his dying without issue; and afterwards and before marriage, executed a settlement in pursuance of the articles, by which he conveyed the estates to trustees, and their heirs, to the uses and upon the trusts of the articles. It was holden that this settlement did not revoke the will, being nothing more than a mere legal execution of the articles.

The Master of the Rolls compared this case, in principle, to that wherein a testator, having devised an equitable estate, takes a conveyance of the legal estate from his trustee, to himself and his heirs, or to

[d] 2 Ves. Jun. 595.

the uses of the will. He admitted that after the articles the devisor remained seised of the legal estate, and passed it out of himself by the conveyance; but he said that by the articles he had reduced himself to a remainder man in fee in equity; that having this ultimate trust in fee he devised it, and then the subsequent act with respect to this fee was no more than clothing it with the legal estate. The objection to this reasoning, however is, that it is not strictly according to the fact, but seems more like misapprehension than could be expected from so accurate a Judge, for there seems to be no propriety in considering the testator as having converted himself by the articles into an equitable remainder man. He clearly retained the whole fee simple in law, and the ultimate reversion, being a part of such fee, was comprised in the will, and afterwards conveyed out of the devisor, which brings the case clearly within the range of the doctrine above discussed.

In alluding to the case of Brydges *v.* the Duchess of Chandos, his Honour observed, that it was impossible not to see that the judgment in that case which gave to the settlement the operation of a revocation was founded upon the variation of the settlement from the articles, and he took it to have been clearly the Chancellor's opinion, that if the settlement had fully followed the articles in the case before him, there would have been no revocation.

It is evident, however, that if that was the inclination of the Chancellor's mind, he was furnishing reasons and authorities against his own opinion, by the long preface to his very learned and able decree in that cause, wherein he has elaborately expounded the

doctrine of virtual revocations by the alienation of the subject of the devise upon the principle and nature of wills, which indispensably require a continuation of the same interest from the making of the will to the time of the testator's death.

The facts of the case of Brydges *v.* the Duchess of Chandos*, were shortly these: the Duke of Chandos, on the 20th of June, 1777, by articles previous to his marriage, covenanted that he would, within six months after his marriage, convey lands in such manner that he should be seised in fee, and his wife entitled to dower if she survived him; and also that he would, within 12 months after the marriage, settle the said estates subject to the dower of the Duchess to the use of himself for life, to trustees to preserve contingent remainders, remainder after the deaths of the Duke and Duchess to trustees for a term, to raise portions for younger children; remainder to the first and other sons of the marriage in tail male; remainder to his own right heirs. The Duke also covenanted, that, in case the dower should not be equivalent to 2000*l.* per annum, his representatives should make good the deficiency. The marriage took effect, and on the 9th of January, 1780, the Duke by his will, after confirming the articles, devised all the real estates which he had by the articles agreed to settle, in case he should die without issue male, or in case of failure of issue male in his wife's life-time, to his wife for life; remainder to his daughters as tenants in common in tail, with further limitations. The Duke afterwards executed a settlement, by which, reciting the marriage articles, he conveyed the fee to

* 2 Ves. Jun. 417.

releasees, to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder to other trustees for a term, to raise 2000*l.* per annum, for the Duchess, for her jointure, and in bar of dower, remainder to the first and other sons of the marriage in tail male, remainder to the Duke and his heirs.

Upon a view of this case, as above shortly stated, there is an obvious variation in the settlement from the terms both of the articles and the will, and this variation of the interests was much dwelt upon by the Court, to meet the argument of the settlement's being attracted to the articles, so as, by the fiction of relation, to date back, in contemplation of equity, from a time anterior to the will. But from the whole course of reasoning and illustration adopted by the Lord Chancellor, and particularly from what he says in making the application of his general propositions to the facts of the case, viz. that "he should be apt to say that this was a conveyance of the whole fee; that the object required it; that it was a disposition that would revoke the will at law; and that *that* Court ought not to determine differently from the rule of law as he had before stated it," it manifestly appears what would have been his opinion upon the case if there had not been in it the other ingredient of a substantial variance between the will and the settlement.

There seems, therefore, to have been good ground for the concession of the counsel in the case of Cave v. Holford, in Chancery*; that it is impossible to re-

* 3 Vez. Jun. 684.

concile Williams *v.* Owen with Brydges *v.* the Duchess of Chandos. The difference, indeed, between a case circumstanced like that of Williams *v.* Owen (2), and that which the propriety of the decree, according to the professed principle of it, required it to resemble, may be expressed by the contrary propositions of *parting* with the estate and *bringing home* the estate.

In Watts and others *v.* Fullarton[r], the testator having previously articled to purchase an estate, became in equity the owner of the estate, from the time of the articles, and having afterwards settled the purchased property by his will, his subsequently taking a conveyance of the estate to a trustee for himself and his heirs, was on solid equitable grounds held to be no revocation; and the trustee would, of course, be seised of the legal estate upon trusts corresponding to the directions of the will.

Lord Bathurst, who decided that case, was said by Lord Mansfield to have relied much on the general proposition laid down by Lord Hardwicke, in Parsons *v.* Freeman[s], that "where a man has an equitable

[r] Stated Doug. 691. 2 Vez. Jun. 602.
[s] 3 Atk. 741. 749.

(2) The opinion of the Master of the Rolls, in Williams *v.* Owen, supposes the articles, and the marriage which followed, to have turned all the estates into equitable estates, so that when the conveyance was afterwards made of the legal estate, it was no more than clothing the equitable fee, which had been devised, with the legal estate.

See the reasoning of the Master of the Rolls, in Harmood *v.* Oglander, 6 Vez. Jun. 218. in explanation of the principle of his opinion in Williams *v.* Owen.

interest in fee in an estate, and devises it, and afterwards directs a conveyance of the legal estate to the same uses, this is no revocation." It is evident, however, that this case of Watts *v.* Fullarton, exceeded the bounds of Lord Hardwicke's proposition, which supposed the legal estate to be afterwards conveyed upon the *same* trusts as directed by the will; and which would be the case of a simple change of the trustee; whereas, in the case last mentioned, the will had settled the estate in a strict form, and the subsequent conveyance from the vendor was for the benefit of the purchaser and his heirs.

The act which succeeded the will in the case of Watts *v.* Fullarton, was in effect nothing more than a completion of the contract; and upon the strength of what has been laid down by Lord Hardwicke, in Parsons *v.* Freeman[h], and confirmed by later authorities, we are warranted in concluding, that if the testator in this case of Watts *v.* Fullarton, had taken the conveyance to himself and his heirs, instead of taking it to a trustee for himself and his heirs, such conveyance would have been no revocation in equity, and the effect thereof would have been to have made the heir a trustee for the persons taking under the will.

That the change of trustees is no revocation of a will was held also in the case of Bark *v.* Zouch[i], where A. having made his will, and devised that his feoffees in trust should make a lease to C. and D. for 80 years, at a certain rent, payable to his executors, afterwards procured them to join with him in making a feoffment of the devised hereditaments to new

[h] 3 Atk. 741. [i] 1 Ch. Rep. 23.

trustees and their heirs, to the use of himself, until he limited new uses thereof, which he never did. It was held that the feoffment was no revocation of his will. And again, in the case of Doe, lessee of Sir William Gibbons *v.* Pott[k], where a mortgagor devised the mortgaged lands, and afterwards paid off the mortgage, and caused a conveyance to be made by the mortgagee of the legal estate to a trustee, in trust for himself and his heirs, such a transfer of the legal estate was held not to operate as a revocation of the will.

But between the two last-mentioned cases there is this observable difference, that in Bark *v.* Zouch, the owner of the equitable estate, after devising it, *joined* in the conveyance from the old to the new trustee; whereas in Doe *v.* Pott, it does not appear from the report of the case that the mortgagor was a conveying party in the instrument, whereby the legal estate was transferred to the new trustee. It is probable he was not, having already, and before his will, conveyed his equity of redemption to the trustees of his marriage settlement. It seems, however, that the decision of Bark *v.* Zouch is agreeable to sound equitable principles; for the reason for a will's not being revoked by a mere change of trustees, viz. because no estate in equity passes out of, or is acted upon by, the testator, seems equally to hold where the owner of the equitable estate joins with the old trustee in conveying to the new, since such act is as inoperative in equity as at law, except for the purpose of being directory of the intended transfer.

[k] Doug. 710. and vid. per Lord Eldon, 11 Ves. Jun. 554.

In a case where the first of two wills devised land to trustees upon certain trusts, and the second devised the same lands, together with another piece of land, to the old trustees, with others, but upon the same trusts, the second will was held to be no revocation of the first[1], and as it should seem, upon the clearest equitable grounds. For in such a case the estate devised by the first will did not *pass out* of the testator till his death, and there was no *inconsistency* in the devises. The peculiar facts of that case made it important to decide whether the first will was revoked; for though the second will included all the purposes of the first, yet the statute of mortmain having passed between the making of the two wills, unless the estate could pass by the first it could not pass at all, as being for a charitable object. It is true, the second will devised the legal estate to three new trustees, in addition to the old, but still in respect to the two former trustees, and in respect to the trusts themselves, there was no disagreement; and we may remember that the rule with its three branches is this—that a subsequent devise, to revoke a subsisting devise of land, must be inconsistent with such former devise; that the apparent inconsistency must be irreconcileable; and that the first of two wills is, upon the ground of inconsistency, revoked only to the extent of the inconsistency.

Revocation in equity by articles to sell for valuable consideration.

Equity holds a very steady course in respect to these revocations of wills by subsequent alienations, applying the rule of law to those interests which are looked upon as the estate itself in equitable consideration, and to equitable purposes, in such manner as to keep the decisions of law and equity, in

[1] 1 Vez. 178. 186. Willett v. Sandford.

this respect, the same in principle. Thus, it being the maxim of equity to treat an estate which has been articled to be conveyed by the owner to a purchaser for valuable consideration, from the moment the articles are executed, as vested in the purchaser, and therefore as capable of passing by his will, if properly executed[m], and the subsequent conveyance of the legal interest as having no effect upon the will, being only the medium of carrying the estate home; in pursuance of the same maxim, that Court considers a devise of land to be revoked by subsequent articles to convey or settle the devised premises for valuable consideration; for, if the estate, after the articles are executed, is to be regarded, as vested in the purchaser, it ought to be regarded as passing by the same act out of the vendor or settler, and therefore by a plain consequence of this rule of equity, a testator by a subsequent covenant for valuable consideration to sell or settle the devised estate, must be held to have revoked such prior testamentary disposition.

Thus, where[n] a testator devised to his wife six houses in bar of dower, and the rest of his real estate to his two daughters and their heirs, in moieties, and afterwards in consideration of the marriage of his eldest daughter, by marriage articles covenanted to settle one moiety of his real estate to the use of himself for life, remainder to the husband and wife for their lives, remainder to the younger children of the marriage in tail general, remainder to the husband in fee; Lord Chancellor King held that al-

[m] See the case of Broome v. Monck, 10 Vez. jun. 604. that an equitable title acquired after a general devise passes by republication.

[n] Sir Barnham Rider v. Sir Charles Wager, et al. 2 P. Wms. 328.

though it was but a covenant, and therefore at law no revocation of the will, yet that the same being for valuable consideration, was in equity tantamount to a conveyance, and consequently a revocation of the will, as to the six houses devised to the wife. So that the husband was entitled to one clear moiety of the rents of the real estate, from the death of the testator. The same doctrine was again laid down by the same Chancellor in a subsequent case[o], and has since been confirmed by the learned Lord who at present holds that high station[p], as well as by the eminent person who at present presides at the Rolls[q].

SECTION VIII.

The Doctrine of Relation.

SOMETHING has already been said on the doctrine of relation, as it applies to this subject. It seems to call for a particular notice, as there is some apparent confusion in the cases upon wills which have turned upon it—a confusion which seems in some measure to have arisen from a neglect to advert to the different notions conveyed by the word, 'relation' in our law (1).

[o] 2 P. Wms. 624. Cotter v. Layer.
[p] 5 Vez. Jun. 654. [q] Vawser v. Jeffrey, 16 Vez. Jun. 519.

(1) It would be too much to undertake to introduce in this place a general explanation of the law on the subject; for being of great difficulty in itself it is rendered more so by the want of an uniform principle in the decisions upon it. A short view of it, however, as far as it is connected with the revocation of wills, is called for by the present enquiry.

Difference as to the effect of disseisin and subsequent entry, where the disseisin is before and where it is after the will.

In the case of the disseisin[a] before adverted to, the relation is of a very forcible kind. By his re-entry the disseisee is circumstanced exactly as if he had never been disseised, for the new possession unites so immediately with the former possession as to destroy the tortious estate, as well as all the legal effects of the tortious act. But it may, perhaps, be reasonably doubted, (2) upon the strong words of statute of wills, and the established maxim of the law, which make the actual *having* either the estate itself, or an interest amounting to a jus in re, essential to the operation of a devise of land, whether, if *after* disseisin a devise be made of the land by the disseisee, and afterwards an entry be made by him, the relation be such as to make the will operate to carry the land. For it has been said that relation shall never operate to make an act good which was void for defect of power (3). In

[a] Vid. supra, Sect. 6.

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(2) This same distinction I have since found adverted to by the present Lord Chancellor, in the case of the Attorney General v. Vigor, 8 Vez. jun. 282.

(3) See Vent. 304. and see also 3 Rep. 29. Butler and Baker's case, that relation will, in many cases, help acts in law, but will never help acts of the parties, that is to say, make void acts of the parties good: and therefore if a man enfeoff an infant or femme covert, and then devise the land, and afterwards the infant or the husband dissent, such dissent without question, shall have relation between the parties ab initio, to this intent that the infant or husband shall not be charged in damages, or receive any prejudice, but shall never make a void grant, gift, or devise, good by relation. But the attentive reader will perceive that there is a relation of a stricter kind, (and which can hardly be called a mere fiction of law,) which may have the effect of giving validity and efficacy to an intermediate act, incapable, at the time of its being performed, of any present operation.

the case which was in the contemplation of Lord Holt, the devisor had the estate when he devised; the disseisin only broke the continuance of the ownership; but in the case last supposed, the devisor would have had no estate, but a right of entry only when he made the devise.

In the foregoing case of disseisin the law seems to help and favour the relation on account of the intervening title's being tortious. For as this species of relation is a fiction, and all fictions of law are governed by the equity of the law (4), the odiousness of

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(4) In the case of the Attorney General *v.* Vigor, 8 Vez. jun. 279. the reader will find an attempt made to reason by analogy from this case of disseisin and entry by the disseisee after will, to a case where after his will the testator exchanged the devised lands for others, and an eviction happened after the testator's death, so as to raise a title to recover back the exchanged property. Those who argued against the revocation contended, that as the attempted exchange had completely failed, the whole transaction was avoided, and the old estate was remitted, precisely as if it had never been out of the devisor: that there was an implied condition, upon the presumed title of the land, that if either party was evicted, there was a total end of the exchange, and the other party might enter: that it must be considered as only a parting with the possession without transferring any title, and that as the old estate continued in the devisor, the devise was no more revoked than it would have been by the grant of a lease. But Lord Eldon, after admitting the perfect propriety of Lord Holt's opinion, as to the effect of the re-entry after disseisin by the disseisee in his life-time, adverted to a striking difference between the cases of disseisin and exchange, viz. that the disseisin was not the act of the party but a wrong and violence done to him: neither did it escape his Lordship that even in the case of the disseisin, if the disseisee neglected to enter, his mere right to enter would not pass by the will, and that the case put by Lord Holt supposed the entry to be actually made; whereas in the case before him, as it stood upon the facts, the eviction did not

the wrong (5), induces such favour to the relation of the recovered right, that the intermediate act is wholly obliterated and out of the remembrance of the law.

Of the effect of a re-entry upon condition broken.

Whether a re-entry for a condition broken by an alienee, or performed by an alienor, restores the old estate so as to remove all consequences of the alienation, seems open to doubt. It does not stand quite upon the grounds of the case, just above put, of the disseisin, there being no wrongful act to aid the construction of relation. In the first volume of Roll's Abridgment[b] it is said, that if a man devise and then alien upon condition, and afterwards perform the condition, and enter and die, it seems the devise is revoked; though in a case mentioned in the reports[c] of the same Judge, it is said, arguendo and without contradiction, that entry for a condition broken makes a man by relation in as of his first estate, just as if the possession had never been out of him. And whether the entry be for a condition broken, or on a condition performed, the principle must be the same. All agree that after entry, upon condition performed or broken, the party is in as of his old estate, but the doubt is whether it be not too strong to say that *he is in as if the estate had never been out of him.*

Whether if a testator aliens upon condition after making his will, and then enters for the condition broken, the will is revoked?

This effect can only be given to the entry by sup-

[b] 617 Pl. 3.

[c] Nicholas v. Simmonds, 2 Roll. Rep. 469.

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happen till after the death of the party, so that the lands conveyed in exchange continued through the life of the party, and at the time the will became operative, under the effect of that conveyance.

(5) Relation will not defeat collateral acts which are lawful, especially if they concern strangers, 13 Rep. 21.

posing it to work by the same forcible sort of relation which has been observed to take place in the case of the disseisin. And indeed it would seem to follow as of course, that if the entry could operate as a *continuance* as well as a *restoration* of the title, the will of the party would be made good by such entry. But it appears to be very questionable whether such a case of reunion of title is strictly a case of relation at all.

If any forfeiture is incurred or privilege lost by the alienation, such forfeiture or loss of privilege continues, notwithstanding the alienor's subsequent entry for breach of condition. Thus if a tenant for life makes a feoffment and re-enters for a breach, he shall be tenant for life again, but still subject to the forfeiture. So if tenant by homage auncestrel had made a feoffment on condition, the uninterrupted continuance of the privity in the blood of the tenant was dissolved by the alienation, and after a re-entry for a breach, the tenant would not have holden by homage auncestrel again. For the same reason also if a lord of a manor makes a common law conveyance of an escheated copyhold (which is an enfranchisement) upon condition, and re-enters for breach of the condition, no relation takes place to save the privilege, but the continuance of the custom is broken, and the estate returns without the right of re-granting it as copyhold[a]. These cases shew that though the re-entry for a condition broken restores the estate, it restores the estate affected and modified by the act of alienation; and that the law takes notice that it has been once out of the party; so that the weight of reasoning and analogy seems to be on the side of the above cited

[a] Co. Litt. Estates upon Condition.

dictum from Roll's Abridgment; since the inference from these examples is, that the return or restoration of the old estate upon an act of alienation does not imply an unbroken continuance of title. From the same reasoning we may deduce a confirmation of the propriety of the decision in the case of Goodtitle v. Otway. For if we hold to the cases which say, that if a man makes a feoffment in fee to a stranger to the use of himself in fee, there though the old estate is said to return, yet it is not the identical estate, since it comes back first in the shape of the use, and then the statute carries the legal estate to the use which is in a manner a new purchase[e]; then the cases upon re-entry for breach of condition are much stronger, to shew the legal consequences of the estate's being once out of the party, for in such cases the identical estate does certainly return. At the same time it must be confessed, that if we adopt the opinion that in the case of a feoffment to the use of the feoffor and his heirs, the old use was never drawn out of the party; the above cases upon re-entry upon condition performed or broken, seem to be somewhat weaker than the doctrine which maintains a will to be revoked by an act which never disturbed the real interest of the devisor, but left that use (which before the statute of uses was the proper equitable subject of devise) still remaining unchanged in the party conveying.

Of relation in its strict sense.

I come now to speak of that stricter sort of relation before alluded to, and which, in its true notion, is that principle by which an act of law is made to date back, in legal consideration, to the time of some precedent act, so as to be regarded as the completion of that of which such first act was the proper beginning, and

[e] 1 Roll. Abr. 615, 616.

forming in conjunction with it one integral and consummate transaction of law. Thus it has been properly said, that where[f] the commencement, progression, and consummation of a thing are necessary to go together, all of them are to be respected. But the thing is to be considered as receiving its perfection from the first. So where divers acts concurrent go to constitute a conveyance estate or other thing, the original act shall be preferred, and to this the other acts shall have relation, as was said by Berkley and Jones, justices in the case of Harper *v.* the Bailiffs of Derby[g]. But Lord Hobart has explained this sort of relation with most strength in the case of Needler *v.* the Bishop of Winchester[h], on the question as to the relation of the enrolment of a deed to the king, where that profound Judge observed, "that there are certain relations which cannot properly be called fictions of law, but are real acts, compounded of some simples, which make not a complete or entire act till they come together, and then they make one perfect act working by their nature ab initio, even as others do that are in their nature single; but those things are properly fictions of law, that have no real essence in their own body, but are so acknowledged and accepted in law for some special purpose." Of this sort of compounded act the case of a grant to the king, not perfected by enrolment, but which when the enrolment takes place has its effect not from or by the enrolment, but from and by the first act, is said by Lord Hobart to be an example[i]; of which kind also is a feoffment within view and a subsequent entry, which entry *dates back* in effect to the time of the feoffment[k].

[f] 3 Bulst. 11. [g] Jones, 428. [h] Hob. 222.
[i] Plowd. Com. 31.
[k] Vid. Parsons *v.* Pierce, Pollexfen, 45.

The same principle governed the opinion of the bench, as to the second point, in Shelley's case (6), which turned upon the retrospect of the execution to the judgment in the recovery, so as to make the act consummate by relation, in the life-time of the party dying between the judgment and the execution. And there it was said that the execution of every thing which is executory always respects the original act, and all make but one act or record, although performed at different times, for causa et origo est materia negotii. Upon the same principle stands the case of dower mentioned in Bingham's case (7), that if a husband levies a fine with pro-

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(6) 1 Rep. 106, b. Where, in the vigorous dialect of those times, the recovery is said to be the mother which conceived the use, and the fountain out of which it rose.

(7) 2 Rep. 93, b. Dyer, 72, b. 224. And note that the statute 32 H. 8. which gives an entry to the wife and her heirs, against the alienation of the husband, helps the discontinuance but not the bar. See Co. Litt. 326, a. To understand this point, respecting the operation of the fine as a bar of dower, it is necessary the reader should know, that where a person has neither a right in presenti or in futuro, at the time of the fine levied, he is out of the purview of the statute; for as the reporter, in his note to the case of Stowell v. Lord Zouch, Plowd. 373. expresses it, the purview is against those who have right at the time of the fine levied, or have future right afterwards upon cause arising before, to which future right wrong was done before the fine, or by the fine. Upon the foundation of this proposition, the learned reporter denies the case in the text, contending that in the case of dower the title wholly accrued after the fine, viz. by the death of the husband, for he was of opinion that until the death of the husband no title was consummate, nor wrong done by the conusee in detaining the land from the wife; and that therefore the fine did not reach the title, in as much as it accrued upon cause wholly after the fine, the two first points, marriage and seisin, being of no moment without the third.

clamations, and dies, and five years pass after his death, the wife is barred of her dower, for though at the time of the fine levied her title was not consummate, yet the law respects the first and original causes, viz. marriage and seisin.

Of the relation, in respect to copyholds, of the admittance to the surrender.

Thus also although a surrenderee of a copyhold has no estate in the premises surrendered until his admission, yet on being admitted he is in by relation to the surrender, from the date whereof his admission operates. Should the surrenderor die before such admission of the surrenderee, he dies indeed seised in law of the premises, and though his widow might in strictness claim her free bench, yet on the admission of the surrenderee that estate is defeated (8), together with all the mesne acts of the surrenderor[l]. And as all the mesne acts of the surrenderor would be defeated by this relation, so by force of the same relation all the mesne acts of the surrenderee would be confirmed; and accordingly the surrenderee, after admittance, in declaring in ejectment might lay the demise immediately from the surrender[m], and recover

[l] Benson *v.* Scott, Carthew, 275. Vaughan *v.* Atkins, 5 Burr. 2764. 2787.

[m] 1 T. R. 600. Holdfast and Woollams *v.* Clapham.

But this opinion of Plowden is contradicted by all the books. See the English Plowden, 373.

(8) Sir W. Jones, 451. Parker *v.* Bleake. It is to be observed that the relation defeats the widow's bench, because it prevents the husband dying seised, which (except where it is otherwise by special or local custom, for which see Robinson on Gavelkind, p. 172.) is necessary to ground the title to dower; and therefore an alienation by the husband to take effect in his life-time, bars the claim of the widow. Cro. Jac. 126. Lashmor *v.* Avery.

mesne profits from that time[n]. On this ground it was, that in a case where a copyholder surrendered to the use of himself for life, with remainders over, and the ultimate limitation to himself and his heirs, and afterwards surrendered to the use of his will, and made and executed his will accordingly, and after such surrender and will made, was admitted upon the former surrender, the will was held not to be revoked, because the admittance related to the time of the first surrender, and the whole transaction might be considered as one and the same[o]. And Lord Mansfield added, that this was the principal reason which the court went upon in Selwyn *v.* Selwyn[p], for, said his Lordship, after stating some other reasons of the judgment, the great and manly ground upon which the court went in that case was that the deed, recovery, and all the whole transaction was to be considered as one conveyance.

The substance of the case of Selwyn *v.* Selwyn was this: A father, tenant for life, and son, remainder man in tail, executed a bargain and sale, which was duly enrolled, whereby they conveyed the entailed lands to a third person, to make him a tenant to the præcipe for suffering a recovery, the uses of which recovery were declared to be to the father for life, remainder to the son in fee, and after the writ of entry was sued out, but before it was returned, the son made a will, whereby he devised the same lands to the father in fee, and died after the recovery was completed without revoking or altering his will. And the following question

[n] 2 Wils. 15. Roe d. Jefferey *v.* Hicks.

[o] 1 Blackst. Rep. 605. Roe d. Norden *v.* Griffiths.

[p] 2 Burr. 1135.

was proposed by the Lord Chancellor to the Court of King's Bench, " Whether the lands of which this recovery was suffered passed by the will ?" The court gave no reasons for their opinion, agreeably to the usage upon cases referred out of chancery; but, according to Sir James Burrow, they repeatedly expressed their approbation of the case of Ferrers and Curson *v.* Fermor and others, and therefore it is likely, says the reporter, (who was confirmed by Lord Mansfield afterwards, as appears by the case above-mentioned of Norden *v.* Griffiths) that they considered the whole as one conveyance, which must relate to the date of the bargain and sale, which was perfected, made absolute and delivered from objections by the subsequent ceremonies (9).

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(9) A writer of great knowledge in his branch of the profession, in page 149 of his treatise on conveyancing, has observed, that until seisin no uses can arise under the recovery, and that consequently until there is seisin in the demandant as the means of supplying the seisin to uses, the person claiming under the uses has no legal estate which will admit of an alienation by deed, but he has an inchoate interest which will allow of his devising his interest by will. The true ground, continues this writer, of Selwyn *v.* Selwyn, is, that even before the recovery was suffered, the testator had in him a title to a future use, which gave him a power of testamentary alienation, and his will operated upon this use in its fiduciary state, and also on the estate itself, when the use was executed into the estate. He goes on to say that another ground of that case, and the ground to which it is more generally ascribed is, that the recovery and the recovery deed formed one assurance.

Possibly, however, this writer, as he makes no mention, might not have been aware, of the above cited case of Norden *v.* Griffiths, wherein Lord Mansfield, who presided on the bench in Selwyn *v.* Selwyn, declares, most emphatically, that the true ground upon which the decision in that case went was that which this gentleman seems not to admit to have had much share in producing it,

The case in Cro. Jac[a]. referred to and approved in Selwyn *v.* Selwyn, was in effect as follows: A lessor covenanted with his lessee for years, that a bargain and sale should be made, and a fine levied to the lessee and his heirs, to the use of him and his heirs, to the intent that a common recovery might be suffered against the conusee, with voucher of the lessor, who should vouch over the common vouchee, to the use of A. B. and his heirs; and after the bargain and sale, and fine and recovery were perfected, A. B. brought an action against the lessee for rent arrear, and the question was whether the lease was extinguished and destroyed by the deed fine and recovery? It was agreed, that if a fine or feoffment be made to a lessee for years, to the use of a stranger, it would not extinguish the term (10), for it was saved by the statute of uses, which executed the use, and saved all rights, estates, and interests; but as in this case the bargain and sale was made, and the fine levied, to the lessee, to the intent that a recovery might be suf-

[a] 643.

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viz. that the indentures, recovery, and the whole transaction was to be considered as one conveyance. Indeed the other supposed ground seems very refined and fanciful, and stands but ill with the subsequent cases on the doctrine of revocation.

(10) If at the common law, before the statute of uses, a termor took a conveyance of the premises in lease to him, to himself and his heirs, to the use of another, his own term was saved to him in equity. And observe that the legislature did not, by the statute of 27 H. 8. design to prejudice any rights or estates, but to preserve them, so that the operation of the statute would be at once to execute the use as to the reversionary interest, and to prevent the merger of the intermediate estate. See the case in Cro. Jac. 643.

fered, whereby certainly the term was drowned and extinguished for a time, until the recovery was suffered, (since during that interval, no use being raised, the saving in the statute of uses did not apply to the case,) whether the lease should be revived and recontinued by the recovery which raised the use, and so let in the statute, was the doubt? And the court resolved that it should be revived, for the bargain and sale, and fine and recovery, were all but one assurance, and the recovery being suffered, which was grounded upon the covenant, was quasi a conveyance to the use ab initio (11).

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(11) Of a similar opinion, in respect to the relation in these compound conveyances to the first fundamental act, so as to carry back the title to the date of the leading instrument, were the two Judges, Croke and Montague, in the case of Havergill *v.* Hare, Cro. Jac. 510. The case as to this point was as follows: William Parker, being seised in fee of lands, on the 31st October, 8 Jac. I. by indenture enrolled, granted a rent of 20*l.* per annum to Isaac Warden, payable at Michaelmas and the Annunciation, with clause of distress; and by the same indenture covenanted to levy a fine of the same lands to the uses following, viz. that if it should happen that the said yearly rent of 20*l.* should be in arrear, and no sufficient distress upon the premises, or if any rescous, pound-breach, or replevin should be made, that then it should be lawful for the said Warden to re-enter and enjoy, till satisfied out of the rents. On the 12th June, 9 Jac. I. Warden sold and conveyed the rent to William Fisher, the lessor of the plaintiff, with all penalties, forfeitures, &c.

On the 19th October, 11 Jac. the rent due at Michaelmas was in arrear, and was demanded by Fisher, but not paid. In the Trinity Term succeeding a fine was levied to Fisher, to the uses specified in the first indenture of covenant above-mentioned. Fisher afterwards distrained for the half-year's rent of 10*l.* due at Michaelmas, 11 Jac. and the tenant of the land replevied; whereupon Fisher entered under the uses of the fine. And one of the

SECTION IX.

Mortgages, &c.

I SHALL now pass to the consideration of mortgages, securities for money, and conveyances to pay debts, which Lord Hardwicke has enumerated as the

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questions in this case was, whether, as this rent of 10*l.* was due, and demanded before the fine levied, (at which time no use could arise upon the non-payment) and then *after* the fine levied a distress was taken for the rent due *before* the fine was levied, and afterwards replevin was sued thereupon, a title of entry accrued by way of use to William Fisher? and on this point the Justices were divided, for Haughton and Doderidge held, that as the rent was due before the fine levied, the use upon the fine could not be extended to the rent formerly in arrear. But Croke and Montague held, that the fine levied and the first indenture were but *one assurance*, for the execution of all things executory respects the original act, and shall have relation thereto, and all make but one act, although done at several times. See Vin. tit. Dev. (O) pl. 3. Jones 7, pl. 7. Mitton *v.* Lutwich, and Salk. 341. Lloyd *v.* Lord Say and Sele; see also S. C. in 3 P. Wms. 170. and the observation in the note to the first edition. It appears, however, from what has been decided and held in courts both of law and equity, in the great case of Goodtitle *v.* Otway, that where articles are made providing for a reversionary interest in the covenantor, and then the covenantor by will disposes of such reversionary interest, and then makes a settlement whereby his whole legal estate is conveyed to uses correspondent to the articles, the will is not saved by any relation of the settlement to the articles in analogy to the abovementioned cases of assurances by fines and recoveries.

excepted cases out of the general rules of revocations*.

Different consideration of mortgages in courts of law and equity.

Mortgages in fee are differently regarded in the courts of common law and those of equity At law they are total revocations, but in equitable consideration they are only revocations pro tanto (1). It is not on the ground of the particularity of purpose that a mortgage in fee is in equity held to be only a revocation pro tanto, though the distinction between the practice of courts of equity and law have been often incautiously put upon that ground; but the true reason arises out of the distinct considerations under which mortgages pass in courts of law and courts of equity.

A court of law can only look to the legal operation of the deed, whereby the testator, by conveying out of himself his legal estate, of necessity must be held to revoke a previous disposition by will of the same estate; but in equity the transaction has another aspect, and is only regarded as a security for the debt; the de-

* 3 Atk. 805.

(1) And if the mortgage be by deed and fine, it is nevertheless said to be a revocation only pro tanto, in equity, 2 P. Wms. 334. per Lord Chancellor King. But according to Viner tit. devise (P) pl. 10. it was held by Lord Cowper, 6 Ann. that if a man devises lands, and afterwards mortgages the same for years, and then levies a fine sur cognizance de droit come ceo, and not a fine sur concessit, this will be a revocation; but that a fine sur concessit would have revoked only pro tanto. It is a critical question whether the principle upon which courts of equity consider mortgages as only revocations pro tanto does not reject this distinction.

visor remains complete owner, as before, of the estate, subject only to the security, which in the contemplation of equity is nothing but a chattel. And, upon the same principle, if, after a devise, the testator makes a conveyance of the whole fee, upon trust to sell and pay debts, the interest of the testator (2) is only affected to the extent of that incumbrance. To that extent the will is revoked; but the equitable estate in the subject of the devise remains unaltered, except in so far as it is become charged with such debts; and therefore if, after such deed of conveyance, the legal estate in the remaining part of the property, when the object of payment of debts has been satisfied by the disposition of part, is taken back by the testator, by a reconveyance to himself and his heirs, his will is unrevoked in equity[b].

In equity, conveyances by way of mortgage, or for payment of debts generally, are only revocations to the extent of the charge.

The late Lord Alvanley (3), when sitting as the Master of the Rolls in the case of Harmood *v.* Oglander, states the criterion for ascertaining when equity will interfere with the law in respect to the revocation of wills by subsequent conveyances, and

[b] Vid. Harmood *v.* Oglander, 6 Vez. Jun. 221.

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(2) It is to be observed, however, that if A. devises lands to his executors to be sold for the payment of his debts, and then conveys it to trustees for the payment of debts, the devise is revoked. 2 Ch. Ca. 116.

Lord Alvanley's defence of Williams *v.* Owen.

(3) It would be a sort of injustice to that learned Judge to omit this opportunity of introducing to the reader the ingenious vindication which, in the course of his judgment in this case, he makes of his decision and doctrine in the case of Williams *v.* Owen. "If, says he, instead of articles, the testator had, before the marriage,

to what extent, with great precision, and in a manner which shews that the doctrine is not grounded on the particularity of the object of the deed. He lays it down as a primary rule of law, that "any alteration of the estate, or a new estate taken, is at law a revocation, whether for a partial or a general purpose; equity never controuls the law upon revocation, except either where the beneficial interest, being distinct from the legal estate, is devised, and the devisor if he afterwards takes the legal estate, takes it without any modification or alteration; or where, having the complete legal and beneficial estate at the date of the will, he divests himself of the legal estate, but remains owner of the equitable interest, as in the case of a mortgage, or a conveyance for the payment of debts."

In the above case of Harmood *v.* Oglander the object of the intended recovery was a mortgage; it was therefore for a partial purpose; but that alone

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conveyed to a trustee, in trust for himself till the marriage, then for himself for life, remainder to the issue in tail, remainder to himself in fee, and then made the will, and then had called upon the trustee to convey, and he had conveyed, it is admitted that *that* would have been a complete revocation in law; but as clearly it would not have been a revocation in equity, and the heir must have conveyed to the uses of the will. In principle that does not differ from the case of Williams *v.* Owen. There the devisor was bound by the articles, and he might have been compelled to convey accordingly. Then it is strange to say, that if a conveyance were taken from a trustee it would be no revocation; but if, according to his obligation, he himself conveyed to the same uses, it would be a revocation. No one can deny that articles are in equity equal to a conveyance. No one can deny that he remained a trustee to the use of the articles, and must have conveyed accordingly." But see supra, page 274.

could not save it; and although, if it had been a simple conveyance of the fee by way of mortgage, it would have been only a revocation pro tanto; yet the mode of effecting this intention being by recovery, with double voucher, which in equity as well as law proceeds upon a previous conveyance of the whole estate from the owner to the tenant to the præcipe, to be recovered out of him by the demandant, from whom a new estate is to be taken, the will was held to be clearly revoked; and this although the recovery was not, in fact, proceeded in further than the conveyance to the tenant to the præcipe.

The true ground on which mortgages in fee are considered in Equity as only revocations pro tanto.

In Sparrow *v.* Hardcastle, as that case is reported in a note to Goodtitle *v.* Otway, in the reports of Messrs. Dornford and East[c], Lord Hardwicke intimates the true ground on which mortgages in fee are considered in Equity as only revocations pro tanto of a will. "The principal ground," says his Lordship, "on which they put this case is, that this grant was intended only for a particular purpose, and that when that purpose was answered the estate was not intended to be altered, but to remain as before; and this was compared to a mortgage. The reason why mortgages are taken to be out of the general rule is this. It does not depend on the general ground insisted on at the bar of being conveyances for a particular purpose, (4) but on the foot of being securities only. Whether the mortgage be in fee or for years

[c] Vid. 7 T. R. 417.

(4) In Harmood *v.* Oglander, Lord Eldon gives full confirmation to this opinion. That case was decided for the entire revocation both at law and equity, on the ground of there being uses de-

only, is all one in this Court; they are alike considered as chattel interests. A mortgage in fee goes to the executors, (for whom the heir is only a trustee), supports no dower, and has no one property of a real estate."

So that upon an accurate consideration of this point, we shall perceive nothing in it which breaks in upon the maxim of equitas sequitur legem. The truth being that when an estate is charged or mortgaged, a Court of Equity does not regard the estate as any way passed, modified, altered, or affected (5). The same doctrine is carried to a trust for payment of debts; so that the resulting beneficial interest

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clared upon the recovery beyond the mere purpose of the mortgage. Indeed wherever a recovery is necessary, the estate must undergo an alteration thereby: and therefore if a tenant in tail makes a mortgage, and for that purpose suffers a recovery, and declares the ulterior use to himself in fee, the estate is altered, and the will is clearly revoked. See 8 Vez. Jun. 106.

(5) An equity of redemption imitates more closely the legal estate than a mere trust. See the notice taken of this distinction in Burgess v. Wheate, 1 Blackst. 145. and see Sir Matthew Hale's definition of a mortgage. Hard. 469. Pawlet's case. So Lord Nottingham, (M. S.) says, an equity of redemption charges the land, and is not a trust. Blackst. 145. A mortgage is not a mere trust, but a *title* in equity. In a word, the equity of redemption is in equity the fee simple of the land, and by consequence, after foreclosure, the mortgagee is considered as acquiring a *new* estate. But if it be a mortgage for a term of years only, and the equity is foreclosed, or released, after the will, the new interest may pass under the general words of the residuary clause; for the equity which is so gained by the release or foreclosure is the interest in a chattel only, and therefore may well pass by the prospective operation of the residuary devise, if sufficiently comprehensive in expression.

Difference between an Equity of redemption and a mere trust.

sideration, it has been taken for established law, and has been said to stand on peculiar grounds, but those grounds have generally been left unexplained. And though Mr. Justice Buller, in the case of Goodtitle *v.* Otway[c], observed that cases upon partitions generally happen in equity, he was compelled to admit that long previous to Luther *v.* Kidby, it was established at law that a partition was not a revocation of a will.

Established law that partition is no revocation.

It is not very easy to reconcile the cases upon partition to the principles which have usually governed in the cases of revocation (1). It may be a reason

[c] 2 H. Blackst. 525.

Difference between tenants in common, and joint-tenants, as to the effect of partition.

(1) Tenants in common after partition take the same estate as before, though in another mode, Vid. post 346. But the partition among joint-tenants has the effect of altering the estates of the parties. In the case therefore of joint-tenants, the points of enquiry are the reverse of those which come into question in the case of tenants in common. Where a tenant in common having devised his estate makes a partition, the question it has given rise to has been, whether the devise was revoked by the partition. But where one of two joint-tenants has made a will devising his moiety, and a partition has afterwards taken place, the question has been whether the will has had effect given to it by the partition; the affirmative of which question could only be maintained on the notion that at the time of making his will, the testator, as such joint-tenant, had an interest in its nature devisable, but which was prevented from passing as such by being intercepted and supplanted by the jus accrescendi. But it has been determined that a joint-tenant is under an original incapacity to devise his moiety, being not comprehended within the statute of wills, which being an enabling statute, whatever is not included in it remains as at common law. Swift a. Roberts, 3 Burr. 1491.

for this doctrine, that the party is compellable by process of law to make partition; and that an act thus imposed upon a party, has upon such ground of compulsion been held not to disturb his previous dispositions by will. And it is remarked by Lord Hale, in his commentary on the writ de partitione facienda (2), that the writ is brought to ascertain the possession, and the legal estate is not affected. The courts seem to have been careful, however, not to extend this allowance to any case where any thing is done beyond the dry purpose of partition; for where in Tickner *v.* Tickner, cited in Parsons *v.* Freeman[a], the deed limited the moiety, in the first place, to such uses as the testator should appoint, and in default of appointment to him in fee, Lord Chief Justice Lee, who had signed the certificate in Luther *v.* Kidby, held that the slight variation by the introduction of the power made it a revocation.

Where there is any other purpose declared besides the mere purpose of the partition, the will is revoked.

Mr. Justice Heath declared it to have been his opinion [b] that "the cases of Luther *v.* Kidby, and Tickner *v.* Tickner, were difficult to be reconciled with some of the other cases, and with each other. That the only difference between them was the power of appointment in the latter; and, that though the execution of the power would be a revocation of the will, yet that the mere reservation of the power ought not to have that effect." Buller, Justice, in the same case said, that the case of partition was a case sui generis. If the partition was by writ against

[a] 3 Atk. 742. [b] 3 Vez. Jun. 656.

(2) Fitz. Abr. 142. and see a note of this case produced by Lord Loughborough, in 2 Vez. Jun. 432.

the wish of the testator it was no revocation, and it was but one step more to hold that the same thing by deed or fine should not have a different effect. The authority of Luther *v.* Kidby, as far as it *is* an authority, only goes to this, thatt here is no difference in effect whether the partition by fine be in pursuance of a covenant, or of a writ of partition, but the court did not mean to lay down a rule applicable to any other case. Taking the whole together, it seems, said that learned Judge, as if it was thought that there was a difference between a fine for a partition and any other purpose. He agreed with Heath J. that there was no material difference between Luther *v.* Kidby, and Tickner *v.* Tickner; for notwithstanding the power of appointment, the fee vested in the testator, and then the deed and fine were the sole ground of revocation in that case, and if so, it was in direct contradiction to Luther *v.* Kidby; and the report of Parsons *v.* Freeman, in Ambler, shews it was so considered, for Lord Hardwicke approved of Tickner *v.* Tickner, and said it was the same case as that before him (3)."

We find no earlier notice of this question as to the revocation of a will by a deed of partition, than that of Lestrange *v.* Temple, in Siderfin[f], where

[f] P. 90.

(3) But as that case is reported in Atkins, a better Reporter, Lord H.'s observation was that Tickner *v.* Tickner, came very near the present; it was not merely to effectuate a partition, but for another purpose, and *therefore* Lord C. J. Lee held it amounted to a revocation, and I am, said his Lordship, for the *same* reason, of opinion that the recovery here is also a revocation.

a quære is made whether, if one holding lands in common with another makes his will and devises all his lands, and afterwards makes a partition by agreement, and not by writ, the partition is a revocation. Soon afterwards, in the case of Temple *v.* Webb [g], a tenant in common of a manor, devised all his interest in the manor, and then a partition was made, and a fine levied to corroborate the partition; and the question being, whether this partition and fine were a revocation or not, they were adjudged to be no revocation. And the Judges are said by the Reporter to have entertained the same opinion, (though no judgment was given) in Risley *v.* Baltinglass [h].

Luther *v.* Kidby [i] was thus: A. and B. were tenants in common of lands in fee simple. A. by his will dated 25th January, 1719, devised his moiety in fee; afterwards A. and B. made partition by deed dated 16 May, 1722, and fine, declaring the use as to one moiety in severalty to A. in fee, and as to the other moiety in severalty to B. in fee. This case was sent by Lord Chancellor King to the Judges of the King's Bench, for their opinion, whether the will was revoked, and it appears by the Register's book, that that court composed of Lord Raymond, C. J. Page, Probyn, and Lee, justices, certified,—"that they were all of opinion that the will of the said A. was not revoked by the deed, and fine levied in pursuance thereof; and that the said A.'s share of the lands contained in the deed, and the fine levied

[g] Freem. Rep. 542. pl. 735. Vin. tit. dev. (R. 6) pl. 6. in the Notes.

[h] Sir Thomas Raym. 240. in the Exchequer.

[i] Vin. tit. dev. (R. 6.) pl. 30, 1730. and see 3 P. Wms. 169. Note by the Reporter.

thereon, did pass by the will of the said A." with which opinion the Lord Chancellor concurred.

About 20 years afterwards, Lord Chief Justice Lee, who had signed the certificate as puisne Judge, in Luther *v.* Kidby or Kirby, decided the case of Tickner *v.* Tickner, which was as follows[k]: Robert Tickner, seised in fee of the estate in question, which was of Gavelkind, died intestate, and left two sons, Henry and Robert, who entered, on his death, and became seised in Gavelkind. Robert being possessed of an undivided moiety made his will, and devised it to his wife Elizabeth Tickner, and her heirs. After this will of Robert, by a deed of partition between Robert and Henry Tickner, and by a fine, all the Gavelkind lands were divided, and Robert's share was allotted to him to such uses as he should appoint by deed or writing, and in default of such appointment to him in fee. A verdict was found in ejectment, subject to the opinion of Lord Chief Justice Lee, who, after mature deliberation, held the transaction to be a revocation of the will.

Great opinions on the propriety of the decisions in Luther v. Kidby, and Tickner v. Tickner.

The doctrine in respect to the question of revocation by partition is founded upon the foregoing cases; but it has been shewn that a part of the Bench in the discussion of the case of Goodtitle *v.* Otway, doubted of the principle on which Luther *v.* Kidby was determined; and considered that case, and the case of Tickner *v.* Tickner, though the Judge who concurred in the one decided the other, as irreconcileable. Great Lawyers, however, have thought very differently upon this subject. To

[k] Cited in Parsons *v.* Freeman, 3 Atk. 742.

Opinion of Lord Loughborough.

Lord Chancellor Loughborough both these cases appeared to be rightly and consistently determined, and this opinion was expressed by him in a judgment which displayed, in language and argument the most graceful and luminous, his deep acquaintance with the whole subject and its principles [1]. Speaking of Luther *v.* Kidby, his Lordship observed, "It was sent to law; and the court of law being of opinion, *and wisely*, that it was not a revocation, this court determined in conformity to the law, following the law." But where the object of the deed went further than a mere partition by conveying the estate to such uses as the party should appoint, Lord Chief Justice Lee held it an alteration in the estate, and that it would not pass by the will at law, and Lord Hardwicke has given his sanction to that authority, and would not determine against the rule of law.

Lord Eldon's opinion.

The present Chancellor in a case determined by him in 1802, has recognised the law upon these two cases of Luther *v.* Kidby, and Tickner *v.* Tickner, to stand thus: "That mere partition, whether by compulsion or agreement, is not a revocation of a will; but the slightest addition, as a power of appointment prior to the limitation of the uses, is sufficient" [m]. And again in another case decided by him in the ensuing year, his Lordship put the seal of his high authority upon this much agitated question. "The case of partition," said his Lordship, "is a sort of special case. Each party can compel the other to make partition; the estate is the same, enjoyed afterwards in a different quality, and in another mode: and upon a

[1] Vid. 1 Brydges *v.* the Duchess of Chandos, 2 Vez. 429.

[m] 7 Vez. Jun. 564.

principle compounded a little of those two reasons, that that which can be compelled, if done voluntarily, and provided nothing more is done than mere partition, shall not revoke the will. I say, provided nothing more is done, for it has been long established, that if the object is to do any thing beyond the partition, it will be a revocation: it is tried by the fact whether the acts demonstrate any intention to go beyond the mere partition: and notwithstanding the expressions of the Judges in some of the reports, that Luther *v.* Kidby, and Tickner *v.* Tickner, cannot stand together, they have stood together a considerable time, and in my opinion are perfectly reconcileable [a]."

But a will may be so confined in terms as to be of necessity revoked by partition.

One distinction upon this subject it is very necessary to recollect:—That if the manner in which the partition is made destroys the interest of the testator in the thing given, so that at his death there is nothing in him to answer to the description of the specific subject of the devise, it must follow, notwithstanding the rule that the mere partition is not a revocation, that the devise is revoked, since it cannot operate, the thing being withdrawn upon which it was to operate. Thus if A. seised as a tenant in common, or co-parcener, of a moiety of two estates, the one in Berkshire, and the other in Lincolnshire, devises his *Berkshire estate in terms*, and then by a partition between himself and his co-proprietor B. the Berkshire estate is allotted wholly to B., and the Lincolnshire estate to A., the devise is of necessity revoked [b].

[a] 8 Ves. Jun. 281.

[b] See the case of Knollys *v.* Alcock, 7 Ves. Jun. 558.

Section XI.

Leases.

THE subject of revocation includes some questions of great nicety in respect to devises of leases and specific chattels. Whether a fresh lease taken by renewal passes under a prior disposition by will of the original lease was a point in the case of Marwood *v.* Turner[a], before Lord Chancellor King. The argument against the revocation supported itself on the following reasons:—That the testator had expressed in his will his ardent desire that his trustees, to whom the lease was devised, should use their utmost endeavours to continue the lease in the male line, as long as there were any to inherit the title. That as to the surrender of the old lease, that being only to take a better and more beneficial estate, was intended for the advantage of the devisee, to give him a larger and more extensive interest, and to increase the bounty that was before designed him. Now to make such an intended act of kindness a destruction of the will, would be to invert, in the highest degree, the meaning of the testator. That the renewal of the lease was only ingrafting upon the old stock, that which was of the same nature with the old stock, and was a continuation of the same estate with some little addition to it. That this was demonstrated by the common case, where a trustee of a lease for lives, when all the lives but one are expired, renews for the old life and two new ones, and then

Whether a renewed lease passes under a prior disposition by will of the original lease?

[a] 3 P. Wms. 168.

the old life dies; here though, but for the renewal, the lease would have been quite at an end, yet the renewed lease is held subject to the same trusts as the old lease was, and is considered as a continuation of the same estate. That it was very usual to make provision for younger children out of these leases, which commonly require a renewal every seven years, or upon the dropping of a life. And if one, so seised or possessed, having made his will, and thereby provided for a younger child or children, should soon afterwards renew his lease, but forget to republish his will, (which might often happen), such a construction would create the greatest inconveniences. That no judgment at law, nor decree in equity, had been cited, whereby it had been determined, that the bare renewal of a lease was a revocation of a will. And it was further urged, that if this renewal of the lease was a revocation in *law*, yet it would not be so in equity, but the renewed lease would be subject to a trust for the devisee.

In general, a renewal is a revocation, whether it be of a chattel or a freehold lease.

But it was held and decreed by the Lord Chancellor, that the renewal of the lease for lives in that case was a revocation of the will as to this particular, for that by the surrender of the old lease the testator had put all out of him, and had divested himself of the whole interest, so that there being nothing left for the devise to work upon, the will must fall, and the new purchase being of a *freehold descendible* could not pass by a will made before that purchase. And his Lordship expressed surprise that this case which must have often happened, had not been before determined.

We should observe that the true reason upon which

this point of revocation turns, is, that the specific thing which was the subject of devise is gone, so that the words of the devise can have no operation. And this reason applies as much to a chattel lease renewed after a will containing a bequest of it, as to a freehold lease, for every specific bequest must upon the same principle be considered as revoked or rather adeemed by the subsequent disposition, alienation, or destruction of the particular subject in the testator's life-time.

A material difference in this respect between freehold and chattel leases.

There is, however, a material difference as to this point between freehold and chattel property. If a lease held upon lives be devised and afterwards renewed by the testator, the devise is revoked, although the will should contain words of future import applicable to that interest; for the renewal being a new purchase (1) of a freehold it cannot pass by an antecedent will, as has been fully explained in a former part of this work. Whereas if a testator possessed of a *chattel* renewable lease devises all his *estate, right and interest,* which he shall have to come in the particular lands so in lease to him at the time of his death, or includes it in a general devise of his residuary property, a lease taken by him after making his will, by way of renewal, will pass by it [b].

[b] See the case of Abney *v.* Miller, 2 Atk. 593.

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(1) A *woman* purchased a church lease to her and her heirs, for three lives, and died, leaving an infant daughter; two of the lives dropped; the infant's guardian renewed the lease, and then the infant died without issue; the freehold lease was held to be a new acquisition, and of consequence as descendible to the heirs, ex parte paterna. Mason *v.* Day, Prec. in Ch. 319.

In the case of Carte *v.* Carte[e], Lord Hardwicke appears to rest much upon a distinction between *trusts* and *legal estates* in respect to the operation of a will upon these renewed chattel leases, and he alludes to Abney *v.* Miller, as being the case of a legal estate, whereas in Carte *v.* Carte, the testator was only cestui que trust. But in Abney *v.* Miller, his Lordship had said that the rule of revocations must be the same in law and in equity; and the same observation has been made by almost every succeeding Chancellor. In truth, it would be difficult to point out a single case, which, when the principles and analogies of equity, and the views, which, from the genius of its particular jurisdiction, it takes of the instrumentary transactions concerning property, are properly attended to, is inconsistent with the rule of equitas sequitur legem.

The decision of Carte *v.* Carte, did not seem to require any other distinction to support it than that which arises out of the different import of the words used in the will. The testator in that case bequeathed to his eldest son Thomas, after giving some legacies to other persons, all the rest of his goods, chattels and estate whatsoever, whether real or personal, in possession and reversion, and then by a supplemental clause directed that he should have the disposal of his lease and receive to himself all the profits and advantages accruing from it; which words upon the principles of reasoning adopted by his Lordship, seemed amply sufficient to pass the beneficial interest then subsisting, together with the benefit of all subsequent renewals, and would equally have comprehended and

[e] 3 Atk. 174.

passed the subsisting lease, and future renewals, had the interest been legal instead of equitable. For his Lordship in the last-mentioned case observed, "there is no question but that a man by will may bequeath a term of years which he has not in him at that time, but which comes to him afterwards. Therefore all these cases of revocations of legacies, or bequests of terms of years, arise from the short penning of the will; and if in the case of Abney *v.* Miller, the testator had said, I will give all the interest I have in the lease, there is no doubt but that the renewed lease would have passed (2)."

Whether the renewal of a chattel lease is a revocation depends upon whether the design is specific or general.

It appears from a careful comparison of the cases, that for the renewal of these chattel leases to be a revocation, the devise of them must be specific, and that whether revocation or not is a question to be determined by that short criterion (3). The case of Stirling *v.* Lydiard[d] amounts in effect to settle it upon this basis. There the testator gave all and singular

[d] 3 Atk. 199.

(2) In Abney *v.* Miller, however, his Lordship intimating the proper words for conveying these after-taken leases, suggests words of a future import as necessary in addition to the words, *all my estate*, &c. the words he prescribes are, *all my estate, right, and interest, which I shall have to come in this lease.* And in Rudstone *v.* Anderson, 2 Vez. 418. the Master of the Rolls, Sir J. Strange, would not allow there was any real distinction between the import of the words *all my tithes* and *all my estate in the tithes.* If a new *interest* were acquired after the will, it would not pass by words devising all the testator's subsisting interest.

(3) A. bequeathed his black gelding to B. and afterwards gives him away or sells him, and buys another black gelding; this new bought horse shall not pass by the will. Wentw. Office Executor, 23.

his leasehold estate, goods, chattels, and personal estate whatsoever, to his daughter, and if she died without issue living, then to the defendant. The testator afterwards renewed a lease with the Dean and Chapter of Windsor; this was held to be no revocation, and the lease passed by the will; the Lord Chancellor observing, that "it was a mistake to suppose this a *specific* legacy; it was a general devise of the whole. Suppose the testator had purchased a new lease, would not that have passed? Why then should not a new term in a lease equally pass? "If I were to construe this a revocation," said his Lordship, "I do not know, but that if a man were to give all his Bank, East India, and South Sea stock, and should afterwards turn it into money, it might as well be insisted that this was a revocation. So that it appears clearly to have been the settled opinion of Lord Hardwicke, that whether the future lease taken by renewal would pass or not by the antecedent will would depend entirely upon the question whether the words of the bequest confined the supposable intention to the thing then actually subsisting, or extended to future interests growing out of it; in a word, whether the legacy was specific or general (4).

But it seems, according to Abney *v.* Miller, which is a very leading case on this subject, that if the renewed lease be not perfected by execution in the testator's life-time, not only will an agreement for such new lease be ineffectual to operate a revo-

(4) See the case of Hone *v.* Medcraft, 1 Bro. C. C. 261. where the same ground of distinction is adopted. See also Copin *v.* Fernyhough, 2 Bro. C. C. 291.

cation, but the actual surrender will not effect the previous disposition of the lease: it was accordingly held by Lord Hardwicke, that as the college seal had not been affixed to one of the renewed leases in Abney *v.* Miller, though the old lease had been surrendered and the new one prepared and accepted, yet the bequest of such lease was not revoked. But this part of the case is not very clear if it can be said to be intelligible at all, without supposing that, the surrender being made by the same instrument as the new lease, probably being stated as the consideration of the new lease, or perhaps implicitly (5) contained in the acceptance of such new lease, such surrender would not be complete according to the intention of the parties until the change and substitution was completed by the execution of the instrument designed to effectuate the renewal. And indeed, supposing the surrender to be made by a separate instrument, yet the making of the new lease, and the yielding up of the old, being reciprocal acts, perhaps the surrender can scarcely be said to be complete, in equity, at least, until the fresh lease has been granted.

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(5) This surrender in law is without doubt an ademption of a specific devise as much as the express surrender, for in these cases the effect produced is not so correctly expressed by revocation, as by ademption. See Wentworth's Office of Executor, 22 et seq. It is not by countermanding the disposition, but by withdrawing or destroying the subject matter of the disposition, that the effect is properly understood to be produced. And whatever destroys the subject of a specific devise, must of necessity annul its operation; thus if after devising an estate held upon lives, the testator purchases the reversion, the devise is revoked and the estate descends. See 2 Atk. 425.

A surrender in law is an ademption of a specific devise.

What propositions appear to be well settled on this subject.

It is very desirable on a subject into which so much refinement has been introduced, to rest upon some steady propositions. All the cases appear to agree in this—that the surrender of the old and the taking of a new lease, will be an ademption or not of the previous disposition by will according as the disposing words are held to import, only the actual thing, or all the testator's eventual interest in it; but whether particular terms denote the one or the other intention is still in some degree open to controversy. It appears according to the report of Carte *v.* Carte, as has before been mentioned, that Lord Hardwicke was of opinion that if in Abney *v.* Miller, the testator had said, "I give all the interest I have in the lease," the will would have passed the renewed lease, that is, such words would have made the bequest general and prospective. Sir John Strange, as appears from the above cited case of Rudstone *v.* Anderson, thought that the bequest was not the less specific by reason of the words estate and interest; and we have seen that Lord Hardwicke, in Abney *v.* Miller, suggests other words of future import to be added to the words *estate and interest,* when he points out a mode of embracing within the will future renewals.

It is out of dispute, however, that a testator may by his will pass his future chattel interests whatever they may be, provided they come within the description of the bequest; and that wherever the words are general, property of this nature, though subsequently acquired, is comprehended within the scope of them*: thus if a testator gives all his per-

* See the case of Stirling *v.* Lydiard, 3 Atk. 199.

sonal estate whatsoever, and afterwards surrenders a subsisting lease and takes a new one, or makes an entire new purchase of a leasehold estate, both these descriptions of property will pass.

In a very particular case which has been lately determined in the Court of Chancery[f], another proposition of considerable breadth and certainty on this subject is furnished, viz. that whether the disposing words are to be confined to the specific interest, or are to be interpreted as descriptively embracing after acquired property, will depend not only on the import of the particular words, but upon the *general context* of the will.

In James *v.* Dean, which is the case alluded to, the Chancellor took it to be established in Hone *v.* Medcraft, and Copin *v.* Fernyhough, that where there is a general bequest in the terms of "all my leasehold estates," and the testator afterwards surrenders and takes a new lease, the bequest is revoked. With the highest respect for this truly great authority, I cannot forbear observing that in the cases said to have established this proposition, the devise is not in a general form, but seems to be a disposition of a leasehold estate particularly described and enumerated among other distinct parts of the testator's property. And, indeed, before the general words, "all my leasehold estates," can be held to be a specific disposition of subsisting interests, the opinion and decree of Lord Hardwicke, in Stirling *v.* Lydiard, above cited, seems necessary to be explained out of the way.

[f] James *v.* Dean, 11 Vez. Jun. 383.

But the great point of James *v.* Dean makes the question whether the subsisting interest only or future interests in chattels pass by the will, to depend entirely upon the indications of the testator's intention, and decides that the intention in this respect is to be collected from the whole context, and a comparison of all the parts of the will. The case was shortly as follows :—Thomas James, by his will, dated the 25th of April, 1788, gave and bequeathed to his wife, Judith James, a messuage and some land, at Standgate, held by him under a lease from the Archbishop of Canterbury, and after her decease he gave the same to Sarah James, Jane James, and Elizabeth James, his brother's daughters, their executors, administrators, and assigns, " for all such term, estate, or interest, as shall be then to come therein, as tenants in common." The testator then directed that the rent, fine, and fees, for the renewal of the lease of the said premises, at Standgate, should be paid by his wife, during her life, and by his brother's three daughters afterwards, as such rents, fines, and fees became payable; then after giving some other parts of his property he made the following disposition: " I also give and bequeath to my wife, Judith James, during her life, all my messuages, lands, and tenements, in Vine-street, in the parish of Lambeth, which I hold by lease, under Sir William East, (being the premises in question) for all the residue of my term and interest therein, and after her decease I give and bequeath the same to my godson, Thomas James, his executors, and administrators, for all the residue of the term and interest I shall have to come therein at my decease." And then the testator gave to his said wife all his leasehold estate at Floatmead, and all other the estate which he purchased of Anthony Keck, Esq. and which he then held by lease

from Sir William East, she paying for renewing the said lease at the usual times, during her life, and keeping the said premises in good repair, and after her decease he gave the same among the said three daughters of his brother James, as tenants in common. He then made his wife his residuary legatee, and appointed her one of his executors.

The testator was, at the date of his will, in possession, under a lease granted by Sir William East, of the premises, in Vine-street, Lambeth, dated the 12th of August, 1769, to hold for 21 years from the Lady-day preceding, if the lessor and two other persons should so long live, with a covenant by the lessee, that in case of the death of any of the said lives, (being the lives upon which the lessor held those premises, with others from the Archbishop of Canterbury,) before the expiration of the term, and the lessor should renew from the Archbishop, he, the lessee, his executors, &c. would pay a proportionate share with the other tenants of the fines to the Archbishop upon every such renewal; and Sir William East covenanted, upon such renewal of the original lease by the Archbishop, to grant a new lease of the premises thereby demised for the remainder of the term of 21 years, which should be then to come and unexpired. But the lease contained no direct covenant for farther renewal.

The testator died in December, 1790, the lease, which expired on the 25th of March preceding, not having been renewed by him. But he had remained in the occupation of the premises until his death, and half a year's rent under this occupation had been paid by him after the expiration of the lease, during his

life. Sometime after the testator's death; viz. on the 29th of March, 1791, Sir William East granted to Judith James a new lease of the premises in question, to hold from the 25th of March, for 42 years, if three persons named, or any of them should so long live. The bill was filed by Thomas James, named in the will, against the executors of Judith James, the testator's widow, praying that the renewal of the said lease by Judith James may be declared to be upon the trusts of the will. The answer insisted that she took the new lease for her own benefit, and this was the question.

The Master of the Rolls dismissed the bill, upon the ground that though a testator might so express his intention as to pass any interest existing at his death, yet in this case his intention seemed merely to give the residue of the term he then had from Sir William East, and that nothing more was in his contemplation. Upon the appeal from this decision the Lord Chancellor considered that the equitable question before his Lordship must depend upon the legal question, whether if the lease had been renewed to the testator it would have passed. It is evident that if the new lease had been made to the testator himself in his life-time, this would have been a case for a trial at law, as being a mere legal question, depending upon the import of the words of the will, in respect to such after acquired property. And it seems to be a rule of equity, to be collected from the case we are now considering, that where the disposing words are such that a court of law would have held the subsequent acquisition by renewal in the testator's life-time to have passed by them, any renewals after the death of the testator, by his representatives, shall be for the bene-

It is a rule that where the disposing words would have passed the leases if renewed in testator's life, any renewals after his death by

fit of the persons to whom the beneficial interest in the subsisting lease was devised.

his representatives, will pass by such words.

Now, in this case, though the testator lived out the lease which he had given by his will to his wife for her life, and at her decease to Thomas James, yet as he continued to occupy till his death, and paid rent, he became a tenant from year to year, which was an interest devisable and transmissible[s]. This legal interest, though become a tenancy only from year to year, attracted to itself that sort of tenant-right, or good will, on which the claim to a renewal would have grounded itself, for it was a sort of excrescence out of the old subsisting lease which had expired. The Court therefore considered, that if this interest would pass by the will, such benefit of renewal would pass also as an adjunct to it, subject to the operation of the same testamentary disposition.

A tenancy from year to year devisable and transmissible.

And the good will or tenant-right which accompanies it passes with it.

It was therefore said by his Lordship, that whether the interest of the renewed lease, (supposing such lease to have been renewed in the testator's lifetime) would or would not have passed, must be decided, to raise any question between these parties upon the record. For the lease not having been renewed, and the testator being at his death possessed of no larger interest than from year to year, the doctrine cannot be applied, unless it would have been applied, if he had been lessee in the renewed lease. His Lordship then laid it down as a sound rule of construction, that when words are, by their import, prima facie equivalent to pass future interests in personal estate, that construction ought to prevail, unless

When words are prima facie sufficient to pass future interest in person-

[s] See Doe v. Porter, 3 T. R. 13.

alty, that construction ought to prevail, unless controlled by the context.

the context, in sound interpretation, calls for another construction; and this depends upon the context of the whole will.

His Lordship thought that though there was a difference between the leases, the lease in question not containing the same direct covenant for renewal which occurred in the others, yet there was enough in the lease in question pointing that way, to lead the testator to think that the expiration of the term would not put an end to the interest. Some parts of the will, particularly the last bequest, must be interpreted to pass the renewed lease, and the different clauses in the will are much the same in effect, though expressed in different words. The obligation upon the wife to renew from time to time, shews that he meant not only the interest *he* had in the present lease, but the interest *she* would acquire under the covenant. Between the bequests accompanied with this express direction to renew, is the bequest of the premises in question; and the person who was tenant for life of these premises, is the wife and the general residuary legatee. His general intention therefore was, that as to the particular part, so specially given to her, she should take only a life interest, and as general residuary legatee she should take absolutely for her own benefit (7).

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(7) Had the testator held over after the expiration of his term, and died in the mere occupation of the premises as a tenant by sufferance, he could have given no title at all by his bequest. The particular legatee or legatees could have taken no interest in such a subject under his will. And supposing, in such a case, another person instead of the executrix to have been the residuary legatee,

Section XII.

Cancelling.

AMONG the methods whereby a will may be revoked is that of the destruction of the instrument itself by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent; which methods of revocation are excepted expressly out of the statute of frauds. But we are to observe that it has been always an established point, both before and since that statute, that the act of cancelling or destroying a will, is in itself an equivocal act, and that its operation as a revocation depends upon the intent with which it was done; which must be made to appear: for if a man were to throw ink upon his will instead of sand, though it were a complete defacing or obliterating of the will, it would not be a revocation: or if a testator, designing to cancel his former will, were accidentally to cancel one subsequently made and

Cancelling, an equivocal act.

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the executrix renewing the lease, would, in equity, according to the opinion of his Lordship, have been considered as doing it for the benefit of the residuary legatee, who, in preference to the particular legatee, would have a right to the benefit of such casual opportunities as arose out of the succession to the *mere occupation*; for the particular bequest could operate nothing, and must have been considered as making no part of the will. But in this case, as the executrix was also general legatee of the residue, it appeared to his Lordship that she would have been precluded from holding it for herself.

meant to be his last will, such an act would clearly be no revocation: in these cases the intention must govern. This was the ground of the determination in Onyons *v.* Tyrer[a]; from which case it appears, that if a testator cancels his first will, and by a subsequent will, not properly executed, as by being neglected to be subscribed by the three witnesses in the testator's presence, sets up a devise contained in the first will, the first will, as to such devise, stands unrevoked; notwithstanding the testator in his second will expressly revokes his first, and such express revocation would, in other respects, be available as a declaration in writing within the statute. For it is plain he did not mean to revoke his first will, as to the particular lands devised by it, unless he might by the second will, at the same time that he revoked the first, set up the like devise, so as to take effect by the second will. And if by the latter will the premises had been given to a *third person*, it should never, said the Court, have let in the heir; since the meaning of such second will would still be to give to the second devisee what it had taken from the first, without any consideration had to the heir; and if the second devisee took nothing, the first could have lost nothing.

If a testator makes a second will, and in terms revokes the first, but it appears that the revocation of the first will was only to give effect to the second, the second will is no revocation, if ineffectual for want of the proper attestation.

It was plain that the testator did not mean to revoke the former will by cancelling simply, as a self-subsisting independent act; but by substituting at the same time another perfect will in its place, and not otherwise; and therefore the cancelling was but a circumstance, shewing that he thought he had made another good disposition by the second will. The effect of such cancelling depended upon the validity of

[a] 2 Vern. 743. 1 P. Wms. 345. Prec. in Ch. 459.

the second will, and ought to be taken as one act, done at the same time; so that if the second will was not valid, as the testator thought it was, and without which he would not have cancelled the first, the cancelling of the first will being dependent thereon, ought to be looked upon as null and inoperative also. In a word, it was relievable in equity, under the head of accident or mistake.

Hyde *v.* Hyde[b], is also a case which shews that the cancelling (1) or tearing of a will must be done animo revocandi, to have the effect in law of destroying the validity of the will. The case was briefly as follows: A man made his will in writing, and thereby devised all his real and personal estate to his wife, her heirs, and executors, in trust, to pay his debts and legacies; and then devised several legacies to his children and other persons, and concluded thus:—"In witness whereof I have to this my last will and testament, containing nine sheets of paper, and to a duplicate thereof, to be left in the hands of A. set my seal to every sheet thereof; and to the last of the said sheets

[b] 1 Eq. C. Abr. 409.

(1) It is obvious that the word, 'cancelling' is used here only to signify the manual operation of tearing or destroying the instrument itself, and not the virtual effect of destroying its validity; and in this sense only is it used in the clause of the statute of Charles, where its effect of revoking a will is excepted out of the restriction thereby created. But when the cases speak, as they sometimes do, of the animus cancellandi, it is manifest that they use the word as importing the same as revocandi, and not merely as the sign or mode of revocation.

my hand and seal;" which will was properly executed according to the statute.

The testator being afterwards desirous of adding other trustees to his wife, and to make some alterations in his will, sent for a scrivener, and gave directions to prepare a draught of instructions for another will, which the scrivener did accordingly, and the testator read it over and approved of it, and set his hand to it; and, thinking he had now made a new will, he pulled out of his pocket his first will, and tore off the seals from the first eight sheets, which the scrivener seeing, asked him what he was doing? "Why," says he, "I am cancelling my first will." "Pray," says the scrivener, "hold your hand; the other will is not perfected; it will not pass your real estate, for want of being executed pursuant to the statute of frauds and perjuries;" to which the testator replied, "I am sorry for that;" and immediately desisted from tearing off any more of the seals; and soon afterwards died without having done any thing further to perfect the second will, or to cancel the first. After his death, on application to the spiritual court by the wife, who was made executrix to the second will, it was sentenced to be a good will as to the personal estate, and she was admitted to prove it.

On a bill brought by the legatees against the wife, and other trustees, to have a specific performance of the trust in the first will, and that the estate might be sold pursuant to the directions of that will, it was insisted that the first will was revoked either by making the second, or by tearing off the seals from the first; but the Lord Chancellor held, that the subsequent will could be no revocation as to the real estate, not being

executed according to the statute of frauds, and that as to tearing off the seals from the first eight sheets, that not being done animo cancellandi, was no revocation; but because the spiritual court had sentenced the second will to be a good will of the personal estate, his Lordship also held it good to that extent, and that such legatees of personalties in the first will as are left out in the second, must lose their legacies; but as to such as had legacies by the first will charged on the real estate, if the same legacies were devised them by the second will, that they should continue chargeable on the real estate; provided such legacies were not increased or enlarged by the second will; for though the second will was not sufficient in itself to charge the real estate, yet since the real estate remained well devised by the first will, they should be still secured by that real estate; for they were not devised out of land like a rent, but only secured by land, which before was well devised; but as to the new absolute personal legacies devised by the last will, they should be chargeable only on the personal estate; and should have the preference in being first paid out of the personal estate, before the other legacies in the first will charged upon the real estate, because they had several funds out of which they might be paid—the personal legacies in the last will out of the personal estate, which was well devised by that will; and the legacies charged or secured upon the real estate, which was devised by the first will, out of the real estate.

What evidence is admissible to determine the intention; and what

In the cases last produced the mere mechanical act of tearing is shewn to be equivocal, and to yield to the inference of an intention not to revoke arising from other circumstances. Parol evidence, therefore,

my hand and seal;" which will was p[illegible] cancelling is according to the statute. [illegible]owever, of the

The testator being afterw[illegible]tended cancelling or other trustees to his wife, [illegible] has been prevented by tions in his will, sent for [illegible]ative proof of the animus tions to prepare a dra[illegible] to be received, and that effect will, which the scriv[illegible] to the intention so established. Even tator read it over [illegible]ution, so endeavoured to be defeated by to it; and, thin[illegible] were manifested by no act of the testator, it pulled out of [illegible] be consonant to the general maxims of courts seals from [illegible] equity to give effect to the intention, and to treat seeing, [illegible] perfected that which would have been perfected but says [illegible] for the fraud. So the slightest act of tearing, or an say[illegible] incipient burning amounting only to scorching, will n[illegible] satisfy the statute, where the intention to revoke can be manifested by proof of accompanying acts, or even declarations: but that, without proof of fraud, or partly executed intention, parol evidence could be received to shew a design to cancel, unaccomplished through mistake or accident, no case has yet established: such a latitude would indeed seem to frustrate the caution of the legislature in respect to this object of the statute of frauds.

The case of Bibb v. Thomas[a] perhaps marks the [illegible] in respect to the admissibility of this evi- [illegible] A testator, who had for two months together [illegible] declared himself discontented with his will, [illegible] was confined to his bed near the fire, ordered M. W. [illegible] to send him, to fetch his will, which she did, and [illegible] it to him, it being then whole, only some- [illegible] He opened it, looked at it, then gave

[a] 2 Str. Rep. 1043.

ith his hands, rumpled it together,
e, but it fell off. M. W. took
cket. The testator did not
ned to have some suspicion
what she was at, to which she
nswer. The testator afterwards
ould not be his will, and bid her
which she replied, " So I will, when
made another ;" but afterwards, upon re-
enquiries, she said she had destroyed it.

The testator afterwards told another person that he had destroyed his will ; that he should make no other until he had seen his brother J. M. and desired the person to tell his brother so, and that he wanted to see him. He afterwards wrote to his brother, saying, " I have destroyed the will which I made ; for upon serious consideration I was not easy in my mind about the will ;" and desired him to come down, saying, " If I die intestate, it will cause uneasiness." The testator however died without making another will. The Jury, with the concurrence of the Judge, thought this a sufficient revocation of the will ; in which opinion Lord Chief Justice De Grey and the whole court, upon a motion for a new trial, concurred ; the Chief Justice observing, that this case fell within two of the specific acts described by the statute of frauds ;—it was both a burning and a tearing ; and that throwing the will on the fire with an intent to burn it, though it

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(2) Tearing is a sufficient revocation within the statute without cancelling by tearing off the seal, if the act be accompanied by any circumstance demonstrative of the intent to revoke. See Bibb on dem. of Mole v. Thomas, Blackst. Rep. 1043.

was very slightly singed only, and fell off, was sufficient within the statute.

A cancelled will is not necessarily revived by the destruction of a substituted will.

It has been observed in a former part of this treatise, in commenting upon the case of Onyons *v.* Tyrer, that the cancelling is an act not necessarily operating as the revocation of a will; it is a circumstance presumptively indicating and expressing the intention, and presumptively also the execution of that intention; but it may be explained away by particular circumstances. In Onyons *v.* Tyrer the act of cancelling was in some sort merely conditional; it was for the purpose of making way for another disposition, and only for that purpose; and that disposition being never legally effectuated, the act of tearing the first will being unaccompanied with any absolute intention of revocation, was held to be inoperative. But where the act of cancelling has not such immediate reference to another disposition by a new will, but is done upon grounds of absolute dissatisfaction with the will already made, the first will shall not be revived by the cancelling or destroying of a second.

If indeed the first will could be revived, after having been deliberately cancelled and its efficacy destroyed, by the cancelling of a subsequent will, as well might a will de novo be made by courts of justice for a party deceased, out of mere facts and conjectures. There is a great and manifest difference between permitting the act of cancelling to be qualified by reference to the accompanying facts, which may shew it to have been done prospectively and in subserviency to a fresh testamentary disposition, and permitting proof of altered intention inferred from the cancelling of a second will, to re-establish the prior will after it has

been once deliberately and unconditionally cancelled. This would be a republication by implication, which we have the authority of Lord C. J. Parker[d], afterwards Lord Macclesfield, for saying, cannot be done since the statute of frauds.

The case of Burtenshaw *v.* Gilbert[e] will exemplify the observation just above made. There the testator, in 1759, duly executed his last will and testament, and also a duplicate thereof, but at the same time declared that it was not a will to his mind, and that he should alter it. In 1761 he made another will, which was also duly executed; the devises in which were different from those in the will of 1759; and at the end of it there was a declaration by which he revoked all former wills. After executing the latter will, the testator took one part of the old will in his hands, tore off the name and seal; and directed the person who had made the new will, to cut off the names of the witnesses to the old one, which he did in the testator's presence. The testator at the same time said that a duplicate of the former will was in the hands of W. a devisee therein. He then delivered the new will to the person that made it, requesting him to take it away with him to his house, and keep it, for reasons which he mentioned. Afterwards a principal devisee in both of these wills died; soon after which the testator sent for the last will, and in 1762 that will was returned to him. The testator before his death, sent for his attorney to make a new will, but became senseless before he arrived. On his death, one part of the will of 1759, and also the will of 1761, were found together in a paper, both cancelled. The other part of the will of

[d] Com. 385. [e] Cowp. 49.

1759 was found uncancelled in the testator's room, among other deeds and papers: how it came there did not appear (3); but W., a devisee therein, was in the house when the searches were made. The question was, whether the testator died intestate or not; that is, whether the will of 1759 was revoked? And it was held that the will of 1759 was revoked; first by the new will of 1761, which was a complete, legal, and effectual will; and would have revoked the former, whether it had been cancelled or not, because at the end of it there was a declaration revoking all former wills; secondly, because the testator had actually cancelled the will of 1759.

If a testator makes duplicates, and cancels one, the effect of the other is destroyed.

This case also confirms the dictum of Sir Thomas Powis, at the end of the case of Onyons *v.* Tyrer[r], that if a man having duplicates of his will, cancels one of such duplicates with the intention of destroying his will, this is a good revocation of the whole will.

[r] 1 P. Wms. 345.

Of the presumption from finding a cancelled and an uncancelled will.

(3) In a very recent case in chancery it was held, that where a testator cancels the part in his custody, the strong legal presumption is that the duplicate in the possession of another was not meant to prevail—That if both are in the possession of the testator, the one cancelled, and the other uncancelled, the presumption of revocation still holds; but it has less strength.—That if both are in the testator's possession, the one *altered* and cancelled, the other in statu quo prius, the presumption against the operative existence of either may still remain, but with a strength yet more diminished. It seems to have been the doctrine of that case that either of these predicaments is enough to constitute a prima facie case for the heir, so as to throw the burthen of proof on the devisee, who is to encounter the presumption by evidence of contrary intention, see Pemberton *v.* Pemberton, 13 Ves. jun. 290.

In Burtenshaw *v.* Gilbert the first will was cancelled; but it has been decided, that where a second will is made, the first remaining uncancelled, and afterwards the second will is cancelled, the first is in force as a good will at the testator's death. Thus in Goodright *v.* Glazier[s], where a testator, having made a will of lands, and afterwards given the same lands to the same person by another will, omitted to cancel the former, but before his death cancelled the latter, and both were found in his custody at his decease, the second cancelled, the first uncancelled, the first will was held to be effectual; the court observing "that a will is ambulatory till the death of the testator: if he lets it stand till he dies, it is his will; if he does not suffer it so to do, it is not his will. Here, though the testator made two wills, yet the second will never operated; for it was only intentional, and the testator changed his intention; and cancelled the second so that it had no effect: it was indeed no will at all, being cancelled before his death: then the former, which was never cancelled, stood as his will."

SECTION XIII.

Alteration and Erasure.

A WILL is not revoked by alteration or erasure beyond the particular object of such alteration or erasure; though this seems to have been a point

[s] 4 Burr. 2512. and see the book 44 Ass. pl. 36.

never precisely in judgment before the case of Larkins *v.* Larkins, which was lately decided in the Court of Common Pleas[a]. We must be careful, however, not to confound erasure with alteration; since the latter, if it consists in making any new gift or disposition, is to that extent another devise, and will clearly require the will to be re-executed according to the statute. The case of Larkins *v.* Larkins, was in effect as follows:

Difference in the effect of alteration and mere erasure—alteration being a fresh exercise of the disposing power requires the will to be re-executed, to give effect to the alteration, if of freehold estate.

William Larkins by his last will, duly executed, devised his lands in M. to his brother, John Pascall Larkins, Samuel Enderby the younger, of Aldermanbury, in the city of London, Esquire, and George Smith, of Lincoln's Inn, in the county of Middlesex, Esquire, their heirs and assigns, upon trust, to sell the same lands for the purposes in the will mentioned. He also gave the residue of his estate and effects to the same persons, and appointed them his executors and the guardians of his daughters. After this will was executed, the testator, with his own hand, made the following alterations: in the first devise to the three trustees, the words "the younger" and "George Smith, of Lincoln's Inn, in the county of Middlesex, Esquire," were struck out by a pen drawn through them: in the bequest of the residue, the words "the younger" and "George Smith, their heirs, executors," were struck out; but over the words "heirs, executors," was written the word "stet;" in the clause appointing guardians, the words "the younger" and "George Smith," were struck out; and, lastly, in the clause appointing executors, the words "the younger" and "George Smith," were struck out. The testator never in any

[a] 3 Bos. et Pull. 16.

manner re-executed or re-published his will after making the above-mentioned alterations. And the question was, whether the devise of the real estate to be sold was revoked, by the testator's having struck out the name of *George Smith,* one of the trustees, after the execution of the will.

The ground upon which it was contended that it was revoked was mainly this, that after devising the same estate to two persons, by revoking that devise as to one, the testator had necessarily altered the estate of the other by enlarging it; and that if it could operate at all, it must operate as a new gift; for whatever alters either the quantity or quality of the estate of the devisee must be considered as a new devise. This position, however, in which the strength of the argument for the total revocation consisted, was positively denied by the court; by whom it was observed, that in a court of law the trustees must be considered as joint tenants in fee; that whatever alteration in the interest of the other trustee was created by this erasure, it was an alteration not arising from a new gift, but merely from a revocation. But Mr. Justice Chambre put the point thus: the devisees being joint-tenants, are seised per my et per tout; but if one joint-tenant die in the life-time of the testator, the other joint-tenant takes the whole of the estate, though it never vested in him during the life of the testator; the reason of which is that the original devise is *sufficient to pass the whole interest* (2).

(2) See Page *v.* Page, 2 P. Wms. 489. Man *v.* Man, 2 Strange, 905. Mr. Justice Chambre seems to have put the decision of this case upon its safe ground, viz. that the will was not altered by the erasure, as it was made to carry no more than it was originally

Had this been the case of a tenancy in common, upon the erasure of one name, the remaining two would take no more than the two-thirds of the estate (3).

An erasure of a part of a will, therefore, does not necessarily operate as a revocation of the whole. And it is always to be recollected that the statute of frauds gave no new or positive efficacy to these symbolical modes of revoking a will, but left them upon the same footing as they stood at common law[b].

Short on the demise of Gastrell *v.* Smith, which

[b] See Carthew. 81.

framed to carry, since each joint-tenant takes the whole estate. But it would be a very different case if an erasure added to the *quantity* of interest carried by the will: as, suppose the words 'for and during his life,' after a gift by a testator of all his freehold estate to B., to be erased, thus converting an estate for life, into a fee. And even if the erasure only change the quality of the estate, it would seem to be a fresh exercise of the disposing power, and to require a fresh execution; as, if after a gift to two and their heirs, the words 'equally to be divided between them' were to be struck out, this would not be merely a revocation but an altered devise.

(3) Where a devise is to several as tenants in common, and one dies in the life-time of the testator, the devise to him becomes lapsed. Bagwell *v.* Dry, 1 P. Wms. 700. and Page *v.* Page, 489. But if a testator devise to A. B. and C. as tenants in common, and *at the time of the devise* only C. is living, although C. will not take the whole estate, yet there is no lapse, properly speaking, of the shares intended for A. and B.; but they pass with the residue, or go as if they had not been mentioned. If, however, the devise be to a class of persons, generally, as to the sisters of T. H., and only one out of several was living at the time of the devise, who survives the testator, such survivor becomes intitled to the whole. Doe and Stewart *v.* Sheffield, 13 East, 526.

was determined a few years ago in the Court of King's Bench[c], was the case of an erasure of the name of one of the trustees, accompanied by the additional fact of the substitution of others in his place. There a testator devised lands to two trustees, in trust for certain purposes, by a will duly executed and attested; and he afterwards struck out the name of one of those trustees and inserted the names of two others. The will was not afterwards republished, but the court held that his intent appearing to be only to revoke, by the substitution of another good devise to other trustees, as such new devise could not take effect for want of the due execution of such altered will under the statute, it should not operate as a revocation; or, at most, it could only operate as a revocation pro tanto, as to the trustee whose name was obliterated. Here it was said, in support of the revocation, that the insertion of the two new trustees in the room of the one whose name was obliterated, distinguished this case materially from those of Larkins *v.* Larkins, and Humphries *v.* Taylor[d]; because it manifested the devisor's intent, that the remaining old trustee should not take alone.

But the court observed, that the facts of the case plainly shewed that the testator had no object but to change his trustees; and it would be unreasonable when he had not by any thing he had done indicated a disposition to dispose of his lands to different purposes from those declared by his will, to infer that he designed that his will should become inoperative, and so to let in his heir at law by what he did, rather than to conclude, that he thought he had by the alterations

[c] 4 East, 419.

[d] 5 Bac. Abr. tit. Wills and Test. 363. Edit. Gwyllim.

introduced made a valid disposition of his estate to the new trustees, and had no design to alter his will except so far as such obliteration and alteration could effectuate that purpose, by substituting the persons whose names he interlined in the stead of him whose name was struck out. If, then, the testator meant no revocation but by means of that, which he through mistake supposed to be a valid disposition to others, and had no intention to revoke by the obliteration he has made, but by an effectual substitution meant to be made of others in the room of him whose name was so obliterated, the case must be governed by that of Onyons *v.* Tyrer.

But supposing the obliteration of the name of the one trustee to have revoked the devise as to him, still the heir would not be let in, for it might be still contended that the effect of the obliteration in this case was at most to revoke only the devise to that trustee, whose name was struck out; and, therefore, giving to that obliteration its full effect, it would still leave the devise to the other trustee in full force, and competent to sustain all the trusts of the will in exclusion of the heir at law.

SECTION XIV.

Mistake.

PAROL and extrinsic evidence to control an express revocation, or to effectuate an alleged intention to revoke, not manifested by any act of the tes-

tator, ought not, in general, to be received; and the difference is very plain between the admission of such evidence to contradict what is expressed, or establish what has no support from any other indications, and its admission for the purpose of explaining, by accompanying acts or declarations, some outward sign of a revoking intention, equivocal in its nature, as the acts of cancelling, obliterating, and tearing, above considered. But even express revocations have been permitted to be controuled by collateral evidence, when that evidence has been furnished by the instrument itself, as where the reasons given by the testator for the revocation of a former will are professedly founded upon a mistaken apprehension of facts. Campbell *v.* French[a], is a case of this sort; which though decided in a Court of Equity, proceeded upon a principle of common law. There the testator by his will gave legacies to A. and B. describing them as grandchildren of C. and their residence to be in America; and by a codicil he revoked these legacies, *giving as a reason*, that the legatees were dead; but the supposition as to that fact being erroneous, the legatees were held to be entitled under the will, upon proof of identity (1). But where a testatrix by

Where a testator expressly revokes under an obvious misapprehension of facts, the revocation fails.

[a] 3 Vez. Jun. 321.

(1) The case mentioned by Cicero, in his Treatise de Oratore, lib. 1. c. 38. has been often cited, and relied on, as a sort of authority in our Courts, more especially in those where the civil law is taken as a guide, for admitting evidence of this mistake of facts to affect the validity of a testamentary disposition. We are to observe, however, that in that case the error was occasioned by palpable misrepresentation, and that such misrepresentation was the immediate and sole impelling motive with the testator for altering his

codicil gave to A. the legacy which she had given by her will to the children of B. prefacing such alteration thus, "As I know not whether any of them are alive, and if they are well provided for," though they were in fact living, A. was nevertheless held to be entitled, the words above cited being construed to mean that if they were living they were well provided for.

The mistake should appear to be in that which constituted the impelling motive to the revocation

But before such express revocation can be vacated upon such grounds, it ought, I conceive, to appear very distinctly, that the mistaken facts were the impelling motives (2) to the revocation; and it must be remembered, that in the Attorney General *v.* Lloyd[b], Lord Hardwicke observed, that "it is a very nice thing to say that because the reason a man gives for his devise is false, that therefore his devise shall fail, and how far that will extend I cannot say." The case of

[b] 3 Atk. 552.

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will. "What cause (says Cicero) could be more important, than that of the soldier, whose death being announced at home by a false messenger from the army, the father, trusting to the report, made another his heir, and died." There was also another question, arising upon that case, on the principles of the civil law, viz. whether a son could be disinherited of his patrimony, (for by that law he had an inchoate sort of property in his father's effects), whom the father had neither appointed heir by his testament, nor disinherited by name? And this last reason seems to have been alone objection enough, as the will was by such omission what the civil law denominated "testamentum inofficiosum." But the error as to the fact seems also to have been considered as a good ground of objection by Cicero. See also James *v.* Greaves, 2 P. Wms. 270.

(2) If a man gives a legacy to his wife by the description of his *chaste* wife, evidence of her incontinence is not admissible. And if a testator, out of love and affection to a child, supposing it to be his

the Attorney General *v.* Lloyd, was shortly as follows:—J. M. by his will, dated February the 8th, 1734, gave particular lands, and his personal estate to be laid out in lands, to charitable uses, and by a codicil, dated July 12, 1736, declared that if by the mortmain act the estates could not pass to those uses, he gave them to M. B. and his heirs. By a second codicil of the 17th of March, 1736-7, reciting that he had been advised that the devise of his *lands* was void, gave his *personalty* to the same charitable uses, and his real estate to M. B. The mortmain act passed in 1736, and the testator died the 8th February, 1737. The advice upon which the testator professed to proceed, appeared not to be well founded; for it had been decided in Ashburnham *v.* Bradshaw[c], by the certified opinion of all the Judges[d], that a devise of lands to charitable uses, made before the statute of mortmain, *notwithstanding the testator survived the statute*, passed the lands.

But Lord Hardwicke reasoned thus, on the principal case: "That the testator was so advised, was a fact, in his own knowledge, and he grounded the devise in the codicil upon this advice, and not upon the

[c] 2 Atk. 36. and see the cases in note 1. Ed. Saund.

[d] Except Denton J. who was in ill health.

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own, had given it a legacy, and it turns out tha the child was not his own; in such a case, according to the opinion of Lord Alvanley, in Kennell *v.* Abbott, the legacy would not be revoked by the mistake. But where a legacy was given to a person under a particular character, which he had falsely assumed, and which alone could be supposed to be the motive to the bounty; as, where a woman gave a legacy to a man in the character of her husband, whom she described as such, but who at the time of the marriage-ceremony with her, had a wife living, the legacy failed. Kennell *v.* Abbott, 4 Ves. Jun. 802.

reality of the law; for, however that might turn out, he might be anxious to quiet a doubtful question, and to prevent its being litigated after his death, by settling it upon some certain foundation." But the principal reason which weighed with his Lordship was, that he doubted whether the new disposition by the codicil was put singly upon the point of law, the words of which were, "It being my intention that the charity should be continued, and being advised my personal estate can be given, I do, therefore, by this codicil, give my personal estate to the charitable uses before-mentioned; and I do hereby give my real estate to M. B." A case was made for the opinion of the Judges of the King's Bench, and that Court certified in favour of the devise of the real estate by the codicil.

SECTION XV.

Accident and Surprise.

THERE may be something also in the circumstance of a testator's being prevented by surprise, or even by a sudden accident, when coupled with other particulars in his situation indicating the probability of an intended revocation, which may be allowed to operate a revocation of his will. Wells *v.* Wilson[*], determined at the Cockpit in 1756, on appeal from the West Indies, lends support to this supposition; which case was as follows:

[*] Cited by Sir Geo. Hay, in Shepherd *v.* Shepherd.

A. wrote his will on one side of a sheet of paper, but neither signed nor sealed it. On the other side he wrote another will, and signed and sealed it. They appeared to be both written at the same time, though it seemed impossible to determine which had been written first. There was a trifling difference. He had provided for the infant then in ventre sa mere, and who afterwards was born in his life-time. Sometime after this A. died, leaving his wife ensient with a child which was afterwards born. The question was, whether the will was thereby revoked, as the posthumous child was entirely unprovided for. Evidence was produced to shew that in his most serious moments he had declared that he had made no will, but was resolved to do so on the first opportunity, mentioning that the situation of his family required such precaution.

While he was in this state of mind, he had the misfortune to receive his death wound by a fall from his horse, and in the short interval between the fall and his death, his thoughts were employed on the making of his will; and accordingly he sent for a professional person; but losing his senses and dying soon after, the paper was all that was found. The great doubt with the court was, whether the will was prior or posterior to the paper written on the back of it. And in order to come at this, they adjourned the case for six months, that they might enquire further as to that fact. But this enquiry was fruitless; and therefore the Court directed that it should stand for argument on its particular circumstances. And at length, the Lords of the Council, upon a view of the whole matter, and the co-operating argument of a child's being then unprovided for, set aside the

will. The decision did not turn upon the naked fact of the birth of a child unprovided for, but upon that and the frequent declarations of the testator; the state of his mind; and his repeatedly declared intention in the interval between the fall and his death."

This is the manner in which the judgment in that case is accounted for by the learned Judge of the Prerogative Court, in Shepherd *v.* Shepherd. He seems, however, to have omitted that circumstance in the case, without adverting to which, the propriety of admitting the evidence of declared intention, seems palpably open to the objections arising from the statute of frauds, viz. the suddenness of the accident, which was a surprise upon those intentions so natural under the circumstances of the testator's family to have existed in his mind, and which afforded a foundation for the reception of that testimony, which, without such a foundation, has always been rejected by the better opinions. A case of this sort is mentioned in the first volume of Roll's Abridgment[b]. A. made his will, according to the statute, and afterwards revoked it by parol, and then declared his intention to alter it when he came to D., but before he could come to D. was murdered; the will was held to be revoked.

[b] 614.

SECTION XVI.

Of the Revocation of Wills made under Powers.

IN a former part of this Treatise, where the execution of wills was under consideration, that part of the subject was viewed in its connection with wills made under, and in execution of, powers: it seems important also to consider how the law in respect to revocations applies to this description of wills.

An appointment by will works by the will according to the nature and qualities of such an instrument.

It appears to be a general, established, point, that the instrument by which a power is directed to be executed, must have the requisites which specifically belong to its nature, and proper constitution, and be attended also by all the train of incidents which legally accompany it[a]. Upon this principle it is that a will made in execution of a power, is, to all intents, a will: it is ambulatory and incomplete till death, and alterable and revocable by cancellation, or any of the methods whereby a will, in the strictest and most absolute sense, is so affected. It is also equally clear that if an appointee under a power executed by will, die before the appointer, the interest under the appointment fails by lapse, as in the ordinary cases.

So in respect to a will of copyhold, though not properly the act by which the estate is transferred.

This rule is universal. It extends to a will of copyhold, which, though not considered as the act by which the estate is transferred, (that being the operation of the surrender), is nevertheless in its own nature specifically a will, though in its instrumentary

[a] 2 Frecm. 61.

operation it is only directory of the uses of the surrender. Thus, if a copyholder surrenders to the use of his will, and then makes his will in favour of A. and survives him, the benefit is gone; for, as a will, the appointing instrument is inefficacious till the death of the appointer, and if the appointee is not then in existence, the gift cannot take place[b].

It cannot be doubted, that an appointee under a power must claim according to the nature of the instrument by which the power is directed to be executed. Thus, if a power is given by deed to appoint lands by will, and the person to whom the power is given makes his will accordingly, and gives the lands to A. *and his issue,* which words in a deed convey only an estate for life to the grantee, though the devisee takes properly under the power; yet, because the appointment is by will, the words are construed to convey an estate tail. So, it is conceived, if it were "to A. for ever," the estate would be construed a fee simple for the same reason.

Upon the same grounds, such an appointment by will, in execution of a power, is held to be revocable[c]; and therefore, though, where a power is executed by deed, unless a power of revocation is reserved by the deed, (and such fresh reservation of power to revoke may be made toties quoties,) the appointment cannot be revoked (1), yet if it be

[b] See the great case of the Duke of Marlborough *v.* Lord Godolphin, 2 Vez. 61.

[c] 2 Vez. 77. S. C. ibid. 610. and see Robinson *v.* Hardcastle, 2 Bro. C. C. 30. Reid *v.* Shergold, 10 Vez. Jun. 370.

(1) Hatcher *v.* Curtis, 2 Freem. 61. Such appointment by

executed by will no such fresh power of revocation need be reserved[d]; the nature of the instrument supplies it.

By the case of Cotter *v.* Layer[e], which has been already cited to shew that a covenant entered into for valuable consideration amounts to a conveyance in Courts of equity, and is therefore, in those Courts, held a revocation of a will, it also appears that, where the will works as an appointment under a power, it is equally revoked in equity by such executory contract under seal. In that case, though the will was made in execution of a power by a married woman, who cannot in strictness make a will at all, (2) and the conveyance was only in fieri, yet the first instrument was adjudged to be revoked by the second.

Lord Hardwicke decided the case of Oke *v.* Heath,

[d] Hatcher *v.* Curtis, 2 Freem. 61. and see 1 Vez. 139. 1 Bro. C. C. 533. 2 Bro. C. C. 319.

[e] 2 P. Wms. 662.

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deed cannot be revoked without a fresh reservation of a power in the executing instrument for that purpose, though the original deed should expressly authorize such future revocations, as was adjudged in the leading case of Hele *v.* Bond, Prec. in Ch. 474.

(2) It is true, nevertheless, that if a married woman, with the consent of her husband, make a will, the same must be proved in the Ecclesiastical Court, Mariot *v.* Kinsman, Cro. Car. 219. and the will of a femme covert cannot be given in evidence until it has been proved in the Spiritual Court; see Jenkin *v.* Whitehouse, Burr. 431. and Stone *v.* Forsyth, Doug. 707. where Lord Mansfield says, if the Ecclesiastical Court will not grant probate, the proper course is to appeal to the delegates. Mr. Douglas in note (+ 150) ib. observes, that the regular course in cases like this, is for the Spiritual Court not to give probate of the will, but administration with the will, as a testamentary paper, annexed.—See Ross *v.* Ewer, 3 Atk. 160. and note (1) by M. Sanders.

agreeably to this doctrine, declaring that the foundation of his opinion was, that wherever such a power to appoint is given to a married woman, which she executes by will, it is subject to all the qualities of a will. She has, said his Lordship, executed her power by will, and called it so throughout. The whole frame is testamentary. And although this arises out of her power to make a will, and it is a general notion of law as to powers, that any one taking under the directions of the will, takes under the power in the same manner as if their names were inserted there; yet they must take according to the nature of the power and instrument taken together. And in another place[g], Lord Hardwicke is more explanatory on this particular point, where he says, that the meaning of persons taking *under* the power, as if their names had been inserted in the power, is, that they shall take in the same manner, as if the power and instrument executing the power had been incorporated in one instrument: they shall take as if all that was in the instrument executing had been expressed in that giving the power. So it is, said his Lordship, in the appointment of uses. If a feoffment is executed to such uses as one shall appoint by will; when the will is made, it is clear that the appointee is in by the feoffment; but he has nothing from the time of the execution of the feoffment, so as to vest the estate in him. The estate will vest in him according to the nature of the act done, and the appointment of the use from the time of the testator's death. This, therefore, is not a relation so as to make things vest from the time of the creation of the power, but according to the time of the act executing the power[h].

[g] 2 Vez. 78.

[h] And see Venderzee v. Aclom, 4 Vez. Jun. 771.

Section XVII.

Subsequent Marriage, and Children.

AMONG implied revocations, and, as such, not falling within the statute of frauds, is that which is produced by a subsequent marriage and the birth of a child or children, on which point the case of Lugg *v.* Lugg (1), is said to have been the first affirmative decision. The point was said to have been afterwards doubted, but was at length recognised as a rule of law[a] though it received no adjudication as to real estate till the case of Christopher *v.* Christopher was determined in the Court of Exchequer in 1771[b]. It appears from the report in Ambler, of Parsons *v.* Lanoe, that Lord Hardwicke entertained doubts as to the applicability of this rule to real estates, but it has since been carried to that extent, if that could be said to be extending the rule which was no enlargement of its principle; for there seems to be no foundation for saying, that the presumption on which it grounds itself is less applicable to one description of estate than another (2).

The general rule is, that marriage and the birth of a child is an implied revocation as well of a will of real as of personal estate.

[a] Brown *v.* Thompson, 3 Eq. Ca. Abr. 413. Parsons *v.* Lanoe, 1 Vez. 189. Ambl. 557.

[b] See 4 Burr. 2171. 2182. Dougl. 35.

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(1) 2 Salk. 592. 1 Lord Raym. 441. by the delegates, among whom was Lord Chief Justice Treby.

(2) It appears that the rule under consideration was borrowed from the civil law, and incorporated into our law, with some hesi- Origin and gradual a-

Lord Mansfield's doctrine in respect to the admissibility of extrinsic evidence to rebut the presumption.

The general rule was admitted in Brady, lessee of Norris *v.* Cubitt [c], the Chief Justice at the same time observing that in his recollection there was no case in which marriage, and the birth of a child, had been held to raise an implied revocation, where there had not been a disposition of the whole estate (3). In the last-mentioned case, Lord Mansfield expressed great doubt whether the circumstances of the case were such as would raise the presumption, the testator having, in contemplation of his marriage, settled 800*l.* a year upon his intended wife; so that he not only contemplated the change in his situation to take

[c] Dougl. 31.

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doption of the rule.

tation, and by very gradual adoption. Lord Kenyon has remarked that a very able lawyer, Mr. Justice Perrott, dissented from the decision in Christopher *v.* Christopher, lest the statute of frauds should be thereby repealed, and having a jealousy of introducing the civil law, he resisted the force of those arguments which found their way to the other Judges who determined that case. But his Lordship added, he was glad those Judges did over-rule his opinion, because no person could wish that his family should be put into such a situation as to be deprived of all provision, and that the secondary objects of his bounty should be preferred to his immediate children. 5 T. R. 58.

Whether the previous disposition of the whole estate is necessary to ground the application of the rule.

(3) Lord Mansfield's doctrine does not appear to have been acted upon, and yet many difficulties must follow a different construction of the rule, for if it is applicable to cases, where the marriage and birth of a child were not preceded by a total disposition, it must either depend upon a fluctuating consideration of what was enough for the family in each case; or, if every partial disposition, however small, is to be revoked by these events, then it must rest upon this proposition, viz. that every man who marries, and has issue, must necessarily mean all he has in the world to become theirs.

place after his will, but actually provided for it, as to his wife, by his will, and his Lordship appears to have considered the rule as flexible to the particular circumstances of each case, and standing only on a presumption of fact, which, like all other presumptions of the same kind, might be rebutted by every sort of evidence. According to this view of the principle of the rule, the facts of the case were admitted to furnish a counter inference to the presumption of the rule, which was made to give way; and the will was adjudged upon these grounds, to be unrevoked by the subsequent marriage, and birth of a child.

The principle of the rule according to Lord Kenyon.

In subsequent cases the rule has been considered as standing upon firmer ground than a mere presumption of fact. In Doe *v.* Lancashire [d], Lord Kenyon was of opinion that the foundation of the principle was not so much a presumed intention to alter the will, implied from the circumstances afterwards happening, as a tacit condition annexed to the will itself at the time of making it—that the party does not *then* intend that it should take effect if there should be a total change in the situation of his family. And Lord Alvanley, in Gibbons *v.* Caunt [e], expressed a disapprobation of the practice of receiving parol evidence to rebut the presumption, which he seemed to think should be considered as inevitably arising from the subsequent marriage and birth of a child.

The decision in Christopher *v.* Christopher, went

[d] 5 T. R. 49. [e] 4 Ves. Jun. 848.

a little beyond former cases, not only in carrying the rule to *real estate,* but in applying it also to the case of a second marriage with children, where there were no children of the first marriage.

Whether a will is revoked by the birth of more children by a first marriage after the will, and a second marriage without children.

By the case of Gibbons *v.* Caunt[f], it was left a question, and so it still remains, whether, if a testator has more children by a first marriage born after the date of the will, and becoming a widower marries again, and has no child by the second wife, the will is revoked. Lord Alvanley, however, observed that there was not a single argument applying to the feelings of mankind, that did not apply as much in the case before him as in the simple one of a subsequent marriage, and the birth of a child.

It was held, however, in the well considered case ex parte the Earl of Ilchester[g], that a second marriage and the birth of children, *where the wife and children were provided for by settlement,* and there were children by the former marriage, which was before the will, was a case of exception to the rule in question; and the will in that case was held not revoked. And this decision appears to strengthen what was observed by Lord Mansfield, in Brady *v.* Cubitt, on the testator's having in his contemplation, at the time of making his will, the provision for his intended marriage; and seems to favour the doctrine of founding the principle of these cases rather upon presumption from intention, than a fixed and permanent rule of law.

The Lord Chancellor, in the case last adverted

[f] 4 Vez Jun. 840. [g] 7 Vez. Jun. 348.

to, disclaimed the adoption of any general principle, and professedly decided the case before him upon its own particular circumstances. He thought it better to express his opinion in terms of exclusive applicability to the case, by declaring that under all the circumstances belonging to it, he thought that the appointment was not revoked by the subsequent marriage, and birth of children.

A subsequent marriage and the birth of a posthumous child operate as a revocation.

The case of Doe *v.* Lancashire[h], was that of a subsequent marriage, and the birth of a posthumous child; and, the point there was, whether the circumstance of the child's being born after the death of the testator, took it out of the rule that marriage and the birth of a child are a revocation of a will. The argument principally relied on against the revocation was this, viz. that at the death of the testator, and before the birth of the child, one of the circumstances which composed a case falling directly within the rule was wanting; and the decision respecting the validity of the will, ought then to be made, as if the question had arisen during the interval between the death of the testator and the birth of his child; for the will could not be valid at the testator's death, and rendered invalid by subsequent extrinsic circumstances. Suppose the child had never been born alive, and the marriage and pregnancy had been held to be an implied revocation, all the devises in the will would then have been revoked in favour of a person who never came into esse. The greatest presumption that could be raised from the wife's pregnancy would be an intention to revoke when

[h] 5 T.R. 49.

that there was no distinction between a child in ventre sa mere, and one actually born. He would add, he said, one to them from 1 Vez. 85. where in a bond given on marriage to raise 2000*l.* for such child or children of the marriage, *as should be living* at the death of the father or mother, a posthumous child was held intitled to take as coming within the description. Upon these reasons the court gave judgment for the revocation (7).

Marriage and the birth of a child must concur, and both events

It seems, therefore, upon the above-mentioned cases to be well settled that marriage, and the birth of a child, are by operation of law a revocation of a preceding will. And it appears to be with equal cer-

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tlement, was by construction of the 10 and 11 W. 3. c. 16. entitled to them: but in the same case he seems to have taken it for granted that on a descent the mean profits belong to the intermediate possessor; for he directed that the profits of the estate descended should be accounted for by the uncle, only from the birth of the posthumous child. In Co. Litt. page 55, b. Lord Coke says, "If a man seised of lands in fee hath issue a daughter, and dieth, his wife being ensient with a son, the daughter soweth the ground, the son is born, yet the daughter shall have the corn, because her estate is lawful, and defeated by the act of God." From which it is to be inferred that Lord Coke did not consider the posthumous child as entitled to any mean profits upon a *descent*. And Lord C. J. De Grey, in 2 Wils. 526. on a question whether a posthumous son was actually seised, denies that the posthumous son, in the case of descent, can be entitled to any profits received before his birth, and cites 9 H. 6, 25. as an authority in point. See Mr. Hargrave's note to Co. Lit. p. 11, b.

(7) The Court agreed in disclaiming any attention to the declarations of the husband, because letting in that kind of evidence would be in direct opposition to the statute of frauds, which was passed in order to prevent any thing from depending either on the mistake or the perjury of witnesses.

tainty settled that both these circumstances must happen to produce such a consequence. In Ward *v.* Phillips, a will was found which gave every thing to the widow. A posthumous child being born, a suit was instituted in the Ecclesiastical Court to set aside the will; and the court having decreed against the will, that decree, on appeal to the delegates, was reversed. Dr. Hay, in commenting upon the case observes, that on the side of the first decree it was objected by Dr. Calvert, that as marriage alone did not revoke a bachelor's will, but required the additional consideration of the birth of a child, the birth of a child or children was to be taken as the essential and operative circumstance, and ought to revoke a married man's will; and for this construction he relied on the case of Jackson *v.* Hurlock, before Lord Northington; but that case went no further than to recognize the rule, that marriage without issue did not revoke a will, which rule, said Dr. Hay, was before established by many cases; but it by no means followed from thence that the birth of children would affect a married man's will.

must take place *after* the will to produce a revocation.

It was further objected, continued the learned Doctor, that in the Roman law, by which we proceed in this court, the birth of children operated as a revocation of a precedent will. This is rightly stated from the Roman law; and it is true that the Roman law in general guides our decrees; but it guides our decrees no further than where it stands uncontradicted by the English law. In the former, children are considered as having a property in the effects of the father; but in our law we know of no such thing,

and therefore the effect of the birth of children must be very different (8).

In Shepherd *v.* Shepherd, the case was thus: Shepherd, the testator, after some small legacies to his collateral relations, made his wife his residuary legatee. After this will, his wife was brought to bed of a daughter in 1763, upon whose birth the testator added a codicil to his will, whereby he directed that the legacies should be paid, and that an annuity of 300*l.* should be secured upon the residuum, and paid to the daughter. The codicil and will were found together. In 1765 another daughter was born; and in 1768 a son, who was a posthumous child, the testator having died about six months before his birth. These two last children being unprovided for, a suit was commenced in equity, to set aside the will, and to decree an intestacy. And the question on the case sent out of Chancery by Lord Camden, for the opinion of Sir George Hay, Judge of the Prerogative Court, was, whether the subsequent birth of children was a revocation of the will. That learned civilian, after stating it to be an incontrovertible position settled by an abundance of cases, that marriage alone will not revoke, held that so the birth of children alone would not, unless under very special circumstances; and accordingly decreed the probate to the executor.

Upon the whole, therefore, it appears that the doctrine as expressly laid down in Lugg *v.* Lugg, before

(8) See Dr. Hay's judgment in Shepherd *v.* Shepherd, 5 T. R. 51, in note.

mentioned as the first of this class of cases, viz. that where the revocation depends upon the alteration in the testator's circumstances, it must be a *total* alteration, has prevailed through all the subsequent cases. And that *total* alteration is made to consist in the combination of the two facts of marriage and the birth of a child or children.

But Dr. Hay, in the above-mentioned case seemed also to think that there might be such a *total ignorance* in a testator of his real situation as might occasion some doubt; according to the case put by Cicero, in his De Oratore, and which has before been mentioned as applicable to our law on the same subject: Pater credens filium suum esse mortuum, alterum instituit hæredem, filio domo redeunte, hujus institutionis vis est nulla. But it has also been before observed that by the Roman law the children were considered as having a sort of inchoate property in the effects of the parent. Unless the testator shews by the context or expression of his will the existence of such total mistake or ignorance, or professedly grounds his testamentary disposition upon facts which he can be shewn to have mistaken, it should seem very strong to say, since the statute of frauds and perjuries, that any extrinsic evidence can be admitted to prove the intentions of the testator for the purpose of *overthrowing* his will (9). Where the will itself

(9) The inquisitive reader will find the subject of the admissibility of extrinsic evidence to controul or explain written instruments treated of much at length in the introductory chapter to the treatise on the statute of frauds. And particularly as to the relief against mistakes, in Sect. 4 of Chapter I.

coupled with the facts shews the mistaken apprehension on which the devise has been grounded, the case falls within the principle of Campbell *v.* French, already cited[b]. And to a case so circumstanced perhaps the principle on which Lord Kenyon seemed in great part to ground his opinion in Doe *v.* Lancashire, may seem to apply; for there appears to be a sort of tacit condition annexed to, or accompanying, in legal consideration, such a devise, that if the facts were otherwise than apprehended by the testator, the devise should not stand.

This presumption of revocation may give way to circumstances.

In a case where, after a man had made his will whereby he had bequeathed several legacies and appointed his wife residuary legatee, the wife died leaving several children, and the testator married again and had one child by his second wife, and afterwards perished by shipwreck together with his wife and all his children, it was decided by Sir W. Wynne, the judge of the prerogative court, that the will was not revoked.

As the circumstances of this case were peculiar, and many important principles occur in the argument, it shall be presented fully to the reader (10).

George Netherwood shortly after his marriage with

[b] 3 Ves. Jun. 321.

(10) A correct note is given of the case of Wright *v.* Netherwood, in Mr. Evans's very valuable edition of Salkeld's Reports; to which note the Author is principally indebted for the above statement, though he has a pretty full one in MSS. in his own possession, with the addition of many learned opinions.

his first wife Elizabeth Lomax, made a will whereby, after charging his real estate with the payment of his debts and legacies, if his personal estate should be deficient, he gave some pecuniary and specific legacies, and bequeathed the residue of his personal estate to his wife. He also devised his real estate to his wife for life, with remainder to one George Netherwood, and appointed an executor for his effects in England, and another executor for his effects in the West Indies. His wife died leaving several children; the testator married her sister and had issue by her, one son. He afterwards embarked for England from Jamaica, with his second wife, her son, and all the children by the former marriage. The ship in which they embarked was never afterwards heard of, and was admitted to be lost.

The will was proved by the executor in England, and by the inventory of the property belonging to the deceased it appeared to amount to about 8000*l.*, the legacies amounted to rather more than 200*l.*

The executor who proved the will was afterwards cited by the next of kin to prove it in solemn form, or to shew cause why it should not be declared invalid.

Sir William Scott and Doctor Nicholl on this occasion argued in support of the will. They contended that in this case it was not revoked by the second marriage and birth of a child. That although it might be admitted as a general principle that these events did revoke a will on the presumption that upon such a total alteration of his situation the testator did not continue to have the same intention, yet that such pre-

sumption was liable to be repelled by circumstances; and that if it appeared to be his intention that the will should stand, marriage and the birth of a child would not destroy it. They observed that all presumptive revocations were stricti juris, and must be wholly inconsistent with the deceased's intention to dispose of his property according to his will. That the general principle of these revocations is, that where a person has contracted such new obligations and relations, it could not be supposed he meant to adhere to his former disposition: that this principle was recognized by all the cases upon the subject, and that they all proceeded upon the ground of a *total alteration* in the testator's circumstances: but that if there were not a total alteration, the implication was repelled.

No case, they said, could be stronger against a revocation than this. When the deceased was married he made a will by which he bequeathed some small legacies, and disposed of the rest to his wife. This, they observed, might have been in confidence that she would take care of any children he should have by her. By the death of the wife the residue became lapsed. And on his second marriage his fortune would have taken the same course in point of substance as if he had made no will. The few legacies would have belonged to the persons to whom they were given, and the residue would have been the subject of the statute of distributions.

They mentioned cases in which it had been held that this alteration in circumstances did not amount to a revocation, as, where the will was not of such a description as to make the court say the testator could not

in duty adhere to the disposition which he had made. Such was the case of Brown *v.* Thompson[l], where it was held that the alteration in circumstances was not sufficient to amount to a revocation, for no injury was done to any person, and those whom the testator was bound to provide for were taken care of. That case they contended was the same as the one in question; the great bulk would go to the wife and children, all the new relations were fully satisfied, and there was no probability of the testator's not intending to adhere to his former disposition. In Brady *v.* Cubitt[m], it was said by Lord Mansfield, "that upon his recollection there was no case in which marriage and the birth of a child had been held to raise an implied revocation where there had not been a disposition of the whole estate." This they contended, although it might not be essential, was certainly very material. Presumed revocations might exist where the residue was very small, but it was otherwise where a small part only was disposed of, and the bulk remained. In Thompson *v.* Shepherd, mentioned in a note to Ambler[n], it was held that marriage and having children did not amount to a revocation of a will made by a widower who had children. It was not that complete alteration of circumstances which implied the revocation of a declared intention. A case of Calder *v.* Calder, lately decided in the prerogative court, they said, did not apply, as it depended upon its own circumstances, and there was no ground to presume that the testator adhered to his intention. That was the case of a will made by a widower having no children, and which had no view to the relations of husband and father. The great bulk

[l] 1 Eq. Ca. ab. 413. [m] Dougl. 31. [n] 490.

of his property was left away, and there were declarations shewing his idea that his property would go to his wife and children upon a marriage subsequent to the will; and the will itself was such as would have involved the family in endless litigation. Every circumstance in that case raised the implication that the will should be revoked; but no such circumstances existed in the case under consideration; on the contrary, every circumstance repelled the implication. They further urged that there would have been a very considerable provision for the wife and her child; and that it must be presumed the testator knew the operation of the will; that it disposed of the small legacies according to his intention; that the residue would be distributable according to law; and that his property would be managed by the respective persons in whom he had reposed a confidence for the purpose.

Upon another part of the case, viz. whether, supposing the will revoked, it was restored by the presumable survivorship of the father, the advocates beforementioned observed that, in cases where the parent and son perished by the same stroke of death, and it could not be ascertained which was the survivor, the Roman law presumed, with certain exceptions, that if the son had not attained the age of puberty, the father survived; but if the son had attained that age, that he survived the father. This presumption, they said, arose from the degree of strength supposed to belong to the respective parties. Applying this general rule of presumption to the present case, they contended that the child by the second wife, being only about a year old, must be taken to have died before the father.

They farther stated that, by the Roman law, a will revoked by the birth of a posthumous child did not revive by his death, because no change in the father's intention could in that case be presumed; but that it was held otherwise with respect to the quasi posthumi, or those who were born after the will in the testator's life-time, on whose death the will was restored by the Prætorian law, as upon a new designation of intention. That there was no case where it had been held by the English law, that under these circumstances a presumptive revocation did take place. That the presumption of the law of England, with respect to revocations, was not more strong than the agnatio sui hæredis, by the civil law, nor *so* strong, for that was an actual revocation, and the other only a presumption liable to be repelled. That by the Prætorian law it was held that upon the death of the agnatus the will was restored; and that the removal of the cause in the present case would as strongly imply a renewal of the first intention, or rather more strongly, on account of the omission to destroy the will.

And lastly, it was said, that, at all events, the testator intended the legacies, on account of which alone the dispute was material, should be carried into effect; and that the executors whom he had appointed should have the management of the property; so that if the court upon a presumed intent, decided against the will, the actual intention of the testator would be defeated.

Doctor Battine and Doctor Swabey on behalf of the next of kin insisted on the general rule that a will

is revoked by marriage, and the birth of a child. They contended that the change in the testator's situation, from being a widower to becoming again a husband and a father, was such a total change as to raise the presumption that he did not intend the will to stand. That it had been decided by Sir George Hay that the cases of widower and bachelor were the same. That there was no decision that the quantity of property would vary the presumption.

With respect to the case of Brown *v.* Thompson, they observed, that it came on first before Sir John Trevor, Master of the Rolls, who held that the will was revoked: that the different opinion afterwards given by Lord Keeper Wright was on account of the particular circumstances of the case; and that Mr. Justice Buller, in Doe *v.* Lancashire, thought the opinion of the Master of the Rolls better than that of the Lord Keeper. They admitted that there was a *dictum* of Lord Mansfield in the case of Brady *v.* Cubitt, that a will was not revoked by marriage and the birth of a child if it only covered part of the property, but they observed that it was a *dictum only.* That in Doe *v.* Lancashire the revocation was held to arise from a tacit condition at the time of making the will; and that although there might be some cases in which a will was allowed to stand from circumstances repelling the presumption, yet nothing was more dangerous than to let a particular equity arising from the quantity of the effects operate against a general rule of law, as it would introduce a vague and uncertain method of decision, and it was better to adhere to a known presumption of law. In this case, they said the disposition was complete by the

will, both as to the real and personal estate, and the testator had not shewn, since the alteration in his circumstances, any disposition to adhere to it. And that though the real estate was not within the jurisdiction of that court, the fact of its being wholly devised away might afford an argument in favour of the revocation.

As to the other point, they contended that it was not to be taken for granted in this case, even according to the principles of the Roman law, that the child died first. That the doctrine alluded to went no further than to shew that, when a father and son perish by the same stroke of death, the father is supposed to survive his infant son. But that it did not appear that in this case they perished by the same stroke of death. The ship being cast away was all that was admitted, and non constitit that they died by shipwreck. They insisted that the general law being that the will was revoked, to take the case out of that law, the revival of the will by the father's surviving must be shewn by the other side. That, by the Roman law, if a will was void for the pretermission of a child who afterwards died, the will was not thereby rendered valid, or if it was revoked by the birth of a posthumous child, the death of that child did not restore it; and that, in case of a will becoming void by any subsequent cause, the removal of that cause did not restore it by the civil law; though it was otherwise by the Prætorian law, which was in the nature of a court of equity, and only prevailed for the sake of the hæres scriptus, or residuary legatee. That in this case the residuary legatee being dead, the ground on which the jus prætorium interposed failed. That

existed, and they contended that, the testator having no wife or children at his death, the tacit condition (which in Doe *v.* Lancashire was considered as the principle of those cases) might be fairly considered as a condition that the will should not take effect if the testator should afterwards have a wife and children *who survived him.*

It was further urged by the same advocates, that all the cases in the courts of common law admitted that the doctrine upon that subject was borrowed from the civil law. That the courts had not adopted all the minute rules and distinctions of that law, but only some of its general principles: and that there was no principle better founded on justice than that, if a will was revoked by the birth of a child, it was revived by his death in the life-time of the testator.

Sir William Wynne, in delivering the judgment of the court, observed, it was clearly the general law that by marriage and the birth of a child the will became void by implication of law. That he thought it was a mistaken notion that there was any such distinction as that mentioned by Ambler*. That the principle of the rule was, that the change of circumstances founded a presumption that there was a change intention which might be as strong in favour of in a second wife and family as a first, and that it did not seem material whether the will was made by a widower having children, or by a bachelor. He said that the more weighty argument was drawn from the operation of the will under the circumstances which had happened. That the testator had given legacies

* 490. in margin. See ante, 361.

which were not very considerable, and the rest to his wife. That the gift of the residue became void by her death, so that if he had left a second wife and son they would have had their share with the other children. That in Brady *v.* Cubitt it was said by Lord Mansfield that there was no case of a revocation where there was not a total disposition; intimating that the ground of revocation was an entire deprivation; but that, however that might be, if there was an ample portion remaining, after a few legacies to friends, there was no decision that a will would be revoked; and that the principles on which the cases had gone, did not militate against such a will. This case, however, he said was not exactly similar. The testator gave the bulk of his property to his wife early after marriage. She lived for several years, during which they had several children born. The birth of those children would not have revoked the will, and he might have meant to leave them in the power of their mother. She died, and it was not an improbable supposition, that he, knowing the effect of the will, suffered it to remain. There was a strong ground then to contend that under those circumstances the case did not fall within the rule laid down and established for the revocation of wills.

The learned Judge said, he was not aware of the case of Barrow *v.* Baxter, in which the court seemed to think the subsequent death of the child would not make an alteration; but he said the point seemed very much like that which had been a vexata questio in those courts, and brought before the courts of common law, whether a will which was revoked by another is set up by the destruction of the second. That there was a case to that effect before Sir George Lee, of

Hellyer *v.* Hellyer, in which it was held that the will being once revoked, remained so, but that there was an appeal from that judgment to the delegates, which was never determined by them; and that the case of Glazier *v.* Glazier[p], was directly contrary to that, it having been there held that the first will was good. That in Brady *v.* Cubitt it was laid down by Buller J. that implied revocations must depend on the circumstances at the time of the testator's death, and that made it material to enquire what those circumstances were. That the fact was, that having embarked they all perished. The Roman law he said, had been entered into, and it clearly appeared by the Prætorian, which was considered as the latter Roman law, that the revocation was entire and not presumptive; and yet the will was held to revive. With respect to the priority of death, he stated that it always had appeared to him more fair and reasonable in those unhappy cases, to consider all the parties as dying at the same instant of time, than to resort to any fanciful supposition of survivorship on account of the degrees of robustness. Then the testator at the time of his death had neither wife nor children, and Buller J. said it was to depend upon the circumstances at the time of the testator's death; and there was no circumstance to raise a presumption that he intended at that time that the will should be revoked.

On the first point, the learned Judge declared he should have great doubt whether the presumed revocation did take place at all.

As to the second, as there were neither wife nor

[p] 4 Burr. 2512.

children at the death of the testator, he was clearly of opinion that the court ought to pronounce for the validity of the will.

SECTION XVIII.

Effect of a woman's marriage upon her will.

The marriage of a woman after making her will is alone enough to revoke it, without the birth of a child.

ALTHOUGH marriage, and the birth of a child, must both happen to revoke the will of a man, yet it has been settled that a woman's marriage alone will be a revocation or rather countermand of her will, if she dies in her husband's life-time (1). This was so determined in the case of Forse *v.* Hembling, in Coke's Reports[a]. It was objected that, although after the marriage, the wife could not revoke her will, yet that that was no reason why the marriage should be a countermand: for, that if a man of sound memory made his will[b] and afterwards became non compos mentis, he could not countermand his will, and yet such his disability was no countermand.

[a] 4 Rep. 61. a. [b] 1 And. 181. Godsb. 109.

(1) If a feme sole surrenders to the use of her will, and marries; her marriage is a revocation, or at least a suspension of the surrender. Ambler, 627.

But the court were unanimous that the marriage and coverture at the time of the death, was a countermand, and that for several reasons. 1st. The making of a will is but the inception of it, and it does not take effect till the death of the devisor; but it would be against the nature of a will to be so absolute that he who makes it, being of good and perfect memory, cannot countermand it; and therefore the taking of a husband, shall amount to a countermand at law.

But when a man of sound memory makes his will, and afterwards by the visitation of God, becomes of unsound memory, (as every man for the most part before his death is), it would be hard, indeed, if this act of God should be a revocation. 3dly, It would be mischievous to women, if their wills, after their marriage, were to stand irrevocable. And this they must be, unless the marriage were a revocation, for the law will neither allow a will to be made or revoked by a feme covert, because both might then be done by the constraint and coercion of the husband.

Whether, if she becomes discovert again, and dies a widow, the will is revived?

It was said by Manwood, in Plowden's Commentaries[c], that if a feme sole makes her will the 1st day of May, and gives land thereby, and afterwards on the 10th day of May she takes husband, who dies on the 20th day of May, and the woman dies on the 30th, the devise is good; for it could not take effect until her death, at which time she was discovert, as she was at the time of making her will; and the intermarriage should not countermand that which was of no effect in the life-time of the husband. Which proposition was not denied. And it is observable that in the

[c] Plowd. 343.

above-mentioned case of Forse *v.* Hembling, where this position of Serjeant Manwood is cited, no disapprobation of it was intimated by the court; and the judgment in that case is expressly grounded not only on the marriage of the testatrix, but also on the circumstance of her dying covert baron. Though in Cotter *v.* Layer[d], it was said by Lord Chancellor King, without any qualification, that a woman's marriage alone was a revocation of her will, yet that opinion being grounded entirely on Forse *v.* Hembling, does not carry the doctrine further.

It seems to have been held, however, in Mrs. Lewis's case[e], that a will made by a woman before marriage is so totally revoked by her marriage that it cannot revive on the subsequent death of her husband. And it is to be observed, that though in Doe *v.* Staple[f], none of the Judges pronounced a decided opinion on the point whether a will by a feme sole, revoked by her subsequent marriage, would have its validity restored to it by the wife's surviving her husband, yet the language used by Lord Kenyon, is rather on the negative side; for his Lordship's words are, that "the will of a woman made before coverture ceases to be her will afterwards; because it is of the *essence* of a will that it should be valid *during the remainder of the testator's life.* Therefore, generally speaking, the will of a woman ceases to have any operation after she becomes covert." That learned Judge does not say "during coverture," nor does he add, "if she dies during coverture;" but his words express the proposition in as unqualified a sense as those

[d] 2 P. Wms. 524. see also 2 Bl. Comm. 499.
[e] 4 Burn. Eccl. Law, C. 47. [f] 2 T. R. 684.

of Lord Chancellor King. And, in the reason which he gives for the revocation is comprehended a negation of any such revival of the will by the death of the husband; for if it be of the essence of the instrument that it should be always valid, (and it is not valid during the coverture, as has been before shewn, because not revocable) then it should seem to follow as a clear consequence, that what destroys the essence must be a total destruction of the thing itself, so as to leave it no potential existence.

The counsel in Mrs. Lewis's case, which was before the delegates, cited many authorities from the civil law to shew, that among the Romans, if a man made his will, and was afterwards taken captive, such will revived and became again in force, by the testator's repossessing his liberty. But this was answered by adverting to the difference between a voluntary act, and an act of compulsion. And the will was adjudged not to be good. So that the weight of authority, and perhaps of principle, seems to be against holding the will of the feme sole, revoked by her subsequent marriage, to be restored to its operation by the wife's surviving her husband.

A married woman may execute a power given to her while sole to be exercised during marriage.

It has been sometimes considered doubtful whether a power given to a feme sole was not suspended by her marriage[s]; but the law seems now to be understood as settled, that a feme covert may execute a power given to her while sole. However, where an agreement before marriage was entered into, that a settlement should be made of the wife's estate, reserving to her a power of disposing of it by will; and be-

[s] 3 Bro. P. C. 308. Rich v. Beaumont.

fore the marriage she devised it in favour of the intended husband, who survived her, the will was nevertheless held to be revoked. For the agreement was for an authority to be exercised during the marriage, and therefore could have no operation in preventing the consequence of law, with respect to what was done before the marriage[h].

And if it is exercised before marriage, it will be revoked by the marriage.

SECTION XIX.

Of the revocation of wills of personal Estate.

A REMARKABLE case which happened in Lord Nottingham's time is said to have given rise to the clause in the statute for invalidating unwritten revocations of wills of personal estate.

Mr. Cole at an advanced age married a young woman who did not conduct herself with propriety. After his death she set up a nuncupative will, said to have been made in extremis, by which the whole estate was given to her in opposition to a written will made three years before the testator's death, giving 3000*l.* to charitable uses. The nuncupation was proved by nine witnesses. Upon the appeal to the delegates from the sentence of the prerogative Court in favour of the written will, Mrs. Cole offered to go to a trial at law in a feigned action, submitting to be

Case said to have given rise to the clause in the statute 29 C. 2. c 3. for invalidating unwritten revocations of wills of personal estate.

[h] See Doe *v.* Staple, 2 T. R. 684. and see the same point ruled in Equity, in Hodgson *v.* Lloyd, 2 Bro. C. R. 534.

bound by the result. Upon the trial at the bar of the Court of King's Bench, it appeared that most of the witnesses for the nuncupation were perjured, and that Mrs. Cole was guilty of subornation. She then applied for a commission of review, which was refused; and upon that occasion Lord Nottingham said, "I hope to see, one day, a law that no written will shall be revoked but by writing."[a]

The statute of 29 Car. 2. c. 3. s. 22[b]. is express, that no will in writing concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read to the testator, and allowed by him, and proved to be so done by three witnesses at least (1). These points were in question in the case which took place in the prerogative Court in the will of Mr. Wright, of Chelsea, which some little time ago excited much general attention. Mr. Wright died on the 13th February 1814, having on the 5th of August 1800 made his will appointing Lady Wilson and the Right Honourable Charles Abbott executors, and bequeathing to the former the residue of his property, after payment of his debts and some specific legacies. The allegation offered pleaded that the deceased on the

[a] See Matthews v. Warner, 4 Ves. Jun. 196, note (a).
[b] 29 Car. 2. c. 3. s. 22.

(1) But it is not made necessary that such revocation by parol, when committed to writing, should be signed or attested.

11th of February, two days only before his death, being very ill, addressed himself to two or three persons who were with him, and declared his intention to give a certain sum out of the money which he had invested in the bank to ——. The words used by him on this occasion were reduced into writing on the 15th of March, after his death, and attested by the persons in whose presence they were uttered. The admission of this allegation to proof was opposed on the ground that the statute 29th Car. 2. by the clause above cited, required that no will in writing concerning any personal estate should be repealed, nor any clause, devise or bequest therein be altered or changed, by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read to the testator and allowed by him, and proved by three witnesses as aforesaid.

From the facts stated in the allegation it appeared that the money in the bank was included in the residuary clause; and the judge observed that it was clear that as the money in the bank was included in the will, the effect of the nuncupative codicil would be to alter the will in that respect. That the act on account of its general objects ought to be strictly construed and enforced. That it was imperative upon the court, and left it no discretion. That as to the case of Brown *v.* Manby in 1770 which had been cited, the words were there pleaded to have been written in the lifetime of the deceased, and with his privity, and therefore it was possible the requisites of the Act might appear on proof to have been complied with, but that in the present case it was clear from the facts pleaded that they were not. The court accordingly pronounced for the will.

But where a man by will in writing devised the residue of his personal estate to his wife, and upon her dying in his life-time made another disposition of the residue by a *nuncupative* codicil, in respect to which the requisites of the Act regarding nuncupative wills were complied with, this was resolved to be good, for by the death of the wife the devise of the residue was totally void, and the codicil was no alteration of the former will, but a new will for the residue [c].

There must be clear evidence of present intention to effectuate the revocation.

As there must be a manifestation of a clear and serious intention to make an actual disposition for any writing to operate as a testamentary act, so to revoke or alter a prior complete testamentary disposition, at least an equal indication of the disposing mind will be required. And this appears from a case recently decided in the Prerogative Court [d], which, as it marks with some precision the degree of evidence which that court requires to establish the operative intention, shall be stated fully. The question was, whether certain alterations made in a paper purporting to be instructions for the will of Sir S. S. Bart. after the will prepared from it had been executed, were operative as codicils, or were merely deliberative as to an intended alteration, to be afterwards carried into effect.

It appeared that Sir S. S. had duly made his will on the 2d of March 1810, which was of considerable length, occupying upwards of fifteen sheets of paper, and had therein made an ample and detailed disposal of

[c] 1 Abr. Eq. Ca. 408. and see 4 Burn. Eccl. L. 203.

[d] Sitwell and others, by their Guardian, *v.* Parker. Prerogative Court, Doctor's Commons, March 11.

his estates and other property. The instructions from which this will was prepared were contained in a paper entitled "Heads or Instructions for the will of Sir S. S." and this paper had been previously left with him for his perusal and approbation; after which it had been returned to his solicitor to prepare the will from, but signed in pencil by the testator, that it might operate in case of accidents in the mean time. It contained, amongst other bequests, one of 2000*l.* to each of the younger children of F. S. Esq. Sir S.'s brother, the eldest being otherwise provided for; but this legacy had been struck through in the instructions, and was therefore omitted in the more formal will, in consequence of Sir S.'s expectations, as explained by him to the solicitor, that the family of Lord C., into which Mr. F. S. had married, would provide for his younger children. After the execution of the will, Sir S. delivered it into the possession of his solicitor, choosing to retain the instructions himself, as containing a more abstracted account of the contents of the will, and therefore more easy of reference than the will itself in its more precise and formal language. Sir S. died on the 11th of July, 1811, and a probate was obtained of his will only; but the paper of instructions being afterwards discovered in his secretary, was found to contain an obliteration of a legacy to Mr. G., the deceased's steward, with a mark in the margin to refer to it, and this endorsement on the outside, "If "any legacy includes Mr. G. in this or any other "will or codicil, I revoke it.—S. S.—February, "1811." The pencilled obliteration of the legacy of 2000*l.* to each of Mr. F.'s children was also crossed through in ink, as if with an intention of reviving it; and the deceased had on the 29th of March, 1811

preceding his death, signed his name to each of the sheets except the second, which contained the obliteration of Mr. G.'s legacy. These alterations appeared to have been made since the execution of the will, and Mr. F. S.'s children, acting by their father as their guardian, instituted the present proceeding as the parties interested, calling in the probate of the formal will, and requiring the executors to take a new probate of it jointly with the paper of instructions, as containing together the will of the deceased.

The evidence in the case fully established the circumstances stated, and also that the deceased, after the execution of the will, had reason to believe that the C. family, with whom the children then were, would not provide for them as he had expected. This idea was subsequently confirmed by an intimation which was received from a distinguished member of the family; and the deceased in consequence often expressed to those in his confidence, that he supposed he must himself provide for the children, or they would come to distress; and for this reason he discontinued the advances of money which he occasionally made to his brother, and apprised him of his intention of providing for his children instead. He was also proved to have declared that he should see his attorney at —— races, and should there make an alteration in his will, but he died before that happened.

Under these circumstances it was contended, on the part of the children, that the deceased, by striking out the former obliteration of their legacy, and signing every sheet of the paper except the one con-

taining the obliterated legacy to his steward, clearly meant to revive the bequest pursuant to his declared intention of providing for them; and that he was only prevented from giving more complete effect to that intention by his death, before he again saw his attorney, as was expected.

Sir John Nicholl, after stating the facts of the case, observed, that the presumptions were strong against the paper, as it had been superseded by the execution of a more formal instrument; and the alterations themselves, relied upon in argument as tending to revive it, were very equivocal. It was possible that they might have been intended as operative, but it was equally so that they might be deliberative only: neither point could to a certainty be ascertained from the present evidence, but it was merely matter of conjecture; and the court could not, upon conjecture alone, pronounce for the alterations in the paper as being intended by the deceased to have operation. He then entered into an examination of the circumstances tending to shew *quo animo* the alterations were made; and inclined to think that they were merely deliberative as to an intended future alteration in his will. The revocation of the steward's legacy, he observed in particular, was expressed not only by striking it through, but also by an endorsement of words, declaratory of his intention in so doing; and it was therefore to be supposed, if he really entertained the same final intention with respect to the revival of the children's legacy, that he would have signified it in a similar manner. What the deceased's intentions really were, it was impossible now to ascertain; he might have formed them, and even proposed to himself the time and manner of giving them effect, and the court could only lament

that he had not made them more apparent; for with all the commiseration naturally inspired by the situation of the children, it could not, consistently with its ordinary rules of decision, pronounce for the alterations in this paper, when the intention with which they were made was not proved to the extent required by those rules. He therefore felt himself bound, though very reluctantly, to pronounce against the paper in question, but directed the costs to be paid out of the estate.

Shortly after the above case, another on the same question was determined in the same court, and by the same judge, which may be useful in helping the judgment in questions respecting the effect of alterations of solemn wills. The case was that of Dickinson *v.* Dickinson and others, in which the question was, whether certain alterations in the will of W. D. deceased, were made by the testator, or by his directions, with an intention that they should have legal operation, or were merely deliberative as to some future testamentary disposition, intended to be made by him.

Alterations in pencil effectual, there being sufficient proof of a dispositive intention.

The will was duly executed by the testator in the presence of three witnesses, whose signatures were added. The testator gave an annuity of 60*l.* to the testator's wife for life, and his freehold property to his two sons, with some pecuniary legacies. The alterations were made in *pencil*, and consisted in striking out the wife's annuity of 60*l.* and substituting in the place of it 160*l.* A line was also drawn through the devise of the freehold property to the sons, and some other of the legacies were altered. The will, thus altered, was enclosed in an envelope, on which was also written in pencil, " to my wife

160*l.* per annum as long as she continues my widow." The sons were dead at the time of the alteration. The judge observed that the alterations were not invalid on account of their being written in pencil. They appeared to have been very deliberately made; the figures inserted were also carried out into the margin, and the pencil writing on the envelope seemed to confirm the alterations made in the enclosed. The papers were deposited in an iron chest by the testator, and not kept for revision and completion. The death was not sudden: the testator had ample time to make another will, if he had so intended. Under these circumstances, the court felt itself called upon to pronounce for the operative effect of the alterations.

Implied revocations of wills, and testaments of personal estate, fall in general under the same doctrine, and are subject to the same principles and rules as those which have governed the decisions in respect to property in land. But there are also some distinct considerations which apply to legacies in particular.

Of ademption of legacies by subsequent advancements.

Where a parent makes provision for a child by his will, and afterwards gives to such child a portion in marriage, if a daughter, or pays a sum for establishing him in the world, if a son, the legacy is held in general to be adeemed[e]. But not so if the provision made in the parent's life-time be not of the same kind with the legacy[f], or be made subject to a contingency[g], or if it be made expressly in satisfaction

[e] 1 P. Wms. 681. Hartop *v.* Whitmore.

[f] 1 Bro. C. C. 425. Grave *v.* Earl of Salisbury.

[g] 2 Atk. 491.

of another claim [h], or if the two gifts be upon different terms [i]. Where the subject of a specific legacy is withdrawn, the legacy must fail; but there are many nice, and some, as it should seem, over-curious distinctions, as to what, to this effect, shall be considered as *specific*. Where a sum of money has been bequeathed out of a particular fund, it has, for the most part, been considered as a general legacy, or legatum in numeratis, so as to entitle the legatee, if the testator receive it in his life-time, to have it made good out of the general effects [k]. But other cases have been decided a different way [l].

Wherever the subject of a specific legacy is withdrawn, the legacy must fail.

The distinctions as to what is specific and what is general have run into great subtlety.

The courts on this subject have run into such nicety as to adopt distinctions between a bequest of a sum of money due on a bond from A. and a bequest of such debt generally, holding the legacy in the former case to be pecuniary, and in the latter to be specific [m]. And a difference has sometimes been taken between a voluntary and compulsory payment of a debt after a bequest of the same; considering the voluntary payment as not indicating any change of mind in the testator, and therefore not an ademption, while the payment procured by compulsion has been looked upon as the result of an active step taken by the testator in derogation of his own gift [n]. But this distinction has been denied in other cases (2).

[h] 3 Bro. C. C. 192. [i] Id. Ibid.

[k] 1 P. Wms. 777. Savile *v.* Blacket, 4 Bac. Abr. 355.

[l] 2 Fonbl. 367. note (†).

[m] 2 P. Wms. 330. Rider *v.* Wager, and n. 1. and see 2 Bro. C. C. 111. 1 Eq. C. Ab. 302. [n] 2 P. Wms. 330. n. 1.

(2) 4 Bac. Abr. 355. n. (b), and see the note in Serjt. Williams's edition of the cases in the time of Lord Talbot, p. 228. to the case

A conversion or specific alteration of the thing bequeathed, as making a raw material, after giving it by will, into a manufactured article, seems to be a clear practical revocation [o]. Though by the Civil Law it was competent for a man after he had changed the subject of a specific legacy, to declare by his conduct that such a change was no ademption: and the case has been put of a gold chain, which the testator, after having bequeathed it by his will, converted into a cup; the legacy was not adeemed because the cup might be restored to its former shape. This distinction, however, has not been adopted by our law; and Lord Thurlow has declared it to be contrary to common sense to say that, after a legacy has been extinguished, the testator may by his conduct revive it [p] (3).

[o] 2 Bro. C. C. 110. [p] Ibid.

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of Partridge *v.* Partridge; but see 2 Vez. Jun. 640. Coleman *v.* Coleman, where this distinction has been admitted as a strong circumstance from which to gather the intention, though not as an absolute or decisive ground.

(3) If the words of Lord Thurlow are correctly reported, his criticism on the distinction seems not to have been just. His reason was grounded on the supposed absurdity of holding a legacy which was extinguished, to be *revived* by the conduct of the testator; but the rule of the civil law did not admit the legacy to have been extinguished.

Section XX.

Satisfaction in Equity.

I SHALL here add a few words on the equitable doctrine of satisfaction, as having an affinity with my present subject, without presuming to enter at large into the consideration of the cases, which would greatly multiply my labour without much profit to the reader.

Of the distinct meanings of the terms *satisfaction* and *performance.*

This word *satisfaction,* from its frequent and too vague adoption in courts of equity, seems to have introduced no small confusion of ideas, and I venture to question whether it is often used with technical precision. By considering what it is not, we shall perhaps be soonest conducted to the true apprehension of what it really is. Lord Thurlow declared himself to have met with continual disappointment in his attempts to establish a broad and useful distinction between cases of *satisfaction* and *performance.* Since, however, we are forbidden to treat these terms as synonymous, by the rules of construction which have separated them in application, we must not be discouraged, even by his Lordship's disappointment, from attempting an approach at least to some practical grounds of discrimination.

To the class of cases called cases of *performance,* as far as the decisions appear to have gone, those seem properly to belong, wherein a man being under

a covenant to do something which is to take effect after his death, does an act in his life-time, or leaves a consequence to arise after his death, which virtually includes, or *is, in substance,* the thing intended. Thus in Blandy *v.* Widmore [a], where a man covenanted to leave his wife 620*l.* and died intestate, and the wife's distributive share came to more than 620*l.*; and in Wilcocks *v.* Wilcocks [b], in which a man on his marriage covenanted to buy lands to the value of 200*l. per annum,* and to settle them by way of strict settlement, and afterwards purchased lands of that value, but made no settlement, and died, and left the purchased lands to descend to his eldest son, the eventual benefit in both these cases operated as a presumed *performance,* and not as a *satisfaction* of the engagement [c]. It is true, that in Wilcocks *v.* Wilcocks, the eldest son took by the event a fee simple instead of an estate in tail, but *he* was not the person to take an objection on *that* ground; and Sir Joseph Jekyll, in observing upon this case [d], declares his opinion, that if the eldest son had aliened the fee, and died without issue, the second son could not have recovered the estate by virtue of the settlement; which observation, if just, furnishes a strong distinction between a case of performance and a case of satisfaction; for as a satisfaction, it is very clear it could have only bound those (1) by whom the benefit was felt [e].

[a] 1 P. Wms. 323. [b] 2 Vern. 558.
[c] Lee *v.* Cox, 3 Atk. 419.
[d] 3 P. Wms. 225.
[e] Vide Wilson *v.* Pigott, 2 Vez. Jun. 355.

(1) The reporter, indeed, adds a query, whether, if the eldest son had died before the next term, so as that he could not have

In cases of this class, though the intention may not be manifested in expression, yet if no contrary grounds of inference exist, the thing intended or engaged to be done being *in effect* performed, the presumption against double portions or provisions prevails[f]. It seems, indeed, that if the effect of the thing be partly performed, such partial performance fulfils the obligation *pro tanto* in equity: thus where a sum of 30,000*l.* was covenanted by a man, on his marriage, to be laid out in land to be settled on himself for life, with remainder to his first and other sons in tail, and the covenanter died, having laid out only a small part of that sum on the purchase of some land, which he left to descend to his eldest son, Lord Talbot decreed it a performance *pro tanto*[g]. So also the rule seems to be, that where a man covenants to do an act, and he does that which may be converted into a performance of his covenant, he shall be presumed in equity to have done it with that intention. Thus where[h] one covenanted by his marriage settlement with the trustees to pay to them two several sums, amounting to 2000*l.* to be laid out in land, to be settled to the uses of the marriage, and did not pay the same, but after having purchased an estate for 2150*l.* died intestate, without having made any settlement of such estate, though it was strongly contended, that as the husband had covenanted to

There may be *performance* pro tanto.

Constructive performance by a collateral act.

[f] Vide Weyland *v.* Weyland, 2 Atk. 632. Prince *v.* Stebbing, 2 Vez. Jun. 400.

[g] Lechmere *v.* the Earl of Carlisle, 3 P. Wms. 227.

[h] Snowden *v.* Snowden, 3 P. Wms. 227. in Notis.

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suffered a recovery, the second son ought then to have been barred of his chance under the settlement.

pay the money to the trustees, he could scarcely mean a performance when he purchased land himself, yet his Honour declared, after admitting that if the case had been *res integra,* he should have thought the reasoning made use of entitled to great consideration, that the case was within the principle of Lechmere *v.* the Earl of Carlisle.

The constructive performance must correspond in time with the stipulated benefit.

But it seems a settled rule, that to constitute a performance, the eventual benefit must correspond in time with the period at which the stipulated benefit was to take place: thus where a testator being under a bond to leave 300*l.* to be paid in one month after his death, bequeathed a legacy of 500*l.* to be paid in six months, this was held to be no performance[1].

The true reason of the difficulty which has been so often confessed, of separating cases of performance from cases of *satisfaction,* seems to have arisen from the want of annexing a just idea to the word *satisfaction,* which is, in truth, a term of loose and general signification, according to the use which has been always made of it in the courts of equity; and has been adopted popularly to express the final and substantial effect, as well of cases of *performance,* as of cases of *election,* and cases of *ademption* or *revocation,* which are the terms truly expressive of the distinct means and operations of law, by which the result described by the word *satisfaction* is severally produced. It would, it is conceived, be very difficult, if not impossible, to suggest an example of a pure case

[1] Haynes *v.* Mico, 1 Bro. 129. and see Richardson *v.* Elphinstone, 2 Vez. Jun. 464. See Garthshore *v.* Chalie, 10 Vez. Jun. 1.

of satisfaction, if we treat the term as having an exclusive and appropriate sense, and not rather as generically comprehending certain specific varieties of equitable rules and technical consequences.

Satisfaction is the *general* term, expressing the final effect of performance, election, and revocation.

Every case upon a will made by a person under a binding contract, unless it be considered as an actual performance, can only amount to a case of election; for how can a testator by his will forcibly substitute *another* thing in the place of *that* thing which he was bound by his contract to perform; or how can such a substitutionary disposition have any other operation than, by giving a better thing in lieu of the thing contracted for, to engage and ensure the choice of the devisee or legatee, on highly presumable grounds of preference? If such a case is termed a case of *satisfaction,* it is because such is the final consequence of an *election;* for it may be presumed almost as certain that, where a greater is proposed in the place of an inferior benefit, the condition will be accepted. In strictness, therefore, this is a pure case of election, or of *satisfaction working by election.*

Payment is performance. Thus where a legacy is bequeathed to a creditor, equal to or exceeding the amount of the debt, the debt is considered as meant to be answered by, or included in, the gift. This is therefore a *satisfaction by performance* (2).

Where a man, having granted a benefit or provision by a voluntary and revocable instrument, by a subse-

(2) Vid. post. Cap. V. Sect. 2. where this rule of presumption is more largely considered.

quent instrument makes an advancement of some other bounty, or gratuity, by way of provision, to the same object (3), and the circumstances of the case warrant the inference that the second provision was meant to take place of the first, this is not properly a case of satisfaction. A satisfaction it *ultimately* may be, but the true operation of it is to *revoke* or *adeem* the legacy. Neither is the term satisfaction expressive, in any other sense than as a discharge, of its ultimate effect in equity, since a smaller sum given in the lifetime may, under circumstances, annul a greater provision by will[k].

But if a legacy of a larger sum can be wholly set aside by the substitution of a less, this cannot be called a performance, still less a satisfaction *by* performance, and less still a satisfaction *by* election; but there seems to be no impropriety or confusion of terms in calling it a *satisfaction*, (meaning only thereby a discharge), *by revocation* or *ademption*. And this phrase is the more appropriate, because it is certainly not in strictness of legal language an ademption *or* revocation *simply*: it is a satisfaction working *by way of* revocation; for in truth it operates as a revocation on a principle of equitable presumption[l].

It does not redound much to the accuracy of a science to multiply terms, and apply different rules to

[k] Vide Hartop *v.* Whitmore, 1 P. Wms. 680. Shudall *v.* Jekyll, Atk. 517. Rosewell *v.* Bennett, 3 Atk. 77.

[l] Vide Ellison *v.* Cookson, 1 Vez. Jun. 100.

(3) Vid. post. Cap. V. Sect. 1. where the doctrines of equity on the subject of double portions is considered more at large.

them, without first distinguishing between the different ideas to be implied by those terms: and, therefore, until the word 'satisfaction' has a more appropriate and exclusive sense, it will only perplex the subject to talk of cases of satisfaction as distinguished from cases of performance, cases of election, and cases of revocation. The idea which is meant to be conveyed by satisfaction, simply used, is neither descriptive of cases of performance, cases of election, nor cases of revocation. It is not descriptive of *performance*, because it is not used to signify the identical, or substantial, or virtual effectuation of the thing contracted to be done, but the *substitution* of one thing for another. And as there are only two sorts of cases, wherein a *substitution* can take place, viz. where the thing to be done is voluntary, and where it is obligatory or resting in contract, in the former of which cases the satisfaction operates by *revocation*, in the other, by putting the party benefited to his *election*, the *final* consequence *only* of each operation is properly expressed by the word *satisfaction*.

CHAP. III.

REPUBLICATION OF WILLS.

SECTION I.

The Doctrine of early Decisions.

AFTER the statutes 32 and 34 Hen. 8. the courts of justice were frequently divided on the validity of parol republications of wills of lands; and it appears that, in opposition to the clear sense of those statutes, the favour with which all testamentary dispositions were regarded, sometimes gave the effect of a republication to slight and unconsidered expressions. In the case of Beckford *v.* Parnecott[a], which was determined in the 37th year of Elizabeth, a man seised of lands in A. devised the same to B. and C. and appointed them his executrixes, and then purchased other lands in A., and being requested to sell the lands which he had lately purchased, refused so to do, saying, "No, they shall go with my other lands in A. to my executrixes;" and afterwards being sick, the will was read to him, without his making any observation; but in a codicil, which he annexed, he gave legacies of goods to other persons on his death. Upon a question being made, whether by these words spoken to a stranger, the will was republished, so as to make the

[a] Cro. El. 493.

new purchased lands pass; Fenner, Clinch, and Popham held them to amount to a new publication (1).

In Fuller *v.* Fuller (2), which took place much about the same time with that of Beckford *v.* Parnecott, where the devise was to the testator's son Richard, and the heirs of his body; which Richard afterwards died in the life-time of the testator, and the testator said, "My will is, that the sons of Richard, my deceased son, shall have the land devised to their father, as they should have had if their father had lived, and died after me," Popham and Fenner held, that this was a new publication to carry the land to Richard's son, but Gawdy and Clinch were of a contrary opinion.

The point of republication was also frequently in agitation after the statute of 29 Car. 2. c. 3. and there are early decisions of great laxity on the subject, notwithstanding the provisions of that statute. Thus, in Cotton *v.* Cotton[b], which was before the Court of Chancery in the year after the passing of the statute

[b] Freem. 264. 2 Ch. Rep. 138.

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(1) According to the report in Mod. 404. Gaudy J. doubted. Dyer, 143 *a.* marg. pl. 55. cites S. C. as adjudged, and says, the main reason given by Fenner was, that the annexing of the codicil amounted to a new publication.

(2) Cro. El. 423. In Mod. 353. where the same case is reported, the reporter adds a query, and says, the reason given for the difference in opinion was, because the last publication was not in writing; but the others thought there was enough before in writing, to pass the land to the issues; though there they were to take by descent, but, under the republication, by purchase. The better opinion appears clearly to have been that of Gawdy and Clinch, according to the analogy of all the best cases.

of frauds, A. being seised of several lands in D. made his will, devising his lands in D. and all other his lands and tenements whatsoever unto his wife, and afterwards purchased *other* lands, and then discoursing with B., B. desired him to let him have those newly purchased lands at the rate at which he bought them; and the testator answered, "No," for that he had made his will and settled his estate, and he intended that his wife should have his whole estate; the court inclined strongly to hold this a new publication, and particularly with respect to the lands; and that it was not material that the words should have been expressed *animo testandi,* for that must necessarily be intended when the discourse had particular reference to the will. By the report of the same case in Chancery Reports, it appears that the point of republication was referred by the Court of Chancery to a trial at law, at which a special verdict, by the direction of Lord Chief Justice North, was found, and on a solemn argument before all the Judges of C. B. they unanimously gave judgment for the devisee against the heir at law.

Whether there can be any implied republication of a will, since the statute of frauds.

About forty years afterwards it was held by Lord Macclesfield, when he sat as Chief in the King's Bench, that since the statute of Charles, there could not be an implied republication of a will of lands, even by the execution of a codicil referring thereto, but that the will must be re-executed (3). At a trial at bar before his Lordship and the other Judges of the

(3) That a will may be republished by the testator's repeating upon it the ceremonies required by the statute, vid. Herbert *v.* Turbal, 1 Sid. 162. 1 Keb. 589.

King's Bench, the facts of the case appeared to be these. The Earl of Bath*, by his will dated October the 11th, 1684, duly executed, took notice that his lands were settled upon his sons Charles and John, in tail male, and then devised in these words: In case my sons shall have no issue male, then, for the preservation of my name and family, I devise my said lands unto my brother B. G. and the heirs male of his body issuing. B. G. died in the life-time of the testator, having issue George then Lord Lansdown, by which the devise to B. G. in tail male lapsed. On the 15th of August, 1701, the testator sent for seven persons and said, "I sent for you to be witnesses to my will," sometimes varying his phrase, and saying, "to be witnesses to the republication of my will;" and then took a codicil, dated 15th August, 1701, in one hand and the will in the other, and said, this is my will whereby I have settled my estate, and I publish this codicil as part thereof; and then signed the codicil, (which lay upon the table with the will) in the presence of the witnesses, who subscribed it in his presence.

By the codicil, he devised in these words: "Whereas, I heretofore made my will, dated 11th October, 1684, which I do not intend wholly to revoke, but in regard to the many accidents and alterations in my family and estate, I, by this codicil, which I appoint to be taken as part of my will, devise as follows;" and then devised divers manors, &c. to his son Charles and his heirs, and 100*l. per annum* to his nephew, then Lord Lansdown, for life. He then put the will and codicil together in a sheet of paper, and sealed them up in the presence of the

* Panphrase *v.* Lord Lansdown, Vin. Abr. tit. Dev. (Z) 22.

same witnesses, but the will was not unfolded in their presence, nor did any of them write their names as witnesses on or under the will, or on the same paper, but to the codicil only. And by Parker, Ch. J. and by the whole court, this was held no republication; for, since the statute 29 Car. 2. there shall be *no republication by implication,* but the *will* must be *re-executed,* otherwise a devise of lands shall not be good.

Sir William Lytton [d], by his will 23d March, 1700, devised all his lands to his nephew Lytton Strode and his heirs, and directed that he should take the surname of Lytton: and his personal estate he devised to Dame Russell, his sister, and Lytton Strode, and made them his executors. After his will made, Sir William Lytton purchased the equity of redemption from the mortgagors in fee, of premises which were mortgaged to him before he made his will; and on the 13th June, 1704, by a codicil attested by three witnesses, he said, I make this codicil which I will shall be added to and be part of my last will which I have formerly made; and the Lord Chancellor Cowper, assisted by Sir John Trevor, Master of the Rolls, Lord Chief Justice Trevor, and Mr. Justice Tracy, on the 16th June, 1706, decreed that this was not a republication, for, that since the statute of frauds, there could be no devise of lands by an *implied republication;* for the paper in which a devise of lands is contained, ought to be *re-executed* in the presence of three witnesses.

If an estate be limited to B. and

With respect to the first of these two cases, determined by Lord Parker and the Judges of the Court

[d] Lytton v. Lady Falkland, Vin. Abr. tit. Dev. (Z.)

his heirs, and B. die in the testator's lifetime, the devise lapses; and a republication of the will does not give to the heir of B. a claim by purchase.

of King's Bench, though the resolution seems to have been grounded upon the rule then adopted, of holding the statute of frauds to be inconsistent with all implied republications of wills, and which consequently forbad such effect to be given to a codicil which *declared no positive intention to republish the will;* yet, according to the principle of the case of Brett *v.* Rigden [e] above mentioned, and the rule of construing a republication of a will not to expand or alter the sense of its expressions, or the legal effect of its limitations, but to apply those expressions and limitations to the existing state of the subjects and objects of the dispositions at the date of the republication, it does not seem that any other judgment could have been given, even on the supposition that the will *was* republished; for if a will limits an estate to go by descent, and the person through whom the descent is to be transmitted dies before the testator, the devise clearly lapses; and if such will is republished, no person can take an estate under it in any other way, than in that in which the *original* limitation was calculated to give it to him: he cannot take as a *purchaser* what, according to the effect of the limitation, he was designed to take by *descent.*

The same law, where the devise is of an estate to a man and the heirs of his body, succeeded by the words "And for want of such issue."

The principle of this reasoning was recognised in Sympson *v.* Hornsby [f], the question in which case arose upon the will of one T. A. who, having a wife and only two daughters, devised lands in several towns to his wife, for life, for her jointure; and, after the death of his wife, to his daughter Bridget and the heirs male of her body; and for want of

[e] Plowd. 345. and see Hartop's case, Cro. El. 243.

[f] Prec. Ch. 439.

such issue, to his daughter Jane for her life, and after her death, to her first and other sons, in tail male successively, with several remainders over. Bridget died in her father's life-time, leaving issue a son, whom the grandfather took into his own house, and expressed much kindness for. Afterwards the grandfather made a codicil which began thus: "A codicil to be annexed to my will." And thereby he gave some part of a leasehold estate, (which, by his will was given to his daughter Bridget) to her son, added another trustee for some charities, and duly executed the same. And the Lord Chancellor, after looking into the books, said he found it already settled, that Bridget dying in the life-time of the testator, the heirs male of her body could not take by purchase, for these words, 'heirs male of her body,' were inserted to express the quantity of the estate; though if the thing were *res integra*, he thought it plainly the intention of the testator, that Jane should not take till there should be a failure of the issue of Bridget, for this he thought the words *for want of such issue* fully imported.

These cases, therefore, contained circumstances which would have been an answer to the claims set up under the will on the ground of its being republished by the codicil, without opposing the doctrine of an implied republication; for, upon the principle just above discussed, the republication of the will would not have extended the devise to the parties claiming by reason of it in those cases. However, in Lord Lansdown's case, we have observed, that Lord Parker in terms denied the possibility of any *implied* republication of a will of lands since the statute of frauds; and in the case above mentioned of Lytton

v. Falkland, the resolution *could* only be founded upon the supposed effect of the statute, to exclude all implied republications, where real property was in question.

SECTION II.

Of the Republication by Codicil.

ABOUT ten years after Lord Macclesfield, then Lord Chief Justice Parker, had decided the case of Panphrase *v.* Lord Lansdown, in the Court of King's Bench, Acherley *v.* Vernon [a] came before him in the Court of Chancery, when his Lordship held an opinion on this subject, not conformable to that which he is represented to have pronounced on the former occasion. The case was as follows:

J. S. by a will, properly executed, dated the 17th January, 1711, devised to M. his wife 1000*l. per annum*, for her life, to issue out of his real estate at H., &c.; to his sister E. 200*l. per annum*, for her life; and 1000*l.* to L. her daughter, for her portion; and after other legacies, he devised the residue of his real and personal estate to A. B. C. D. and E. and their heirs, executors, and administrators, on trust to vest the residue of his personal estate in lands of inheritance, and directed that his trustees should stand seised and pos-

[a] Com. 381.

sessed of his real and personal estate to the uses of his will, during his wife's life; and after her decease, if he should die without issue, to the intent that his freehold and leasehold estates, and the lands to be purchased, should be settled to the use of the defendant G. for 99 years; then to his first and other sons in tail male, &c. J. S. purchased several fee-farm rents, assart rents, and other lands and tenements, and then by a codicil, dated 2d February, 1720, being two days before his death, he recites, that he made a will, dated 1st January, 1711, and then says, "I hereby ratify and confirm the said will, except in the alterations hereafter mentioned. The portion to my niece L. shall be made up 6000*l.* and what I have given to my sister and niece shall be accepted by them in satisfaction of all they may claim out of my real and personal estate, and on condition they release all right, &c. to my executors and trustees in my will named; and thus having provided for my sister and niece, I devise all the lands by me purchased since my will, to my trustees and executors in my will named, to the same uses, and subject to the same trusts to which I have mentioned to devise the manor of H., and the bulk of my estate; and I revoke that part of my will, whereby I appoint A. B. and C. three of my trustees in my will, and I desire K. and N. to be two of my trustees, and devise my said real estate to them accordingly." Lord Chancellor Macclesfield decreed, that the will was confirmed by the codicil; that J. S.'s signing and publishing his codicil, in the presence of three witnesses, was a republication of his will, and both together made but one will; and by the said will and codicil, his fee-farm rents, assart rents, and lands, contracted to be purchased, and all his real and personal estate, (except

the copyhold purchased before his will) did well pass. On appeal to the Lords, the decree was affirmed.

Notwithstanding the codicil in the case last produced *expressly confirmed* the will, yet the decree of the court, and judgment of the Lords, have been considered as standing on the *general* ground, that *every* executed codicil refers to and acts upon the will, and must in its nature not only suppose the existence thereof, but must attract it into an union with itself, bringing it down to its own date. And upon the authority of this case it stands, that whatever be the apparent purpose of making the subsequent instrument, and whether the subject of its express disposition be real or personal estate, if it import to be a codicil, and have the signature of the testator, and the attestation of three witnesses, agreeably to the directions of the statute in respect to wills of real property, it will have the effect of republishing the will.

This interpretation of the ground of the decree in Acherley *v.* Vernon, seems to be built upon the *general* expressions of Lord Macclesfield, in that case, "that the codicil being executed and attested by three witnesses, was a republication of the will; and that they became one will;" and this seems the safest ground for the doctrine to rest upon, for the words of confirmation in the codicil, in Acherley *v.* Vernon, and those declaring the codicil to be part of the will, were only the expression of the tacit meaning of every codicil, which in its very nature supposes and recognises the existence and operation of the antecedent will.

That this was Lord Hardwicke's understanding of the case of Acherley *v.* Vernon, clearly appears from the expressions used by him in Gibson *v.* Lord Mountfort[b], where his lordship says, that in Acherley *v.* Vernon, it was the opinion of the judges, that the codicil was incorporated with the will, *which made it a republication:* thence deducing this *general* proposition, that every codicil executed according to the statute of frauds, to whatsoever part of the property it may relate, operates as a republication of the will. It was admitted for the heir, said his lordship, that though it is a codicil only to a personal estate, yet if there is a general clause of confirmation of the will, that *that* will make the codicil, duly executed, a republication of the will. But, said the same Chancellor, this will make *every* codicil a republication, if it is executed by three witnesses, though it relates only to personal estate; for a codicil is, undoubtedly, a farther part of the last will, whether it be *said so* or not.

But in the Attorney-General *v.* Downing[c], the Court seemed to be inclined to a *middle* course between the case of Acherley *v.* Vernon, wherein the mere act of making a codicil, executed according to the statute, was a republication, and those of Panphrase *v.* Lord Lansdown, and Lytton *v.* Lady Falkland, in which all implied republication was excluded; by requiring an intention to republish to be declared or expressed, or otherwise distinctly manifested, by the testator, in order to give to his codicil that effect. And Lord Chancellor Camden held, that the annexation of the codicil to the will was *one of the modes* by

[b] 1 Ves. 492, 3. [c] Ambler, 571.

which such intention might be declared, and was *therefore* a republication. His Lordship seemed to think, that the *expressions* used in the codicil, in Acherley *v.* Vernon, were the foundation of the decree; for the words, he said, were so blended with, and incorporated into the will, that the one could not stand without the other.

The present doctrine holds every codicil, unless it be confined in expression, a republication of a previous will, if such codicil be executed and attested according to the statute.

By the settling case of Barnes *v.* Crowe[d], the case of Acherley *v.* Vernon has been set up as the great authority on this subject, to the full extent of the doctrine ascribed to it by Lord Hardwicke, in Gibson *v.* Mountfort, as above laid before the reader; and the effect of *annexation* was there denied, as being only parol evidence of a republication, which Lord Commissioner Eyre said, could not be received since the statute of frauds. "If we disentangle ourselves from the rule, said the Lord Commissioner, that there shall be *no republication* without *re-execution*, the principle that a codicil, attested by three witnesses, shall be a republication, seems intelligible and clear. The testator's acknowledgment of his former will, considered as his will, at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself; because by the nature of it, it *supposes* a former will, refers to it, and becomes part of it;(1) and being at-

[d] 7 Ves. Jun. 486.

(1) Whatever number of codicils a man makes, they are all parts of his previous will; in so much that, if a testator, after making his will, makes a codicil or codicils in any way modifying its dispositions, and afterwards by any other testamentary instrument ratifies

tested by three witnesses, his implied declaration and acknowledgment seem also to be attested by three witnesses. Before the statute of Charles II. it was no part of the essence of the republication that the will should be re-executed; any thing that expressed the testator's intention, that the will should be considered as of a subsequent date, was sufficient. Since the statute, continued the Lord Commissioner, re-execution of the will is not necessary; nothing more is required than a writing according to the provisions of the statute, expressing that intent."

In the late case of Pigott *v.* Waller*, before the present Master of the Rolls, his Honour submitted to the authority of Acherley *v.* Vernon, as that case was understood by Lord Hardwicke, in Gibson *v.* Mountfort, and by Lord Commissioner Eyre, in Barnes *v.* Crowe, but not without expressing some disapprobation of the reasonings on which that authority was supported, and a predilection for the old rule, as it stood upon the cases of Lytton *v.* Lady Falkland, and Panphrase *v.* Lord Lansdown; for, said his Honour, a direct republication or re-execution (2) is an *unequivocal* act, making the will operate precisely as if it were

* 7 Vez. Jun. 98.

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and confirms his will, he ratifies and confirms it together with the codicils which have been made to it, and subject to whatever changes they have made in it. But if a testator after making his will, makes another will inconsistent with the first will, and afterwards by a will or codicil, effectual as such, confirms the prior will, the effect of the intermediate will is, as it seems, destroyed. See Crosbie *v.* Mac Dowall, 4 Vez. Jun. 610.

(2) A re-execution, with a repetition of the ceremonies required by the statute, is clearly a republication.

executed upon the day of the republication; but a reference to the will proves only, that the devisor recognises the existence of the will, which the act of making a codicil necessarily implies; not that he means to give it any *new* operation, or to do more by *speaking of it*, than he had already done by *executing it*. Why *his* speaking *of it* should make the will speak, as it is said, is not very easily discernible, as a question of intention. If he speak of it at all, he must speak of it as existing upon the last day as well as the first; but can that shew that he means it to exist in any *other* form, or with any *other* effect than he originally gave it.

But his Honour concluded by saying, that Barnes *v.* Crowe, afforded a certain rule; and if he departed from that, it would only be to set every thing loose again; not to get back to, what he thought better, the *old rule*, for then Acherley *v.* Vernon would be in the way. He was therefore disposed, for the convenience of adhering to settled rules, and former decisions, to hold the codicil a republication.

From what has been said it may be collected, that though a codicil properly executed makes the will speak, (as it is expressed) at the date of the codicil, yet it must have words clearly applicable to the intermediate acquisitions, or it cannot have the effect of passing them. And if it had a specific reference to a thing existing when it was first published, but subsequently withdrawn, the republication of it by a codicil will not make it operate upon another subject, which has come by substitution into the place of the thing so withdrawn, though precisely similar in its amount and quality. Thus, where a man, by his

If a will has a specific reference to a thing subsisting when it was first published, but subsequently withdrawn, the

marriage settlement, having a power to charge a sum of 2000*l.* upon certain premises, made his will accordingly, disposing of this sum, and afterwards by a subsequent settlement extinguished his former power, and created to himself a new power of charging the same sum on other property, and afterwards made a codicil with three witnesses, making no mention of the power; the Master of the Rolls, Sir William Grant, held clearly that the power itself being gone before the death of the testator, the will had nothing to operate upon, and could not be applied to the new power. It is true, he observed, a codicil has the effect of republishing a will, and makes it speak at the time of the republication. But here the will speaks only of the power given by the marriage settlement, which was as much gone as if it had never existed. It was a *new* power, for a *new* consideration, affecting *different* estates[f].

republication of it by a codicil will not make it operate upon another thing, which has come by substitution into the place of the thing so withdrawn, though similar in amount and quality.

This then appears to be the proper understanding of the doctrine, viz. that the codicil, if executed so as to act upon the subject, brings down the will to its own date, and makes it speak as if it were made at that time (3); but that still it is made to speak

[f] 7 Vez. Jun. 499. Holmes *v.* Coghill.

(3) There is a difference between the relation which a codicil bears to a will, once completed according to the then existing intention, and that which subsists between the interrupted stages of one entire testamentary act; and upon this distinction, will, it seems, depend the question, whether or not the *first act* of the testamentary disposition will require to be executed and attested according to the statute. But whether the subsequent writing be

Difference between a codicil and the sequel of an inceptive will.

only *its own sense*, and if it had any particular view to any particular object or purpose, which ceased to

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considered as a republication by way of codicil, or as the conclusion of something already begun, such *subsequent* writing to be effectual to pass land, ought to be executed as the statute directs in the case of a devise of lands.

Difference between a codicil and a paper incorporated by reference.

When a will properly executed to pass freehold estates, refers to an unexecuted paper *already in existence*, by an unambiguous description, and expressly adopts its contents among its own dispositions, such paper is, with exact propriety, said to be incorporated into, and to be executed by the execution of, the will, for its relation to it is that of the part to the whole; but where a *codicil* is said to be part of, or incorporated into a will, this union must be understood to be the effect of its *first acting upon the will by its own force, and attracting it to itself.* The will must be completed by a previous execution to be so republished, and when so republished must be regarded as a new will. And it was upon this principle that in the Attorney General *v.* Heartwell, Ambl. 451. where a will was made before the statute of mortmain, bequeathing personalty to be laid out in lands for a charity, and after the statute the will was confirmed by a codicil; the codicil, by making the will a new will, brought the devise within the statute; and the same, accordingly, was declared void by Lord Northington.

Hence we see the necessity for both will and codicil to be executed according to the statute. In the case put of the reference by the will to an existing paper, such paper is mute till it is acted upon by the instrument that incorporates it, and has no testamentary operation before the execution of such instrument; whereas in the instance of the *codicil, the will is first acted upon thereby*, and being brought down to the date thereof, speaks again with reference to the state of the property, by virtue *of the execution of the codicil*, with which it becomes incorporated, and thus, by a consequence of reasoning, becomes *re*-executed and *re*-published with the solemnities prescribed by the statute. And this is properly the republication by codicil, the effect and meaning of which is, that the terms and words of the will shall be construed to speak with regard to the property of the testator, and the objects of his dispositions, just as they stand circumstanced at the date of the codicil. In construing such will so republished, it must be considered therefore what

exist during the interval between the will and codicil, the codicil will not, from the accidental aptitude of the words to another subject created or acquired since the will, have any operation upon that which was so entirely out of the original view of the testator.

In a very recent case (4), circumstanced in some respects like the one last above cited, where a will had been made, and a recovery subsequently suffered, upon which was reserved a power to the testator to declare the uses of the land by his will or codicil, and then the testator made a codicil confirming his will, except where altered by that codicil, but taking no notice of his power, the Court of King's Bench, upon a case for their opinion out of Chancery, held that the power was not executed by the codicil: one of their reasons for which opinion seemed to be, that

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the words of the will at the time of the republication import. Their *sense* cannot be enlarged, but their *operation* may, if time or accident have increased the amount or number of the particulars comprised within the compass of its expressions *.

(4) 10 East, 242. Lane *v.* Wilkins. It must be admitted however, that the more prevailing and ostensible reason seemed to be, that, as the will declared only the testator's intention not to disturb the existing limitation in tail by suffering a recovery, but to leave the estate to go as it stood limited, this declaration amounted to no devise at all; and when, after having altered his intention, and taken a new estate in the premises by suffering a recovery, reserving to himself a power of appointment by deed, will, or codicil, he executed a codicil expressly confirming his will, such codicil could not be considered as carrying the will further than its natural and proper effect, which was not a positive devise or disposition, but the declaration of a purposed omission.

* It is obvious upon equitable principles, that if a will is republished, containing a general devise of the testator's estates, an estate only contracted for after such general devise, will pass. 10 Vez. Jun. 605. Broome *v.* Monck.

they could not infer an intention to execute the power from the mere general confirmation of the will by the codicil; though they readily admitted that it was not necessary, that any express reference should be contained in a will, to make it a valid execution of a power.

The effect of a codicil as a republication may be restrained by its special terms.

It has also been solemnly decided, that this effect of a codicil upon a will, of making it speak as to the existing property of the testator, may be restrained by the manner in which the *codicil* is expressed. Thus, where the codicil, reciting the devise by the will, revoked the same as to two of the trustees, and then devised the *said* lands, &c., lands purchased between the will and codicil have been adjudged not to pass[s].

SECTION III.

Of the Republication of Wills of personal Estate.

AS it is hoped that by this view of the cases the progress of the doctrine of republication, as to real estate, is made clear to the reader; I shall now say a few words upon the question of the republication of wills of personal estate. In respect to this description of property, the doctrine is said not to have been

[s] 2 Bos. et Pull. 500. Bowes *v.* Bowes, (House of Lords).

changed by the statute of frauds; and this appears to have been the opinion of Lord Hardwicke, from the words used by his Lordship in the case of Abney *v.* Miller[a], wherein the act of republication insisted upon was, that the testator, after renewing his leases, being in search for another paper, and the person who was assisting him, having taken up the will by mistake, he said, "This is my will," not meaning thereby to republish, but to shew that it was not the paper he wanted. His Lordship observed, that to make it a republication, there must be the *animus republicandi* in the testator, which observation warrants the inference, that he was then of opinion, that if the words used *had been declarative of an intention* to republish, they would have been effectual to produce such a consequence. What will be the weight of this doctrine of Lord Hardwicke, when the point comes directly under adjudication, remains to be seen; but in the mean time, one may be permitted to suggest, that there is a difficulty in conceiving why the clauses of the statute, which affect the publishing of wills, should not also reach to the republication of them.

A republication is a new publication; and if a will can be republished by parol so as to make it pass property not affected by its original disposition, (1) what is this but making, partially at least, a nuncupative testament, unaccompanied by the forms pre-

[a] 2 Atk. 599.

(1) This supposes the case of a *specific* bequest, for a general disposition of personal estate would be prospective, and therefore would not raise the question.

scribed by the statute? We have seen that many of the judges struggled hard against admitting a parol republication of wills of *lands*, even before *the statute of frauds*, as being in contravention of *the statute of wills*; and where the requisites are not observed so as to make good a nuncupative testament, the statute of frauds has imposed the same necessity for a written declaration of the will in respect to personalty. No subsequent writing can republish a will of land, since the statute of frauds, unless it be executed so as to be itself capable of passing land according to that statute; why then should a will of personal estate be capable of being republished without the observance of the mode whereby alone a personal will can be rendered effectual?(2)

The destruction of the revoking instrument may operate as an implied republication by setting up the original will.

This branch of my subject may be concluded by observing, that although words are never allowed to have the effect of republishing a will of lands, (whatever may be the doctrine in respect to personal testaments) yet where an express or implied revocation has taken place, it has been held that the will may be set up again by a species of implied republication, founded upon the destruction of the revoking instrument. As where a testator makes two wills, the latter of which is inconsistent with, or expressly revokes the former, yet if he afterwards destroy the second will, leaving the first in a perfect state, the original will is held to be set up again[b]. And this

[b] Glazier *v.* Glazier, 4 Burr. 2512.

(2) Words written in a void space left in a will was held by Lord Hardwicke to be a republication. Carte *v.* Carte, Ambl. 30. But it is clear that this can only be so in respect to personal estate.

seems to stand upon plain principles, for the first will, being ambulatory during the testator's life, is in existence without any alteration at the time when its operation is to begin, and that which was to be destructive of its operation, is out of the way at the moment when it was to have its destructive effect.

But if a legacy given by a will be adeemed, a codicil, ratifying and confirming the will, has not the effect of setting up the adeemed legacy[e].

[e] Monck *v.* Lord Monck, 1 Ball and Beatty, 298. and see Irod *v.* Hurst, 2 Freem. 224. Drinkwater *v.* Falconer, 3 Vez. Jun. 623.

CHAPTER IV.

OF THE IMPORT OF WORDS AND PHRASES.

SECTION I.

As to moveable things.

Goods and chattels; what they comprehend.

"GOODS and chattels" are the most comprehensive terms of description for passing property of a personal nature by will. In the civil law all estates are divided into bona mobilia and bona immobilia; and it has been authoritatively said that in wills relating to personal estate words should be construed agreeably to the rules of the civil law[a]. Thus it may be regarded as settled that the word "goods" is sufficient in its general sense to pass the testator's leases[b] and bonds, where there is nothing expressed to afford an inference of its being used in a narrower signification. But though this is the original and technical

[a] Cro. Eliz. 387. 1 P. Wms. 267.
[b] 1 Eq. Ca. Abr. 199.

sense of the word "goods," yet the word is very susceptible of modification from the context, and it will be seldom found to have this comprehensive effect except where it makes part of the residuary clause. Thus in the case of Crichton *v.* Symes[c], where the bequest was in these words, *I give and bequeath to B. all my goods, and wearing apparel, of what nature and kind soever, except my gold watch,* Lord Chancellor Hardwicke decreed, that, as these words stood in the will, the testatrix intended to give only her wearing apparel, ornaments of her person, and household goods and furniture, but no other part of her personal estate. And in another case, where, after a devise by a testator, of all his household goods, and other goods, and all his stock, &c. he bequeathed the residue of his personal estate to J. S.; it was considered that if the devise of all the testator's goods were taken in its largest sense, it would frustrate the bequest of the residuum, which should not be allowed; and that it seemed reasonable that the words "other goods," should be understood to signify things of the same nature with household goods. The decree accordingly was, that the money, cash, and bonds passed by the residuary devise[d].

Bonds and choses in action have no locality, and therefore do not pass by a bequest of property in a particular place.

Bonds, being a species of choses in action, and as such admitting of no locality, will not pass under a devise of "goods and chattels" *in a particular place,* though they happen to be there at the testator's death[e]. And the same may be said of bills of exchange, promissory notes, judgments and records,

[c] 3 Atk. 61. [d] Woolcomb *v.* Woolcomb, 3 P. Wms. 112.
[e] Chapman *v.* Hart, 273.

upon the same principle; but no doubt can be entertained that the word "goods" will extend *generally* to all these securities for money, since the debts themselves are clearly comprehended under the term[f]. It is equally clear that money in specie passes under the same word. And bank notes were considered as being carried by the words "goods and chattels" in a will, although the bequest was confined to the goods and chattels in a particular house; bank notes, in the view of the Chancellor, being regarded as in the nature of cash, rather than as choses in action. Had they been looked upon as choses in action, they would, for the reasons above-mentioned, not have passed under the description of goods and chattels *in a particular place*[g]. It has, however, been held that, where a limited and express pecuniary legacy is given, and, by general words, all the goods and chattels in and about the house are afterwards bequeathed to the same person, money in the house will not pass to the legatee, on account of the particular legacy before devised to him[h].

Bank notes; whether to be considered as cash or as choses in action.

The general rule is that where a testator devises all the goods in a house or place, the description will relate to, and comprehend, all such as shall be in the house, or place, at the time of the testator's death; and that if they happen to be removed to another place, in the life-time of the testator, they will not pass. But this rule must be under-

Of bequests of goods in a house, &c.

[f] Moore *v.* Moore, 1 Bro. C. C. 128.

[g] 1 Vez. 273. But see this point doubted by Lord Eldon, in 11 Vez. Jun. 662.

[h] 2 Ch. Rep. 190. 2 Atk. 112. 3 P. Wms. 112.

stood with some qualification, for if the goods are removed upon some sudden emergency, as on account of fire, inundation, &c., and before they can be returned to their place the testator dies, they shall be considered as if they were actually in the testator's house at his death, and the legacy is not defeated by such an accident[1].

When the bequest is of a collective and fluctuating body; what passes.

When the subject matter of a bequest is a collective and fluctuating body, subsequent additions are considered as passing, notwithstanding the terms of the bequest are particular as to place and time; thus it has been said, that if I devise all my flock of sheep *now* on such a hill or in such a pasture, the sheep, subsequently produced, will pass; for it is within the reason of a devise of the personal estate, which being always fluctuating, shall relate to the time of the testator's death. And the same principle has been carried to the devise of the testator's library of books, *now* in the custody of B., under which devise, books subsequently added to the same library, were held to pass[k]. So also in the case of General Guise, who by his will gave all his collection of pictures to Christ Church College, in Oxford, and afterwards sold some and added others to the collection, Lord Camden was clear that the pictures added to the collection passed, upon the principle that the personal estate is fluctuating[l].

But in general cases the word *now* would be considered as restricting the devise to the present state of the thing given.

[1] Ibid. and see 2 Vern. 747.

[k] 1 P. Wms. 597. All Souls' Coll. v. Coddrington.

[l] Ambler, 641.

If I devise all the corn *now* in my barn, and part of the corn is afterwards consumed and fresh corn put in, Sir Joseph Jekyll thought such new corn would not pass: though the contrary is laid down in Swinburn, 448. But if there be no such words importing individuality, as if a man devise all his plate, and makes subsequent purchases of plate, what he has at his death passes [m].

Goods on board a ship.

In the important case of Chapman and Hart [n], a difference was taken between a bequest of goods in a house, and of goods on board a ship. Lord Hardwicke observed, that the latter devise must be taken to be made with a consideration of the several contingencies and accidents they are liable to in such a situation; and if it should be determined that if by any accident they should not be on board at the testator's death, they would not pass, many marine wills would be defeated. If the goods were removed to preserve them, the ship being leaky or likely to founder, or if the testator be removed to another ship, (which is a contingency to which he is daily subject), this will not defeat the legacy. But if a testator devises all the furniture at his house in A., such a devise will not pass furniture intended to be, but not yet actually, placed in the house at A., even though such goods were already packed up and ordered to be carried thither; which was the point in the Duke of Beaufort's case [o].

Household furniture and plate, &c.

As a general rule, though admitting of some qualifications, it may safely be premised that by a devise of

[m] Plowd. 343. [n] 1 Ves. 271.
[o] 2 Vern. 739.

household goods *plate* will pass [p]; though not by a devise of utensils [q]. But such general bequest of furniture, goods and chattels, by a silversmith, will not carry the *plate* which constitutes a part of his stock in trade, but only the plate used in his house [r]. And the same doctrine has prevailed even in the case of a deed: Lord Hardwicke declared in the case of Crichton and Symes [s], that the House of Lords were never clearer than in the case of Pratt *v.* Jackson [t], that the word 'goods' related only to the household goods and furniture, and did not extend to the goods of the settler in the way of his trade, or his goods as a contractor for the Government [u]. We find also the same principle further adopted and confirmed in Le Farrant *v.* Spencer [w], where the devise was of all the testator's household furniture, linen, plate, and apparel whatsoever. The Chancellor directed the case to be sent to a Master, to distinguish what goods the testator had for his domestic use, and what for trade and merchandise, without which, he said, it was impossible to determine the extent of the bequest, for it clearly included only the former.

Where a testator devises his furniture at or in certain houses named, such a devise will not carry a description of *plate* which the testator was in the constant habit of removing with him from house to house, for that could not be said to be the furniture of one house more

[p] 2 Vern. 572. 638. 1 P. Wms. 425. 2 P. Wms. 419. 3 Atk. 369.
[q] Dyer, 59.
[r] 11 Vezey Jun. 666.
[s] 3 Atk. 63.
[t] See 2 P. Wms. 302.
[u] See the note of the decision of the House of Lords, 3 Atk. 62. 3 Brown's Parliament. Cases, 199.
[w] 1 Vezey, 97.

than another, and it would seem that he meant only the particular furniture of each house[x].

Under the Duchess of Bolton's will[y] the import of the word '*furniture*' was largely discussed. The testatrix devised her household furniture and farming utensils, which should be within or upon the premises at her death unto Charles Powlett. The Duchess died possessed of a great quantity of plate, which was worth about 1600*l*, some useful and ornamental china, books, pictures, and linen, which were then at her house at Westcomb. The principal question was as to the plate. And his Honour premising that the word '*furniture*', unaccompanied by circumstances, was a word of very general meaning, and comprised every thing contributing to the convenience of the householder, or ornament of the house, adverted to the possibility of a restricted sense being put upon the word by a variety of circumstances which might attend the case. He denied that the question whether the plate would pass or not by the word *furniture*, depended upon the fact of its being in common use or not. If a person of rank buys a service of plate suitable to his quality, *and never uses it*, yet, he thought, the plate would pass by the word *household-furniture;* but that, if a tradesman had a dozen of silver-handled knives and forks, which he commonly used, and had besides a service of plate, which perhaps he bought as a good bargain, the service would not pass. Upon the whole of the case his Honour was of opinion that the *plate* did pass by the word *household-furniture*.

[x] See Equity Cases Abridg. Tit. Devises, (k).
[y] Ambl. 605. Sir G. Kelly *v.* Powlett.

He was also of opinion that the linen and china, both useful and ornamental, as also the pictures, both those which were hung up and others that were in cases, passed by the devise; but, in conformity to the decision in Bridgeman *v.* Dove[a], he determined that the term *household-furniture* did not include *books*. Linen, china, and pictures.

In Snelson *v.* Corbet[a] Lord Hardwicke seemed to consider the evidence of the *plate* being *used in the house* as going some way towards determining the question whether it was included or not in a devise of *household-furniture* in the affirmative. In the case of Jesson *v.* Essington[b] Lord Keeper Wright gave it as his opinion, that by a devise of rings and household goods *plate used in the house* did not pass. But the opinion of the Master of the Rolls, Sir Thomas Clarke, in the above-mentioned case of Kelly *v.* Powlett appears to afford very just criteria for deciding this question under all circumstances, and subsequent cases seem mainly to have adopted his principle[c].

It appears also that since that case it has been considered uniformly, that under the mere term household-furniture, *books* will not pass to the legatee[d]: not even where the word 'furniture' has been connected with other things furnishing entertainment to the mind as medals and pictures: and it seems that globes and mathematical instruments are equally out of the scope of the word 'furniture' in a will[e]. Books, globes, and mathematical instruments.

[a] 3 Atk. 202. [a] 3 Atk. 369. [b] Prec. in Ch. 207.

[c] See the authority of this case admitted in the case of Porter and Tournay, 3 Vesey Jun. 311.

[d] 3 Vesey Jun. 311. Porter and Tournay.

[e] Prec. in Ch. 207. note.

Medals, coins, jewels, ornaments of the person, &c.

Lord Hardwicke was of opinion that under the word medals, curious pieces of current coin kept with medals will pass as such. But ornaments of the person, as jewels, &c. will not pass by a bequest of a cabinet of curiosities, even though such ornaments may be kept together with the curiosities, and occasionally shewn with them. Thus, where E. C. in a codicil to her will made the following bequest, "I give to J. S. my collection or cabinet of curiosities, consisting of coins, medals, gems, and oriental stones, and other valuable things," the question was whether certain ornaments of the person were within the bequest. Evidence being read of persons in the trade as to the different sense of gems and jewels, that the latter meant stones set and prepared for wear, the former the same things when kept for curiosity only, the Lord Chancellor said, he took it that things to pass under the will in question must be ejusdem generis with those expressly devised, and that ear-rings, and other ornaments of the person, were part of the personal estate, and not specimens of natural curiosity. Had Mr. Pitt's diamond been in the cabinet as a specimen of natural curiosity, it must have passed to the devisee; and therefore he thought the proper line of distinction was their being prepared for wear, if not worn; and directed an enquiry to be made with respect to their being worn. On the Master's report that they were occasionally worn, the cause came on before his Honour, sitting for the Lord Chancellor, who was of opinion that that circumstance made the difference[f].

Under a bequest of the use of a house with all the

[f] 1 Bro. C. C. 467. and 22.

furniture, and stock of carriages and horses and other live and dead stock, to J. W. for life; it was held agreeably to what has been above observed, that the plate did pass as being included under the word furniture, but that the wine did not[g].

Live and dead stock.

In the case of Porter and Tournay, it appeared to have been the opinion of the Master of the Rolls, that the words *live and dead stock* are of too ambiguous an import to receive any certain construction, but that coupled with other words, they might receive a sense correspondent to those words: thus, if after giving furniture, I give all my live and dead stock, I shall be held to mean in-doors stock, as wine, liquors, &c.; and if the word is coupled with what usually forms a part of the property *without* doors, then only such live and dead stock as are out of the house and about the premises will be considered as intended. In Porter and Tournay, the case just alluded to, the words 'live and dead stock' immediately followed the words 'stock of carriages and horses,' and, therefore, the Master of the Rolls applied these words exclusively to the out-doors stock: adverting to the difference between that case, and Gower *v.* Gower[h]; in which the disposition was, of all other the testator's goods and chattels whatsoever which should be *in and about* his dwelling-house and out-houses.

Farming stock.

Standing corn will pass under the description of stock of the farm. Thus where one devised a farm in his own occupation, to his mother for life, remainder to G. in tail, and also devised to his

[g] 3 Vez. Jun. 311. [h] Ambler, 612.

mother all his goods and chattels, *stock of his farm*, bonds, &c., and all other his moveables whatsoever, and made her executrix; it was held that growing corn which was not reaped till after the death of the testator and of his mother, who died soon after him, passed to her representative, and not to G. the devisee of the land[1]. And in a subsequent case where there was a similar disposition of the stock upon the testator's farm after a devise of the land in fee, the devise of the stock was held to carry the standing crops of corn; although in that case the devise of such stock was to the executors to pay debts; and although there were assets sufficient to pay the debts and legacies without such part of the property[k].

Stock in trade.

With respect to the words 'stock in trade,' what shall be comprehended in these terms must always in a great measure depend upon evidence of intention, intrinsically or extrinsically collected; but where there is nothing peculiar in the case to determine the import of the phrase, the popular and usual understanding of the words must govern their interpretation. It may also be a question of some difficulty what words will carry stock in trade, as well as what the words 'stock in trade' will carry. In the case of Stewart *v.* Marquis of Bute[l], where the testator gave all his waggon-ways, rails, staiths, and all implements, utensils and *things*, at his death used or employed together with, or in or for, the working, management or employment of his collieries, and which might be deemed of the nature of personal estate, in

[1] 6 East, 604. note, Cox *v.* Godsalve.

[k] 8 East, 339. West and another executors of Moore *v.* Moore.

[l] 11 Ves. Jun. 657.

trust to be held or enjoyed with the collieries, Lord Rosslyn decreed that under this bequest money due from the fitters and others and in the Tyne Bank, coals at the pits, and staiths, corn, hay, horses, timber, oil, candles, fire-engines, and other articles of stock in trade passed; which decree was affirmed on the rehearing by Lord Eldon His Lordship however expressed considerable doubts, which doubts it is conceived related principally to the monies due from the fitters and at the bank (1).

Stock in the public funds.

The questions arising upon bequests of stock in the public funds, are very numerous and branching. But in a treatise like the present, intended for general use, it will be expedient to confine the consideration of the subject to clear and practical distinctions.

The topic of most frequent discussion on the subject of the bequests of stock, is whether the legacy is to be regarded as specific or general. In the case of Purse *v.* Snaplin[m], Lord Hardwicke states a specific legacy to be a bequest of a particular chattel, specifically described, and distinguished from all other things of the same kind; which may in other words,

[m] 1 Atk. 414.

(1) In a case in Ambler, 395. where a man devised freehold and copyhold messuages, lands and tenements, to A. for life, with remainder over, and afterwards the residue of his personal estate to B. and made B. executor; and part of the testator's estate consisted of a brew-house and malt-house, which together with the plant and utensils were then in lease; it was held that the plant passed to the devisee; for without the plant the walls could be of no use, and it was material that they were in lease together. The testator must therefore have meant to devise them both together.

as Mr. Coxe observes[a], be stiled an individual legacy (2). But courts have been led to the construction of bequests of specific legacies by other indicia. Thus in Jeffreys *v.* Jeffreys, afterwards decided by the same great equity judge, the testator having at the time of making his will just so much stock as would *exactly* answer the *two* legacies which he thereby bequeathed, they were both held to be specific. In the case of Purse *v.* Snaplin, before alluded to, there were two legacies of 5000*l.* in the old South Sea annuity stock of the S. S Company, to two persons respectively; and the testator at the time of making his will and at his death had only 5000*l.* in old S. S. stock. Lord Hardwicke considered these bequests as entitling the legatees to have them made good out of the testator's general assets; and the principle upon which the case was determined was this—that the testator had not so specifically described the subjects of the legacies as to distinguish them from all other things of the same kind. The only distinction between that case and the subsequent case of Jeffreys *v.* Jeffreys, was, that in the latter the actual property answered exactly to both legacies.

In Ashton *v.* Ashton[b] there were no words of more specific import than in Purse *v.* Snaplin, above cited, neither did the stock of which the testator

[a] See his note to Hinton *v.* Pinke, 1 P. Wms. 538.

[b] Cas. temp. Talb. 152.

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(2) Thus money, though only a measure of value or amount in specie, may become an individual legacy when it is designated as being in a particular place, as in such a drawer or bag. See 1 Atk. 508. Ambl. 57. Stock does not pass under the word money. See Vez. Jun. 327.

was actually possessed, correspond in amount with the stock devised. The testator devised 6000*l.* S. S. annuities to be sold and laid out in land, to be settled as therein directed, and died possessed of a large personal estate, but had only 5360*l.* in S. S. annuities. Lord Talbot, nevertheless, held the legacy to be specific and not of *quantity* merely But the late Mr. Serjeant Williams, to whose learned labours we are indebted for the last edition of Lord Talbot's decisions, has observed in a note to this case, that "it seems to have been determined upon the testator's directing the 6000*l.* S. S. annuities to be sold, and the produce thereof to be laid out in a purchase of lands, which strongly implied that the testator only intended to give the S. S. annuities which he was possessed of; and that he did not mean to have additional annuities purchased, in order to be sold out again presently afterwards:"—a remark of which Lord Hardwicke, and not the learned editor, who seems to have forgotten whence he took it, should have the credit[p].

In the second volume of Domat. 159. it is laid down that when a testator bequeaths a certain thing, which he specifies as being *his own*, the legacy will not have effect, unless that thing be found extant in the succession. "As if I bequeath to such a one *my* watch, or *my* diamond ring, and there be not found, after my death, any diamond ring, or watch among my effects, the legacy will be null." There are cases in our books to the same effect. It is true, that Lord Hardwicke in the case of Avelyn *v.* Ward[q], seemed

[p] See 1 Atk. 418. [q] 1 Ves. 425.

to consider that too much weight had been given to the word *my*, and that to rely on it entirely was allowing it too much importance; yet in a subsequent case of Sleech *v.* Torrington [r], we find Sir Thomas Clarke, whose opinions and reasonings on the construction of wills are always entitled to great esteem, remarking, that it was very material as a circumstance in that case, that no pronoun possessive was added to the description of the annuities. So in the case of Ashburnham *v.* Macguire [s], where the words were "*my* 1000*l.* East India Stock," Lord Thurlow laid considerable stress upon the pronoun *my*, and observed, that it had been relied on in many cases in deciding the legacy to be specific.

The general rule is, that a bequest of so much stock is a general legacy unless there is some special ground for construing it specific.

The general rule, however, appears by the result of the cases to be this, that the bequest of stock in the funds is to be regarded as expressive of quantity, in general, and not confined to a particular sum of which the testator may be possessed at the time of making his will, or of his death, unless there is some word, phrase, or constructive ground in the will leading to such restrictive interpretation. Thus, where a testator bequeaths the sum of 12000*l.* of his funded property to T. S. and the residue of his property to B., this is a general pecuniary legacy to be answered out of the whole personal estate [t]. A bequest of so much stock in such a fund, in general terms, is a direction to the executor to procure so much stock for the legatee. This was expressly said by Lord Chancellor Talbot in the case of Partridge *v.* Partridge [u], in which case a testator devised

[r] 2 Vez. 560. [s] 2 Bro. C. C. 108.

[t] See Lambert *v.* Lambert, 11 Vez. Jun. 607.

[u] Cas. temp. Talbot, 226.

1000*l.* capital South Sea Stock to B., and it appeared that at the time of making his will he had 1800*l.* of such stock, and afterwards, by sale, he reduced it to 200*l.* which he afterwards increased to 1600*l.* and died, the alteration of the stock was held to work no ademption.

It is observable, however, that in that case Lord Talbot is stated to have said, that if the testator, after such a legacy, sells out part, and dies, such sale will be an ademption pro tanto; which opinion seems to be at variance with the principle of the case, for if the bequest is to be regarded as a gift of quantity only, and not of a specific thing, and if it be law that where a testator bequeaths so much stock, having none such at the time of his devise, the bequest is to operate as a direction to the executor to procure so much, why should the removal of the stock, or the diminution of it in specie, affect the substance of the bounty. On this point, therefore, perhaps, the case of Bronsdon *v.* Winter[*], has proceeded with greater consistency. There the testator devised the sum of 2000*l.* South Sea Stock, and at the time of making his will had just that amount of such stock; he afterwards sold 1500*l.* of it, and Verney, Master of the Rolls, held this to be no partial ademption of the legacy, but decreed the 2000*l.* stock to be made good out of the testator's personal estate.

In both these last-mentioned cases, the Act of Parliament for changing three-fourths of the capital South Sea Stock into annuities, had taken place be-

[*] Ambl. 57.

tween the time of making the will and the death, but it followed, a fortiori, from the principles on which other parts of the case were decided, that such parliamentary change could work no ademption.

There can be no doubt, however, that in these points, as in most that regard the construction of wills, the intention of the testator is to be the guide; and this intention is to be collected from the general tenour of the instrument rather than from particular words or phrases.

Thus in the late case of Hotham *v.* Sutton[x], the intention, though in some degree proceeding upon a mistake as to the fact, was the ground of the Chancellor's judgment. In that case, the testatrix, reciting that she was possessed of 12,700*l.* 3 per cent. Bank Annuities, standing in her name, gave and bequeathed the same, or so much of such Bank Annuities, as should be standing in her name at her death. At the date of her will, and at her death, she had near 15,000*l.* in that fund, besides other stock. Here the recital of the will, though erroneous, was considered as comprising the reason of the disposition—it was the measure of her bounty; the determination, therefore, was, that the bequest operated only on the sum mentioned in the recital, and that the excess of 3 per cent. Consol. Bank Annuities beyond the amount of 12,700*l.* passed under the residuary clause.

Where a bequest of the interest and dividends will

Before the subject of bequests of stock or funded property is dismissed, it may be useful to advert to a case wherein, with good reason, it was held, that the

[x] 15 Ves. Jun. 319.

capital of the stock passed under an express disposition only of the interest and dividends. This was the case of Phillips *v.* Chamberlaine [z], in which the testator gave all his monies and securities for money, together with all his real and personal estate, to his executors, their heirs, executors, administrators, and assigns, according to the nature and quality of the same premises respectively, upon trust, to sell and dispose of all except the funds and securities; and after various dispositions of determinable interests in the same funds and securities, he directed his trustees to pay all the rest of the residue and surplus of the dividends and interest thereof unto and among four relatives therein named, and the survivor of them, each share to be paid to them severally as they attained the age of 21 years; and if any one of the said four persons should die before he should attain the age of 21 years, the share of the deceased should be divided equally among the three survivors, or if two should die, equally between the two survivors, or should three out of the said four persons die during their minority, the survivor was to be entitled to the whole residue and surplus aforesaid. The question being, whether the residuary clause carried an absolute property to the legatees, or only the use, that is, the interests and dividends that should arise during their respective lives, and the principal be considered as undisposed of, the Chancellor observed, that he had never heard that where a testator gives for ever, and without limitation, the dividends and interest to accrue upon the residue of his personal property, that such a gift would not carry the whole interest. Where they were so given for ever, who was there to claim the capital? When the interest and dividends of a resi-

carry the stock itself.

[z] 4 Ves. Jun. 51.

due are absolutely given to trustees and their heirs, upon trust to pay the interest and dividends to A., and from time to time, and without any limitation of duration, it will carry the whole interest. It is impossible, said his Lordship, to suppose such an absurdity, as would result in this case from the contrary construction. An absurdity may be so great, as to raise a *necessary* implication. A Judge must divest himself of common sense to impute such an absurdity to a testator as to suppose, that he gives the interest to them for their respective lives only, and if any one shall die under the age of 21, then that a share given for life only shall survive to the others. That part of the clause was perfectly satisfactory to shew, that he did intend to give them the absolute interest. If they were only to have an interest for their lives, of what consequence would their deaths before 21 be? If they had it only for their lives there would be no part or share for the survivor to have. It is clear he meant to give an interest that would survive; even independently of the circumstances that it was given as a residue; and it must always be remembered that when the residue is given, every presumption is to be made that he did not intend to die intestate."

Of qualified and temporary interests in chattels.

This seems a proper place to introduce some observations on those bequests of chattels which create qualified and temporary interests in them, followed by gifts over to others in succession. In the consideration of which subject, it should be distinctly understood that a strict legal remainder can only be limited of freehold estates. Every bequest of personal estate to take effect *in futuro*, whether it be after a preceding bequest or not, or limited on a certain or uncertain event, takes effect only as an ex-

ecutory disposition. Every future bequest of this description of property falls under that class of dispositions called executory devises, and is subject to the rules and restrictions affecting the same.

At common law no remainder of personal estate could in strictness be limited.

At common law, if a personal estate was devised to one for life, or otherwise, and after the decease of the devisee or legatee, or on the happening of any other event, certain or uncertain, the same was given over to another, such limitation over was void, and the whole, in strictness of construction, vested in the first taker. To avoid this inconvenience, and the disappointment of the testator's intention, a difference was made between the bequest of the *use* of a thing, and of the thing itself[s]. All difficulty, however, on this subject has long ceased to exist; and these limitations or gifts of ulterior interests in personal estate have for some centuries had their full operation as executory devises, or rather *bequests*. Thus, where a term is given to one for his life, remainder to another after his decease, this limitation is considered as not meant to take effect as a remainder, but, upon the principle of ut res magis valeat quam pereat, such limitation or gift over is regarded as a substantive devise to take effect upon the death of the person first named, or other event, certain or uncertain, and is considered as preceding the intermediate disposition: so that it is the same as devising a chattel interest in land to one man upon his paying a sum of money to executors, or upon the death of another, which makes it a proper executory devise; and after limiting which future interest, the testator is still at liberty to dispose of the estate in the mean time.

[s] Bro. Dev. pl. 13. Cro. Ca. 341.

Thus in Lampett's case in Cooke's Reports[a], where a testator, being possessed of a messuage for a term of years, devised the same to his father for the term of his natural life, remainder, after his father's decease, to his sister and the heir of her body, it was resolved that the limitation to the sister was good as an executory devise. And in other cases where the ulterior disposition has depended upon an uncertain event, or been made in favour of a person not in being at the time, it has been supported upon the same principle[b].

The doctrine above attempted to be explained is equally applicable to mere bona mobilia, in courts of Equity. It has long been settled, that a bequest of goods to A. for life with remainder after his decease to B. is a good bequest to B.; who formerly might file his bill against the legatee for life, to compel him to give security for the goods being forth-coming at his death[c]; but the later practice is, for the devisee for life to be required to sign an inventory, to be deposited with the Master for the benefit of all parties, which Lord Thurlow has observed to be more equal justice, as there ought to be existing danger to justify the requisition of a security[d].

Of the dominion accompanying the interest for life in a personal chattel.

Very little is to be found in the books respecting the extent of enjoyment or dominion acquired by the person taking under a will the estate or interest for life in a personal chattel. In one case[e] it was held,

[a] 10 Rep. 46. see also 8 Rep. 95. Matthew Manning's case.
[b] See 1 Roll. Abr. 612. 1 And. 60, 61.
[c] See 2 Freem. 206. 1 P. Wms. 1.
[d] 1 Bro. C. R. 279. 3 P. Wms. 336. 2 Atk. 82, 321.
[e] Marshal v. Blew, 2 Atk. 217.

that a devise from a husband to his wife of the use of household goods, furniture, plate, jewels, linen, &c. for life or widowhood, and afterwards to children and grandchildren, included an authority for the wife to use the goods in her own, or in any other person's house, alone or promiscuously with other goods, or even to let them out to hire. Mr. Fearne has observed, in treating incidentally on this point[f], that in Marshall *v.* Blew it did not appear that the goods and furniture were annexed as heir-looms, to go along or be enjoyed with any house; but that such an annexation of them to the possession of any particular dwelling house might probably have excluded the liberty of using them, or letting them to hire, *separately*, or otherwise than with the house on which the limitation of the goods was so attendant. Mr. Fearne, however, was of opinion that even where the furniture was directed to go with the house in the nature of heir-looms, it would be competent to the person having the life-interest, to let such furniture together with the house, grounding himself, in some measure, on the case of Cadogan *v.* Kennet[g], where, though the possession of the goods was connected with the house under the trusts, and a particular of them was annexed by way of schedule to the settlement, yet it was admitted that the husband who takes an interest under the trusts in the same for his life, might have let the house and furniture together.

As to consumable things.

There are many subjects of testamentary disposition of which it may be said *usu consumuntur*; and where such are bequeathed to a legatee with a particular interest in them, as for his life only, some other person being appointed to succeed him in the pro-

[f] See Ex. Dev. 6th Ed. by Butler, 407. [g] Cowp. 432.

perty, many niceties and distinctions may arise in reference to the nature of the thing given. Where things are at once unproductive and consumable, the use of them implies the destruction of them, and this will always be the case with consumable dead stock: but in respect to live stock, it is observable that though the individual thing is destroyed, the species still continues to exist, and the race is continually propagating: it may therefore be a question whether the legatee for life be not bound to keep up the stock for the benefit of his successor in interest, subject to the reasonable use and consumption of the produce. In the above cited case of Porter *v.* Tournay[h], it was observed by the Master of the Rolls that "there had been great doubt among the judges, what a person having a limited use of such articles may do; some learned judges had thought they must be sold, and that a person so entitled was to have only the interest of the money produced by the sale; but that was a very rigid construction." I am not aware of any more recent decision whereby these peculiar difficulties have been removed. One should certainly advise a person claiming such determinable interest, to govern himself by the fair and equitable principle of taking only a reasonable and proportionate use and enjoyment, and preserving the thing bequeathed, as far as might be consistent therewith, for the benefit of his successor under the will; in all cases ascertaining the quantity, number and kind, by a proper inventory or account.

As to the remedies for pre-

Where, by the dispositions of a will or settlement the possession of furniture and household goods are

[h] 3 Ves. Jun. 311.

annexed, in the nature of heir-looms, to the possession of the mansion itself, such goods will not be suffered to be separated from the house by an execution against a person taking an estate for life under such will or settlement. If such will or settlement has vested in trustees, the legal estate in the house and goods so settled together, the legal remedy will reside with such trustees for enforcing restitution, or recovering the value; and thus in the case of Cadogan *v.* Kennet, above cited, upon an action of trover brought by the trustees to whom the possessio legalis belonged, for the benefit of the husband and wife and the sons of the marriage in succession, Lord Mansfield observed that it was a settlement very common in great families: in wills of great estates nothing was so frequent as devises of part of the personal estate to go as heir-looms: so in marriage settlements it was very common for libraries and plate to be so settled, and for chattels and leases to go along with the land. If the husband grew extravagant there never was an idea that these could afterwards be overturned: if that court were to determine they should, the parties would resort to chancery. It was the business of the trustees to see that the goods were not removed: the creditors had no right to take the goods themselves: the possession of them belonged to the trustees: the absolute property of them was then vested in the eldest son, and they were to be kept in the house for his benefit. (3)"

serving the goods to the persons in the succession.

(3) The question whether that settlement was or was not void as against creditors, under the statute against voluntary and fraudulent conveyances, was a branch of the case, which, though of considerable interest, is not connected with our present inquiry, and has been discussed at large in the treatise on voluntary and fraudulent conveyances.

In the case of Foley et al. *v.* Burnell[1], Lord Foley had devised his house called F. to trustees for a term of 99 years, and subject thereto, to his son T. for life, remainder to his first and other sons with remainder over, and bequeathed "all the standards, fixtures, household goods, implements of household furniture and pictures, gold and silver plate, china, porcelain, &c. which should be in the several capital messuages, called S. W. and F. to be held and enjoyed by the several persons, who from time to time should successively and respectively be entitled to the use and possession of the same houses respectively, as and in the nature of heir-looms, to be annexed to and go along with such houses respectively for ever." Upon the testator's decease the trustees, who were also executors of the will, permitted the eldest son to occupy the house called F. and to use the wine, linen, and china which was in it at the death of the testator. Upon those articles being taken in execution at the suit of a creditor of the son, the trustees and executors, after having demanded them, brought an action of trover, and had a verdict for the amount of the articles so taken in execution.

Mr. Fearne in his comments on this last mentioned case, with his usual sagacity, suggests a doubt whether, as the property comprised in the heir-loom clause was not in this case devised to the trustees, but seemed only to have vested in them as executors, their consent to the possession by the first cestui que trust as legatee thereof did not divest them of the legal estate, and pass it to the legatees under that clause according to their respective interests under the will,

[1] Cowp. Rep. 435. n.

and so disqualify them for the recovery of the goods by legal process. The same writer, however, was of opinion that if the legal remedy had failed on that ground, the legatees might still have found a resource in Equity. And he conceived himself to be supported in that opinion by the arguments of the court in another case under the same will, in which the legal estate and interest in the chattels devised was clearly in the first taker[k]. The Lord Chancellor, in considering the relief in the case last adverted to, put the case of a bequest of a chattel interest to one for life, remainder to another in tail, in which, he said, the ulterior devisee might come to the court to prevent the destruction of the subject. Which case, Mr. Fearne observes, as well as the common instance of trustees for preserving contingent remainders being allowed to maintain an injunction from waste against tenant for life of the legal estate, seems to warrant the interposition of the court, for the benefit of the persons intitled after a temporary antecedent interest in the first taker, notwithstanding the interest of such first taker be clothed with the legal estate.

But it appeared to Mr. Fearne, to be a very sufficient ground for the equitable relief, that executory dispositions of *chattels personal* appear to have been originally founded in, and still to rest on the doctrine of courts of Equity; and that if so, there could be no obstacle to the interference of those courts in the regulation of interests, created by, and dependent upon their own jurisdiction.

In chattels *real* the law has long admitted a division

[k] Foley v. Burnell et al. 1 Bro. C. Rep. 274.

of the interest between the devisee for life, and those in remainder; but the division of the interest in chattels personal between tenant for life, and those to whom they are limited over, seems yet to be a matter of equitable cognizance, resting upon the execution of a court of Equity in specie. And such a specific apportionment and execution of the rights of the parties would be frustrated if the court could not secure the specific chattels themselves, in the mean time, against such a disposition of the first taker, and all claiming through or under him, as would endanger its existence or preservation.

SECTION II.

As to immoveable things.

Leaseholds not, in general, included under a general devise of lands.

IT is a general and established proposition that where a man is possessed of freehold and leasehold property, the leasehold will not pass by a general devise, applicable to freeholds, unless an intention to include leaseholds under those words can be collected from the face of the will, or from the nature or situation of the leaseholds themselves. The great and fundamental case upon this subject is Rose *v.* Bartlett[a], determined so long ago as the beginning of the reign of Charles I. It was there resolved that if a man have

[a] Cro. Car. 292.

lands in fee, and lands for years, and devise all his lands and tenements, the fee-simple lands pass only, and not the leases for years; but if a man have a lease for years and no fee-simple, and devise all his lands and tenements, the lease for years passes; for otherwise the will would be merely void. The rule has prevailed notwithstanding some expressions have been used by a testator which might seem to have been adopted on account of their applicability to chattel interests. Thus in the case of Davis *v.* Gibbs[b], where the words were "manors, messuages, lands, tenements, hereditaments, and real estates whatsoever, of which I am any ways seised or intitled to," the rule laid down in Rose *v.* Bartlett was adhered to, and the same point was decided in the same way by Lord Mansfield in Pistol on dem. Randal *v* Richardson[c], in which the testator devised "all and every of his several lands, messuages, tenements, and hereditaments whatsoever and wheresoever, whereof he was seised, and *interested in,* or *intitled to*" to his son for life, remainder to the heirs of his body; and afterwards devised his personal estate to his wife and daughter, and made his wife sole executrix. The question was, whether the leasehold lands by the above words of the will were given to the son, or were part of the personal estate. After two arguments Lord Mansfield delivered the opinion of the court, "that the leasehold lands did not pass to the son, but were part of the personal estate" (1). The

But if the testator leaves none but leaseholds to answer the disposition, they will pass.

[b] Fitzg. 116. 3 P. Wms. 26. [c] 1 H. Bl. 26, note.

(1) If a man, having both freeholds and leaseholds, devise all his lands and tenements, by a will unattested, as the statute directs, so that it is inoperative in respect to the freeholds, still the words

If the will is ineffectual to pass free-

case of Addis *v.* Clement[a], indeed, which was decided the other way, expressly proceeded in part on the effect of the words, "whereof he, the testator, was seized or possessed, or interested in," and it was lamented by Lord Kenyon, in Lane *v.* Lord Stan-

[a] 2 P. Wms. 455.

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hold for want of due execution, this will not make the leaseholds pass by a general devise, applicable to freehold estate.

of the devise are held not to pass the leaseholds. This was one of the points in Chapman *v.* Hart*, determined by Lord Hardwicke, where a testator devised all his lands at or near Fowey to the plaintiff, and the will was executed in the presence of two witnesses only. The Chancellor observed, that it was not certain whether the testator had any leasehold in or near Fowey. If there should appear to be both, and the law had been with the plaintiff, so that she should be entitled thereto, it would be a ground for the direction of an enquiry; for the answer was not a positive negation of any leasehold. But if, let the fact come out how it would, the law was against the plaintiff, he ought not to direct an enquiry. And he was of opinion, that though it should appear that the testator had leasehold as well as freehold, the plaintiff would not be entitled. His Lordship supposed a case of a person seised of freehold and copyhold in D. who surrendered to the use of his will, and devised all his lands and tenements in D. to his child: there being a surrender, both freehold and copyhold would pass, if the will was duly executed according to the statute of frauds: but if no surrender to the use of the will, only the freehold would pass; to which lands and tenements generally mentioned should be applied; there being no surrender to the use of the will, to shew a different intent. Suppose that will executed in the presence of two witnesses, or of one only; those general words used; and no surrender: though this were to a child or wife, the court would not supply the defect of the surrender to the use of the will, or compel the heir at law to surrender the copyhold to the devisee, because the will was not duly executed; when, if duly executed, the court would not have supplied that defect: for such variation of the construction would be very dangerous.

* 1 Vez. 271. and see Streatfield *v* Streatfield, Talb. 175.

hope[e], that that case was not cited in Pistol *v.* Richardson, since his Lordship thought that if Lord Mansfield had had it in his view he might have been induced to decide otherwise than he did. But it seems from a manuscript note of Pistol *v.* Richardson that the case of Turner *v.* Husler[f], which proceeded on the authority of Addis *v.* Clement was noticed by Lord Mansfield in his judgment, who received his account of it from Mr. Baron Eyre[g].

Lord Eldon in the case of Thompson *v.* Lady Lawley and others[h], seemed evidently to think that too much stress might be laid upon these words, "possessed of, or intitled unto." But his Lordship took notice of the other ground of the decision in Addis *v.* Clement, viz. that the 21 years lease in that case was held of the church, and always renewable, so that the lessee, who was the testator, might look upon himself, from the right he had to renew, as having a perpetual estate therein—a kind of inheritance; and appeared to think *that* an ingredient which sufficiently distinguished the case from Pistol *v.* Richardson.

Leaseholds will pass where there are only such to answer the devise, although the devise is expressly of the testator's freeholds.

The distinction taken in Rose *v.* Bartlet as to the effect of a will devising "lands and tenements" upon leasehold property, where there are no freeholds to satisfy the words, was fully confirmed by the case of Day *v.* Trig[i], where, upon a devise by a testator, of all his *freehold* houses in Aldersgate-street, to the plaintiff and his heirs, having

[e] 6 T. R. 353. [f] 1 Br. C. C. 78. [g] See 2 Bos. et Pull. 306.
[h] 2 Bos. et Pull. 303. [i] 1 P. Wms. 286.

in fact no freehold houses, but only leasehold houses, in the place described; it was decreed by Mr. J. Tracy, sitting for the Lord Chancellor, that, though in a *grant* of all one's freehold houses, leasehold houses could not pass; and though, even in the case of a *wife*, had there been any freehold houses to satisfy the words, leasehold houses should not have passed, yet the plain intention being to pass some houses, and he having no *freehold* houses in the place mentioned, the word *freehold* should rather be rejected than the will be wholly void, and the leasehold should pass (2).

And under an express devise of leasehold, freehold may pass, if such appear to be the intention.

As by the case last cited it appears that the insertion of the word '*freehold*' by the testator, will not prevent the passing of *leasehold* property, where the intention to pass them is manifest upon the whole will; so in a late case it has been ruled in the court of King's Bench, that under the phrase *personal* estates, real property may pass, if it is clear from the bearing of the instrument, that such was the testator's intention[k]; and where by a will giving the estate a local description and a name, the property was mistakingly called leasehold, the testator's freehold was held to pass, there being no other property answering the name and description[l].

So, by the word legacy a devise of freeholds may be understood.

On the same principle of giving words a descriptive effect, commensurate with the clear intention of the parties, whatever may be their primary or

[k] Doe on dem. of Tofield *v.* Tofield, widow, 11 East, 246.

[l] Doe d. Wilkins *v.* Kenneys, 9 East, 366.

(2) He observed also that the suit was proper in equity, since the leasehold houses (being chattels) could not pass by the will without the assent of the executor, which assent he was compellable to give in equity.

strict sense, the word 'legacy' has been construed as comprehending real estate. Thus, where A. by will gave two legacies of 150*l.* each to his son and daughter, to be paid at 21, and then gave all his realty and personalty to his wife for life, and after her death, one freehold estate to the son, and another to the daughter; but if either or both his children should die before the wife, then those *legacies* which were left to them should *return* to the wife; it was held that on the death of the son before the mother, the mother was entitled to the reversion of the freehold estate, the word 'legacy' not being necessarily confined to the pecuniary bequests, where by the context of the will it appeared to have been used by the testator in a larger sense[m].

Whether copyhold passes by the general devise of lands, &c.

Whether, where there has been a surrender to the use of the will, the general words 'messuages, lands, tenements, and hereditaments,' will pass copyhold as well as freehold estate, without any inference furnished by the will itself, of the testator's intention to include both, seems to rest in some doubt. In the case of Doe d. Belasyse *v.* the Earl of Lucan[n], none of the judges appeared to hold any decided opinion on the point. That case, however, has completely established the doctrine that wherever the intention of the testator to devise his copyhold can be collected from the will, and the words, though they make no mention of copyhold, are large enough to comprehend it, and a proper surrender has been made to the use of the testator's will, such copyhold will pass to the devisee. And we may safely infer from the principles

[m] Hardacre and another *v.* Nash and another, 5 T. R. 716.; and see Hope d. Brown *v.* Taylor, 1 Burr. 268.

[n] 9 East, 448.

of the last-mentioned case, as well as from others, that, where the testator's freehold will not satisfy the description, or the purposes expressed in the will, unless the copyhold be considered as included in the devise, the intention to devise the copyhold is sufficiently indicated.

The case last adverted to was to the following effect. The testator, having a freehold manor of Sutton, and freehold lands there, and having also copyhold lands within the township of Sutton, and within the local ambit of the manor, but held of another manor, and having surrendered his copyhold to the use of his will, devised all his manor of Sutton, and all his messuages, farms, lands, tenements, and hereditaments, whatsoever, within the precincts and territories of Sutton, in the county of Chester, with their rights, members, and appurtenances, in trust for his daughter, and to her children in strict settlement; and first, it was held that farms, lands, &c. within the township, though not within the manor of Sutton, passed by the description of farms, lands, &c. within the precincts and territories of Sutton. Secondly, that the general words of 'messuages, farms, lands, and tenements,' and particularly the word 'farms' (3) were sufficient to carry copyhold as well as freehold in the place described, if such appeared to be the intent of the testator upon the whole will; and, thirdly, that such intent was to be inferred in the case before the court, as it appeared that the testator had within the place

(3) Lord Ellenborough observed that the word 'farms' at least would include copyhold as well as freehold.

described, a farm composed of copyhold and freehold, which he had let as one entire subject, and also by his having charged the property devised beyond the annual income of it, unless the copyhold were included. It was held clearly, that another small copyhold at the distance of about eight miles from Sutton, and not in the same county, passed by the residuary clause, whereby the testator devised all the *rest, residue, and remainder of his real* and personal estate[o].

Of the doctrines of equity on this subject.

The cases on this subject, which are of frequent occurrence in equity, have arisen upon the usual resort to that forum to supply the defect of a surrender, which it will only do for the sake of three descriptions of persons[p], creditors, wife, and children: of which three classes the courts of equity shew the greatest favour to creditors; for neither the wife, or younger child, will have the defect of a surrender supplied for them, if the heir at law (being a child of the testator) would be thereby left unprovided for. If the will devises the copyhold in terms, and for the benefit of any of the abovementioned favoured objects, equity will supply the want of a surrender, and give effect to the express intention of the testator; but where the words are general, as 'messuages, lands, tenements, and hereditaments,' and such surrender has been wanting, the cases have for the most part shewn a reluctance to

[o] See the case of Doe d. Pate *v.* Davy, Dougl. 716. note (2), and see the cases in 6 Vin. Abr. tit. copyhold, 236-7.

[p] Goring *v.* Nash, 3 Atk. 189. Goodwin *v.* Goodwin, 1 Ves. 228. Byas *v.* Byas, 2 Ves. 164. Tudor *v.* Anson, 2 Ves. 582.; and see Mr. Coxe's note to Watts *v.* Bullas, 1 P. Wms. 60.

consider copyhold included in those words, without some ground of necessity for such construction. Thus in Hazlewood *v.* Pope[q], Lord Chancellor Talbot held that "if a man devises all his lands, tenements, and hereditaments, in Dale, in trust to pay his debts and legacies, and the testator has some freehold and some copyhold lands there, only the freehold lands shall pass, for his will must be intended of such lands and tenements as are devisable in their nature. *Secus*, if the testator had surrendered his copyhold lands to the use of his will, because this shews he did intend to devise his copyhold. But even in the first case, i. e. where there had been no surrender to the use of his will, when the testator devises all his lands to pay his debts, it seems rather than the debts should go unpaid, that the copyhold shall in equity pass."

It is clear from the above expressions of the Chancellor, that the difficulty lay in giving to the general words the effect of passing copyholds, without a strong necessity for such construction, where the copyhold had not been previously rendered devisable by a surrender to the use of the will; considering the fact of the omission or observance of this ceremony as being a strong circumstance of inference with respect to the testator's intention.

That this was likewise Lord Hardwicke's view of the subject may be collected from the case of Goodwyn *v.* Goodwyn[r], where his Lordship observed, that it had been in several cases held that a devise in general words of all lands and tenements will not comprise copyhold lands, which have not been surrendered to

[q] 3 P. Wms. 322. [r] 1 Ves. 226.

the use of the will so as to shew an intent to comprise them. And where, continued the same Chancellor, the intention of the testator of raising portions or payment of debts may be answered by freehold lands, the court will not suppose he intended to pass copyhold. In that case the copyhold had been surrendered to the use of the will, and the general words being considered as comprehensive enough to include them, it was adjudged to be included in the devise. His Lordship, in a case[a] which came before him a few months afterwards, adverted to the same doctrine in the following words. "Suppose a case, (which though I do not know to be determined, I should not doubt to determine so,) of a person seised of a freehold and copyhold in D. who surrenders to the use of his will, and devises all his lands and tenements in D. to a *child; there being a surrender,* both freehold and *copyhold* would pass; but if no surrender to the use of the will, only freehold would pass."

Whether the general words *lands, tenements,* and *hereditaments,* are alone sufficient to pass copyhold estate, without any special circumstances to indicate their intention.

It does not seem, therefore, that the courts formerly considered the general words *messuages, lands, tenements,* and *hereditaments,* of force per se to carry copyhold estate, and the reason appears to have been, that copyholds being not in their own nature devisable, these general devising words were not, prima facie, applicable to them. It was always considered that there must be something to manifest an intent to pass them. If, therefore, the surrender to the use of the will was wanting, and there was a general devise of the lands, &c. in favour of the testator's wife or child, equity though disposed to supply the defect of the surrender in behalf of these favoured objects, could not see in these

[a] Chapman *v.* Hart, 1 Ves. 272.

general words the intention to pass the copyhold at all, if there was any freehold estate to answer the words of the will.

But if the devise was for the purpose of paying debts, and the freehold was not enough to answer that highly favoured object, equity supplied the surrender in behalf of the intention inferred from the necessity of the case, though the devise was only in the general terms above-mentioned. Still, however, it is said that equity will supply the want of the surrender *so far only* as may appear *necessary* for the payment of debts; and, therefore, it has been held, that while any freehold estate remained applicable to that purpose, the want of the surrender of the copyhold should not be supplied[1]. And this has been even held to be so, notwithstanding the express intention of the testator to charge the copyhold rateably with, or in preference to, the freehold.

Where there was a surrender to the use of the will such surrender appears to have been considered as at once opening a way for the copyhold into the will, and affording a ground for inferring an intention in the testator to pass it by his will; and having got so far, the only enquiry was, whether there were words in the will capable, in point of legal compass, of embracing copyhold estates, as doubtless the general words 'lands, tenements, and hereditaments,' must be admitted to be.

This would be giving great effect to the act of sur-

[1] Mallabar *v.* Mallabar, Cas. Temp. Talb. 78. Combes *v.* Gibson, 1 Bro. C. R. 273. Hellier *v.* Tarrant, Ca. Temp. Talb. 3d. ed. 288. (note).

rendering, and might if once so settled save a great deal of trouble: but it seems as if it would be travelling faster than the cases to rely on such a doctrine. In the late case of Doe and Belasyse *v.* the Earl of Lucan above stated, Lord Ellenborough said he should proceed merely on the testator's intention as he collected it from the face of the will; saying he was afraid to look at any argument of intention to be derived from the surrender to the use of the will, though, perhaps, it might be proper to be regarded even in that court, as it certainly would be in another court, but that it was not necessary for him to give any opinion upon that point; he professed to determine the case upon the intention as collected from the words of the will only.

Upon the whole it must be considered as resting in some uncertainty whether, and how far, the fact of a surrender to the use of the will affords inference of intention; and, supposing no special ground for inferring intention, whether the general words, "lands, tenements, and hereditaments" in a will, to the use whereof a surrender has been made, are of force per se to carry copyhold estate. But thus much is certain, that where these words occur in a devise, and a surrender of copyhold has been previously made to the use of the will, the copyhold will pass, if an intention to pass it, can be collected from the context of the will.

Copyhold, will pass customary estates.

The word *copyhold* is not always necessarily confined in a will to that which comes strictly within its meaning. Thus in a late case[a], a customary estate,

[a] Cook and Cook *v.* Danvers, 7 East 299.

parcel of a manor, demisable only by the licence of the lord, and passing by surrender and admittance, whether strictly copyhold or not, was adjudged to pass under the description of a copyhold in a will, the intention being apparent. (4) And, indeed, where the intention is apparent from the context of the will itself, the specific and technical meaning of words needs scarcely any longer be a subject of enquiry, after the cases which have decided that legacy, or personal estate, may be descriptive of a real devise, or of real property, if it is clear that such was the meaning of the testator.

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(4) But it should seem that upon a broader ground than any evidence of *particular intent* the word copyhold in a will ought to be considered as including customary estates held of a manor, and demised and demisable by copy of court roll, although not copyhold in the stricter sense. It is thus that Lord Ellenborough has expressed himself on the subject in the case of Roe and Conolly *v.* Vernon and Vyse, 5 East. 83, 84. "In disposing of their property testators usually advert to the known and ordinary circumstances attending it, and adopt the appellations by which it is generally and more familiarly distinguished. They cannot be supposed to regard or consider those equivocal or less obvious qualities of their estates, about the effect of which profound lawyers and legal antiquaries might entertain controversies. The distinction between estates which may be immediately transferred from man to man by deeds and instruments executed merely between the parties themselves, and those estates the titles to which are evidenced by copies of the rolls of the courts baron, are familiar to men the least acquainted with the rules of property; but the distinction, and still more the effect of the distinction, between tenants by copy of court roll at the will of the lord according to the custom of the manor, and tenants by copy of court roll simply according to such custom, as determining the one to have a freehold interest, and the other not, is a distinction not at all likely to occur to persons in general when disposing of their property."

In the above-mentioned case of Haslewood *v.* Pope[w], Lord Chancellor Talbot made a doubt, whether, if a man have lands, and also a *manor* in Dale, of which the lands are not parcel, a devise of the lands would include the manor; but he seemed clear that it would pass under the word *hereditament*, and there can be as little doubt that the word *tenement* would embrace it. What words include a manor.

The same may be said of an *advowson*, (5) which in Westfaling *v.* Westfaling[x] was clearly held to pass by the word *tenements*[y] or *hereditaments*[z], but not by the word *lands*. But supposing the devise to have been of *lands*, at a particular place, and that the testator had nothing but a manor, or an advowson, to answer the devise, rather than that the will should be inoperative, it seems to be the better And advowson.

[w] 3 P. Wms. 322.
[x] 3 Atk. 460.
[y] Hob. 303.
[z] Dyer, 323. pl. 30.

(5) It appears doubtful whether the word *advowson* will carry an impropriation of it. Hob. 304. But by the devise of an advowson the next turn or presentation inclusively passes, even though the devisor himself is the incumbent. 1 Atk. 619. And there is no doubt but that the next turn or presentation is a proper subject of devise, vid. Law *v.* Bishop of Lincoln, 2 Blackst. 1240. though if the presentation falls in the life of the testator, the devise must of necessity fail. Nor does it seem that after avoidance, the right to present is strictly devisable, being in the nature of a chose in action. It is held, however, that if the incumbent is also the patron, he may devise the next turn or presentation; for although at the very instant of the death the church becomes void, yet the testament is regarded as having an inception in the life time, which secures its operation at the moment of the death. Harris *v.* Austin, 3 Bulst. 36. 1 Roll. Abr. 210. Cro. James 371.

opinion that the manor or the advowson would pass[a]. So in the case of Ritch *v.* Sanders[b], where a testator gave all his free lands wheresoever, to his brother John Sanders for life, upon condition that he suffered the testator's wife to enjoy all his free lands in Holford for life, the testator having only a portion of tithes of inheritance, in Holford, and no lands, the word "lands" was held to extend to tithes, though an incorporeal hereditament, and collateral to the land.

Lands include *houses.*

But *lands*, ex vi termini, will pass *houses*, so that if a man having both lands and houses in Dale, devise all his lands in Dale, his houses will pass to the devisee[c].

What passes by the word *manor.*

By the demise of a *manor*, the manor passes together with all the demesnes and services, so that if after such devise a copyhold, parcel of the manor, escheats to the lord, it undoubtedly passes by the will[d]. In strictness the soil and inheritance is in the lord, and the copyholder is only a tenant at will; so that under a devise of a manor, copyhold premises, parcel thereof, subsequently purchased by, and surrendered to, the lord, will pass[e].

What passes under *farm.*

The word *farm*, as importing all such premises as have been usually let together, and comprehended within one entire holding, has always been considered as carrying the whole premises, where the

[a] Vid. 3 P. Wms. 322. [b] Style, 261.

[c] Ewer *v.* Heydon, Moor, 359. pl. 491. and see Godb. 352. pl. 447.

[d] Bunter *v.* Cooke, 11 Mod. 129. Salk. 238.

[e] Roe d. Hale *v.* Wegg and Others, 6 T. R. 709.

same have consisted of different descriptions of estate; and this, although the word has been associated with other terms, descriptive in their ordinary sense of freehold property only, and the testator has died seised of freehold estate sufficient to satisfy the prima facie import of the words. Thus, where A. being seised of several freehold estates, and possessed of part of a *farm*, held by a church lease, renewable, (the other part of the farm being freehold, and the whole having been always let together, as one entire farm, at one rent,) devised "all his manors, messuages, houses, *farms*, lands, woodlands, hereditaments, and real estates whatsoever," to B., and gave "all the rest and residue of his ready money, rents in arrear, stock in the public funds, jewels, and personal estate whatsoever" to C.; it was clearly held that the leasehold part of the farm (6) passed under the first devise[t].

[t] Lane *v.* Earl Stanhope and Others, 6 T. R. 345.

(6) Unity of possession is always a strong argument of intention to include the subjects so held together, under one and the same devise, even where the word *farm* does not occur in the will. As in the case of Roe d. Pye *v.* Bird, 2 Blackst. 1301. where a testator devised all his estate in A. having copyhold and leasehold there which had been purchased together, and afterwards occupied together for twenty-three years; the devise was held to include both the leasehold and copyhold, as one consolidated estate, though there was in the same will, a bequest by the testator, of all his personal estate to another. And so, where a man devised his freehold and copyhold messuages, lands and tenements to A.; under this devise the plant of a brewhouse was held to pass with the brewhouse itself, having been tenanted together, although there was a bequest of the personal estate to another. See Wood and Wife, *v.* Gaynon and Wife and others. Ambl. 395.

Thus also, in an earlier case, where a testatrix had devised to A. an entire *farm* in the occupation of one of her tenants, which included a small parcel of marsh lands; this parcel of marsh lands was held to pass, together with the *farm* to which it was attached, notwithstanding there was in the same will a devise of all the testatrix's marsh lands to another person, she having a large estate in marsh lands besides, which was let together to another tenant[c].

Messuage —what it may include.

The word *messuage* has also been carried by construction to the same extent. Thus in a case where the testator devised his three messuages, with all houses, barns, stables, stalls, et cætera, that stand upon or belong to the said messuages, and the question was, whether the lands and meadows which were held with the messuages, would pass by the will; the Court, after saying that the intention of the testator was the polar star to direct them in the construction of wills, observed, that the testator had clearly manifested his intention to dispose of his whole estate, by the introductory words, which were, "As touching such worldly estate wherewith God hath blessed me, I give, &c." The Court also laid great stress upon the fact of the testator's having purchased the whole estate together, both messuages and lands, a short time before he made his will. They thought it clear from all circumstances, that the lands and meadows, as well as the houses, were meant to pass by the devise, as one entire farm, as much as if the testator had said, "I give and devise all that my *farm*, with the appurtenances which I purchased of A. B." which,

[c] Holdfast d. Hitchcock *v.* Pardoe, 2 Blackst. 975. and see Doe d. Belasyse *v.* the Earl of Lucan, 9 East 448.

without doubt, would have passed the whole, both messuages and lands[h].

House—what it may include.

Notwithstanding the different construction given to *messuage*, and *house*, in many of the early cases, the Court in the case of Doe d. Clements *v.* Collins[i], seemed to think the distinction had been carried too far. There, A. being tenant for years, of a house, gardens, stables, and coal-pen, made the following bequest, "I give the house I live in, and garden to B." And it was held that the stables and coal-pen occupied by A. together with the house, passed without being expressly named, though the testator used them for the purposes of trade, as well as for the convenience of the house.

But no case has gone so far as to say that the word *house* alone, is capable of receiving from evidence of intention such an enlargement of its sense as to pass lands in a will. In the case of Doe d. Walker, *v.* Walker[k], the argument from intention was much pressed, but the Court considered that to supply the word "lands" would be to supply an absolute omission in the will, of which they said they never knew an instance. The case was shortly this. A testator devised to his wife his house and goods, with all his lands, goods, and chattels whatsoever and wheresoever, for her life; and after her death to two younger sons, till they should attain the age of fifteen, for their education. He then devised his aforesaid house, goods, and chattels, equally to be divided between all

[h] Gulliver d. Jeffereys *v.* Poyntz, 3 Wils. 141. And see the cases collected in Hargrave's notes to Co. Litt. 5 b. note 21.

[i] 2 T. R. 498. [k] 3 Bos. et Pull. 375.

his sons and daughters, share and share alike; and it was determined that under the last clause of the devise, the lands did not pass. There is a case, however, in Peere Williams[1], in which, by force of the general intent deducible from the dispositions of the will, land was held to pass without any other descriptive word besides his (the testator's) *house* at C. The testator directed that his cousin, Anne Edgley, should continue to live at his house at C. and that her son, H. E. should continue to live with her there in the same manner as he then did with the testator; that the said Anne Edgley should be at all the charge of house-keeping, servants' wages, and coach horses, to the number that he maintained. The testator was seised in fee of some little *land*, by him always employed for producing hay and corn which was constantly spent in the house, and the land was ploughed with the coach horses which the testator kept. Upon this will and these circumstances the court reasoned that the intention of the testator was, that after his death, and during the life of his kinswoman Anne Edgley, every thing should be carried on and transacted as it was in his life time, and that to such a nicety, as that the same number of servants, and even of coach horses was to be employed, the same hospitality observed, and the same horses used in ploughing the lands; which could not be, unless the lands were to continue as before to be enjoyed with the house: therefore, as it seemed to have been his intention not to part with them, it was decreed that those lands which had before been constantly enjoyed with the house, and the profits whereof had been applied to the maintenance of the house, should continue to be so enjoyed.

[1] Blackburn *v.* Edgley, 1 P. Wms. 600.

There is less difficulty in construing land to pass with a house, where the word *appurtenances* is added. Thus in Doe d. Lampriere, *v.* Martin [m], land occupied with a house, and highly convenient for the use of it, was held to pass in a will by the word *appurtenances*, though the land in that case was held for a different term.

Of the effect of the word appurtenances.

In the last cited case the devise was of "all the testator's copyhold messuage, with all out-houses, gardens, and *appurtenances* to the same belonging, situate at Fulham, and then in his possession." And the land in question was the site of some cottages, which the testator had lately pulled down for the purpose of taking the ground on which they stood into the court-yard of the house, so that his plain meaning was to unite these parcels together, and to devise all that he personally occupied.

From the reasoning of the case it appears, that the land was considered as included in the word *appurtenances*, for the sake of giving effect to the manifest intention of the testator, as it appeared by the context of the will itself, assisted and explained by extrinsic evidence; which seems to be a sufficient ground for extending the import of the word *appurtenances*, or any other word of description in a will. But it may be observed that that word in its strict technical sense has been held to extend to the buildings, curtilage, and garden, belonging to a house, and the court-yard seems to be part of the curtilage.

But *appurtenances* will not ex vi termini compre-

[m] 2 Blackst. 1148.

hend land, although usually occupied with a house, but only such land or ground as is immediately connected therewith, and necessary to the commodious enjoyment of it. If it is to be carried beyond this, so as to include lands, such extension of its sense must be a consequence of the principle of giving effect to the general plain intent of the testator. Thus in Buck and Whalley *v.* Nurton [a], where in the will of the testator was the following clause: "And it is my express will and desire, and I do hereby direct that the said John Nurton shall hold and enjoy my said capital mansion-house, with the *appurtenances*, for the space of one year after my death." In another part of the same will the testator had devised "All that his capital mansion-house wherein he then lived, and the lands and grounds thereto belonging, and therewith held and enjoyed, with the *appurtenances*."

The testator was possessed of a mansion-house, together with several parcels of land, amounting to 64 acres, and there were also extensive gardens and pleasure-grounds, together with walks and ways attached to the house. The question was what parts of the premises passed to John Nurton by the clause which directed that he was to have the mansion-house with the appurtenances for a year after the testator's death. The ejectment was brought to recover 64 acres and a half of land, consisting of a park, meadow land, pasture land, and orchards, which were proved to have been constantly occupied by the testator for many years before his death in conjunction with the mansion-house. But the court did not see

[a] 1 Bos. et Pull. 53.

sufficient evidence of intention in the case to justify them in giving to the word *appurtenances* an effect beyond its technical sense, notwithstanding the fact of the usual enjoyment of the lands in question together with the house. The word *appurtenances* was therefore confined to the gardens, pleasure-grounds, walks, and *orchards*, though as to the orchards Eyre, C. J. appeared to have some doubts.

By a devise of the occupation, or of the *rents* and *profits*, the land itself passes.

It has long been settled that by a devise of the *occupation*, or of the *rents and profits* of the land, the land itself is carried to the devisee. Thus where the occupation was devised to the executor for a time, and afterwards the land itself to another, the executor's execution of the legacy to himself was adjudged to be an execution of it to the other, *both their interests being the same*[a]. Such a gift of the *rents and profits*, or of the occupation of the land, is considered as a mere circumlocution (7) to express the thing itself (8). But the books make a difference between

[a] Welcden *v.* Elkington, Plowd. 524. Paramour *v.* Yardley, Plowd. 539. And see Parker *v.* Plumber, Cro. El. 190.

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(7) The strictness of pleading requires that gifts or grants by circumlocutory phrases, be stated and described according to their true legal effect. So that if in a plea to an action of trespass the defendant state that the plaintiff licensed him to enter and occupy the land for the space of a month, such a plea would not be good, but he ought to say that the plaintiff *leased* the land to him for that time; for the facts will not prove a *licence* but a *lease*, notwithstanding the expression in the grant. See Plowd. 154. 542.

(8) It was observed by the court in Paramour *v.* Yardley, that this was more than the king shall have of the tenant in fee simple upon his outlawry in a personal action, for he shall have only the profits as they arise of themselves without manuring.

the devise of the use or occupation of a personal chattel, and the devise of the occupation and profits of land, or a chattel real. Thus in the year-book 37 H. 6. (9) the case was that A. being possessed of a book called the Grail, devised it to B. one of his executors, to have the occupation of it during his life, and that after his death C. should have it in the same manner for his life, and that after his death it should be disposed of by his executors to the use of a church, and died, and B. took the book, and kept it by force of the devise, and delivered it to the wardens of the said church, and died; then C. took the book, and the church wardens brought an action of trespass against him, and it was the clear opinion of the court, that the action was maintainable, because the book was never delivered to C. by the executors, and the occupation or possession of B. was no execution of the legacy to C. because nothing was devised to B. but the occupation, and the like to C., for the devise proves in itself that the *property* of the book was always in the executors, to the use of the testator, to the intent that they should dispose of it to the use of the church; the occupation was a distinct thing from the property: the occupation of one was not the occupation of the other, but their occupations differed from each other, and were several things devised out of the principal, for which reason the occupation of B. was no execution of the occupation of C.

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(9) Cited in Paramour v. Yardley, Plowd. 542. and approved by all the court; and see Cary v. Appleton, Ch. Ca. 240. where the same distinction is taken; and see Moor, 754. 3 Bulst. 105. and Allen 55. in which last case it was admitted that an *authority* to take the profits, implies as much as a devise of the profits.

By a devise of the *ground-rent* the reversion will pass.

As a devise of the rents and profits passes the land itself, so by a devise of the *ground rent* reserved on a lease for years, the reversion has been held to be carried to the devisee. This was determined in the case of Maundy *v.* Maundy[p], which case was as follows. On a special verdict in ejectment for houses in ——— square, it was found that Ventris Maundy being seised of the reversion in fee of the houses, which were of the value of 260*l.* per annum, but then let on a lease for 60 years, at 22*l.* per annum, called a ground rent; and having several sons and daughters, made his will in April 1696, in the following terms: "In respect to my worldly estate, wherewith it has pleased God to bless me, I dispose of it as follows: To my son Daniel I give 4*l.* per annum of my ground rent;" and in like manner he parcelled out the whole 22*l.* to his children (except the eldest), his, her, and their assigns for ever; "but as to Ventris my eldest and undutiful son, I give him, in hopes he may reform, 5*l.* per annum, due on blank tickets in the million lottery. And if any of my other children die, their legacy to go to the survivor, my said undutiful son excepted, who is to have no share or part thereof, nor any more share or portion than I have before given him."

The building leases being expired, the heir of Ventris the eldest son, brought this ejectment, insisting that the reversion was undisposed of; and that, however strong the intention to disinherit the eldest son appeared, yet, if it was undisposed of, he must have it[q]. And upon argument in the Common Pleas,

[p] Strange, 1020. Fitzg. 70. 288. S. C. in C. B. cas. temp. Lord Hardwicke, 142. 2 Barnard, K. B. 202.

[q] Denn *v.* Gaskin, Cowp. 661.

judgment was given against him in favour of the devisee, which judgment was affirmed in the King's Bench. And the case of Kerry *v.* Derrick [r], was relied on as good authority, and precisely to the point. So in a subsequent case [s] in Chancery, it was held that a bequest of *leasehold ground rents* passed not the reserved rent only, but the whole reversionary leasehold interest.

Of the effect of the word *premises*.

With respect to the force and extent of the word *premises* in a will, it is obvious that being entirely a word of reference, it will be commensurate in its operation to the extent of the words to which it refers, and as it may be extended by reference to any number of terms, its descriptive force may thus be made to cover a variety of subjects having no connection or affinity among themselves. Thus in a case [t] where a testator devised as follows: "I give and devise all that my messuage, dwelling-house or tenement, with the shop, barn, stable, and other buildings thereunto belonging, which said messuage or tenement, buildings, lands, or premises, are now in my own possession, and all other my real estate whatsoever, in M. or in any other place whatsoever, to S. and her assigns, for and during the term of her natural life; and from and after her decease, I give and devise the said messuage or tenement, buildings, lands, and premises, unto my youngest son W. B. his heirs and assigns for ever;" it was held that the word *premises* used in the devise to B., carried all that was before given to A., and was not confined to the premises in the testator's own pos-

[r] Moor, 771. Cro. Jac. 104. cited in 2 Vern. 400. as Cherry *v.* Dethick.

[s] Kaye *v.* Laxon, 1 Bro. C. C. 76.

[t] Doe d. Biddulph *v.* Meakin, 1 East, 466.

session, so that a reversion in fee of another messuage, to which the testator was entitled after the determination of a life in being, in whose possession it was outstanding during his life-time, passed to the devisee in remainder.

SECTION III.

Estate, Hereditaments, Inheritance, Property, Effects, &c.

THE word 'estate' is a word of great compass; predicable of every species of property, corporeal or incorporeal, real and personal. It may also embrace every description of interest; and so far is it from being necessary in a will to add words of inheritance in order to make it pass a fee, that words of restraint must be added, or specific grounds for inferring a narrower intention in the testator must be shewn, to make it import less than the fee (1), where the fee is disposable.

In the great case of the Countess of Bridgewater *v.* the Duke of Bolton[a], Lord Holt has commented

[a] 6 Mod. 106. Lord Hardwicke has said that this is a book of no authority, but that this case is well reported in it.

(1) See Barnes *v.* Patch, 8 Ves. Jun. 604. The position of Lord Trevor in Shaw *v.* Bull, 12 Mod. 592. where he says that 'my estate,' 'the residue of my estate,' or 'the overplus of my estate,' may pass the estate, *where the intent is apparent to pass it*, is therefore to be considered as too narrow.

very learnedly upon the force of the word, taken separately, or in combination with others. The questions were whether the words "All my real and personal estate" passed the fee-farm rents; and if they did, whether they passed the fee-simple, or only a life interest, there being no words of inheritance in the will (2). And first, it was held that the rents passed: for the word 'estate' is genus generalissimum, and includes all things, real and personal: and, secondly, that the word 'estate' ex vi termini, passed the fee in a will (3).

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(2) The devise was to B., his executors and assigns; but this form of limitation does not seem, according to the latest and best authorities, to weigh much against the effect of the word *estate*, except perhaps where, as in Chester *v.* Painter, 2 P. Wms. 335. and Rogers *v.* Buggs, Andr. 210., the testator has shewn his own clear apprehension of the difference between these different forms of limitation, by his addition of the word *heirs* to the word *estate* in other parts of his will. But even this argument has been considered as of little force in other cases; especially if from the general context of the will an intention to give the whole may be collected. See Ibbetson *v.* Beckworth, Ca. Temp. Talb. 157.

(3) Lord Holt observed that "most certainly in grants the word *estate* would not pass a fee, because the law had appointed that, let the intent be ever so fully expressed and manifested in grants, without the word 'heirs' the fee should not pass. Litt. Ten. Sect. 1.; and that, even if a feoffment were made *to J. S. to have to him a fee simple*, which words could have no other sense than to pass an inheritance, yet that an estate for life only would pass. 4 Com. dig. 'estates' (A. 2.); but that in a will it was otherwise; because a will of lands was a new conveyance, created by the statute, whereby a man was enabled to devise all his socage land *at his will and pleasure*; so that when a person manifestly shewed his intent that the devisee should have the inheritance, the statute that empowered him to devise his estate at his pleasure, would make his disposition good without tying him up to the forms of the common law." This reason will, however, occur to many readers, to be

Estate, or estates, though particularized by name and place, will carry the fee-simple.

It is observable, however, that Lord Holt laid considerable stress on the accompanying words 'all' and 'my'. The word 'all' in his opinion, made the devise more comprehensive, and the word 'my', being a word of relation, expressed the amount of the identical interest which he had in the subject, viz. a fee. But subsequent cases have given to the word 'estate,' simply taken, a more absolute and independent force. And where it has been coupled with words of local description, or used in the plural number, it has been held to transmit all the testator's interest in the subject. Where a testator devised all his estate *in* D., it was decreed that the fee passed[b]. And the same point was afterwards ruled by Lord Hardwicke[c]; who in a subsequent case, considered the distinction between *in* or *at* a place, as an idle distinction[d]. In the case of Holdfast on dem. of Cowper *v.* Marten[e], where the testator gave and bequeathed to A. his

[b] Barry *v.* Edgeworth, 2 P. Wms. 522.
[c] Tuffnell *v.* Page, 2 Atk. 37.
[d] Goodwyn *v.* Goodwyn, 1 Vez. 228.
[e] 1 T. R. 411.

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imperfect and unsatisfactory; for where lands were devisable before the statute, by the customs of particular places, the same latitude and indulgence was allowed to testators; who are to be supposed, in the majority of cases, to make these final dispositions of their property, in a condition of mind in which it would be unreasonable to expect correct phraseology. Thus where lands were devisable under the custom of a place, express and precise words of limitation were not necessary by the common law; for a devise of lands to a man, et sanguini sui, passed an estate tail. 1 Roll. Abr. 834. pl. 17.; and so a devise of lands to a man, in fee-simple, or to him and his assigns for ever, has always passed a fee-simple. See Doe d. Lady Dacre *v.* Roper, 11 East, 518.

estate *at* B. A. was adjudged to take the estate *at* B. in fee.

Lord Hardwicke, in the above-cited case of Goodwyn *v.* Goodwyn, remarked that though later cases had gone farther than that of the Countess of Bridgewater *v.* the Duke of Bolton, and had held that by a devise of "all my estate *in* or *at* such a place, not only the lands themselves, but all the interest passed," yet that there was no case where it had been so held, where there was a farther description, as in the case then before him, viz. in the *occupation of particular tenants*. The word, too, being *estates*, and not estate, made such a difference in the case as to induce him to suspend his judgment.

Both these difficulties appear now to be removed. In the case of Fletcher *v.* Smiton[f], it was clearly decided that the word *estates* in a will carries the fee, unless coupled with other words that shew a different intention. And in a recent case[g] a devise of "all my estate, lands, &c. known and called by the name of the coal-yard, in the parish of St. Giles's, London," was held to carry the fee-simple in the premises devised. The law must, therefore, be considered as settled, that no words describing the situation of, or otherwise particularizing, the land devised, shall restrain the word *estate* from carrying the fee-simple. In the last-cited case the court adopted Lord Hardwicke's remark in Goodwyn *v.* Goodwyn, "That there was no reason why the words *in the occupation of* B. and D. should restrain the extent of the word *estate* more *than the locality, which*

[f] 2 T. R. 656. [g] Roe d. Child *v.* Wright, 7 East, 259.

would not." It is not surprising, therefore, that after these decisions the court of Common Pleas should have interposed in a very late case to save the counsel the trouble of arguing that a devise of 'all my estate *of Ashton*' passed the fee-simple[k].

The fee will not pass by force of the word *hereditaments* alone.

As to the word *hereditament*, the better opinion seems always to have been, that it does not per se denote the quantum of interest conveyed. Thus in the case of Hopewell *v.* Ackland[l], upon its being contended that the word *hereditament* imported an inheritance, Lord Trevor stated decisively that this word *hereditament* can not be taken to denote the measure or quantity of estate, but that it has a larger meaning than *lands* and *tenements*, as it may extend to annuities, advowsons in gross, &c. And in the subsequent case of Canning *v.* Canning[k], it was said by the Master of the Rolls, that the law was settled in the case of Hopewell *v.* Ackland, that a fee will not pass by the word *hereditaments*. Again Lord Kenyon in the case of Doe d. Palmer and others *v.* Richards[l], admitted that the words "All the rest, residue, and remainder of my messuages, lands, tenements, and *hereditaments*," were not sufficient in law to carry a fee: and the same was held for law in the subsequent case of Denn d. Moor *v.* Miller[m]. The law on this point may therefore be regarded as settled contrary to the single opinion of Powell J. in Lydcott *v.* Wil-

[k] Sir Arthur Chichester *v.* George Chichester Oxendon, 4 Taunt. 176. The Chief Justice observed, that he did not think it would have helped the plaintiff much if the testator had said 'All my Ashton estate.' And in Bailis *v.* Gale, 2 Vez. 48. a devise of "all the estate I bought of M." passed the fee.

[l] 1 Salk. 238. [k] Mosel. 241. [l] 3 T. R. 358. [m] 5 T. R. 558.

lows[n], who said that *hereditament* was equivalent to the word *inheritance*; and that it could not be doubted that if a testator, seised of lands in fee-simple, devise the same by the words 'my inheritance,' the fee would pass.

The fee passes by the word *inheritance.*

That by the word *inheritance* the fee passes in a will, is sufficiently settled upon the authority of Lord Hobart[o] and Lord Holt[p]. And in the case of Trent *v.* Hanning[q], where the testator had appointed certain persons 'trustees of inheritance,' for the execution of his will; though Lawrence J. thought these words too vague and indefinite to pass the fee, the other three Judges considered that the testator plainly meant to make trustees of his estates of inheritance in the same manner as if he had used the words 'trustees of my inheritance,' or 'trustees to inherit my estates,' and they therefore certified their opinion that the trustees took the fee-simple.

Of the import of the word *property.*

Lord Mansfield has said[r], that the word *effects* is equivalent to *property* or *worldly substance*; but two recent cases determined in the court of King's Bench, have established a distinction between them of great importance. According to the late case of Doe, lessee of Wall *v.* Langlands[s], the word *property*, unaffected by the context of the instrument, seems to have been considered as comprehending all that the testator is worth, and as passing as well his real as personal estate; in which case there were no

[n] 3 Mod. 229.
[o] Widlake *v.* Harding, Hob. 2.
[p] Lord Raym. 854.
[q] 7 East, 97. [r] Hogan *v.* Jackson, Cowp. 299.
[s] 14 East, 370.

introductory words expressing an intention of disposing of every thing the testator had, and the word *property* was immediately followed by words expressive only of personal estate, viz. 'goods and chattels.' As to the question, which the Chief Justice said, was the material one in the case—whether the words immediately following the word 'property,' were descriptive of the *kind* of property the testator intended to give, his Lordship disapproved of construing them, as explanatory of what was meant by *property*, and maintained that it was more obvious and natural to read the words cumulatively, i. e. as 'my property *and* goods and chattels,' than as 'my property, *namely* my goods and chattels.'

It is very difficult to find any solid principle of distinction between the case of Doe *v.* Langlands, above cited, and that of Roe d. Helling *v.* Yeud[1], which a year or two before was decided in the Court of Common Pleas. There the testator, after directing his debts and funeral expences to be paid by his executors, and making several bequests of annuities and money, devised to his five grandchildren, whom he appointed executors, as follows: "To whom I give all the remainder of my *property* whatsoever, and wheresoever, to be divided equally, share and share alike, after their paying and discharging the before-mentioned annuities, legacies, and demands, or any I may hereafter make by codicil to this my will; all my goods, stock, bills, bonds, book-debts, and securities in the Witham drainage in Lincolnshire, and funded property." There being no pro-

[1] 2 N. R. 214.

vision throughout the will that appeared to have any relation to real estate, and nothing being given to any person his heirs and assigns, and the intention of the testator seeming to the Court to be at most doubtful, it was determined upon the general rule that an heir ought not to be excluded unless the intention to give the real estate away from him appears plainly by the will itself, that the title of the heir should prevail.

The reason of the doubts felt by the Court as to the testator's intention, or rather of the inclination of their minds to think that the testator meant only to dispose by will of his personalty, was the particularity of the enumeration of personal things at the end of the clause: but that lawyer must be acute indeed, who can find a principle for deciding how many particulars enumerated after the word 'property,' expressive of personal estate only, shall restrict the sense of that sweeping term to a disposition of personal things alone.

Of the import of the word *effects*.

The case of Hogan d. Wallis and others *v.* Jackson[n], which had been nine years depending in the Courts in Ireland, turned upon the single question whether the residuary clause expressed in these words, "I also give and bequeath unto my dearly beloved mother, Mary Jackson, all the remainder and residue of all the *effects*, both *real* and personal, which I shall die possessed of" were sufficient to pass the real estate. It was contended at the bar that the word *real* might be satisfied by confining its sense to

[n] Cowp. 290.

real chattels (4); and though Lord Mansfield and the Court decided that the phrase *real effects* clearly carried the real estate, yet their decision seemed rather to found itself upon the capacity and extent of the word itself in legal phraseology (5) than upon the principle which is now taken as the hinge of all these cases, i. e. the intention of the testator, without any technical regard to the words used by him.

In Doe d. Chilcott *v.* White [x], Lord Kenyon can hardly be said to have carried the doctrine farther by holding, that where the testator having before devised real and personal property to his wife for her life, empowered her to give what she thought proper of her *said effects* to her sisters for their lives, the disposing power extended to the *realty*.

[x] 1 East, 33.

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(4) The force of the word *real*, when added to a general term, such as property or effects, can at this time hardly be doubted. But where the devise was of all his goods and *chattels*, real and personal, moveable and immoveable, Lord Hardwicke, upon very plain grounds of distinction, was of opinion, that the lands would not pass by the law of England, though they might have so done by the civil law. Grayson *v.* Atkinson, 2 Wils. 333. See Markam *v.* Twysden, 1 Eq. C. Abr. 211. and see Ridout *v* Pain, 492. Chattels real are not called so because they are real estate, but because they are extractions out of the real estate, per Holt, C. J.

(5) As the Courts had already got so far as to hold that the word *legacy* might signify a devise of land, when used in a will in that sense, (by Lord Macclesfield in Beckley *v.* Newland, 2 P. Wms. 182. and by Lord Mansfield, in Brady *v.* Cubit, Dougl. 40.) one might have expected that in the case above cited, Lord Mansfield would have rested the question as to the extent of the word *effects*, upon the broad ground of intention.

In the case of Doe on the demises of Andrew and others against Lainchbury and others[r], both the words *property* and *effects* occurred in the residuary devise, blended with an enumeration of personal things, but they were both considered as embracing the real property, the testator having used them in other parts of his will to describe real estate. By the residuary clause he devised all his "*money, stock, property, and effects,* of what kind or nature soever to A. and B.; to be divided equally between them, share and share alike," but he began his will by stating "as to my money and effects I dispose thereof as follows," and then proceeded to dispose of parts of his *real* estate. And again having *lands* lying together with the *lands* of another person, he directed the latter to be purchased, if offered for sale, to be added to his other adjoining *property*: thus shewing by his own use of the words that he considered them as being applicable as well to real as to personal estate.

One clear doctrine results from all these cases:— that although the word 'estate,' taken independently of the context, by its own force, denotes not only real as well as personal estate, but the highest degree of real estate, and the word *property* carries of itself both real and personal property, while the word *effects* is generally and properly applicable to personal estate only; yet that all these words, and, indeed every form of expression whereby a testator declares his will in respect to the disposition of his property, submit to the rule which requires a will to be construed agreeably to the intention of the testator, where it can be collected from the whole

[r] 11 East, 290.

will, and is consistent with law and public policy.

Of the doctrine of construing words as *ejusdem generis* with the accompanying words.

No criterion is more frequently resorted to in the books for expanding or contracting the sense of the words, *estate, property,* and *effects,* than the company in which they appear. Thus, the word *estate* is frequently restrained to things ejusdem generis with those with which it is coupled and associated. As where a man, seised in fee of lands absolutely, and of other lands by mortgage not forfeited, devised first all his lands in fee to A., and all the rest of his goods, chattels, estates, mortgages, debts, &c., to C., it was holden that no freehold passed[z]; and of this decision Lord Holt strongly approved in the great case of the Countess of Bridgewater *v.* the Duke of Bolton, above-cited.

A long list of determinations to the same effect has been confirmed by a late case[a] decided by the present Lord Chancellor. There the testator, after directing that his debts should be paid out of his personal estate, gave certain legacies; and, having a real estate in land, and a real estate in a rent-charge, devised the latter to his wife for life, and after her death to trustees to sell; and, after giving some more legacies, directed that as and for the monies to be received from the sale and disposal of the said rent thereinbefore devised in trust to be sold on the death of his wife, as also the monies to arise from a sale of the remainder of his household goods and furniture, plate, linen, china, beds and bedding, and from all other his *estate* and effects, of what

[z] Wilkinson *v.* Maryland, Cro. Car. 447. 1 Rol. Abr. 834.

[a] Woollam *v.* Kenworthy, 9 Vez. Jun. 137.

nature or kind soever, or wheresoever, the same should in the first place be subject and liable to, and charged and chargeable with, the payment of the before-mentioned legacies; and the residue of such monies to arise as aforesaid, he directed to be divided and applied as therein mentioned.

Upon this will, Lord Eldon observed, that, though the words charging the personal estate with the legacies could mean nothing, the personal estate being by law chargeable with the legacies, yet that they were capable of being fairly enough interpreted as applicable to the money arising from the sale of the real estate. The question was, whether upon the whole it was not clear that the testator did not mean that any thing of a real nature should pass under the word *estate*? For that purpose every part of the will must be looked at, to determine, whether that word, in the context in which it occurs, and upon the general intention of the will, and all the phrases of it taken together, was to be understood ejusdem generis with the personal estate immediately before described, or as meant to take in the real estate. It was to be considered whether by the insertion of this word, where it occurred, the testator, who had anxiously provided for the application of a real estate, expressly devised upon the trust, could be taken to mean that this other real estate of which he was so seised, should by the effect of the word 'estate' standing as it did, be cloathed, in the hands of the heir, with a trust of the very same nature as the estate specifically devised to the trustees. That was not the probable intention upon the will, taken altogether; and upon the whole he thought, and so decreed, that the estate in question descended upon the heir at law, for his own benefit.

Where the testator explains his own meaning by the word *estate*, by shewing of what he understands it to consist, there can be no room for doubt. This was the plain reason of the decision in Timewell *v.* Perkins [b], by Mr. Justice Fortescue, at the Rolls. The clause was thus, "Item, all those my freehold lands and hop-grounds, with the messuages, &c. now in the tenure of L., and all other the rest, residue, and remainder of my estate, *consisting* in ready money, plate, jewellery, leases, judgments, mortgages, &c. or in any other thing whatsoever and wheresoever, I give to A. H. and her assigns for ever."

But where the word *real* is added to the word 'estate,' whatever words of limited expression or partial extent may precede, or surround, or follow, it would be difficult, indeed, to maintain, that any thing less than both land and inheritance are embraced by it. Thus in Ridout *v.* Pain [c], where a testator gave all the rest, residue and remainder of his goods and chattels, and personal estate, *together with his real estate*, Lord Hardwicke said there could be no question but that the words, "together with my real estate," would carry the land and inheritance, though accompanied with the other words, "goods and chattels, &c."

Whether the word 'estate,' 'property,' and others of that general class, precede or follow the enumeration of particulars, is a circumstance which seems to afford no solid criterion for deciding whether they are,

[b] 2 Atk. 102. [c] 3 Atk. 486.

or are not, to be construed ejusdem generis with the particulars specified. Nor can ordinary faculties of discernment see any better ground of distinction in the *number* of the articles enumerated; or understand, why the articles which succeeded the word *property* in the above-cited case of Roe *v.* Yeud[d], in the Common Pleas, were held to restrict that word to personal things, while in the case of Doe *v.* Langlands[e], the word *property* was construed to extend to real estate, notwithstanding it was followed by words of like limited import. Probably, however, the last-mentioned case, which has treated the succeeding words as accumulative rather than explanatory, will be adhered to in future as the safer and more masculine decision.

Where the word *estate* comes after several words properly descriptive of personalty only, Lord Hardwicke has furnished a test more intelligible and applicable than many others which have been relied on. He says that where the preceding words fully comprehend all the personalty, so that there is nothing to satisfy the word 'estate,' unless it be held to apply to the real property, there, notwithstanding the company in which it is found, it will pass the real property of the testator. The case in which this distinction is found is that of Tilly *v.* Simpson[f], in Chancery, Easter, 1746. The testator, after declaring that he intended to dispose of all his worldly estate, and making several devises to different persons, gave and bequeathed "all the rest and residue

[d] 2 N. R. 214.
[e] 14 East. 370.
[f] 2 T. R. 659 Note to Fletcher *v.* Smiton.

of his money, goods, chattels, and estate whatsoever," to his nephew A. B., and the question was, whether a beneficial interest in a real estate not before disposed of, would pass to the nephew by this devise.

Lord Hardwicke was of opinion that it would. He said, that where the court had restrained the word *estate* to carry personal estate only, it had appeared that it was the intention of the testator that it should be so understood: as where it had stood coupled with particular descriptions of part of the personal estate, as a bequest of "all my mortgages, household goods, and estate," in which the preceding words were not a full description of the personal estate. But that it was otherwise where the preceding words were sufficient to pass the whole personal estate. If the testator had said, "All the rest and residue of my personal estate and estates whatsoever," a real estate would have passed. His Lordship then observed that the bequest in the case before him amounted to the same, for the word *chattels* was a full description of the personal estate; therefore, since the testator had used words comprehending all his personal estate, and then had used the word *estate*, that word would carry a real estate. That the word *whatsoever* was used, which was the same as if he had said, *of whatsoever kind it may be* (6); and if that had been the case it would most certainly have carried the real estate. The case

(6) In the late case of Hicks *v.* Dring, 2 M. and S. Trin. Term, 1814, the words after *effects* were *of what nature or kind soever;*

of Tirrell *v.* Page [5] was, his Lordship said, very material to the question, and he thought the cases could not be distinguished. There the gift was of "all the rest and residue of my money, goods, and chattels, and all other estates whatsoever, I give to J. L." The only difference was in the word *other*, which he did not think could distinguish it. If it had been 'all the rest and residue of my household goods and mortgages, and all other estate,' he did not think that those words would have carried the real estate.

If the reasoning of Lord Hardwicke be thought a little refined, and seems, as far as it proceeds upon the ground of executing the intention, to found the inference of intention upon a distinction of words rather too technical to decide the meaning of unlearned testators, it nevertheless affords a principle of some certainty, and which, if adhered to, may at least conduce to judicial consistency.

The word *effects*, we have already seen, by its general import, carries per se nothing beyond the personalty, although like all other words of description in a will, its sense may be enlarged so as to embrace real estate by force of the context. But though the words *wheresoever and whatsoever*, or, *of what nature or*

[5] 1 Chan. Ca. 262.

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but these words were not considered as enlarging the sense of the term. So in the case, already cited, of Woolham *v.* Kenworthy, 9 Vez. Jun. 137. the word *estate* was preceded by the word *other*, and followed by the words *of what nature or kind soever*, and yet it was confined to things ejusdem generis.

kind soever, follow the word *effects*, they are not sufficient without other aid from the context to bring real estate within the descriptive force of the term. Thus, where a testatrix, seised in fee of real estate, devised "all the rest residue and remainder of her effects wheresoever and whatsoever, and of what nature, kind, or quality soever," (except her wearing apparel and plate), to certain nephews and nieces, to be equally divided between them by her executors, it was held that the residuary clause did not carry the real estate [h].

The words "of what nature or kind soever" do not enlarge the sense of the word effects.

There were several circumstances indeed in the will last-mentioned, to oppose the extension of the word *effects* to real estate, as, the exception of wearing apparel, and the placing the subjects of the devise under the management of the executors. But in a case just determined in the Court of King's Bench, and not yet reported, the rule seems to be established that a simple disposition by a testator of *all and singular his effects of what nature and kind soever*, will only pass the personal estate [i].

Nor will this word, although followed by the words *of what nature or kind soever*, always embrace the whole *personal* property of the testator; it is often confined to such particulars only as are ejusdem generis with certain matters and things before enumerated. Thus, where a testator bequeathed to his wife an annuity of 200*l.* per annum, being part of the monies he then had in bank security, entirely for her own use and disposal, *together*

[h] Camfield *v.* Gilbert, 3 East, 516.

[i] Hicks *v.* Dring, 2 M. and S. T. R. Trin. Term, 1814.

with all his household furniture and effects, of what nature or kind soever, the word was confined to articles ejusdem generis, that is, to household furniture [k].

It is very material, however, to observe that in the case last-mentioned, part of the testator's personal property was devised to the wife in the foregoing part of the will;—a circumstance tending strongly to shew that the testator meant the word *effects* to receive a limited interpretation. And this circumstance was sufficient to weigh against the consideration of the intestacy as to some of the property of the deceased which was the consequence of the construction adopted.

In the case of Camfield *v.* Gilbert, a little above cited, it appeared that the exception of wearing apparel and plate, served in some measure to mark and circumscribe the meaning which the testator meant to give to the word *effects;* for by the exception, the class out of which the exception was made was implicitly characterized. And upon the same principle of construction the sense of the word *effects* was in another case *enlarged* by force of the exception. Thus where the words in a codicil were "plate, linen, household goods, and *other effects,*" (money excepted), Lord Eldon observed, that though the doctrine appeared to be settled in the Court of Chancery, that the words *other effects* in general meant effects *ejusdem generis,* yet as *money* could not be represented as ejusdem generis with plate, linen, and household goods, the express exception of *money* out of the *other effects,* shewed the testatrix's

[k] Rawlings *v.* Jennings, 13 Ves. Jun. 39.

understanding that it would have passed by those words, and that express words were required to exclude it. She thought, that the words of the bequest would carry things not ejusdem generis. The disposition must, therefore, be taken to comprehend all that she has not excluded, which was *money* only. His Lordship accordingly decided that stock in the funds which does not pass under the word *money*, was included in, and passed under, the words of the bequest[1].

SECTION IV.

When the whole Estate passes.

The word 'heirs' necessary to carry the inheritance in a grant.

BY the law of England, in the conveyance of real estates, words of limitation are required to the donation or grant, for the creation of an estate of inheritance. Thus Lord Holt in the Countess of Bridgewater's case[2], in speaking of the construction of the word *estate*, said, that "most certainly in grants it would not pass a fee, because the law appoints that, let the intent of the parties be ever so fully expressed and manifested in grants, without the word *heirs* a fee shall not pass. (1) If a feoffment," continued that

[1] Hotham *v.* Sutton, 15 Vez. Jun. 319. [2] 6 Mod. 106.

(1) The Reader will find in Co. Litt. 9. b. many instances in which a fee will pass by deed or grant without the word *heirs*, but they are all exceptions which prove the rule. Thus, if a father enfeoff the son to have and to hold to him and his heirs, and the son enfeoff the father as fully as the father enfeoffed him, by this the father hath a fee-simple. So by the ancient law gifts in frank marriage, or for the consideration of marriage, carried the inheritance

In what instances a fee may pass in a grant without the word *heirs*.

great judge, "be made to I. S. *to have to him in fee-simple,* which words can have no other sense than to pass an inheritance, an estate only for life shall pass, and yet '*fee-simple*' in pleading, is that which describes the inheritance, as *seisitus in dominico suo ut de feodo.* It stands also upon the authority of Littleton [b] that "if a man would purchase lands or tenements in fee-simple it behoveth him to have these words in his purchase, 'to have and to hold to him and his heirs;' for these words 'his heirs' make the estate of inheritance. For if a man purchase by these 'to have and to hold to him for ever;' or by these words 'to have and to hold to him and his assigns for ever;' in these two cases he has but an estate for term of life, for that they lack these words, 'his heirs' which words only make an estate of inheritance in grants."

[b] Sect. 1.

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without the word *heirs.* Corporations aggregate, which in judgment of law never die, take the fee without the word *successors* in the grant to them. And for the same reason, because the king never dies in judgment of law, a grant to him by deed enrolled passes the fee to him without the words *heirs* or *successors.* If one coparcener, or joint-tenant releases to the other, or, if there be three, and one releases to one of the others, generally, and without the word *heirs,* the fee passes. A fine sur cognisance de droit come ceo, &c. by which it is implied, that there was a precedent gift in fee, will carry the fee without words of limitation. And so, by a common recovery the recoveror recovers the fee-simple without the word *heirs.* By those releases also which work by extinguishment the whole estate may pass without words of inheritance, as where the Lord releases to the tenant of the land all his right, &c. the seigniory, rent, &c. are extinguished for ever, without the word *heirs.* And it is said that if land be conveyed by bargain and sale enrolled for a consideration in money, which reaches to the whole estate, the fee-simple passes, for the conveyance works by contract and by the use created. See Viner. Abr. title estate, (K 2) and (L).

Upon the same authority it stands[c] that before the statutes 32 and 34 H. 8. where, by the custom of ancient boroughs and cities, lands and tenements were devisable by testament, the great rule prevailed, that the will should be performed according to the intent of the devisor; and therefore, if, before the statute taking away the necessity of attornment, (2) a man seised of a rent-service or rent-charge, devised such rent or service to another, the devisee was competent to distrain the tenant for the rent or service in arrear, without any previous attornment from such tenant: for if the effect of the gift were to depend upon the attornment of the tenant, perhaps the tenant might never attorn, and then the will of the devisor would never be performed. "So," says the same venerable writer, "if a man deviseth such tenements to another by his testament habendum sibi imperpetuum, and the devisee enter, he hath a fee-simple causa qua supra." It was the maxim of the *common law*, and not, as has been sometimes said[d], a principle arising out of the wording of the statute of wills, that ultima voluntas testatoris est perimplenda secundum veram intentionem suam.

But it is equally a fundamental rule in respect to the operation of wills of land that the intention must be disclosed either by expression or clear implication, to carry the inheritance; and this arises from the peculiar character of a will according to the law of Eng-

[c] Lib. 3. c. 10. Sect. 585, 586. of Attornment. [d] See ante.

(2) The necessity of attornment was taken away by statute 4 and 5 Ann. c. 16. and the efficacy by statute 11 Geo. 2. c. 19.

land, which considers it as an appointment to uses in the nature of a conveyance, and capable, as such, of operating only upon the real property which the testator has at the time. In analogy, therefore, to the case of a conveyance, the devisor must mark his intention by expression, or some positive ground of inference, in the instrument itself, that is, either by a form of limitation, or by words amounting to a virtual declaration of his will.

What shall amount to such virtual declaration of a testator's will is not established on any system of rules; for no rule can anticipate the infinite variety of supposable cases. The rule which may, under circumstances, supersede every other is this, that the construction of every will is to be made with reference to the whole, and to be grounded upon a consideration of the reciprocal bearings of all the component parts. A doctrine, which necessarily, to a certain degree, renders every case upon wills an individual case, and not to be used as a precedent but with great caution.

Where decisions, however, have turned upon the signification of certain words, or phrases, as expressing by circumlocution the settled operation of certain technical limitations, they may be said to have reduced even this luxuriant branch of the law to the consistency and certainty of rule and system. Such constructions, too, as rest upon those primary rules which are borrowed from the consideration of the great end and purpose of all testamentary acts, as, *that words are to be construed so as to effectuate dispositions and to avoid intestacy;* and *that every testator is to be regarded as intending a benefit rather*

than a burthen by his gifts, afford a standard of interpretation in a vast variety of cases.

In the commentary upon the first section of his author, Lord Coke has stated by way of example several cases to shew where estates of inheritance may pass in wills, without words of formal and regular limitation. As if a man devise lands to another in perpetuity, or to give, or to sell, or in fee-simple, or to him and his assigns for ever. (3) All which may be considered as examples of the circumlocutions above alluded to; and the case he puts of the devise of 20 acres to another, and that he shall pay to his executors for the same ten pounds, whereby the devisee takes the fee, upon the ground that the devise might otherwise be a detriment rather than a benefit, by his dying before any profit could be derived from it, is an example of the rule that every testator is to be considered as intending a benefit to the object of the gift.

What words in a will are equivalent to a limitation to the heirs.

A devise to a man and his successors[e] will give the fee, and so will a devise to a man and to his blood, for the blood runs through the collateral line, as well as

[e] Roll. Rep. 399.

(3) The dictum in Perkins, sect. 557. that if lands be devised to J. S., to hold to him and his assigns, he will take by these words a fee is clearly not law, and is contrary to Lord Coke, who says in the passage to which we have been referring, that if a devise be to a man and his assigns, without saying *for ever*, the devisee hath but an estate for life, Co. Litt. 9. b. And if the devise be to several, equally to be divided between them and their assigns, it carries only an estate in common for life.

the lineal[f], but a devise to one et semini suo, or[g], it seems, to his posterity, would create an estate tail[h]. Nor is any particular form of expression necessary to the effect of the devise; for if a testator *releases*, by his will, to I. S. and his heirs, I. S. will take the fee[i].

Whether the devise imports all that the testator has, or confers the entire dominion over the thing given, it is the same in effect.

And whether the phrase used by the testator imports the whole interest residing in himself, or the entire dominion and enjoyment of the thing by the devisee, the same effect is produced. Thus, it is the same thing whether a testator gives 'all his estate,' 'all he is worth[k],' 'whatever he has in the world[l],' '*all his* inheritance[m],' 'all his right, title and interest[n],' 'all his part, share and interest[o].' Or, devises his lands to I. S. "to give sell or do therewith at his will and pleasure[p]," or 'for his own use and to give away at his death to whom he pleases[q],' or 'to dispose thereof at his free will and pleasure;' (4) in all of which

[f] Co. Litt. 9. b. [g] Ibid.

[h] Atty. Gen. v. Bamfield 2 Freem. 268. Vin. tit. Dev. (L a.)

[i] And. 33. and see 1 Lord Raym. 187.

[k] Huxtep v. Brooman, 1 Bro. C. R. 437. But *all*, of itself, does not imply all the testator's interest, see Bowman v. Milbranck, 1 Eq. Ca. Abr. 208.

[l] Hopewell v. Ackland, Com. 164.

[m] Widlake v. Harding, Hob. 2.

[n] Cole v. Rawlinson, 3 Bro. P. C. 7.

[o] Andrew v. Southhouse, 5 T. R. 292.

[p] Bro. Tit. Dev. pl. 39. Co. Litt. 9. b.

[q] Timewell v. Perkins, 2 Atk. 102.

Difference between the phrase 'to be freely enjoyed' and 'to be freely disposed of.'

(4) Goodtitle v. Otway, 2 Wils. 6. and see Maskelyne v. Maskelyne, Ambl. 75. But there is a clear distinction between the expression in the text which implies a perfect dominion of the estate, and the phrase, 'to be freely possessed and enjoyed' which in the case of Goodright d. Drewry v. Barron, 11 East, 220. was

cases the fee-simple would undoubtedly pass to the devisee. (5)

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held to carry to the devisee nothing beyond an estate for life. The import of these words might be satisfied by being understood to mean 'freely during life,' or 'free from all charges,' or 'free from impeachment of waste.' The testator might mean more, but the court ought not to give to them a more extended meaning than was necessary against the heir. In the above case it was observed by Mr. J. Le Blanc that if the lands had been given to the devisee 'freely to be disposed of,' the intent would have been shewn to pass the fee. The case was distinguishable from Loveacres *v.* Blight, Cowp. 352. where similar words were held to pass the fee; for in that case, there being a charge on the devisees which might last longer than their lives, there was a ground for understanding the words of the devise in the largest sense they would bear, otherwise the benefit intended by the testator might be unavailable.

Though it may be looked upon as settled that the devise of an estate, generally, to be at the disposal of the devisee, gives the fee-simple, yet where the estate is expressly limited to the devisee *for life*, with a power of disposition, the devisee takes no more than a life-estate with a power annexed. If the party dies without having executed the power, the interest ceases with the life, and no one can take by transmission through the devisee, 3 Leon 71. 4 Leon 41. Tomlinson *v.* Dighton, 1 P. Wms. 149. Reid *v.* Shergold, 370. and see Bradley *v.* Westcott, 13 Vez. Jun. 445. And such a power must be exercised in conformity with the intention expressed in the terms of its creation. Thus in Doe d. Thorley *v.* Thorley, 10 East 438. where a man devised all his freehold estate to his wife *during her natural life*, and also *at her disposal afterwards to leave it to whom she pleased*, the court adjudged that the word *leave* confined the authority of the devisee for life to a disposition by her will only. In Tomlinson *v.* Dighton the power of disposal annexed to the life estate was unrestrained.

(5) Where the property is personal, the words 'all I am possessed of' and such like expressions, where they stand uncontrouled by the context will have the effect of passing all the personal estate which the testator has at his death, and not only what he possesses at the date of the will. 5 Vez. Jun. 816.

A direction to *purchase* land for another implies the purchase of the fee-simple.

In the construction of wills, words must receive a natural interpretation, and be understood in their received sense. Thus in the case of Green *v.* Armstead[r], where A. devised his house and land in C., to his son B. for his life, and then to remain to D. the son of B., except B. *purchased* another house with so much land, and of the same value, as the said house and land in C. for the said D. his son, and then B. might sell the house and lands in C. as his own, it was held that D. took a fee in the house, and lands in C., as B. did not make any purchase of any other lands; for the word *purchase* imported, in common speech, an absolute purchase in fee. And therefore, if a man directs his executors to *purchase* land for his son, no doubt says the case, it will import a fee-simple.

Appointment of a person to be *heir* is a gift of the fee-simple.

And though, as has been above remarked, a will, according to the law of England, is a species of conveyance, differing in that respect from the Roman will, which is rather the appointment of an heir; and though, in propriety of speech, no one can be truly the heir by our law, but he whom the law makes so; yet, says the same great author from whom the point last-mentioned was taken, "There is an heir by appellation and vulgar acceptance, which imitates the state of a true heir. And, therefore, if by my will I appoint that I. S. shall be the heir of my land, he shall have it in fee, for such estate as the ancestor hath, such estate he is to inherit."' So in a subsequent case where the words of the will were, "I make my cousin, G. B., my sole heir and executor;" it was held not only that the lands passed without being mentioned, but a fee-simple in the lands[t].

[r] Hob. 65.

[s] Spark *v.* Purnell, Hob. 75.; and see the record in Wynche's Entrees, 407.

[t] Style 307, 383.

We have seen above, that one of the cases put by Lord Coke, in commenting on the first section of Littleton, wherein an estate in fee might be passed by a will without the word *heirs*, was that of a devise to B. paying a sum of money to his executors. Accordingly it has long been settled, that where land is given by a will, with a direction that the devisee shall pay a gross sum out of it, the devisee thereby takes the fee-simple; and this, although the sum so directed to be paid be below the value of the land for one year; for, as has been before observed, one of the primary rules in the construction of wills, is this—that every devise shall be intended to carry with it a benefit; and if the devisee in the case supposed, took only an estate for life, he might die before he could be compensated out of the land, and so the devise, instead of a benefit, might bring a loss to him.

If land is devised generally, and the devisee of the land is charged, in respect thereof, with the payment of a sum of money, he takes fee.

Thus in Collier's case[u], where a testator gave lands to his brother, paying to one person twenty shillings, and to others small sums, amounting to forty-five shillings all together, the land being of the value of 3*l.* per annum, it was adjudged that the brother took an estate in fee[w]. So, if I devise my land to I. S., in consideration that he will release 100*l.*, which I owe him, to my executors, the devisee, upon releasing the debt, has the fee-simple for the same reason[x].

For the same reason, also, if I devise my lands charged with the payment of my debts and legacies, the fee will pass to the devisee. Thus, where A. seised of lands in fee, made his will, and gave his cousin B. 20*l.*, to be paid out of his lands within one year; and after other legacies, he gave all his lands to R. gene-

So if such devisee is charged with the payment of debts and legacies.

[u] 6 Rep. 16. [w] 3 Rep. 21. a. 1 Roll. Abr. 834. [x] Bendl. 15.

rally; it was adjudged that R. took an estate in fee-simple[y]. And where a testator devised by the following words, "All the rest, residue, and remainder of my messuages, lands, tenements, hereditaments, goods, chattels, and personal estate whatsoever, my legacies and funeral expences being thereout paid, I give, devise, and bequeath unto my sister J. D.; and constitute and appoint her my executrix and residuary legatee of this my will," Lord Kenyon said, that the first words alone were not sufficient in law to carry the fee; but that he relied on the words immediately following,—"My legacies and funeral expences being thereout paid," as sufficient for that purpose; for the fund which was to answer these purposes ought to be as ample as possible. These charges extended to, and were to be taken out of, the property which was before given to the residuary legatee; and if that devise did not comprise the whole of the devisor's estate, the interest as well as the land, the legacies and funeral expences might not be paid[z].

In a subsequent case decided by the same learned Chief Justice, the doctrine was more distinctly expounded. The devise was in the following words: "I give and bequeath my freehold house, with the appurtenances, &c. and all the furniture thereto belonging, to E. Gibson, whom I make executrix of this my last will, she paying all my just debts, and funeral expences and legacies before-mentioned, in twelve months after my death. I also leave to the said E. Gibson, all the rest and residue of my personal estate." The Judge before whom the cause was tried, being of opinion that the devisee took a fee by reason

[y] Freak *v.* Lee, 2 Show, 38.

[z] Doe d. Palmer and others *v.* Richards, 3 T. R. 356.

of the words, "The paying all my debts, &c." nonsuited the plaintiff. And on a motion to set aside the nonsuit, Lord Kenyon thought the direction perfectly right; observing, that in cases of this kind, the question has always been, whether the charge is to be paid only out of the rents and profits of the estate, or whether it is to be paid by the devisee at all events; in the former case the devisee only takes an estate for life, but in the latter he takes the fee; otherwise he might be a loser by the devise. The devisee, in the case under consideration, was bound to pay the debts and legacies at all events, and the charge was thrown on her in respect of the real estate[a].

So also where the devisee is charged with a perpetual annual payment.

Where lands are devised with a direction that the devisee shall make a *perpetual* yearly payment thereout, if the devisee were not to take an estate commensurate with the charge, he could not fulfil the testator's intention. Accordingly where one devised lands to C. his younger son, and directed that C. should pay annually to the elder son B. *and his heirs,* three pounds; it was resolved that this was an estate in fee[b]. So in another case, where lands were devised to J. and S., who were to pay yearly to the Merchant Taylors' Company in London, six pounds ten shillings, it was resolved that the devisees took a fee-simple, by reason of the annual payment, without any regard to the greatness or smallness of the sum; for as the charge

[a] Doe d. Willey v. Holmes, 8 T. R. 1. See also Goodtitle d. Paddy v. Maddern, 4 East, 496. The distinction has turned in all the cases on this—whether the debts, &c. were merely a charge on the estate devised, or a charge on the devisee himself, in respect of such estate in his hands, per Lord Ellenborough.

[b] Shallard v. Baker, Cro. El. 744.

continued for ever, the estate must continue so too, as without the estate, the charge could not continue[c].

Or with the payment of an annuity for the life of another.

And although the annual payment to which the land is subjected, is to continue only for the life of another, the devisee of the land must have the fee; for otherwise the annuity might fail before the death of the person for whom it was intended. Thus, where a testator, after giving several legacies, gave to Mary Ramsey the sum of twenty shillings a year, for and during her natural life, to be paid by his executors; and gave his two yard-lands, with his house and homestead, and all the residue and remainder of his goods, chattels, and personal estate, to Thomas Allen, he paying his debts, legacies, and funeral expences, and made Allen his executor, the devise to Thomas Allen was adjudged to be of an estate in fee in the lands, because the annuity was given to Mary Ramsey, for her life, to be paid by the executor, which must have an estate to support it; and, as the devises to Allen followed each other immediately, they must be construed as one clause, so that the payment of debts and legacies was charged on the real as well as the personal estate[d].

And in another case, where a testator gave his two copyhold tenements to Sarah Boreham, she paying thereout forty shillings a year to her sister Elizabeth Boreham, though the gift of the annuity to E. B. was not expressed to be for her life, yet, there being reasons enough afforded by the other parts of the will for construing it to be so intended, it was held that the

[c] Webb v. Hearing, Cro. Jac. 415., and Smith v. Tendall, 11 Mod. 90. 2 Salk. 685.

[d] Goodright v. Allen, 2 Blackst. 1041.

annuity to Elizabeth, made it a devise in fee to Sarah[d].

By a devise to trustees for purposes which require the fee, the fee passes without words of limitation.

Upon a principle similar to that which is the true solution of the class of cases just above considered, it is held, that if lands are devised to trustees, for purposes which require them to have the fee-simple in them to perform, the estate in fee will pass without any words of limitation; for, as Lord Hardwicke has observed, it has often been determined that, in a devise to trustees, it was not necessary that the word *heirs* should be inserted, to carry the fee at law; for if the purposes of the trust could not be satisfied without having a fee, courts of law would so construe it[e].

Of chattels real a general devise, without any words of limitation or declaring any estate, passes the whole interest of the devisor[f]. If such property be devised to another for his life, and no intention appear to dispose of the whole interest, a possibility of reverter is left in the executors of the testator, to take effect upon the death of the devisee within the term. But a devise in a form of limitation which would pass the inheritance in tail, if it were a freehold estate, will carry the absolute interest in a term or chattel interest[h]. For the remainder of a term cannot be made to depend upon a possibility so remote as the failure of issue,

[d] Baddeley *v.* Leppingwell, 2 Burr. 1531. Wilmot, 223. and Goodright d. Baker *v.* Stocker, 5 T. R. 13.; same point determined accordingly, and see Andrew *v.* Southouse, 5 T. R. 292.

[e] Gibson *v.* Montfort, 1 Vez. 485. Shaw *v.* Wright, 1 Eq. C. Abr. 176., and see Oates *v.* Cooke, 3 Burr. 1684. Chapman *v.* Blissett, Ca. temp. Talbot, 145.

[f] Fenton *v.* Foster d. Dyer, 307. a. Roll. Abr. 831.

[h] Seale *v.* Seale, 1 P. Wms. 290. Butterfield *v.* Butterfield, 1 Ves. 133. 154.

and therefore the interest must stop with the first taker.

As to the force and operation of the preamble, or introductory words in a will.

With respect to the force and operation of the preamble and introductory words in a will, after some fluctuation it is at length clearly settled, that although they make profession of disposing of all the testator's property, in the fullest manner, they will not operate to carry the words of the devising clause beyond their legal sense and signification. If the testator commences his will with saying, "as touching the disposition of all my temporal estate," (6) this will not of itself cause a devise of a house to A. without any words of limitation, to be construed an estate in fee-simple [i]. But if the words used in the devising part of the will, though not proper and technical, are yet sufficient to carry the interest contended for; as, where a testator, after saying "as to all my worldly substance," by the residuary clause of his will devised to his mother *all the remainder and residue of all his estate and effects both real and personal*, the mother was held to take the fee [k]. But in a subsequent case, where a testator devised thus, "as to all such

[i] Frogmorton and Wright *v.* Wright, 2 Blackst. 889.

[k] Hogan *v.* Jackson, Cowp. 290.

(6) In the case of Tanner *v.* Morse, Ca. temp. Talbot, 284. it was contended that these words *temporal estate* in the introductory clause, in a strict sense, related only to estates of a certain duration, and that were to continue for a time only; but the Chancellor treated this as a very fallacious construction, the word temporal being the same as worldly, and used in opposition to the word eternal. There could not be a better specimen of the vain disputations which sometimes find their way into courts of justice.

worldly estate as God has endued me with, I give and bequeath as follows :—I give and devise all that my freehold messuage and tenement lying in G. together with all houses, &c. and appurtenances whatsoever, belonging to the same, to M. R., G. R., and T. R., my sister's sons, equally," and then, amongst other pecuniary legacies, gave the sum of ten shillings to his heir at law; Lord Mansfield, after saying that he suspected extremely that the testator meant to give his nephews a fee in the premises, for he had no other landed property, and had given a disinheriting legacy to his heir at law, agreeably to the vulgar notion taken from the Roman law, that the heir is to be cut off with a shilling (7), yet declared it to be impossible to find words in the will before him sufficient to controul the rule of law. Whatever the testator might intend, the misfortune was that quod voluit non dixit. The testator had not said that he meant *to dispose of* all his worldly estate, and there were no words that would connect the devise of the lands in question with the introduction so as to pass the whole interest: therefore the devisees would only take a life estate[1]. In the subsequent case of Right *v.* Sidebotham [m], the same Chief Justice declared himself bound by the decision of the case last-mentioned, and accordingly, with the concurrence of the other Judges, decided in the same way.

[1] Denn d. Gaskin *v.* Gaskin, Cowp. 657.

[m] Dougl. 759.

(7) Vid. Vin. c. 2. tit. 18. de inofficioso testamento.

In Ibbetson *v.* Beckwith[a], where considerable stress was laid by Lord Talbot on the introductory words, we are to observe that the testator devised by the word *estate*, the force of which word we have already discussed, and the introductory clause contained words which Lord Mansfield treated in the case of Denn *v.* Gaskin as very material; for there the testator expressed his intention *to dispose of* his worldly estate. But in the case of Frogmorton *v.* Wright, already cited[b], where the writ begun with the words "as touching the *disposition of all* my temporal estate," no attention was paid to this distinction, nor has it been treated since with any regard.

And although the word *estate* may be used by a testator in the devising clause of his will, yet if there is ground for inferring from the whole of the contents that the real estate was not intended to be devised, the general introductory words, though embracing in the fullest manner the property, *both real* and personal, will not overrule the inferences deducible from the whole tenor of the instrument. As, when a testator begun his will thus, "as to all my estate and effects both real and personal," and then proceeded, by a residuary clause, to give all the rest of his estate and effects of what nature soever, to A. and B., their *executors and administrators*, in trust to add the *interest to the principal*, and so to accumulate the same, it being his will that the residue should not pass but at the time and manner as the principal sum of 4000*l.* (before given to A. and B.) was directed to be paid, it was held that a house, the only freehold of which the testator was seised, did not pass by the will; and

[a] Ca. Temp. Talb. 157. [b] 2 Blackst. 889.

Lord Kenyon observed that the testator set out in the beginning of his will as if he meant to dispose of all his property; but though these general words would have shewn his intention if there had been subsequent words in the will to carry that intention into execution as had been said by Lord Talbot in Ibbetson *v.* Beckwith, it had been held in a variety of cases that alone they are not sufficient to dispose of a fee; and by adverting to the residuary clause, there were no words to pass the estate in question. The testator only meant that that should extend to his personal estate. It was given to trustees, their *executors and administrators*,—technical terms applicable to *personalty*. But "I rely," said his Lordship, "on the following words of the clause, 'to add the interest to the principal so as to accumulate the same.' The interest and principal were to make one consolidated sum of the same nature, and are terms wholly inapplicable to real estate. Seeing, therefore, that there is nothing in the residuary clause to pass this estate, and that there is nothing in the will to make it necessary for the trustees to take it to perform any trust in them, the heir at law stands intrenched in his right as heir, and cannot be removed from it."

By the later cases, the importance of the introductory clause appears to have been less considered than formerly.

The importance of the introductory clause as manifesting an intention of complete and ultimate disposition, has been gradually declining in Courts both of law and of equity. In the case of Goodright d. Baker *v.* Stocker[p], Lord Kenyon laid a very slight stress upon it, observing that, though the general introductory words would have *some* effect in the construction of the subsequent devises, as had been said

[p] 5 T. R. 13.

by Lord Talbot in a case before him, they could not of themselves have carried the fee. In another case[q] Lord Ellenborough, in adverting to the effect of this clause, observes, that the construction might be considered as *in a degree* aided by the introductory words of the will respecting his worldly and temporal estate, &c. which, said his Lordship, "are allowed to have *some* weight in cases where the intention of the testator is doubtful, and where there are other words in the will to carry his intention into effect."

In the case of Goodright d. Drewry *v.* Barron[r], which has been already cited for another purpose, the imbecillity of this introductory clause was still more marked. There the testator after the introductory words "as touching my worldly estate, &c." devised a cottage, house, &c. to A. and his heirs, and also gave to B., whom he made his executrix, "all and singular his lands, messuages, and tenements by her freely to be possessed and enjoyed", it was held that the latter words, being ambiguous, did not pass the fee against the heir, and that the word estate in the introductory clause, could not be brought down into the latter distinct clause. With respect, said the Chief Justice, to the introductory words, it has been held in many cases that they are not sufficient of themselves to carry a fee; but *juncta juvant.* And Mr. J. Le Blanc observed that the introductory words were a circumstance *with others,* from whence the testator's interest might be collected.

Finally, in the case of Doe d. Wall *v.* Langlands[s],

[q] Doe d. Bates, *v.* Clayton, 8 East, 147.

[r] 14 East, 372. [s] 14 East, 372.

it was said by the present Chief Justice, that "very little inference of intention can be drawn from mere formal words of introduction, though we certainly find them in some cases called in aid to shew that a man did not mean to die intestate as to any part of his property; and the making a will at all may also be used as affording such inference."

Of the effect of the residuary clause.

The effect of the words usually employed in the residuary clause is deserving of some consideration. In Tanner *v.* Morse, (8) the testator devised in the following words "As to my temporal estate, I bequeath to my nephew T. (the testator's heir at law), 50*l.*" then, after several legacies, he concluded thus: "And all the *rest and residue* of my estate, goods and chattels whatsoever, I give and bequeath to my beloved wife M. C., whom I make my full and sole executrix." It was contended that as to the words "All the rest and residue of my estate," they must have *relation to something that went before*, and there was nothing disposed of in the will before that clause, but only some legacies charged upon the personal estate. Lord Talbot, however, decreed an estate in fee-simple to pass by the words of the will, considering the introductory clause followed by the devising words, as amounting to the same as if the testator had said, "I devise the rest and residue of all my temporal estate." And, indeed, it never has been doubted that if by necessary or fair construction the introductory words "As to all my worldly estate, substance, &c." are fairly to

(8) Ca. Temp. Talbot 284. Before Lord Chancellor King, and afterwards affirmed by Lord Talbot on a rehearing: reported in 3 P. Wms. 295. by the name of Tanner *v.* Wise.

be construed as connected with the devising words that follow, the fee-simple passes under them; for then it is really a *disposition by*, and not merely an *introduction to*, the will.

How far the residuary words are to be considered words of relation.

It is observable that in the last-mentioned case, as it is reported in Peere Williams, Lord Talbot appears to have adopted the argument of the counsel, that *rest* and *residue* were mere words of relation, having a necessary reference to some property of the testator before-mentioned in the will.

But Lord Holt expressed a different opinion in the case so much above referred to, of the Countess of Bridgewater *v.* the Duke of Bolton[t], wherein he said that it might be objected that the word *residue* was a word of relation, and therefore to be confined by its relation to something given before. But this he denied, and said "Suppose a man gives some of his personal estate away by will, and in the same will, gives the residue of his estate, real and personal, away, should not this pass the freehold as well as the rest of his personal estate? Surely there is no doubt of it." "And," said his Lordship, "Considering the last clause of the will, whereby he orders these *rents*, in case of deficiency, &c. to be sold, and the remainder thereof, after the debts and legacies paid, to go to the Earl: I say, considering this clause, with other scattered clauses in the will, the rents thereby will pass. Some doubts have been made whether the word '*remainder* of my rent' be sufficient to pass these rents: because a *remainder* is a residue of something; so that if there be nothing sold, there can be no *residue* or *remainder*. But this depends upon the construc-

[t] See 6 Mod. 108.

tion of the word '*remainder*;—whether there be a necessity to sell to make a remainder. But I do not think that the word *remainder*, here, is to be taken for a *remnant of a totum*, when part is extracted from it; for if the rents are not sold, then they remain unsold, and the word *remainder* shall be understood for the rents remaining unsold. This word *remainder* made some dispute which lasted for above an age. It was a great question whether there could be a remainder of a thing created de novo[u], and which never had been before. Since, a more reasonable construction has been made. If a man by deed grant a rent to A. and the heirs of his body, remainder to B. and his heirs, this is a good remainder[v]."

Lords Holt and Talbot reconciled as to this point.

There can not be a doubt, it is humbly apprehended, of the propriety of these observations of Lord Holt; which may be reconciled with those of Lord Talbot, above alluded to, by attending to the following distinction.

The words, *rest, residue,* and *remainder* are not to be considered as mere words of relation, when the question is, *what subjects* are included under them; for it seems clearly settled, not only that property of the testator not before mentioned by him will pass under the residuary devise, unless there is something in the will itself to limit and contract its compass to the extent of the descriptive words used, but property not distinctly in the contemplation of the testator at the time. Thus M. C. made her will, duly executed for passing freehold estates, and hereby gave devised and bequeathed all and every the

[u] Plowd. 35.

[v] 1 Sid. 285. Co. Litt. 241. a note, (4). 298. a note, (2).

[w] 1 Hen. Blackst. 223.

real estates, which she was any ways seised of, interested in, or entitled unto, late the estate of W. N., to certain persons, in manner therein mentioned, and she gave to other persons other messuages, &c. by particular local descriptions: she then gave several pecuniary and specific legacies, and afterwards devised and bequeathed all the *rest* and *residue* of her estate, of what nature and kind soever, unto C. for her life, with limitations over to other persons. The testatrix died soon after making her will, seised of eight acres of freehold, and four of copyhold lands of inheritance, in the parish of Chertsey, which were the lands in question, and not particularly devised by the will. She had duly surrendered the copyhold to the use of her will. In this case there was no difficulty in construing the lands, of which there was no mention made in the will, as passing by the words "All the rest of my estate, of what nature or kind soever."

So also in the case of Goodright d. Earl of Buckinghamshire and others, *v.* Marquis of Downshire[t], the Court recognized the principle laid down in many antecedent cases, particularly in Smith d. Davis *v.* Saunders[r], that a residuary clause will extend to every *latent* reversion which the testator might have in him, unless it be expressly excluded by devise to some other person.

But when the question is, not as to the *particular parts of the property*, but as to *the quantity of interest*, which passes to the devisee by the residuary clause, it may frequently be of importance to consider the words, 'rest,' 'residue' and 'remainder,' in their relation to the things mentioned in the preceding

[t] 2 Bos. et Pull. 600. [r] 2 Blackst. 736.

parts of the will. For if these words are considered alone, without any aid from the introductory words of the will, or the descriptive words used in designating the property, they are incapable, of themselves, of passing the absolute interest.

Thus in the case of Canning *v.* Canning[a], where the words were, "*all the rest, residue and remainder* of my messuages, land, or hereditaments whatsoever and wheresoever, unbequeathed after my just debts legacies and funeral expenses are paid, I give to my executors, in trust for my daughters, &c." it was adjudged that the executors took only a life estate; for the words "all the rest," &c. comprehended the particulars only, and not the estate. So where the words were "all the rest of my lands, tenements and hereditaments, either freehold or copyhold, whatsoever and wheresoever, after payment of my just debts, I give, devise and bequeath the same unto my wife, S. C., and I hereby nominate and appoint my said wife sole executrix of my will," it was adjudged that the wife only took an estate for life[b]. And in the case of Doe d. Palmer, *v.* Richards[b], where the devise was of "all the rest, residue and remainder of my lands, hereditaments, goods, chattels and personal estate," it was admitted by Lord Kenyon that these words alone were not sufficient in law to carry a fee.

But where a testator makes a partial disposition of his interest in a thing, whether it be a chattel or hereditament, and afterwards devises or bequeaths the "*rest, residue* and *remainder*," &c. then these words may properly be considered as having a specific relation to what has gone before; and standing in this

[a] Mosel. 240. [b] Denn *v.* Mellor, 5 T. R. 558.
[b] 3 T. R. 350.

light, they seem to have been always held to carry the whole of the testator's remaining interest. And thus Lord Holt and Lord Talbot may be reconciled by adverting to the difference between a specific relation,—as that which exists between an individual whole and its component parts, and that more general relation that exists between the several particulars which compose a numerical quantity. When *rest* or *residue* are used to signify this latter relation, the words import only the things devised, but when they denote the former species of relation they imply the quantity of interest remaining in the testator.

Thus in Grayson *v.* Atkinson[c], where a testator began his will thus—as to all my temporal estate wherewith it has pleased God to bless me, I give and devise the same as follows:—and then gave several legacies to A.; and directed him to sell all or any part of his real and personal estate for the payment of his debts and legacies, and concluded with giving, "all the *rest* and *residue* of his goods and chattels *real* and personal, moveable and immoveable, as houses, gardens, *tenements*, to A." without using the word *estate*, or any words of limitation, Lord Hardwicke, though he doubted at first, was afterwards clearly of opinion, that A. took a fee in the realty.

So in Hogan d. Wallis *v.* Jackson[d], where, after beginning with the usual introductory words, "As to all my worldly substance," the testator gave to his mother *his house and lands of G. for the term of her natural life, without the liberty of committing waste thereon*, and gave other lands to her in the same manner, and after several legacies and annuities, devised to his mother, *all* the *remainder* and *residue* of all his

[c] 1 Wils. 333. [d] Cowp. 290.

effects, both real and personal, which he should die possessed of, the mother, by the residuary clause, was adjudged to take the fee in the testator's fee-simple estates (9).

In both the last-mentioned cases, we find the usual general introductory words; but as it has long been settled that these words can only assist, and not enlarge, the succeeding devises, or enable them to pass more than the words themselves are equal to, it follows that these residuary words were considered as, of themselves, capable in law of carrying to the devisee the whole interest, when the context shews this to be the intention; and such intention appeared in these cases by the relation of the residuary words to a preceding partial disposition of the property.

Of the devise of a *remainder* or *reversion.*

In the case of Norton *v.* Ladd[e], upon a devise to A. for life, and after her decease the whole *remainder* of the lands to B., it was held that a remainder in fee-simple passed. And that case has never been doubted.

And upon a principle similar to that which has above been endeavoured to be explained, it seems, that when a testator has nothing but a *reversion* or *re-*

[e] 1 Lutw. 755.

(9) It was strongly contended that as the mother had a specific estate for her life, and that estate was made liable to impeachment for waste, such particular disposition to her was totally repugnant to, and inconsistent with, an intention to give her the absolute property in a subsequent part of the same will. But this argument was not suffered to prevail, and was considered by Lord Mansfield as answered by the decision of Ridout *v.* Paine. 3 Atk. 486.

mainder in fee, in the land, and devises it as such, the whole interest passes to the devisee; for though the will may have made no previous devise of a partial interest out of the subject, yet the words "reversion, or remainder," naturally imply the quantity of interest remaining in the testator, after the determination of the antecedent estate or estates.

Accordingly, in the last cited case of Norton *v.* Ladd, it was said, that the devise of a *reversion* carried the fee. And where a testator devised thus "I give to my son C. G. the reversion of the tenement my sister now lives in, after her decease; and the reversion of those two tenements now in the possession of J. C." Lord Hardwicke declared his opinion that the word *reversion* passed the fee[r]. "The interest," said his Lordship, "which the testator had in it, was the reversion in fee which he had in himself, expectant on those leases which he had granted, whether for life, or for years. 'Reversion' was the right of having the estate back again, when the particular estate determined: it was descriptive of the right of reverter by way of eminence, that was in himself; consequently there was no ground to split or divide it. Giving the reversion was giving the *whole* reversion, unless words are added limiting and restraining the interest."

Thus also, in the case of Cole *v.* Rawlinson[s], Lord Treby observed that it had been lately adjudged in the Common Pleas, that when I. S. having a *remainder* in fee devised all his *remainder* to I. N., a fee passed to the devisee. And, where the Bell Tavern was settled upon A. for life, remainder to B. in tail,

[r] Bailis *v.* Gale, 2 Vez. 78. [s] 1 Lord Raym. 187.

remainder to A. in fee, and A. devised all the house called the Bell Tavern to B. without saying for what estate, it appears by a note in Viner[b], that the fee was held to pass.

I pass over the cases wherein the word *estate* has occurred in the residuary devise, as improper examples of the force of the devising residuary words; since that term, of itself, embraces the absolute fee-simple in a will.

Of the different effects of the residuary clause, in respect to real and personal estate.

The effect of the residuary clause is very different in respect to real and personal estate. Which important distinction is clearly and fully stated by Sir William Grant, in the case of Cambridge *v.* Rous. His words are as follow: "The third question upon the will of S. is, whether the particular legacies, lapsed by the death of M., fell into the residue, and pass by the residuary clause, or belong to the next of kin, as undisposed of. It has been long settled that a residuary bequest of personal estate, (for it is otherwise as to real) carries, not only every thing not disposed of, but every thing that, in the event, turns out to be not disposed of. And this, not in consequence of any direct or expressed intention; for it may be argued in all cases, that particular legacies are separated from the residue, and that the testator does not mean that the residuary legatee should take what is given away from him: no, for he does not contemplate the case: the residuary legatee is intended to take only what is left; but that does not prevent the right of the residuary legatee. A presumption arises for the residuary legatee against every one except the

[b] 8 Vin. 209. tit. Dev. (L. a) pl. 29.

particular legatee. The testator is supposed to give it away from the residuary legatee, only for the sake of the particular legatee. In the case of lapse of *real* estate, the heir at law takes; but in the case of personal property the residuary legatee is preferred either to the next of kin, or the executor."

It is, therefore, the settled rule of construction, that, as to personal estate, whatever is not effectually taken out of the bulk of the property, falls into the residuum, and passes by the general bequest thereof. Nor does it signify whether the particular legacy becomes ineffectual by the death of the legatee in the testator's lifetime, or by the disposition itself being void in law.

In Brown *v.* Higgs[i], one of the bequests of the will was void under the statute of mortmain, and it was without difficulty determined that the subject of the void bequest passed to the residuary legatee: and to what was observed, as to the testator's not meaning to include in the residue what he imagined himself to have previously disposed of, it was said by the Master of the Rolls, that the same argument might be urged in the case of lapsed legacies; for no man supposes his legacies will lapse, or will not take place. And, in Shanley *v.* Baker[k], in the same court, the authority of Brown *v.* Higgs was recognized and confirmed. And again in Crooke *v.* De Vandez[l], the particular phrase of "what remains" used by the testator, being held to be tantamount to the word *residue*, and to include every thing not already disposed of, personal

[i] 4 Ves. Jun. 708. [k] Ibid. 732.
[l] 11 Ves. Jun. 330.

estate, bequeathed upon a contingency too remote, was held to pass under them to the residuary legatee.

There is not any distinction as to this effect of the residuary bequest between specific and general legacies. And where a man by his will[m], gave and bequeathed all the *rest and residue* of his real and personal estate, whatsoever, and wheresoever, and of what nature or kind soever the same might consist of, *not therein before specifically disposed of,* the general devise was held to comprehend *specific* legacies lapsed, upon the ground that the word *specifically* ought to be construed 'particularly.' The Master of the Rolls being of opinion clearly, that the testator was not to be interpreted as meaning to die intestate with regard to all sums specifically bequeathed, and testate with regard to all pecuniary legacies.

But if a devise of *real* estate becomes ineffectual from lapse, it is considered by the law as undisposed of; and, having been separated from the residue at the time that the will had an incipient operation, in the nature of a conveyance, it cannot be brought again into it by a subsequent event. And where a testator manifests his intention to make a particular disposition of a real estate, and such disposition is void in law, still it will not pass inclusively in the residue, unless under special circumstances overruling the inference of intention to separate it from the residue. Thus in a case[n] where the testatrix, having four sisters, devised particular estates to them, with remainder to her own

[m] Roberts v. Cooke, 16 Ves. Jun. 451.

[n] Amesbury v. Brown, cited 2 Black. 739.

right heirs, and afterwards gave the residue, in a general residuary clause, to one of the sisters, and died, having no other real estate; upon one of the particular estates determining, it was held that the reversion did not pass by the residuary clause; for though the devise might not operate to make the heir take by purchase, (10) yet it was in the nature of an exception out of the residuary clause, which determination was approved by Lord Northington and confirmed by the Court of K. B. in Smith d. Davis *v.* Saunders[o].

[o] 2 Blackst. 736.

Of the devise to the heir—when he takes by the will—when by descent.

(10) Where the same estate is devised to the heir in quantity and quality, as he would have taken by descent if there had been no devise, the devise is void, and the heir will take by descent. But where by the devise a different estate is given from that which the law would give, the will prevails; as where a man devises to A. and B., his daughters and co-heirs, in fee: for instead of an estate in coparcenary, they take as joint-tenants, with survivorship. So, if the devise be to them, as tenants in common. And if a man devise to one of several co-heirs of himself; in as much as one co-heir cannot take without the others by descent, the whole shall pass by the devise. If a devise be to the heir and another in fee, the heir takes by purchase, for he takes subject to survivorship in a stranger. But if a testator devise to his heir and another, as tenants in common, it seems that the devise to the heir, as to his moiety, is void, for he takes the part devised to him just in the same manner, as if it had been left to descend to him. And, where lands are subjected to a charge by a will, with a devise to the heir in fee, it seems that the heir will still take by his title of descent, and not by purchase; and that if it is subjected to a temporary right of possession in another, until the heir pays a sum of money, and then is devised to the heir in fee, still the heir takes according to his better title, i. e. by descent. See Fearne's posthumous Works, 226. 229. and see Reading *v.* Rawstorne, 2 Lord Raym. 4th Ed. 829.

Section V.

By what words an Estate tail passes.

IN conformity with the principle of giving effect to the intention, an estate tail, as well as an estate in fee, may be created in a will by expressions, be they ever so informal, that manifest the meaning of the testator. To discuss the varieties into which the cases in the books have expanded the doctrine, would require volumes of learned labour; the reader can expect only the general heads of this multifarious subject to be treated of in this place.

The formal words of limitation whereby estates tail are to be created.

An inheritance in tail general, is properly created in a deed where lands or tenements are given to a man, and his heirs of his body begotten. And this estate, according to Littleton[a], "is called general tail, because whatsoever woman such tenant in tail taketh for wife, (if he hath many wives, and by every of them hath issue,) yet every one of these issues, by possibility, may inherit the tenements by force of the gift; because every of such issue is of his body engendered."

"In the same manner it is," says the same author, "where lands or tenements are given to the woman, and to the heirs of her body; albeit that she hath divers husbands, yet the issue which she may have by

[a] Sect. 14, 15.

every husband may inherit as issue in tail by force of this gift, and therefore such gifts are called general tails."

He then defines the tenancy in tail special to be, "where lands or tenements are given to a man and his wife, and to the heirs of their two bodies begotten; in which case, none shall inherit by force of this gift, but those that be engendered between these two. And it is called *special* tail, because, if the wife die, and he taketh another wife, and have issue, the issue of the second wife shall not inherit by force of this gift, nor the issue of the second husband if the first husband die."

Of the necessary words in a deed to create an estate tail.

These estates tail, whether general or special, are not, in general, to be created by a gift inter vivos, without the words of limitation used by Littleton, as above stated; for every estate tail was a fee-simple at common law, and at common law, no fee-simple could be conveyed by feoffment or grant without the word *heirs*; and to the word *heirs* must be added words to express from whose body the heirs intended are to spring (1).

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(1) Yet, says Lord Coke, if a man give lands to A. et hæredibus de corpore suo, the remainder to B. in formâ prædictâ, this is a good estate tail to B., for, in formâ prædictâ do include the other. If a man letteth lands to A. for life, the remainder to B. in tail, the remainder to C. in formâ prædictâ; this remainder is void for the uncertainty. But if the remainder had been to C. in eâdem formâ, this had been a good estate tail, for idem semper proximo antecedenti refertur.

The words 'of his body' are not so strictly required, even in a deed, but that they may be expressed by others which are tantamount; for the example which the statute de donis puts, has not the words *de corpore*. The words are these—cum aliquis dat ter-

Therefore, if a man by deed give lands or tenements to A. and to his seed, or to the issues, or children, of his body, or to the issues of his body lawfully be-

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ram suam alicui viro et ejus uxori et hæredibus de ipsis viro et muliere procreatis. Therefore, if lands be given to B. et hæredibus quos idem B. de prima uxore sua legitime procrearet, this is a good estate in especial tail, (although he hath no wife at the time,) without the words *de corpore*. So it is if lands be given to a man, and to his heirs which he shall beget of his wife, or to a man et hæredibus de carne sua, or to a man et hæredibus de se. In all these cases, these are good estates tail, and yet the words *de corpore* are omitted.

The word *begotten* may in many cases be omitted in a deed; and though Littleton says, ingendered, or begotten, yet if the words be, 'to be begotten,' or, 'whom he shall have begotten,' the estate tail is good; and, as procreatis shall extend to the issues begotten afterwards, so procreandis shall extend to the issues begotten before. Co. Litt. 20. b.

If lands be limited by deed to the use of J. S. et hæredum masculorum suorum legitime procreatorum, remainder over, it is a fee-simple; but if it be hæredum masculorum *de se*, or in English, *the heirs of him lawfully begotten*, especially where there is a remainder over, it is tail. Bedell's case, 7 Rep. 41. Where the premises in a deed come short of the full description, provided they have the word 'heirs,' the habendum may supply what is wanting to make the estate tail; as if lands be given to B. and his heirs, to have and to hold to him and the heirs of his body, or if lands be given to B. and his heirs, to hold to B. and his heirs if B. have heirs of his body, but if he shall die without heirs of his body, that they shall revert to the donor; thus has been adjudged an estate tail. See Co. Litt. 21. a. and the note by Mr. Hargrave, 124.

It seems that a limitation in a deed to a man and to the heir of his body in the singular number, gives him an estate tail. See Co. Litt. 22. a. and Richards *v.* Lady Bergavenny, 2 Vern. 235. And, according to many authorities, *heir* may be nomen collectivum as well in a deed as a will, and operate in both in the same manner as heirs in the plural number; for which see the several authorities referred to by Mr. Hargrave, in note to Co. Litt. 8. b.

gotten, A. has but an estate for his life[b]. And if a conveyance be to a man and his heirs male, he thereby takes a fee-simple without regard to the word male.

What words are sufficient in a will to create an estate tail.

But in a will, if A. devise land to B. and his heirs male, the law will supply the words '*of his body*,' and make it an estate tail[c]. And if land be devised to B. and his *issue*, or to his *children*, and B. had none at the time of the devise, he takes an estate tail; for the intention to give to the children the land by such a devise is plain; and they cannot take as immediate devisees, not being in existence; nor by way of remainder, for the devise is immediate to B. and his children; therefore the words must be taken as words of limitation, that is, as vesting an estate tail in the parent[d].

In the case last supposed there is no way of executing the intention of the testator, but by giving the parent an estate tail; but if B. *has issue living*, and land is devised to B. and his issue, or children, the intention of the testator to give an immediate estate, may be effectuated by a joint estate being executed in B. and his children, and there being no words of inheritance to indicate an intention to give more than a life estate, they take only as joint-tenants for life.

Again, if the devise be to B. for his life, or to B. generally, and *after his decease* to his children, or *remainder* to his children, he having a son or daughter, the father takes but an estate for life, with remainder to his children for life; for no greater estate

[b] Vent. 228, 229. [c] Co. Litt. 20. b. [d] 6 Rep. 17.

would have passed by these words at common law, and to make a will operate differently from a conveyance at common law, the intent of the testator must appear[e].

Where lands are devised to another generally, and without any words expressive of the interest he is to take, he thereby becomes entitled only to an estate for life. Nor will a greater estate pass to the devisee by a devise to him and his assigns. But if after such general devise the testator shews his meaning to be, though expressed in the loosest terms, to continue the estate in the descendants of the devisee, his estate will be enlarged so as to carry such intention into effect.

Thus where a house was devised to three brothers, among them; provided always that the house be not sold, but go to the next of the name and blood: it was resolved that the devisees took estates tail[f].

And where a person devised land to his three daughters, to be equally divided; and if any of them died before the other, then the one to be the other's heir, equally to be divided; and if his three daughters died without issue, then he willed it to two strangers: it was adjudged that the daughters took estates tail[g].

A person devised land to his wife for life, and after her decease to his son; and if his son died without

[e] Wild's Case, 6 Rep. 17.
[f] Chapman's case, Dyer, 333.
[g] King *v.* Rumball, Cro. Jac. 443.

issue, *having no son,* that another should have it: it was adjudged that the son took an estate in tail *male*[k].

R. J. being seised in fee of a copyhold of inheritance which he had surrendered to the use of his will, devised to J. Wedgeborough his house in the Brook, and 30*l.*, and then gave other pecuniary legacies; and to William Taylor, his sister's son, a house by the description of his "house on the green, with the ground and out-houses thereto belonging," and declared his will and meaning to be, that if either of the persons before-named died without issue, lawfully begotten, then the said legacy should be divided equally between them that were left alive: adjudged that William Taylor took an estate tail[l].

A man having issue two sons, devised all his land to his eldest son; and, if he died *without heirs male,* then to his other son in like manner. The court observed that the words 'of his body,' which properly created an estate tail, were left out; but that the intent of the testator might be collected out of his will, that he designed an estate tail; for, without this devise, it would have gone to his second son, if the first had died without issue. It was therefore an estate tail[k].

A. devised to the three sons of C. D. successively, in tail male, remainder to every son and sons of the said C. D. which should be begotten on the body of Sarah his wife. And *for want of such issue* to

[k] Robinson *v.* Miller, 1 Roll. Ab. 837.

[l] Hope ex. dem. Brown *v.* Taylor, 1 Burr. 268.

[k] Blaxton *v.* Stone, 3 Mod. R. 133.

W. N. &c. with a proviso that the devisees and their descendants should take the surname and arms of the testator. The Court of King's Bench resolved that the afterborn sons took several estates in tail male, in succession; as the words "for want of such issue," must be construed 'for want of heirs male of the body,' and that this was the true construction[1].

A person devised in these words: "I give and bequeath all my copyhold lands to my nephew Isaac Slater; but, if the aforesaid Isaac Slater shall die *without male heir*, then my will is, that my nephew John Slater shall enter upon and enjoy the said copyhold lands, his heirs or assigns, for ever; provided the aforesaid Isaac Slater paid to his wife Elizabeth Slater, the sum of 8*l.* a year, during her life; with a power of entry to the wife if the annuity was not paid. It was contended, that Isaac took a fee by reason of the annuity. But Lord Kenyon said, it was clear from all the cases on the subject, that Isaac Slater took an estate tail.

What words will enlarge an express estate for life into an estate tail.

And although the testator gives to the devisee an express estate for his life only, such estate will nevertheless be enlarged into an estate tail to give effect to the general intent of the testator by embracing the ulterior objects of the devisor, within its legal extent and duration.

A. Dymock devised to his nephew William all his freehold estate at A. to hold to him during his natural life; and, after his decease, to and amongst his is-

[1] Evans *v.* Astley, 3 Burr. 1570. [2] 1 Vent. 230.

sue; and, in default of issue, to be divided between his nephew E. and his niece M. and to their heirs and assigns for ever[a]. Lord Kenyon said, that although this will was very inaccurately drawn, he thought the devisor's *general intention* might be collected from the words of it: the great question in the case was, what estate W. Dymock took under the will. In the first clause the estate was expressed to be given only during his natural life, but in the next limitation it was to go to his issue, and in default of issue it was to go over; it was clear, therefore, from the whole of the will, that the devisor did not intend that it should go over to those in remainder, until after a general failure of issue in W. Dymock. He therefore thought that the Court was warranted by many determinations, and particularly by that of Robinson *v.* Robinson[b], to give that effect to the will which would best answer the devisor's *general* intention; though, by so doing, they might defeat some *particular* intention. Here the *general* intent was, that W. Dymock and his issue should take first; then what construction would best effectuate that intention. It had been argued by the plaintiff's counsel that W. Dymock took only an estate for life, and his children an estate tail: but it would be difficult to put two different interpretations on the word 'issue:' and, even if that could be done, it would not further the intention of the devisor, for there were no cross remainders to the children, and they never can be supplied; so that, according to the construction contended for, if one of the children died, his share would go over to those in remainder, in prejudice of those children who survived; which was certainly not intended by the de-

[a] Doe *v.* Applin, 4 Term. R. 82. [b] 1 Burr. 38.

visor. Therefore his *general* intent would be best answered by saying, that W. Dymock took an estate tail; and, in so determining, the Court would not go farther than had been done in other cases. Judgment was accordingly given that W. Dymock took an estate tail.

A testator devised all his freehold messuages, &c. to his daughter, Mary Ayscough, and the heirs of her body, lawfully to be begotten, for ever, as tenants in common, and not as joint tenants; and, in case his said daughter should happen to die before twenty-one, or without having issue on her body lawfully begotten, then he gave his freehold messuages to R. Ayscough in fee [p].

Particular intention expressed must give place to the general intention collected from the whole will.

Lord Kenyon said, it was a rule of construction in cases of this kind, settled by a variety of decisions, but particularly by that of Robinson *v.* Robinson, that where it appeared in a will that the testator had a *general intention*, and also a *secondary intention*, and they clashed, the latter must give way to the former. Here were no words of limitation added to the estate given to the children, (supposing they took as purchasers); and yet the remainder over was not to take effect till there was a general failure of her issue; so that there must be an estate to comprehend all her children for ever; his Lordship concluded in these words—" I admit that in this case the testator intended that his daughter, M. Ayscough should only take an estate for her life, and that her children should take as purchasers: but then he also intended that all the progeny of those children should

[p] Doe *v.* Smith, 7 Term. R. 531. 1 Burr. 38.

take before any interest should vest in his more remote relations: now the latter intention cannot be carried into effect, unless M. Ayscough takes an estate tail; in order, therefore, to give effect to the devisor's *general intention*, according to the fair construction of the will, M. Ayscough must take an estate tail."

Henry Cook devised a messuage or tenement to Richard Cook *for the term only of his natural life;* and after his decease, he gave and devised the same unto the lawful issue of the said Richard Cook, as tenants in common, to whom he gave, devised, and bequeathed, the same; but in case the said Richard Cook should die without leaving lawful issue, then, and in such case, after his decease, he gave and devised the same to Elizabeth Harding in fee[q].

Lord Kenyon said, it had been the settled doctrine of Westminster Hall, for the preceding forty or fifty years, that there might be a *general* and a *particular* intent in a will, and that the latter must give way, when the former could not otherwise be carried into effect. That this doctrine had been confirmed by the cases of Robinson *v.* Robinson, Roe *v.* Grew, and Doe *v.* Smith. That the court would best fulfil the *particular* intent of the testator in this case, by giving Richard Cook only an estate for life; but the *general* intent was, that all his issue should inherit the entire estate, before it went over; and *that* intent could only be answered by giving him an estate tail, by implication from the subsequent words, " in default of his leaving issue."

[q] Doe *v.* Cooper, 1 East R. 229.

If an estate be devised to a man for his life with remainders to his first and other sons indefinitely in tail, and then the limitation over is introduced by the words "in default of issue," or "for want of issue of the body of the first taker," or "in default of heirs male" by these words in such a case the express estate for life given to the first taker, shall not be enlarged by construction into an estate tail, for the limitations as they stand extend to all the issue of the first taker. And for this the case of Bamfield *v.* Popham[r], is the leading and standard authority. But if an estate be given to a man for his life, with limitations to his issue falling short of the testator's manifest intent to embrace all his issue within the scope of the limitations, and then come the words "if he shall die without issue, or in default of issue," these words in such a case will reflect back an estate tail upon the first taker, notwithstanding his express estate for life (2).

Where there is a devise to one for life expressly, with remainders to first and other sons, and then a limitation over in default of issue.

The learned Editor of Pere Williams in his note to the case of Bamfield and Popham very justly observes, that there is no general or fixed rule for the construction of words of this kind, but that courts both of law and equity consider the raising of estates tail by implication always to depend upon the question whether such implication be necessary, or not, to effectuate the *general intention* of the testator.

[r] 1 P. Wms. 54.

(2) Langley *v.* Baldwin, correctly stated in the case of the Attorney General *v.* Sutton, 1 P. Wms. 753.

That this is the true and proper criterion, appears strikingly from the case of Langley *v.* Baldwin. (3) That was a case referred by the Court of Chancery to the judges of the court of Common Pleas for their opinion, in the time of Lord Trevor. And the limitations run thus. To A. *for his life without impeachment of waste, and with a power of jointuring,* remainder to the first, second, and so on, to the sixth son of A., and no further, in tail male; then came the words, "And if A. shall die without issue male of his body," remainder to B. in fee. And notwithstanding the limitation to A. was without impeachment of waste, and with a power of jointuring, which are usually coupled with a life estate, and therefore in some degree declaratory of an intention in the testator to confine the interest to the life of the first taker, yet the judges of K. B. were unanimously of opinion, that A. took an estate tail by implication; because if there should be a seventh son, and the six sons should die without issue, the property would pass over such seventh son and go to a remote remainder man, which could not be supposed to have been the intention of the testator; therefore, to let in such seventh son and other subsequent sons to take (but still to take as issue male of the body by descent and not by purchase) the court held that A. took, by implication of law, an estate tail.

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(3) In Ginger *v.* White, Willes, 348. The C. J. observed, that this case of Langley *v.* Baldwin was best stated in 1 P. Wms. 759. in the Attorney General *v.* Sutton. And in the case of Alanson *v.* Clithero, 1 Vez. 25. it was observed by Lord Hardwicke, that the case of Langley *v.* Baldwin was wrongly reported in Equity Cases Abridged in the very point.

In the case of Ginger d. White *v.* White[a], the devise may be shortly stated thus: the testator John White the elder, being seised in fee of the premises in question, devised to J. for life, and from and after his decease, to the male children of J. successively one after another as they were in priority of age, and to their heirs, and in default of male children of J. then to the female children of J. and their heirs, and in case the said John should die without issue, then he gave the house to his grandson W.; and upon these limitations in the will it was held, that J. took only an estate for life; in pronouncing which opinion it was said by Lord Chief Justice Willes, that to find out what construction is to be put upon the words of a will we ought in the first place to consider what the intent of the testator is, which is too often the last thing that is thought of. And in adverting to the case of Bamfield *v.* Popham he observed, "It has been said, that that case has been held not to be law. I am sure I have heard it cited, at least twenty times, in the Court of Chancery, and never heard it contradicted; and, I believe, I never shall, except by those persons who know not how to distinguish it (though the distinction is plain and obvious) from some other subsequent cases." The learned Chief Justice then proceeded to point out what those cases were from which it was so distinguishable; and mentioned particularly the case of Langley *v.* Baldwin.

The limitations in Bamfield and Popham were to the first and other sons indefinitely in tail male, extending to all the issue which might be born of the body of the first taker. Therefore in Bamfield *v.*

[a] Willes, 348.

Popham there was no need of construing the express estate for life into an estate tail, since all the issue in tail were already comprehended under the limitations as they stood. And, as was observed in the case of the Attorney General *v.* Sutton[t], in such a case the words "if he shall die without issue male," shall be considered as predicated of *such* issue male, and when vainly inserted, and they cannot operate or be of use, they shall not be construed so as to merge and destroy an express estate for life.

The case of the Attorney General *v.* Sutton[u], was to the same effect, which was shortly this: One seised in fee devised his lands to his nephew for his life, remainder to his first and second sons in tail male successively, (without carrying the limitations further to his other sons,) and after his said nephew's death, *without issue male of his body,* then the remainder over to trustees, for charities; and here the case of Langley and Baldwin was relied upon as expressly in point; and the difference was taken between that case and the case of Bamfield *v.* Popham, in which the limitation was to the first and every other son and sons in tail male successively, and so comprehending all the issue male of the first devisee indefinitely. This case passed through several stages of adjudication, but the words "and if he shall die without issue male of his body" were at length adjudged to give an estate tail to the first devisee.

In Robinson *v.* Robinson[x], the limitation was to Launcelot Hickes for his life, and *no longer,* and after his decease, to such son as he should have law-

[t] 1 P. Wms. 753. [u] Ibid. [x] 1 Bur. 38.

fully to be begotten, and *in default of such issue* then to the testator's right heirs; and these words, *in default of issue,* were held to give the father an estate tail; for it was plain the testator did not design that his heirs at law should take until his lineal posterity was extinct.

In the Attorney General *v.* Sutton the express limitations went no further than to the second son. In Langley *v.* Baldwin, the estate was expressly carried to the sixth son, and no further. And in the recent case of Wight *v.* Leigh[y], the words of the will gave only *life-estates* to the sons.

In all these cases the intention of the testator was plain, that the remainder over should not take place until the lineal descendants of the first taker should be exhausted; to carry which general intention into effect, it was necessary to enlarge the life estate given to the first taker, into an estate tail; but in Bamfield *v.* Popham the specified limitations carried the estate to all the possible issue of the first taker, in succession.

Issue co-extensive with heirs male, or heirs of the body.

In the consideration of this point, whether the words be "in default of *issue* male," or "in default of *heirs* male," they are of the same force in a will.

In the case of Doe *v.* Aplin[z], two of the learned judges observed upon the word "issue," that it was equal in extent in a will to the words "heirs of the body," and a saying of Mr. Justice Rainsford[a], was cited, "that the word 'issue' is, ex vi termini, nomen

[y] 15 Ves. Jun. 564.
[z] 1 T. R. 82.
[a] Finch, 282. and see the case of King *v.* Melling, 229.

collectivum, and takes in all the issue to the utmost extent of the family, as far as the words 'heirs of the body' would do."

A limitation to one and his heirs, may be reduced by subsequent words to an estate tail.

It is old and settled law that if a man devise an estate to another, in words that primarily import the fee-simple, yet the subsequent words may controul the devise, and reduce the gift to an estate tail. Therefore, if a testator devise lands to A. and his heirs, and afterwards devises the same lands to another, in case A. dies without issue, A.'s estate is reduced to an estate tail; the word 'heirs' being understood in the restricted sense of *heirs of the body*; otherwise, the limitation over could not vest according to the intention of the deviser; for the law does not carry its favour towards wills so far as to suffer the limitation of a fee upon a fee.

Accordingly, in a very early case [b], where a man devised lands to A., his daughter, and her heirs, and if she died without issue in the life-time of her sister B., that it should remain to B. and her heirs: three judges held this to be an estate tail in A., against the opinion of Dyer, who thought that A. took only a fee-simple conditional; but the resolution of the three judges has been since established by an uniform series of decisions [c].

In Brice *v.* Smith [d] this rule of construction was

[b] Clatche's case, Dyer, 330.

[c] Soulle *v.* Gerrard, Cro. El. 525. Dutton *v.* Engram, Cro. Ja. 427. Chadock *v.* Cowley, Cro. Ja. 605. and particularly the case of Fitzgerald *v.* Leslie, 3 Bro. P. c. 154.

[d] Willes, 1.

considered applicable to the case, where after a devise by a testator of his freehold messuage to his son P. B. and his heirs for ever, on condition of his paying a sum of money to W. B., the following clause was added, "Item, my will and mind is, that in case any of my said children, unto whom I have bequeathed any of my real estates, shall die without issue, then I give the estate of him so dying, *unto his or their right heirs for ever.*" In this case it was said that though *heirs* would have been construed *heirs of the body,* in case the remainder had been devised over to a stranger, it would be otherwise in the case before the court, because the remainder was devised over to the heirs of the person so dying without issue. But Lord C. J. Willes, who delivered the opinion of the court, said, "that though this distinction had seemed at first to be of some weight, yet, that when considered, it made no difference in reason or law. That even in grants, if there were words that created an estate tail, the grantee would have an estate tail, though the next remainder was limited to his heirs; and nothing was more common in settlements than to limit an estate to a man and the heirs of his body, remainder to his right heirs; and for this plain reason—to prevent his disinheriting his issue, except by some solemn act done in his life-time." The court were all clearly of opinion that P. B. took an estate tail.

Although there was a charge upon the devisee, in respect of the estate, that circumstance appeared to have no weight in the case last-mentioned, not being adverted to either by the bar or by the bench. But in Dutton *v.* Engram[*], a question of this sort

[*] Cro. Ja. 427.

arose. William Goldwell, seised of lands in fee, devised them to his wife for life, and after her death to John his eldest son and to his heirs, upon condition that he, as soon as the land should come to him in possession, should grant to Stephen, his second son and *his heirs,* an annual rent of 4*l.* out of the said tenements, and that if the said John died *without heirs of his body,* that the land should remain to the said Stephen and the heirs of his body.

The first question was, whether John had an estate in fee by the devise, which was to him and his heirs, upon condition that he should grant a rent to Stephen and his heirs, whereby the intent was shewn, as it was said, that he should have a fee, otherwise he could not legally grant such a rent to have continuance after his death. But it was resolved to be an estate tail; for, being limited that if he died *without issue,* then it should go to Stephen, and the heirs of his body, that shewed what heirs of John were intended, viz. *heirs of the body.* But yet, by the limitation of the will, he was to make a grant of the rent, which being by appointment of the donor, was not contra formam donatoris, but stood with the gift, and should bind the issue in tail.

And in a much later case[r], where J. B. devised to his wife for life, and after her decease to be equally divided among his four children, A., B., C., D., and to each of them and their heirs for ever, share and share alike; and in case they should be minded and agree among themselves to sell the estate, they should have equal shares of the monies from thence aris-

[r] Roe *v.* Avis, 4 T. R. 605.

ing: but if they agreed to keep the estate whole together, then all the rents, issues, and profits thereof, should be equally paid and divided between them and to the several and respective heirs of them on their bodies lawfully begotten, share and share alike; it was held that the children of J. B. took only estates tail in their respective fourths; for though it was given to them and their heirs, *and they had also a power of selling the estate by the former part of the devise,* yet the subsequent words, "to the several and respective heirs of them, on their bodies lawfully begotten," restrained the operation of the former words, and reduced the estate devised to an estate tail[g].

Where a man devised lands[h] to A. his son *for ever,* and after his decease remainder to his heir male for ever, with other remainders over, it was holden an estate tail in A.; for, though the first devise being to him for ever, would give him the fee-simple; yet the subsequent words *to his heir male,* shewed what sort of inheritance the devisor intended him (4).

[g] See also to the same effect, Doe *v.* Rivers, 7 T. R. 276. and Doe *v.* Whichelo, 8 T. R. 211.

[h] Roll. Abr. 836.

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(4) The words '*for ever*' in this case, by force of the succeeding words, were rendered inoperative, and then the case was, as if the first limitation had been to A. generally, or for his life, with remainder to his heir male, and in a will is the same as if the remainder had been to the heirs of his body, which, by an ancient rule of law, expounded in Shelley's case 1 Rep. 93. is not an estate in contingency, or in abeyance, awaiting the coming of such heir into existence, and then attaching primarily in him as the root of a

A general explanation of the rule in Shelley's case.

A limitation importing an estate in tail general may by subsequent words be confined to the heirs in tail male.

And what would otherwise be an estate tail general may by subsequent words be confined to the heirs in tail *male*. As if a man devise lands to his wife for her life, and after her decease to her son, and if he dies without issue, *having no son*, that then J. S. shall have it, the son by this devise takes an estate in tail

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new succession, but executed in the ancestor, and giving him an immediate estate tail. In the fifth section of Mr. Fearne's contingent remainders, and in the treatise of Mr. Preston exclusively on the subject, the student will find this rule explained in all its varieties of application, and with all the distinctions which negatively mark its boundaries. The lineaments of the rule, (which it would be an idle shew of learning to treat of *at large* in this place, instead of referring the reader to those publications, which have been distinctly devoted to the consideration of it,) are shortly these. An estate for life to A., remainder to his heirs or to the heirs of his body, is not an estate in A. for his life, with a contingent remainder to his heirs or the heirs of his body, but an immediate estate in fee or in tail in A. So, if A. by will or otherwise, has an estate of freehold limited to him, and the same instrument contains a subsequent limitation to his right heirs, or to the heirs of his body, after some other estate for life, or in tail, interposed between such limitation of the first estate to him, and such subsequent limitation to his heirs, or heirs in tail, this remainder to the heir or heirs of the body of A. vests in A. as a remainder, and is transmitted through him by descent as from ancestor to heir. The general rule is this, that whensoever the ancestor takes any estate of freehold, whether it be or be not such as may determine in his life-time, and there is afterwards in the same conveyance, an unconditional limitation to his right heirs, or heirs in tail,(either immediately, and without the intervention of any mean estate of freehold between his freehold and the subsequent limitation to his heirs, or mediately, that is, with the interposition of such mean estate), there, such subsequent limitation to the heirs, or heirs in tail, vests immediately in the ancestor, and does not remain in contingency or abeyance; with this distinction, that where such subsequent limitation is immediate, it then becomes executed in the ancestor, forming, by its union

male, for though the devise to the son, and if he die without issue, would have been a good tail general, yet when the devisor added the words "having no son," he thereby explained what issue he intended should inherit the land [1].

[1] Roll. Abr. 837.

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with his particular freehold, one estate of inheritance in possession; but where such limitation is *mediate,* it is then a *remainder* vested in the ancestor who takes the freehold, not to be executed in possession till the determination of the preceding mean estates. As, if there be an estate to A. for his life, or during the life of C. or any other sole estate of freehold, remainder to the heirs of the body of A., this is an estate tail executed in possession in A.; but if there be an estate to A. for his life, or during the life of C., or any other estate of freehold, remainder to B. for life, remainder to the heirs of the body of A., this is only a present freehold in A. with a vested *remainder* to him in tail, to take effect in possession after the determination of B.'s estate.

Where the limitation to the heirs, or to the heirs of the body of any ancestor taking the preceding freehold, is contingent, even though the estate so limited could by no possibility have vested in the ancestor, as in the case of a gift to two for their joint lives remainder to the heirs of the one dying first, the heir still takes by descent. But if the contingency on which the vesting is to depend, happen in the life-time of the ancestor, the remainder is then in the class of vested remainders, and as such attaches in the ancestor. So that whether limited on a contingency, or so as that it may immediately vest, it is the ancestor's estate, and the heir can only take by descent.

And where, between the estate of freehold given to A., and the subsequent limitation to his heirs, or heirs of his body, contingent estates are limited to others, though in such a case there is nothing interposed to prevent the immediate union of the limitations to the ancestor and his heirs, yet such union does not operate to merge the freehold in A. necessary to support the intervening contingent limitations; but the two limitations are united and executed in the

Estates may arise in a will by implication merely, and without any express words of devise.

Thus it appears that such is the deference paid by the law to the intention of a testator, that devises regularly passing estates for life may operate to give estates of inheritance, and words giving the fee-simple may be restrained to estates tail, by the implication arising upon subsequent expressions. But

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ancestor, only until such time as the intervening limitations become vested, and then open and become separated, in order to let in such intervening limitations as they arise. Thus in Lewis Bowle's case, 11 Rep. 80. where there was a limitation to husband and wife, for their lives, remainder to the first and other sons of the marriage in tail, remainder to the heirs male of the bodies of husband and wife, the court resolved that it was an estate tail executed in the husband and wife sub modo, that is, so as not to merge the estates for life absolutely, but executed only till the birth of the first son: and then the estates should become divided by operation of law, and the husband and wife become tenants for their lives, with remainder to their first and other sons, remainder to husband and wife in tail.

But for this junction of the two estates to take place in the case of husband and wife, the remainder must be the same in quality with the preceding limitation, that is, if the limitation of the freehold be *joint*, the subsequent limitation of the inheritance must be *joint* also, as in the case of Lewis Bowles just mentioned. And, if there be a limitation to the wife for her life, remainder to the heir of the body of husband and wife, no remainder is executed in the wife. So, if the limitation of the freehold be not joint but successive, as to one for life, remainder to the other for life, remainder to the heirs of their two bodies, the ultimate limitation is not executed in possession, but the husband and wife take a joint remainder in tail. Though in the case of a limitation to A. for life, remainder to the right heirs of him and B., a stranger, (B. being alive at the time), the ulterior limitation is said to be executed immediately in A. for a moiety, 2 Roll. Abr. 417. pl. 6. and see Roe *v.* Quartley, 1 T. R. 630.

For this rule to apply there must, of course, be an estate in the ancestor; but it does not signify whether this estate is in him by

there are cases which carry the principle still farther, for an estate tail may sometimes arise by the mere force of implication, without any express words of devise to the party himself, upon the principle of so construing the intention of the testator as to give it a legal effect.

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express limitation, or by implication, or by resultancy, Pibus *v.* Mitford, 1 Vent. 372. But both the estates must be legal, or both equitable for the union to take place. Venables and Wife *v.* Morris, 7 T. R. 342. 438.

And although the limitation to the ancestor be succeeded by a limitation to the heir, or heir male, in the singular number, the rule above-mentioned operates to make this an expansion of the first estate into an estate tail; but if words of limitation are superadded, the person answering the description of heir takes by purchase, and becomes the root of a new inheritance, the stock of a new descent, and the rule in Shelley's case has no influence on such a case; still, however, if the first words of limitation are in the plural, words of superadded limitation engrafted upon them will not convert them into words of purchase. In Archer's case, 2 Rep. 66. lands were devised to A. for life, remainder to the next *heir* male of A., and to the heirs male of the body of the next heir male; A.'s estate was adjudged to be only an estate for life, and the remainder to the next heir male to be a good contingent remainder taking effect in him by purchase. But in the great case which gave the name to the rule, the limitation was to the use of the heirs of the body of Edward, lawfully begotten, and of the heirs of the body of such heirs male lawfully begotten, remainder over, in virtue of which limitation Edward took an estate tail.

Nevertheless, if the superadded words limit an estate of a different nature from that which the ancestor would take by virtue of the first limitation to his heirs or heirs male, as if there be a limitation to A. for his life, and after his decease to the use of his heirs, and the heirs female of their bodies; the rule in question seems to be excluded. But for such superadded words of limitation to exclude the rule, they must describe an estate descendible in a different course, and to different persons as special heirs from those to

Thus in the case of Walter *v.* Drew [k], where a testator having two sons, devised his lands to his second son and his heirs, if his eldest son should happen to die and leave no issue of his body lawfully begotten, it was held that the eldest son took an estate tail by implication, for otherwise the limitation to the second son would have been an executory devise, which, as being limited to take effect upon an indefinite failure of issue of the elder brother, would have been void as being too remote [l].

Thus also in a case in Dyer [m], a testator having two sons and a daughter, devised his land to the younger son and his heirs, and if both of his two sons should die without issue, remainder to the daughter; the younger son died, and then the testator died, and it was held that the daughter took a good remainder; but to make it such the elder brother was adjudged to take an estate tail by implication of law; for if he had taken no estate, then the limitation to the daughter would have been an executory estate, limited to take effect after the indefinite failure of issue of the elder brother, and consequently void as being too remote.

[k] Com. Rep. 372. [l] See note infra, page 543. [m] P. 330.

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whom the previous limitation would carry the estate; for if the devise be to A. for life, and after his decease to the heirs of his body begotten, and their heirs for ever, A. clearly takes an estate tail.

For the full discussion and explanation of all these points, the studious reader is referred to the elaborate treatise of Mr. Fearne on Contingent Remainders, particularly the 6th edition, by Mr. Butler, who has added greatly to the value and utility of the original work.

And where a testator devises land to his heir at law, after the death of his wife; here, as the heir at law is plainly excluded during the life of the wife, unless the wife takes it nobody can, and it must be in nubibus till the wife's death. Therefore to avoid this consequence, the wife takes an estate for her life by implication.

In the case of Willis and Lucas [a], a testator having two sons, devised his lands to the younger son for his life, he and his heirs paying thereout a rent to the elder brother during his life, and after the death of the younger son, *and also* of his wife, to the first and other sons of the younger son in tail; the younger son died, and the question was whether his wife took any estate; and it was held she took by implication an estate for her life; and the ground upon which it was so held, was the plainly intended exclusion of the heir by the devise of a rent to him during his life.

So in Goodright *v.* Goodridge [b], J. G. having two sons, Richard and John, devised all his lands to his wife for life, and then proceeded thus: "And my will is, that if my son Richard do happen to die without heirs, then my son John shall enjoy my lands," and the court held that Richard took an estate tail by implication.

After a devise to A. and his heirs, a remainder over, upon A.'s dying without issue, is generally void.

There can be no regular remainder limited after a fee-simple: therefore, where an estate is devised to one and his heirs, and that if he dies without heirs, it shall remain over to another, this last limitation is

[a] 1 P. Wms. 471. [b] Willes, 369.

But if such remainder be to a person who might inherit to A., the words 'without heirs' will be construed heirs of the body.

void [p]. Nor can the law help such a devise by any construction for which the will itself does not afford some argumentative support. But where the limitation over is to one who is a collateral heir of the devisee, the testator is construed to mean by the word *heirs*, heirs of the body, and the first devisee takes only an estate tail, for it is not possible that he can die without an heir, while the person to whom the remainder is thus limited, or his issue, continue in existence.

Accordingly, where a testator devised his houses to Francis his son, after the death of his wife; and if his three daughters, or either of them, should survive their mother, and Francis their brother, *and his heirs*, then, that they should enjoy the same houses for the term of their lives, it was resolved that Francis the son had but an estate tail under this will; for by '*heirs*,' in this place, was intended '*heirs of the body*,' because, the limitation being to his sisters, it was necessarily to be intended that it was, if he should die without issue of his body, for they were his heirs collateral; and the intention being collected by the will, the law should adjudge accordingly [q].

The construction is the same where the remainder is limited to the heirs of the testator himself.

And the same construction prevails where the remainder is limited to the heirs of the testator himself; if such heirs must also be heirs of the first devisee. Thus in Nottingham *v.* Jennings [r], where a person, having issue three sons, John, Francis, and William,

[p] Co. Litt. 18. a. Vaughan, 269.

[q] Webb *v.* Hearing, Cro. Ja. 415. and see Tyte *v.* Willis, Ca. Temp. Talb. 1. Morgan *v.* Griffiths, Cowp. 234.

[r] Com. Rep. 82.

devised his land to Francis and his heirs, and for default of heirs of Francis, to the heirs of the devisor, it was said by Holt C. J. that as the testator had devised that his own right heir should take after the death of Francis without heirs, although his own right heir took nothing by the devise, (for he took by descent), yet that circumstance shewed the testator's intention to have been, that upon the death of Francis *without issue*, the eldest son should take, and that, therefore, the word *heirs* must be construed to mean *issue*, because Francis could not die without an heir as long as the testator had an heir.

But where the devise was to one and his *heirs*, and if he died *without heirs*, then to a charity; this devise over was held to be void[a]. And again, where the testator devised to his son and his *heirs*, and if he should die *without heirs*, remainder over to another who was half brother to the first devisee: upon a question made, whether the first limitation was in fee or in tail, Lord Hardwicke said it was a plain case, and one of those points which the court would not suffer to be argued, as having been determined before (5): for

[a] Attorney General *v.* Gill, 2 P. Wms. 369.

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(5) It would be in contradiction to the nature of a remainder, to be limited after a fee; for Lord Coke defines a remainder to be "a remnant of an estate in lands or tenements, expectant upon a particular estate, created together with the same at one time;" and this is the nature of a remainder, whether vested or contingent; it is that which remains of the fee after a particular estate has been carved out of it. At common law there were two sorts of particular estates—an estate for years, and an estate for life; but by the statute de donis another sort of particular estate, the estate tail, was introduced, leaving a reversion, or remnant of

Of the properties of a remainder vested, and contingent.

this was a devise over to a stranger, as the law considered him, and who would not in any event inherit as heir to his brother[t].

Of the implication of cross remainders.

Cross remainders, or reciprocal expectancies, in succession, between several persons, to and amongst whom an inheritance in land is originally devised, are also interests which may arise in a will without ex-

[t] Tilbury v. Barbut, 3 Atk. 617.

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the fee in the donor, which is always to be distinguished from a possibility of reverter, and a right of entry for a condition broken.

To satisfy the above definition of a remainder, it follows that one or other of these descriptions of a particular estate, must first be carved out of the fee. If land be conveyed or devised to A. for his life, and after A.'s decease to B. and his heirs, the estate vests in interest, though not in possession, and is a proper vested remainder in B. And this answers Lord Coke's definition, for B.'s remainder passes from the grantor at the same time as A.'s life estate in possession. Again, if land be conveyed or devised to A. for life, and if B. die in the life-time of A., then after B.'s decease to C. and his heirs, C.'s estate is contingent.

To be a proper remainder, it must exist in lands and tenements, and not chattel interests, which are not the proper subjects of remainders in law. And to be a good *contingent* remainder, it is a rule that some vested estate of freehold must precede it; which rule arises from the necessity there is for the freehold to pass out of the grantor at the time that the remainder is created. If I limit an estate to the use of A. until C. return from Rome, and after the return of C., to the use of B. and his heirs; A., in this case, has a particular estate which is to last till C.'s return, which being an uncertain period, such particular estate in A. is a freehold, for it *may* last for his life, and the residue of the estate after C.'s return, is a remnant of the fee expectant upon the particular estate; but as C.'s return from Rome is an uncertain event, the limitation of such remnant over being dependent thereupon, is a contingent remainder.

press limitation, by force of the implied intention of the testator; though it is a settled rule that they can only be created in a deed by express limitations[v]. The formal limitation, which it is safest to adopt both in wills and deeds, runs as follows:—" To the use of all and every the sons or daughters, &c. (as the case may

[v] Cole v. Livingston, 1 Ventr. 224. Doe v. Dorvell, 5 T.R. 521.

Mr. Fearne has distinguished contingent remainders into four sorts:—

First, where the remainder depends entirely on a contingent determination of the preceding estate itself; as if A. make a feoffment to the use of B. till C. return from Rome, and after such return of C., then to remain over in fee, here the particular estate is limited to determine on the return of C., and only on that determination of it is the remainder to take effect; but that is an event which possibly may never happen, and therefore the remainder, which depends entirely upon the determination of the preceding estate, is dubious and contingent.

Secondly, where some uncertain event, unconnected with, and collateral to, the determination of the preceding estate, is, by the nature of the limitation, to precede the remainder; as if a lease be made to A. for life, remainder to B. for life, and if B. die before A., remainder to C. for life. So if lands be given to A. in tail, and if B. come to Westminster-hall such a day, to B. in fee; here B.'s coming to Westminster-hall has no connection with the determination of A.'s estate; but as it is an uncertain event, and the remainder to B. is not to take place unless it should happen, such remainder is therefore a contingent remainder.

Thirdly, where a remainder is limited to take effect upon an event, which, though it certainly must happen some time or other, yet may not happen till after the determination of the particular estate; (and it is necessary that some preceding freehold estate should subsist and endure till the contingency happens, though a remainder may be so limited as not to vest till the very instant at which the preceding estate determines:) as if a lease be made to J. S. for life, and after the death of J. D. the lands to remain to

be) and of the heirs of their respective bodies issuing, share and share alike, as tenants in common; and in case there shall be a failure of issue of the body or bodies of any of such sons or daughters, then as to the part or parts, as well accruing and surviving, as original, of such of them whose issue shall so fail, to the

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another in fee; now it is certain that J. D. must die some time or other, but his death may not happen till after the determination of the particular estate by the death of J. S., and therefore such remainder is contingent. So in case of a lease for life to A., and after the death of A. and M., the remainder to B. in fee, this is a contingent remainder; for the particular estate being only for the life of A., and the remainder not to commence till after the death of A. and M., if A. die before M., the particular estate will end before the remainder can commence, which is very possible, and therefore such remainder is contingent.

Fourthly, where a remainder is limited to a person not ascertained, or not in being at the time when such limitation is made; as if a lease be made to one for life, remainder to the right heirs of J. S.; now there can be no such person as the right heir of J. S. until the death of J. S. (for nemo est hæres viventis) which may not happen till after the determination of the particular estate by the death of tenant for life, therefore such remainder is contingent. —So where a remainder is limited to the first son of B. who has no son then born; B. may never have a son, or if he should, the particular estate may determine before the birth of such son; therefore this remainder is contingent.—So if an estate be limited to two for life, remainder to the survivor of them in fee, the remainder is contingent; for it is uncertain who will be the survivor.

Cases wherein the limitation is void as being mounted on a fee.

With respect to the doctrine adverted to in the text,—that a fee cannot be mounted on a fee; it may be useful in a short compass to shew wherein limitations over may be invalid on this ground of objection; as,

1. When there is a limitation to A. and his heirs, (which is a pure fee-simple) remainder to another who cannot possibly be heir to A., and his heirs, the limitation over is void.

2. When there is a limitation to A. and his heirs, as long as A. and his heirs shall be lords of the manor of D., or while B. or any

use of the survivors or surviyor, and other or others of them, equally to be divided between them if more than one, share and share alike, as tenants in common, and to the several and respective heirs of the body and bodies of such surviving and other son or sons, daughter and daughters; and if all such sons

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issue of his body shall be in existence, and when A. or his heirs shall cease to be lords of the manor of D., or after the decease of B. and failure of his issue, then to C. and his heirs; in either of these cases the remainder to C. is void.

Of the nature and restrictions of executory devises.

But where an estate is limited after a limitation of the fee, but not so as to await its natural expiration by efflux of time, but so as to happen within a certain period, and then to take place in exclusion of the first estate; this ulterior disposition of property, though void at common law, is valid under the form and character of limitations to uses or executory devises, provided it be limited to take effect within a certain distance of time allowed and prescribed by the rules, in that respect, which have been settled by a series of cases and authorities.

What these rules are has been so clearly and concisely shewn by the late Mr. Serjeant Williams in his note to the case of Purefoy *v.* Rogers, 2 Saund. 388. that it is conceived a full extract from it will be the best mode of completing the object of this note, i. e. of placing before the reader a very short, but faithful outline of this difficult doctrine.

"One of the properties of executory devises is, that they cannot be aliened or barred by any mode of conveyance, whether by recovery, fine, or otherwise; therefore until the contingency happens upon which the limitation is to take place, executory devises create a kind of perpetuity; for which reason the law has put them under some restraint, and circumscribed the bounds within which they are to be allowed.

"At first it was held that the contingency must happen within the compass of a life, or lives in being, or a reasonable number of years after; at length it was extended a little further, namely, to a child in ventre sa mere at the time of his father's death, because, as that contingency must necessarily happen within the usual time of ges-

or daughters shall die without issue, or there shall be but one such son or daughter, then to the use of such one son, or daughter, and the heirs of his or her body." This formal language, however, is not indispensable in a deed, and so long as the limitations are described substantially, and in terms, it matters not,

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tation, that construction would introduce no inconvenience: and the rule has in many instances been extended to twenty-one years after the death of a person in being, as in that case likewise there is no danger of a perpetuity. Goodtitle *v.* Wood, Willes Rep. 213. Therefore it is now become an established rule, that an executory devise is good, if it must necessarily happen within a life or lives in being and twenty-one years, and the fraction of another year, allowing for the time of gestation. Long *v.* Blackall, 7 Term. Rep. 102. This rule was adopted in analogy to legal formal limitations, namely, for a life or lives in being with a remainder in tail to unborn children, who cannot bar it till twenty-one, and the fraction of another year, since the statute of William, if tenant for life should leave his wife ensient. Porter *v.* Bradley, 3 Term Rep. 146." The Serjeant then states an example of what he calls the proper executory devise, which is where an estate in fee is devised, followed by a limitation of the inheritance over to another upon the happening of a particular event, and thus proceeds:

"2. There is another species of executory devises, where a testator gives a future estate to arise upon a contingency, or at a certain time, and does not part with the fee, but retains it; and on his death the fee descends to his heir in the mean time. 1 Salk. 229, 230. As where a man devised to his wife till his son attained the age of twenty-one, and then that his son should have the lands to him and his heirs; but if he died without issue before his said age, then to his daughter and her heirs, this was adjudged to be a good executory devise to the daughter, if the contingency happened, and that in the mean time the fee descended to the son as heir; but if he lived to twenty-one, though he died after without issue; or if he left issue, though he died before twenty-one, the daughter could not have the lands, because her brother was to die before twenty-one, *and* without issue to intitle her to take. 3 Leon. 64. 70.

though the terms are informal, and to a certain degree incorrect[u].

In a will, cross remainders may be implied, without any express limitations, where there is evidence furnished by the tenor of the instrument, to shew that

Changes in respect to the rule of presumption.

[u] Doe *v.* Wainewright, 5 T. R. 427.

Hinde *v.* Lyon. 2 Roll. Rep. 197. 217. Boulton's case. Palm. 132. S. C. 1 Eq. Cas. Abr. 188. So where a testator devises lands to A. in fee to commence six months after his decease, it is a good executory devise, and during those six months the estate descends and continues in the testator's heir at law. 1 Lutw. 798. Clarke *v.* Smith, S. C. cited 2 P. Will. 43. So where a man seised in fee devised to trustees for 500 years upon certain trusts, remainder to the first and other sons of his eldest son T., who was then a bachelor, successively in tail-male, remainder over; the limitation to the unborn son of T., was held good by way of executory devise; and it was also held that the inheritance descended to T. till he had a son, or till his death without one. Gore *v.* Gore, 2 P. Will. 28. In this case it is to be observed, that the contingency, upon which the executory devise is limited to the first son of T., must in all events happen on the death of T., for it must take place either on the birth of a son to T., or on his death without having had any son. A man having only one sister and heir, who had issue A., and afterwards married W., by whom she had issue B. and M., devised lands to his sister until B. should attain twenty-one, and after B. should have attained that age to B. and his heirs; and if B. should die before twenty-one, then to the heirs of the body of W. and their heirs, as they should attain their respective ages of twenty-one. The testator died; B. died before twenty-one, living W., and afterwards W. died. It was adjudged that T. M. either as heir of B., *or as heir of the body of* W., being of age after the death of W., took the estate by way of executory devise. Taylor *v.* Biddall, 2 Mod. 289. There M. who was the heir of the body of W. could not take till the death of W., because nemo est hæres viventis; and as that heir of the body of W. who should attain twenty-one might

it was the testator's intention that the estate should go in that course of succession. But it has been said that the law never favours cross remainders even between two persons only, and that between more than that number, they could not, under any circumstances, be implied[v], on account of the confusion that would

[v] 2 Roll. Rep. 282. Gilbert *v.* Whitty, Cro. Ja. 655. Davenport *v.* Oldis, 1 Atk. 579, 580. per Lord Hardwicke.

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not have been born before his father's death, and the estate could not vest in him till his age of twenty-one, it is evident the estate might possibly not have vested under that limitation till twenty-one years after a period of a life then in being. So where a testator devised lands unto his grandson W. S. and his heirs; but in case W. S. should die before he should attain his age of twenty-one years, then to his grandson T. S., and if T. S. should die before he should attain his age of twenty-one years, then to such other son of the body of his daughter M. S. by his son in law T. S., as should happen to attain his age of twenty-one years in fee, and for default of such issue remainder over. The testator died leaving two grandsons, the said W. S. and T. S. who both died under age; afterwards another son A. of the body of M. S. by T. S. was born; it was held by the judges of the court of K. B. upon a case sent to them, and afterwards decreed by Lord Talbot, that it was a good executory devise to this after-born son A., if he should attain his age of twenty-one years: and the judges decided it upon the authority of the last mentioned case of Taylor *v.* Biddall; the record of which was searched and found to agree in the material parts of it with the printed report. Stephens *v.* Stephens, Cas. Temp. Talb. 238. In this case the limitation was confined to vest at the infant's age of twenty-one, which must necessarily happen within twenty-one years after the death of its mother M. S. who was then in being. So where a devise was to the child with which the testator's wife was then ensient, in case it should be a son, during his life, and after his decease then to such issue male, or the descendants of such issue male, of such child, as, at the time of his death, should be his heir at law; and in case, at the time of the death of such

be likely to arise from the division of the estate among so many, and the uncertainty as to what interest would vest in the survivors[x]. But this exclusive doctrine has received considerable qualification, and the following distinction has since prevailed, viz.: "That the presumption is in favour of cross remainders be-

[x] Holmes *v.* Meynel, Sir Thos. Jones, 173.

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child, there should be no such issue male, nor any descendants of such issue male then living, or in case such child should not be a son, then to P. L.; it was held that it was a good executory devise over to P. L. within the limits allowed by law with respect to executory devises; for the devise over to P. L. must take effect, if at all, after a life which must be in being within nine months after the devisor's death. Long *v.* Blackall, 7 Term Rep. 100. This case, it is to be observed, begun with a devise to a posthumous child for life, with a limitation over, upon a failure of issue of his body at his death; which of course would include an heir male then in ventre sa mere; for as the devise begun with the allowance for the birth of a posthumous child, and also might conclude with it, the time might be claimed twice over; and so the time allowed for the birth of a posthumous child after lives in being and twenty-one years might be enlarged to two periods of gestation. And therefore in a late case, it was objected in argument, either that the effect of beginning an executory devise with the life of a person in the womb had escaped the attention of the Court of King's Bench; or if that court did take it into their consideration, and meant to say that the executory devise was nevertheless a valid one, then it was insisted, that the opinion of the judges in that case was questionable, as having exceeded former determinations, because it added a further period to the boundary of executory devises, and the decision had the effect of taking the life of a person en ventre sa mere for a life in being; but that objection was over-ruled, and the case of Long *v.* Blackall was allowed and approved of as a case of undoubted law. 4 Vez. Jun. 254. 273. 323. 341.

"It has been held, in support of a testator's intent, that a limitation in a will which, in one event, would have operated as a contin-

tween *two* and no more; but where the question arises, whether cross remainders, are to be implied between *more than two,* they are rather to be presumed *against,* although such presumption against them may be answered by circumstances plainly indicating a general intention which cannot be sa-

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gent remainder, but which event did not happen, should operate as an executory devise, provided it falls within the established rule of law respecting executory devises. As where a devise was to S. son of J. for life, remainder to his first and other sons in tail-male, remainder to any other son or sons of the said J. who had no other son then born, remainder over. S. died in the life-time of the testator without issue, and afterwards the testator died; it was held by Lord Talbot that on the event which happened, namely, S.'s death in the testator's life-time, it would best effectuate the testator's intent to construe the limitation over to the first and other sons of J., to be an executory devise, though if S. had survived the testator, they would have operated as contingent remainders. Cas. Temp. Talb. 44. Hopkins *v.* Hopkins. See Brownsword *v.* Edwards. 2 Vez. 249. S. P.

"With regard to executory devises it is a rule, that wherever one limitation of a devise is taken to be executory, all subsequent limitations must likewise be so taken. However it seems to be established, that whenever the first limitation vests in *possession,* those that follow vest in *interest* at the same time, and cease to be executory, and become mere vested remainders and subject to all the incidents of remainders, as appears by the before-mentioned cases of Stephens *v.* Stephens, and Hopkins *v.* Hopkins, and also Doe *v.* Fonnerau, Dougl. 487.

"3. A third sort of executory devises or rather *bequests* is, where a *term for years* or other *personal* estate is bequeathed to one for life, remainder over to another; the remainder shall take effect as an executory bequest. At common law, if a man had granted by deed a term of years to A. for life, remainder over to B., A. had the whole term in him; and therefore no remainder could be limited after it. But when long and beneficial terms came in use, the convenience of families required that they might be settled upon a child, after the death of the parent. Such limitations were soon

tisfied but by the construction of cross remainders." And this seems to be nothing more than a return to good sense and ancient law; for in Clache's case[y], 13 Eliz. where a man having issue *five* sons, devised lands to his four younger sons and the heirs male of their bodies; and if they all died without issue of their bodies, or any of their bodies, that the

[y] Dyer 303. b.

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allowed to be created *by will;* and the old objections were removed by changing the name from *remainders* to *executory bequests.*

"It is an established principle that the limitation over of a term after a general failure of issue is void, as being too remote. Saltern *v.* Saltern, 2 Atk. 312. 376. If however the testator makes use of words in his will which indicate an intention to confine the generality of the expression of *dying without issue,* to dying without issue *living at the time of the person's decease,* they will be so construed to effectuate the intent. As where a term was bequeathed to H. for life, and no longer, and after his decease to such of the issue of the said H. *as H. should by will appoint,* and in case H. should die without issue then over to A.; H. died without issue living at his death; those words upon the whole of the will were construed to mean issue living at his death; because it was to be intended such issue as A. should or might appoint the term to, namely, issue *then living.* Target *v.* Gaunt, 1 P. Wms. 432. So where a testator gave the residue of his real and personal estate to his nephews W. and G., and if either of them should depart this life, and *leave no issue* of their respective bodies, then he gave the said premises to D., Lord Chancellor Parker observed that the devise carried a freehold as well as a leasehold; nevertheless, he thought it might be reasonable enough to take the same word in two different senses as to the two different estates; and that as to the freehold, the construction should be, if W. or G. died without issue *generally,* and as to the leasehold, the same words might be construed to mean a dying without *leaving* issue *at their death.* Forth *v.* Chapman, 1 P. Wms. 667. Thus also, where a term was bequeathed to T. son of D. and S. and the heirs lawful of him for ever; but in

A person devised land to his four sisters and a niece for their lives, share and share alike, as tenants in common and not as joint-tenants, remainder to their sons successively in tail male, remainder to their daughters in tail, the reversion to his own right heirs[a].

Lord Mansfield said, that wherever cross remainders were to be raised by implications between two, and no more, the presumption was in favour of cross remainders; where they were to be raised between more than two, there the presumption was against cross remainders; but that this presumption might be answered by circumstances of plain and manifest intention either way. This was a qualification of the rule laid down in former cases; for they seemed to say that there should not be cross remainders between more than two; but the true rule was to take it with the qualification above stated. Here the presumption was against cross remainders, and judgment was given that there were no cross remainders.

A devise was in these words:—"To the use of all and every the daughter and daughters of the body of P. H., and to the heirs of her and their body and

[a] Perry v. White, Cowp. 777.

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was laid down by Lord Hale in the above-mentioned case of Purefoy v. Rogers, namely, "that where a contingency is limited to depend upon an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only." A rule which Lord Kenyon in delivering the opinion of the court in Doe v. Morgan, 3 T. R. 363. stated to have uniformly prevailed without any exception to the contrary.

bodies lawfully issuing; such daughters, if more than one, to take as tenants in common, and not as joint-tenants; and for default of such issue, to the right heirs of the devisor for ever." There were two daughters, and one of them having died an infant, the question was whether her sister became entitled to her moiety. A case being sent out of the court of Chancery for the opinion of the Judges of the King's Bench, the certificate was:—" There are no words in the instrument which intimate any intention to limit over the *respective* shares of the two daughters dying without heirs of their bodies respectively: on the contrary, the limitation over is of the *whole* estate, limited to all the daughters, and is to take place on the express contingency of failure of all and every the daughter and daughters, and the heirs of their body and bodies; and the limitation over on default of such issue is to the heir at law. Consequently we are of opinion, that as nothing is given to the heir at law, whilst any of the daughters or their issues continue, they must amongst themselves take cross remainders[a]."

George Phipard devised all his lands, situate, &c. to his brothers William and John, and his sister Elizabeth, and the heirs of their bodies, as tenants in common, and not as joint-tenants; and for want of such issue, to his own right heirs for ever; and gave all the residue of his goods and chattels, as well real as personal, to his said brothers and sister, to be equally divided betweeen them. Upon a case out of Chancery, Lord Mansfield said, that the reason given in the old cases against raising cross remain-

[a] Wright *v.* Holford, Cowp. 31. reported by the name of Wright *v.* Englefield, Ambl. 468.

ders, to prevent the splitting of freeholds, had not very great weight at the time it was given, and certainly had none now. To be sure where they were to be raised between two, and no more, the favourable presumption was in support of cross remainders; where between more than two, the presumption was against them; but the intention of the testator might defeat the presumption in either case.

In general, he believed, in devises of this kind, the intention of the testator was in favour of cross remainders. But there must be some circumstances manifesting such intention. In the present case, the testator had two brothers and a sister; if he meant his estate should have gone to his heir at law, there was no occasion to make a will; therefore, it was clear he did not mean his brother John should take as heir, or that William should do so. But he meant that his sister should be equally an object of his bounty. It was clear that he meant no division should take place to create an inequality between them till a failure of the heirs of *all* their bodies. He therefore began with the disposition thus: "As to *all* my temporal estate, I give *all* my lands to my two brothers and my sister, and to the heirs of their bodies lawfully begotten."

These were the words of an ignorant man, and the will was inaccurately drawn; for there could not be a limitation to two brothers and a sister, and to the heirs of their three bodies. The court, therefore, must mould them as near to the intent of the testator as they could. The lands, he said, were equally to be enjoyed by his brothers and sister, and the heirs of their bodies. It was impossible to have expressed

his intention, that his sister should take equally with his brothers, more plainly. He meant his estate should continue fettered with an intail, during the existence of the persons then in being, and their issue; and that his heir at law should take nothing till after that intail was determined: whereas, if the construction were to be, that the heir at law should take upon the failure of issue of any one, the elder or the younger brother, as the case might happen, would then take a fee in the share of the deceased brother or sister, and so create an inequality, which the testator never intended to make: for it was limited to them, and the heirs of their bodies, and for want of such issue: want of issue there plainly meant issue of all of them. How could it then be executed, but by raising cross remainders? It seemed to be as strong a case as that of Wright *v.* Holford. The other judges concurred, and the court certified that these were cross remainders [b].

T. B. being seised in fee, devised all his manors, &c. to all and every the daughter and daughters of the body of his daughter Martha, and the heirs male of the body of such daughter or daughters, equally between them, if more than one, as tenants in common, and not as joint tenants; and for default of such issue, he gave and devised *all his said premises* unto his right heirs for ever. Upon a case sent out of Chancery for the opinion of the judges of the King's Bench, Lord Kenyon said, that as between two only, it should be presumed that cross remainders were intended to be raised; but if there were more than two, it was necessary to resort

[b] Phipard *v.* Mansfield, Cowp. 797.

to other words in the will to discover an intention to raise cross-remainders : but, here, there was no doubt, from the words of the limitation over, but that the devisor intended to raise cross remainders between the grand-daughters. The testator clearly intended that the whole should go together; whereas, if no cross remainders were raised between the grand-daughters, it would go to the right heirs by separate portions on the death of each grand-daughter[c].

Mr. Justice Buller said this was a stronger case for raising cross remainders than that of Phipard *v.* Mansfield; for here, besides the words, 'for default of such issue,' namely, issue of all of them, the devise over is of *all* the devisor's estates. Now, they could not all go together, but by making cross remainders between the grand-daughters.

The court certified, that the daughters of Martha took estates in tail male, with cross remainders.

A person devised an estate to all and every the younger children of Mary Foxon, begotten or to be begotten, if more than one, equally to be divided among them, and to the heirs of their respective body and bodies, to hold as tenants in common, and not as joint tenants. And if the said Mary Foxon should have only one child, then to such only child, and to the heirs of his or her body lawfully issuing; and for want of such issue, he gave and devised the said premises to C. N. The question was, whether cross remainders were raised between the younger children of Mary Foxon[d].

[c] Atherton *v.* Pye, 4 Term. Rep. 710.

[d] Watson *v.* Foxon, 2 East. R. 36.

Lord Kenyon said, that where cross remainders were to be raised by implication between two, and no more, the presumption was in favour of cross remainders: where they were to be raised between more than two, the presumption was against them; but that presumption might be answered by circumstances of plain and manifest intention either way. Whatever was declaratory of the intention of the party, he took to be expressed. No technical words were necessary to convey an intention; but, if taking the whole instrument together, there was no doubt of the party's meaning, the court arrived at the conclusion. Now, here the testator set out with devising *all* his farm, &c. to his daughter and granddaughter for their lives, remainder, after the death of the survivor, to all and every the younger children of Mary Foxon, if more than one, equally to be divided amongst them, and the heirs of their respective body and bodies as tenants in common: and, if only one child, then to such only child, and the heirs of his or her body, &c.; and for want of such issue he gave and devised the said premises to his son-in-law, C. N. (what he meant by the *said* premises was evident, and could not have been rendered clearer by saying, *all* the said premises, though it might have served to multiply words.) Then, after several limitations, and for want of such issue, he proceeds to divide the estate into thirds, to go to different persons: till then the entirety of the estate was to be preserved, and all was to go over at the same time. But great stress was laid here upon the word *respective*, as disjoining the title; and the authority of Lord Hardwicke was referred to in the cases mentioned. No person regarded whatever fell from that great Judge, with more reverence than he did; but it was unworthy of his

great learning and ability, to lay such stress as he was stated to have done, on the word 'respective.' Creating a tenancy in common, divided the title as much, whether the word 'respective' was used or not. And, as to what might have been said by other Judges, with reference to the opinion delivered in Comber *v.* Hill*, and Davenport *v.* Oldis, in subsequent cases where the word 'respective' did not occur; feeling themselves right on the principle on which they proceeded, it was not to be wondered at, that they were desirous of relieving their own minds from the weight of Lord Hardwicke's opinion: but it was too much to infer from thence that those Judges, therefore, approved of his opinion, or that their judgments were governed solely by that consideration. In the case of Atherton *v.* Pye, the devise over, in default of such issue, was of *all* the testator's said lands: and stress was laid by some of the Judges on the word *all,* in support of raising cross remainders between the issue, he would not say by implication, but by what the Judges collected to be the intention of the testator. But the word 'all' was not decisive of that case, and, in truth, made no difference in the sense; for a devise over of *the said premises,* or *the premises,* or *all the said premises,* meant exactly the same thing. Admitting, therefore, the general rule, that the presumption was not in favour of raising cross remainders by implication between more than two, still that was upon the supposition, that nothing appears to the contrary, from the apparent intention of the testator. He had no doubt here, but that the testator intended to give cross remainders among the issue of M. F. The devise over of the *premises* meant *all the premises.* He intended that *all*

* 2 Strange, 969.

the estate should go over at the same time. He thought Lord Mansfield's quarrel with Davenport *v.* Oldis well founded; and he agreed with the cases of Wright *v.* Holford, and Phipard *v.* Mansfield; and he could not distinguish this case from those. He was clearly of opinion, that the intention of the testator was the polar star, by which the court should be guided in the construction of wills, where no law was infringed, &c. Here the intention was clear to give cross remainders. The other Judges concurred; and judgment was given accordingly.

The doctrine of opposing the implication of cross remainders between more than two, has given way to the principle of consulting the testator's intention.

Thus it appears, therefore, that by a series of weighty decisions, the severe doctrine of opposing the implication of cross remainders between more than two, has entirely given way to the principle of consulting the testator's intention, without regard to technical phraseology. If the object of the testator by the limitation over, after the devise to the persons beforenamed to take as tenants in common in tail, appears to be to limit the estate entire and unbroken to those in remainder, and not till after the failure of all the issues of the persons so previously entitled as tenants in common, to effectuate that intent cross remainders will be implied among such tenants in common. And very slight verbal particularities have been considered as marks of such intention. Thus in Roe *v.* Clayton [f], it seemed to weigh much with the court that the limitation over was a devise of *all* the estate. And in the subsequent case of Doe d. Gorges *v.* Webb [g], where the testatrix devised the premises to her daughters as tenants in common, and the heirs of their bodies, and in default of such issue, gave the *same* to her own right heirs for ever; the word

[f] 6 East, 628. [g] 1 Taunt. 234.

'same' was considered as shewing that the testator meant to give all together to the devisee over.

In a very late case in Chancery[h], however, Lord Eldon did not seem to think the reasoning from these expressions, '*all*,' or '*all the premises*,' or '*the same*,' very satisfactory. But his Lordship fully adopted the opinions of the Judges in the later cases, as to the improper stress laid by Lord Hardwicke, in Davenport *v.* Oldis[i], on the purport of the words *several and respective* in the devise to the persons and their issues in tail; since the words "to take as tenants in common," do equally without these words import estates in severalty; and the estates of tenants in common do, as such, without more words, descend to their issues respectively.

Upon the whole it may be doubted whether, consistently with the spirit of the modern cases upon this subject, which evidently shew a strong disposition to take cases out of the influence of the supposed rule of presumption against the implication of cross remainders between more than two, such distinction between the cases grounded on the difference of number has in reality any longer a practical existence; for it will be difficult to understand the proposition that the courts lean one way, and the presumption of law another. And it must be difficult, if not impossible, to apply this supposed difference of presumption to those numerous cases where the devise is not to individuals named and ascertained, but to the fu-

[h] Green *v.* Stephens, 17 Ves. Jun. 64.

[i] 1 Atk. 579. 589. See also Comber *v.* Hill, 2 Strange, 969. and Williams *v.* Browne, 996.

ture children of persons having none at the time of the devise; for if these presumptions are to be considered as founded upon the intention of the testator, such intention in the case last supposed must be inferred as provisionally and in prospect contemplating the possible alternative of the objects of the devise being two and no more, or above that number, and calling for a different construction as the event may shape the case.

SECTION VI.

By what words an Estate for life only will pass.

IT seems to be a safe and fundamental principle in the construction of wills, that it shall be made according to the rules of the common law in respect to estates limited or conveyed by deeds, unless there is something clearly to be collected from the will itself disclosing a different intention in the testator (1). And it will be useful as a check upon the zeal sometimes discovered for executing the supposed intention of a testator, to remember Lord Chancellor Harcourt's

(1) Carth. 5. per Bridgman, C. J. who cites Wild's case, 6 Rep. 16. in support of the position.

observation in Bale *v.* Coleman[a], that "the intent which ought to govern must be a certain and manifest intent, and not an arbitrary one; it must be according as it appears upon the will, and according to the known rules of law;—it is not to be left to a latitude, and as it may be guessed at." (2)

[a] See Vin. Abr. tit. Dev. (D. b.) 7 MSS. Rep.

General rules for the construction of wills.

(2) The following general rules respecting the construction of wills seem to be pretty steady in their application.—The construction of wills must be the same in courts of law and equity, 1 Bl. Rep. 377. Words tending to disinherit the heir at law, will not have that effect, unless the estate is completely devised to another. Dougl. 763. The common expression in the books that an heir shall not be disinherited, except by express words, or necessary implication, is incorrect: the proper terms of the rule are, that the intent of the testator ought to appear plainly in the will itself, otherwise the heir shall not be disinherited. Moon d. Fag *v.* Heaseman, Willes, 141. And where there is no ambiguity it has long ago been said by great authority, that a devisee is as much favoured as an heir at law. 6 Mod. 133. 2 Vern. 340. per Holt C. J. in Falkland *v.* Bertie. The order of words is not to be regarded, but a transposition may be made to render a limitation or disposition sensible, Hob. 75. Spark *v.* Purnell, 2 Vez. 32. East *v.* Cook, id. 74. Duke of Marlborough *v.* Lord Godolphin, id. 248. and see Brice *v.* Smith, Willes, 1. In respect to which a court of equity has no more power than a court of law. And this can only be done to come at the meaning of the testator, and not to alter or affect the operation of the devise: it ought never to be done where the words are plain and sensible, much less to let in different devisees or legatees in a will: for to do that would be to make a new will, ibid. et vid. 2 Leon. 165. Blackler *v.* Webb, 2 P. Wms. 384. Repugnant words may be rejected, Boon *v.* Cornyforth, 2 Vez. 278. Cole *v.* Rawlinson, 2 Lord Raym. 831. The devise of a trust is to be construed in the same manner as that of a legal estate, and not to be varied by subsequent accidents. Atkinson *v.*

If there are no expressions in a will giving in direct terms an estate of inheritance, nor any plain grounds for inferring an intention to give such estate, nothing passes away from the heir at law beyond an estate for life. Therefore, as before has been observed, a devise of land to a person ge- Where there are no words giving an inheritance or plain grounds for inferring an intention so to do, the de-

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Hutchinson, 3 P. Wms. 259. The intent of the testator is to be the rule of construction if the words will bear it out; but if the force of the words be such that the intent cannot be complied with, the rule of law must take place, Brownsword *v.* Edwards, 2 Vez. 248. Loose, general, and doubtful words may be rejected as surplusage, where they oppose a plain precedent devise, or the broad and manifest intent of the testator. Hob. 65. 6 Mod. 112. Wills should be so construed as to preserve estates in the intended channel of descent, Cro. Car. 185. 1 Leon. 285. 2 Vez. 615. 2 Str. 798. Effect ought to be given, if possible, to the *whole* will, and a codicil is to be considered as part of it, Gray *v.* Minethorpe, 3 Vez. Jun. 105.; and a construction may be made to support the intention upon the *whole* will even against strict grammatical rules, 11 Vez. Jun. 148. But an express disposition cannot be controuled by inference, Collett *v.* Lawrence, 1 Vez. Jun. 269. Words of desire are of imperative obligation, if the object be certain, Eccles *v.* England, Prec. in Ch. 200. Harland *v.* Trigg, 1 Bro. C. C. 142. Pierson *v.* Garnett, 2 Bro. C. C. 38.; unless there is plainly a discretion intended to be given, Cunliffe *v.* Cunliffe, Ambl. 686. Morris *v.* the Bishop of Durham, 10 Vez. Jun. 522. If a testator uses technical phrases he must be supposed to understand them, unless by other parts of the will he manifests the contrary, Phillips *v.* Garth, 3 Bro. C. C. 60. Green *v.* Howard, 1 Bro. C. C. 31. 3 Bro. C. C. 234. And, primâ facie, words must be understood in their *legal* sense, unless a contrary intent plainly appear, Holloway *v.* Holloway, 5 Vez. Jun. 401. It is an universal rule, that words having an obvious construction, are not to be rejected upon a suspicion that the testator did not know what he meant by them, Milner *v.* Slater, 8 Vez. Jun. 295. If a testator expresses himself incorrectly the court will supply proper words, if the meaning distinctly appear, Dodson *v.* Hay, 3 Bro. C. C.

visee takes only an estate for life.

nerally [b] disposes of nothing but an estate for the life of the devisee, and the addition of the word 'assigns' will not enlarge it. Accordingly, if a man devise in the following manner*, "I devise Black Acre to

[b] Fairfax v. Heron, Prec. in Ch. 68.

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* Vin. Abr. tit. Dev. (Q. a). But if a man devise Black Acre to one in tail, and also White Acre, the devisee will have an estate tail in White Acre also, for this is *all one sentence*, ibid. And so it has been held that if in the first clause *no devisee is named*, as where a testator says, "Item, I give the manor of D., Item, I give the manor of S. to J. K. and his heirs," this shall be referred to both the manors, and J. K. will have the fee in both. Ibid.

404, Doe d. Leach v. Mecklem, 6 East, 486. But mistakes in a will are never to be intended if a reasonable construction can be found out, Purse v. Snaplin, 1 Atk. 415. General words will be controuled to render the whole will consistent, Whitmore v. Trelawney, 6 Vez. Jun. 129. Where there is no connection by grammatical construction, or by direct words of reference, or by the declaration of some common purpose, between distinct devises in a will, the special terms of one devise cannot be drawn in aid of the construction of another, though in its general terms and import it may be similar, and apply to persons standing in the same degree of relationship to the testator, Wright ex dem. Compton v. Compton, 9 East, 267. In trying the meaning of phrases used in a will all circumstances may be looked at, in which the court might have been called upon to determine the meaning of the same phrases applied to a different state of facts, Earl of Radnor v. Shafto, 11 Vez. Jun. 457.

Every word ought to have an effect if possible, and not inconsistent with the general intention, which if manifest is to controul, Blandford v. Blandford, Roll. R. 319. Constantine v. Constantine, 6 Vez. Jun. 100. The general words of a will may be restrained in cases where it appears that the devisor did not intend to use them in their general sense, Strong v. Teate, 2 Burr. 912. and Doe on

my daughter F. and the heirs of her body begotten; Item, I devise to my said daughter White Acre;" the daughter shall have but an estate for life in White Acre; for the word 'item' has not the force of the words 'in the same manner,' or 'in formâ prædictâ,'

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dem. Reade *v.* Reade, 8 T. R. 118.; but the safest course is to abide by the words; unless upon the whole will there is something amounting almost to demonstration, that the plain meaning of the words is not the meaning of the testator, 9 Vez. Jun. 205. In every will there is a tacit condition both in law and equity, that whoever would derive a benefit under it must acquiesce in the whole of it, however disjointed the parts, Molyneux *v.* Scott, 1 Bl. Rep. 377.

Croke, Justice, laid down three rules which, he said, if observed, would open all the doors in every will: 1st. No will ought to be construed per parcella but by the entirety; 2d. No contrariety or contradiction to be admitted; 3d. No nugation, nor any thing nugatory ought to be in a will; 2 Bulst. 178.

The same word in different parts of the same will should be construed in the same sense, Whitmore *v.* Lord Craven, 2 Ch. Ca. 169. unless the general intention calls strongly for a difference of construction; and sometimes they may have a different force as applied to *different subjects*, Forth *v.* Chapman, 2 Vez. 616. It is an ordinary rule that where a former clause in a will is *express*, *positive*, and *particular*, a subsequent clause shall not enlarge it, Roberts *v.* Kiffin, Barn. C. R. 261. Constructions of wills shall be made according to estates at common law by *deed*, unless something in the intent of the will appear to the contrary, Carth. 5. per Bridgman, C. J. cites 6 Rep. 16. Wild's case. Wills in general are construed from the *making*, unless circumstances, or the tenor of them, shew that the construction should be from the *death*, but the *intermediate* time is not to be regarded, 1 Vez. 295.

The intention of a testator must be construed in consistency with the rules of law, so as not to be considered as intending to limit a fee upon a fee; or to create a perpetuity; to make a chattel descendible to heirs; to put the freehold in abeyance; or to

Lord Kenyon said that where a devisee is directed to pay an annual rent charge, or a solid sum to another person, out of the estate devised, it had been properly decided that the devisee should take a fee, because he might be a loser unless the estate in his hands were at all events sufficient to enable him to bear those charges. Where a sum of money was given, it might be payable before the rents became due: and where an annual charge was made on the estate, it might continue beyond the life of the devisee, and, therefore, it was necessary, in both those cases, that the devisee should have a permanent fund. This case had been compared to that of Doe *v.* Richards[m], but there the words were, "my legacies and funeral expenses being thereout paid;" which imported that those sums were to be paid by the devisee out of the interest given to her: and if she had died immediately after the devisor, and had only taken a life-estate, the fund out of which she was to bear those charges might have failed. The court was therefore compelled to make that decision, and he was now perfectly satisfied with it. But, in the case before the court, the words of the will were, "after payment of my just debts and funeral expenses." Now, supposing the devisor had, in the beginning of the will, charged his debts and funeral expences on his real estate, and had then, after a series of limitations, devised to his wife, in the words now used, it could not have been contended, that such a charge on the real estates would have passed the fee to his wife; and if not, the place in which the same words were introduced, could not vary the question. He

[m] 3 T. R. 356.

makes his will in this manner, "I devise the moiety of my house to my wife for her life; Item, I devise the other moiety of my house to J. S.; Item, I devise to J. S. all the said house, and all the land that appertains to it after the death of my said wife;" J. S. will take only an estate for life in the premises after the death of the wife [c].

So if I devise Black Acre to J. S. Item, I devise White Acre to J. S. and his heirs, it is only an estate for life in Black Acre; for the Item has no dependance upon the first clause, but is distinct and several.

The cases of Denn *v.* Gaskin [d], and Right *v.* Sidebotham [e], have been already produced as instances of the rule which will not suffer a greater estate than for the life of the devisee to pass by a will without proper words of limitation, or a plain indication on the face of the instrument of an intention in the testator to give an inheritance. The words of Lord Mansfield in the last-mentioned case are very declarative of the law on this subject.

"I verily believe," said his Lordship, "that almost in every case, where, by law, a general devise of lands is reduced to an estate for life, the intent of the testator is thwarted; for ordinary people do not distinguish between real and personal property. The rule of law, however, is established and certain, that express words of limitation, or words tanta-

[c] Vin. Abr. tit. Dev. (Q. a.) [d] Cowp. 657. ante, Sect. 4.
[e] Dougl. 759. ante, Sect. 4.

mount, are necessary to pass an estate of inheritance, 'all my estate,' or 'all my interest,' will do; but 'all my lands, lying in such a place,' is not sufficient; such words are considered merely descriptive of the local situation, and only carry an estate for life; nor are words, tending to disinherit the heir at law, sufficient to prevent his taking, unless the estate is given to somebody else. I have no doubt, but that the testator's intention here was to disinherit his heir at law, as well as in the case of Denn *v.* Gaskin; but the only circumstance of difference between that case and this, and which has been relied on as in favour of the defendants, if the testator had any meaning by it, (which I do not believe he had) rather turns the other way; because he uses different words in devising different parts of his estate. I think we are bound by the case of Denn *v.* Gaskin." Judgment that the widow took only a life estate in the last-mentioned premises.

So in another case, where C. B. being seised and possessed of freehold and leasehold property, lying contiguous, and demised together, made his will and devised to his wife all his freehold and leasehold messuages, &c. and all his estate and interest therein, for and during her natural life, and after her decease, he devised the said messuages to his sisters-in-law, M. S. and M. B., as tenants in common; but in case his mother should give any disturbance to his wife, then his will was, that the same should go to his kinsman, W. B., his heirs and assigns for ever; and charged his estate with the payment of all his just debts, to be paid out of the yearly rents of his estates by his said wife. Lord Mansfield said, there were no

words of limitation added to this devise, and therefore, that it was clear, by the rule of law, that it was only an estate for life, unless it could be found from the whole of the will taken together, and applied to the subject matter of this devise, that the testator's intention was to give a fee; and, accordingly, judgment that the sisters-in-law took only an estate for life[f].

Sir R. Worsley, being seised in fee of the premises in question, devised them to trustees, upon trust that they should stand seised thereof, to the use of his grandson Robert, Earl of Granville, for life, remainder to his first, and other sons in tail male; remainder to Lady Carteret for life; remainder to her first and every other sons in tail male, and in default of such issue, "to the use of all and every the daughter and daughters of the body of the Lady Carteret, lawfully issuing, as tenants in common, and not as joint-tenants, and in default of such issue, to the use and behoof of his own right heirs for ever[g].

Lady Carteret had one daughter, Lady Catherine Hay; and the question was, what interest she took under this devise? A case was sent out of Chancery to the Court of King's Bench, for their opinion.

Lord Kenyon—The general rule which is laid down in the books, and on which alone courts can with any safety proceed in the decision of questions of this kind, is, to collect the testator's intention,

[f] Roe v. Blackett, Cowp. 235.

[g] Hay v. Earl of Coventry, 3 Term Rep. 83.

her sons an estate tail, the law must have taken place, notwithstanding any subsequent clause or declaration in the will, that they should not have power to dock the entail. And this agrees with, and well explains, what was said by Lord C. Harcourt in Bale *v.* Coleman, that "the intent must be construed according to what appears upon the will, and *according to the known rules of law.*"

It appears that the decision in the case just above stated was grounded upon the latitude afforded to the court to interfere in moulding the settlement of which the will was *directory*, according to the spirit, though not according to the letter of the will. But where the devise is *immediate* in its operation, not directing a settlement, but settling the estate by positive limitations, even though the subject of the devise is a trust estate, such equitable limitations seem to be subject to the same strict construction as legal estates, and to afford no room for the exercise of judicial discretion in departing from the letter of the will to effectuate the general and presumable purposes of a settlement. And such appears to have been the principle which governed Lord Harcourt in his reversal of the decree of Lord Cowper in Bale *v.* Coleman [r].

In that case the testator devised to trustees and their heirs for payment of debts and legacies, and after debts and legacies paid, willed that one fourth part should be and remain *in trust* for E. for life, with power of leasing; and after her decease, *in trust* for C. for and during the term of his life, with like power of leasing, and after his decease to the heirs male of

[r] 2 Vern. 670.

the body of C., remainder over. This being the devise of a trust, Lord Cowper conceived that it differed from an immediate devise, and that it was rather to be looked upon in the nature of an *executory* devise, to take effect after debts paid; or in the nature of marriage articles; besides that the enabling C. to make leases seemed to imply very strongly, that he was to have no power to dispose of the inheritance.

But the same cause coming on before Lord Harcourt, upon a rehearing, he said the case of a will differed from the cases of marriage articles, in the nature of which the issue were particularly considered, and looked upon as purchasers. That in cases of a will where the parties claim voluntarily, *the testator's intent must be presumed to be consistent with the rules of law;* and that at law the same words would certainly create an estate tail. That it could not be inferred with any certainty from the power of leasing, that no estate tail was intended, such power being more beneficial than that which was given to a tenant in tail by the statute; and as the debts were admitted by the pleadings to be all paid, the same construction was to be made as if there had been originally no trust. His Lordship, upon these grounds decreed A.'s share to be conveyed to him and the heirs male of his body.

We do not find that distinction alluded to by Lord Harcourt in the above case, which has been so frequently recognized in other cases, namely, between executed and executory trusts; but on the negative side as denying to executed trusts a greater latitude of construction than is conceded to the limitations of legal estates, his doctrine has the support of a very prevailing

series of authorities. Lord Harcourt was not called upon to make any distinction between trusts executed and immediate, and trusts executory and prospective, as the trusts in the case before him were undoubtedly of the former kind, and the decision of his Lordship proceeds upon the analogy between this description of trusts and limitations of the legal estate. Instead of simply denying the resemblance of these executed and completed estates in equity to the case of articles directory of a future settlement, he takes rather too broad a ground by insisting on the supposed propriety of a severer construction of wills than of marriage articles, drawn from the distinct natures of the instruments themselves, which would extend such severer construction to executory as well as to executed trusts if contained in a will.

Of the distinction between executed and executory trusts.

The distinction between these two descriptions of trusts has been the hinge on which a great many important, and much considered adjudications have turned; and without resorting to which, we should in vain search for a principle to reconcile the cases on the subject. In the case of the Earl of Stamford *v.* Lord Hobart[1] determined by Lord C. Cowper, whose decree was affirmed by the Lords, the opinion of Lord Harcourt as to the propriety of putting a stricter construction in general upon wills than marriage-articles, was implicitly denied. It was there observed that, as it was usual for equity, in cases of executory articles for settling of estates, to supply informalities and defects, especially when the things supplied were necessary to support the main intent of the parties, and to carry such articles into execution, according to that intent,

[1] 1 Bro. P. C. 288.

as far as it might agree with law, though not strictly according to the words and penning of the articles; so *a fortiori* would equity do in the case of a will, where the same was to be executed by a conveyance to be made.

If the view of this doctrine taken in the last cited case be a correct one, Lord Harcourt's general reasoning from the distinct characters of the instruments themselves, the one, *i. e.* marriage articles being considered as standing on obligatory and valuable considerations, the other on the mere intention and voluntary bounty of the testator, seems to have gone too far, and further than was necessary for the support of his decision of the case before him; there being quite sufficient ground for it in the analogy between trust estates executed or fully limited, and estates at law, and in the sound intelligible maxim of equitas sequitur legem. I have insisted the more on this point, because in the learned and elaborate discussion of these cases by the late Mr. Fearne, that profound writer seems to lend some countenance to this mode of treating the subject.

The strict consideration of trust estates which was the ground of the decision in Bale *v.* Coleman was fully adopted by Lord Hardwicke in Garth *v.* Baldwin[t]. In which case, there was a devise of lands to a trustee, in trust to pay the rents and profits to S. for her separate use for her life, as if she were sole; and after her decease to pay the same to E. her son for life, and afterwards to pay the same to the heirs of his body, and for want of such issue, to pay the

[t] 2 Ves. 646.

same to all and every other son or sons of the body of S. begotten, &c. Upon the question whether E. was entitled to the lands in tail, or for life only, Lord Hardwicke proceeded on this principle, namely, that in limitations of a trust either of a real or personal estate to be determined in that court, the construction ought to be made according to the construction of limitations of a legal estate, unless the intent of the testator or author of the trust plainly appears to the contrary. He laid it down as a maxim, that he was not, in a court of equity, to overrule the legal construction of the limitation, unless the intent of the testator or author of the trust appeared by declaration plain, *viz.* by plain expression or necessary implication. And accordingly he decreed a conveyance in tail to E.

It could scarcely have been expected that after the decree of Lord Hardwicke in Bagshaw *v.* Spencer[u], his Lordship would have reasoned as we find him doing in Garth *v.* Baldwin just above cited: for in Bagshaw *v.* Spencer, the expressed ground of the decision was the distinction between a trust in equity, and a mere legal estate; his Lordship at the same time declaring that *all trusts* in notion of law were *executory*, and that the distinction between trusts executed and executory had never been established.

Again in the case of Roberts *v.* Dixwell[w] Lord Hardwicke observed, that the latter part of the trust was merely executory, to be carried into execution after the performance of the antecedent trusts. That the whole direction, therefore, fell upon the court, and

[u] 1 Ves. 142. 2 Atk. 246. 570. 577. [w] 1 Atk. 607.

they were to direct how the parties were to convey. He said, that the Court had taken much greater liberties in the construction of *executory* trusts, than where the trusts were actually executed; and directed a conveyance to the sons successively in tail, it being not a trust executed, but executory.

Thus notwithstanding the reasoning of Lord Hardwicke in Bagshaw *v.* Spencer, he will be found in other cases decided by him both before and after that case, to have upheld by his authority the distinction taken by Lord Talbot in Lord Glenorchy *v.* Bosville[a], which may be considered as the great case upon the subject. The devise in that case was to trustees, and their heirs, in trust till the marriage, or death of the testator's grand-daughter, to receive the rents and profits, and pay her an annuity for her maintenance; and, as to the residue, to pay his debts and legacies, and after payment thereof, in trust for his grand-daughter, and if she married a Protestant, after her coming of age, or with consent, then to convey the estate after such marriage, to the use of her for life, without impeachment of waste, remainder to her husband for life, remainder to the issue of her body with several remainders over; and one of the questions was, whether Lady Glenorchy, (the grand-daughter) under this will was tenant for life or in tail. Lord Talbot said he should have made no difficulty of determining this to be an estate tail had it been the case of an *immediate* devise. He thought, in cases of trusts executed, or immediate devises, the construction of the courts of law and equity ought to be the same, for there the testator did not suppose any other

[a] Ca. Temp. Talb. 3.

conveyance would be made. That the case of Papillon *v.* Voice[y] seemed a strong authority for executing the intent in executory trusts, as well as in marriage articles; and he accordingly decreed to Lady Glenorchy only an *estate for life* with remainder to her first and other sons in tail male, &c.

Of the opinion of Mr. Fearne; and the judicial declarations of Lord Thurlow, and Lord Eldon.

It would be useless to cite more cases upon this subject. All of them which had taken place before and during his time have been collected, and reasoned upon by Mr. Fearne in his Essay on Contingent Remainders, whose opinion was strongly in favour, as well of the close analogy between trust estates executed and legal estates, as of the distinction between such executed trust estates, and such trusts as are executory, and which leave something to be done on which a court of equity may ground its special interference to carry the intent of a testator into full effect. We may conclude with observing, that Lord Thurlow in Jones *v.* Morgan[z], adhered to the principle of applying the same rules to trust as to legal estates where the devise is immediate; and that Lord Eldon in the important case of the Countess of Lincoln *v.* the Duke of Newcastle[a], said, that there is a distinction between a will making a direct gift, and a covenant by articles to be executed, but none between a covenant in consideration of marriage, and an executory trust by will.

[y] 2 P. Wms. 471. [z] 1 Bro. C. C. 206. [a] 12 Ves. Jun. 218.

Section VII.

What words create a Joint-Tenancy, and what a Tenancy in common in a Will.

INDEPENDENTLY of all inference to be drawn from the contents of the will, it is well settled that a devise to two or more generally, or to two or more and their heirs, makes them joint-tenants.

Courts of law and equity lean against the construction of a joint-tenancy.

Courts both of law and equity are said now to lean *against* joint-tenancy; though formerly it was otherwise, upon the ground of the inconvenience of multiplying services under the old tenures [a]. Any words therefore, importing an equality of benefit, will lead to the construction of a tenancy in common. Thus, nothing is better settled than that in a will, the words "equally to be divided" will create a tenancy in common.

What has been the construction where there are words importing an equality of interest, and also a survivorship among the devisees.

But it sometimes happens that after such *distributive* words the testator adds an express limitation *to the survivor*, or directs that the estate may be enjoyed with benefit of *survivorship*; which has a tendency to embarrass the construction. It has been laid down in positive terms that where lands are devised to two or more persons, to hold to them and the survivor of them, they will take an estate in joint-tenancy, though there may be other words in the will indicating a tenancy in common [b]. And Lord Hale has said, that a devise to two equally to be divided between them, and *to the survivor* of them, makes

[a] 3 Atk. 524. [b] Furse v. Weekes, 2 Roll. Ab. 90.

an estate in joint-tenancy upon the express import of the last words [c]. But this doctrine has not prevailed in later cases, in which the courts have been ingenious to give effect to the words of severance without sacrificing the words of survivorship.

In some cases, however, the construction of words in a will, as importing a joint-tenancy, has been favoured as tending to effectuate and preserve the estates. As where a testator devised to Jane and Elizabeth all his estate, to be equally divided between them during their natural lives, and, after the deceases of the said Jane and Elizabeth, to the right heirs of Jane for ever; the only question was, whether this devise made Jane and Elizabeth joint-tenants for life, so as that, upon the death of Jane, the whole survived to Elizabeth for life; or whether, upon the words "equally to be divided between them," they were tenants in common [d]?

Lord Chief Justice Holt pronounced the opinion of the Court that they were joint-tenants, notwithstanding the words "equally to be divided among them," and that the lands ought to survive to Elizabeth: 1st. Because, though upon such words, generally they would be tenants in common; yet if it should be so in this case, it would be expressly against the intent of the testator, and would defeat the heirs of Jane of part; for they were to take altogether, and not by moieties, one at one time, and one at another, but all at once; if they should be tenants in common, they must take by moieties at several times. 2dly, It

[c] 1 Vent. 216.

[d] Tuckerman v. Jeffries, 3 Bac. Abr. 681. Holt, 570.

was expressed that the heirs of Jane were not to take till after both their deceases. 3dly, If they should be tenants in common, then the heirs of Jane would be in danger to lose a moiety; for, as to that one moiety, it must be a contingent remainder; so that if Elizabeth had died during the life of Jane, the contingency for that moiety not happening [*when the particular estate determined,*] it must descend to the heirs at law of the testator, who were Elizabeth and the issue of Jane, as coparceners. 4thly, Jane and Elizabeth were heirs at law of the testator, and, as such, the whole would have descended to them in coparcenary, if no will had been made; but it was plain, the testator intended to prefer the heirs of Jane to the whole. It was therefore adjudged that Elizabeth and Jane took as joint-tenants.

A. Haws devised all his estate in D. to his four younger children, A., B., C., and D., their heirs and assigns for ever, equally to be divided between them, share and share alike, as tenants in common, and not as joint-tenants, *with benefit of survivorship*[*]. Lord Hardwicke said, that, in Chancery, joint-tenancies were not favoured; because they were a kind of estate that did not make provision for posterity: neither did courts of law at this day favour them, though Lord Coke says, that joint-tenancy is favoured, because the law was against the division of tenures: but, as tenures were abolished, that reason had ceased, and courts of law inclined the same way with the courts of equity. Another was, that where there were contradictory words in a will, the court made a reasonable and uniform construction, and would re-

[*] Haws v. Haws, 3 Atk. 523. 1 Wils. R. 165.

ject such words as were absurd, and contradictory to the intent of the testator. The words "equally to be divided," in a will made a tenancy in common; here was also added, "as tenants in common, and not as joint-tenants," which are very strong words; but then, it was also said, "with benefit of survivorship," which last words created the difficulty in the case; that is, to know at what time the testator intended this benefit of survivorship should take place. This might be explained by another part of the will, where he plainly pointed out a survivorship among the children themselves, as to personal estate, where the words were, "If any of my younger children die under age and unmarried, then I direct that the share of him so dying, shall go to the survivors." Then he came to this devise of his real estate, to his said four younger children; but it was true he did not say, with the like benefit of survivorship. He thought it was natural to consider this as a fund or provision for these four children; and that he meant, if any of them should die before 21, or unmarried, that the share of the child so dying should go among the other children: and he was of opinion that C. dying under age, his share did survive to the others, and should not go to the heir at law.

Adverting to what had been urged in argument, viz. that by the words "with benefit of survivorship," might mean to prevent a lapse if one or more died in the life-time of the testator, his Lordship seemed to think this too nice a construction, and observed that it was not probable that the testator meant by the '*benefit of survivorship*,' survivorship of himself; for a testator seldom provides for a contingency in his own life-time, for when any such happens he may alter his will if he

pleases. But, continued his Lordship, if no other reasonable construction can be put upon these words, the court ought to resort to it, as in the case of Lord Bindon *v.* the Earl of Suffolk[f]; which was the case of a devise to five grand-children, share and share alike, equally to be divided between them, and if any of them die, then *to the survivor*, and they were held to take as tenants in common; for by the words "if any of them die, his share shall go to the survivor," Lord Cowper said, it must be intended, if any of them should die in the life-time of the testator, for by that construction every word of the will would have its effect and operation.

And in the case of Rose d. Vere *v.* Hill[g], where the devise was to the testator's five children, and the survivors and survivor of them, and the executors and administrators of such survivor, share and share alike, as tenants in common, and not as joint-tenants, Lord Mansfield and the Court of King's Bench, considered the devise as creating a tenancy in common in fee, and that the words "survivors and survivor" related to the death of the testator.

But where J. S. devised lands to A. and B. and the *survivor of them*, and their heirs and assigns for ever, equally to be divided between them, share and share alike, and A. died in the testator's life-time, and then the testator died, leaving C. his heir at law, the court said, that wills must be so expounded that, if possible, every word might have its effect. That, in that case the devise being to two and the *survivor of them*, they were plainly joint-tenants for life; and that the next words "and to their heirs equally to be divided

[f] 1 P. Wms. 96. [g] 3 Burr. 1881.

between them, share and share alike," as plainly imported them to be tenants in common of the inheritance, by which construction every word of the will took effect. But A. having died in the testator's lifetime, B. became thereby entitled to the whole for his life; and the inheritance of A. having lapsed by his death, his moiety must descend to C. as the testator's heir at law[h].

Of the effect of two different dispositions of the same estate in a will.

Where there are two different dispositions of the same estate in a will, the better opinion seems to be that the two devisees shall take in moieties: though Lord Coke was of opinion that the latter words revoked the former[i]. In many of the old books it is said generally, that there should be a joint-tenancy[k]; but Mr. Hargrave observes, that according to the modern opinions, and, it seems, the best, there will be a joint-tenancy, or tenancy in common, according to the words used in limiting the two estates; by which it is meant, that, if the two estates given by the will have the unity or sameness of interest, essential to a joint-tenancy, the devisees shall be joint-tenants; but, if otherwise, they shall be tenants in common.

The courts have laid hold of slight words in favour of a tenancy in common.

The books abound in cases in which, where real or personal estate is devised to two or more persons, the courts have shewn an inclination to lay hold of any words in the will indicating an intention to make an equal partition of the property, to construe it a tenancy in common. A man devised his lands to his wife for life, the remainder to A., B., and C., and their heirs respectively, for ever. And the question being, whether A., B., and C., were joint-tenants, or tenants in common,

[h] Barker v. Giles, 2 P. Wms. 280.

[i] Co. Litt. 112. 6. n. 1. 2 Atk. 373. 3 Atk. 493. [k] Plowd. 539.

the court held that they were tenants in common: for the intent of the devisor appeared in the will, that every one should have his part, and *their heirs*: so here was a provision made for children; and the word 'respectively,' would be idle, if another construction should be made, and would signify no more than what the law said without it[l].

So, where lands were devised to five persons, their heirs and assigns, all of them to have *part and part alike*, and the one to have as much as the other; it was adjudged to be a tenancy in common[m].

Again, where L. devised lands to his two sons *equally*, and their heirs, it was adjudged, that the devisees took as tenants in common; for, otherwise, the word 'equally,' would have no meaning[n].

A person devised a messuage with the appurtenances, unto M. G. and T. R. *equally* to them, his sister's sons. Lord Mansfield said, there was no room for argument; 'equally' implied a division; whereas, if they were to take as joint-tenants, there would be no division[o].

A man devised lands to his two sons and their heirs, and the longer liver of them, equally to be divided between them and their heirs, after the death of his wife. The court was of opinion, that the sons were tenants in common, and that the devise was good; and the reason was grounded upon the construction of

[l] Forrest v. Frampton, Style, 434. and see the same point in Heathe v. Heathe, 2 Salk. 123.

[m] James v. Collins, Het. 29. Cro. Car. 75.

[n] Lewen v. Cox, Cro. Eliz. 693. 1 Vern. 32.

[o] Denn v. Gaskin, Cowp. 657.

wills, that it ought to be according to the intent of the devisor: his intent appearing to be not only to provide for his two sons, but for their posterity; and that not only his two sons, but their heirs, should have an equal part: for the words were, "equally to be divided between them and their heirs." And though, by the first words it was given to them and the survivor of them, yet the last words explained what he intended by the word 'survivor;' that the survivor should have an equal division with the heirs of him who should die first. And, though the testator had not aptly expressed himself, yet, upon all the words taken together, his meaning seemed to be so[p].

A person devised a freehold estate to trustees and their heirs, in trust to permit his three sisters and their assigns to hold and enjoy the said premises, and to receive the rents thereof, to their sole and separate use; and as his sisters *should severally die,* he gave the premises to their several heirs. Lord Hardwicke held, that the plain meaning of the words, "as they severally die," &c. was, that the sisters should take as tenants in common[q]. And in another case, a devise of the profits of land in trust for the testator's six younger children, to be distributed among them in *joint* and *equal* proportions, was held to give a tenancy in common, and not a joint-tenancy[r].

A testator devised all his real estates to trustees, as soon as his three daughters should attain their respective ages of twenty-one, to convey to them *and the heirs of their bodies, and their heirs, as joint-*

[p] Blisset v. Cranwell, Salk. 226.
[q] Sheppard v. Gibbons, 2 Atk. 441.
[r] Ettricke v. Ettricke, Ambl. 656.

tenants. Lord Hardwicke, after observing that, on account of the direction to convey, this was an executory trust, in which case, the court assumed greater latitude of moulding the will according to the intention of the testator, gave his opinion, that the daughters did not take as joint-tenants, but that conveyances should be made to them at twenty-one respectively, in tail, with cross remainders in tail; by which means, survivorship would be preserved upon the death of any daughter without issue, which was the most that was meant by joint-tenants[s].

Robert Clarke devised his estate to trustees, and their heirs, to the use of the testator's niece Susannah Clarke, and his two nieces Elizabeth Garland and Ann Corry, and the survivor and survivors of them, and the heirs of the body of such survivor and survivors, as tenants in common, and not as joint-tenants, and for want of such issue remainder over[t].

Upon a case sent by the Master of the Rolls for the opinion of the Court of Common Pleas, the Judges of that court certified, that the devisees took as tenants in common.

T. S. devised a term for years and all her interest therein to her two daughters; they paying yearly to her son 25*l.* by quarterly payments, viz. each of them 12*l.* 10*s.* yearly out of the rents of the premises, during his life, if the term so long continued. This was clearly held a tenancy in common, by Lord C. Jefferies, the 25*l.* being to be paid by the two daughters equally in moieties[u].

[s] Maryat *v.* Townley, 1 Vez. 102.
[t] Garland *v.* Thomas, 1 N.R. 82.

But where no expressions occur to favour a tenancy in common, courts will not build the construction on conjectural grounds: nor will the subject matter supply an argument one way or the other.

But although according to these cases, and a great many more that might be produced, the inclination of the courts against the construction of joint-tenancies, disposes them to give effect to the slightest expressions indicating the intention to benefit the devisees equally; yet where no such expressions occur, the courts will not, on conjectural grounds, make a construction which has no foundation in the will itself to support it. Nor will the subject matter of the devise or legacy supply any argument one way or the other. And in the case of a mere money legacy, the rule is the same. Thus the present Lord Chancellor, in a late case [y], stated that, upon the doubt which Lord Thurlow had expressed in Perkins *v.* Baynton [z] whether there could be a joint-tenancy of a mere money legacy or a residue, and the cases cited upon the distinctions attempted upon the question, where the residuary legatees were executors, he had looked at one of the original wills in Doctor's Commons, where a construction had been put upon these bequests; and he had made up his mind upon the point, upon which he had never any doubt since, that a simple bequest of a legacy or a residue of personal property to A. and B., without more, is a joint-tenancy.

[y] Kew *v.* Rouse, 1 Vern. 353.

[y] Crooke *v.* De Vandez, 9 Vez. Jun. 197. [z] 1 Bro. C. C. 118.

END OF VOL. I.

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