A

# TREATISE

ON

# LEGACIES;

OR

# BEQUESTS

OF

# PERSONAL PROPERTY.

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# PREFACE.

THE following work is the result of an attempt to collect and arrange in a systematic view the cases relating to bequests of personal property. Few subjects can perhaps be found, upon which the authorities are more numerous, or, to all appearance, more frequently contradictory. In many of them also the decisions, grounded upon the special language of each particular will, have afforded little or no illustration of any general principle. Of the most important of these, however, the author has given a short statement, in the hope of rendering his book as practically useful as possible; while he has contented himself with merely referring his reader to those others, which he thought least likely to be of any service as a precedent or guide in future. It is scarcely to be expected that any practical work should be altogether free from errors or imperfections: should any be found in the present treatise, the author has only to plead in excuse the labour consequent upon the extent of his task, and the difficulty arising from the contrariety of judicial opinions.

2, PUMP COURT, TEMPLE,
*May*, 1826.

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A

# TREATISE

ON

# LEGACIES, &c.

---

## CHAPTER I.

### OF THE NATURE AND DIFFERENT KINDS OF LEGACIES.

#### SECTION I.

*Of General or Pecuniary Legacies.*

A LEGACY is a gift by will of personal property. The word "devise" is more specially appropriated to a gift of lands; and every person, taking an interest in the produce of real estate directed to be sold, is in truth a devisee, and not a legatee.[a] But the terms are used indifferently: legatees may take under a bequest to "*all my devisees above named;*"[b] and the word legacy will pass a real estate, if from the context of the will it appears to have been the intention of the devisor.[c]

It is not material in what form a legacy is bequeathed; and any words manifesting an intention to give are sufficient: as if a man by his will

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[a] 4 Mad. 492. [b] Coope *v.* Banning, 1 Sim. and St. 534.
[c] Hardacre *v.* Nash, 5 T. R. 716.

appoints to be paid or delivered; or disposes, assigns, deputes, or leaves such a thing to any one; or says, let such a person have such a thing; these and the like expressions are sufficient to create a good bequest.[a] A direction given, or a request made to an executor and residuary legatee, to pay a sum of money to another person is a legacy, to be paid out of the testator's assets.[b] Even promissory notes may be good testamentary gifts.[c]

A mere recital, it has been laid down, without more, will not amount to a gift, or demonstration of intention to give;[d] and if a man says, out of the 100*l.* which I have bequeathed A. I give B. 50*l.* this passes nothing to A. although the gift of the 50*l.* to B. is good.[e] Yet where the words were, "I have made a lease for 21 years to I. S. paying but 20*s.* rent," it was held a good lease, and that the words "I have" should be taken in the present tense.[f] So where a man willed, that in case his niece A. should die without issue, that the premises *before given to his said niece*, should go to E. and S., it was held to imply a gift to A. and her issue; and that the words of gift being omitted by mistake, the Court would supply them.[g] And in a late case it seems to have been thought, that a recital of a gift, as antecedently made, might amount to a gift, if there was nothing in the will to which the recital could refer.[h]

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[a] Bac. Ab. Leg. B. Godolph. 426. 472.

[b] Taylor *v.* George, 2 Ves. & B. 378. Brest *v.* Offley, 1 Ch. Rep. 246.

[c] See Att. Gen. *v.* Goulding, 2 Bro. 428. Chaworth *v.* Beech, 4 Ves. 555.

[d] 18 Ves. 41; and see Wright *v.* Wyvill, 3 Lev. 259.

[e] Godolph. 282. Bac. Ab. Leg. B.

[f] Mo. 31. N. 101. In 2 Vent. 57, it is said this case is of little authority.

[g] Bibin *v.* Walker, Ambl. 661.

[h] Smith *v.* Fitzgerald, 3 Ves. & B. 2.

An exception, however, out of a bequest of property, of a certain part of it, "*which is hereinafter given to A.*," does not amount to a disposition to A.[a] And where a man, having given the interest of some stock to his wife, M. C. for life, bequeathed to each of his executors 50*l.* "as they will be benefited hereafter, when the stock comes to be transferred after the death of their aunt, M. C.," this was not considered sufficient to give the stock to the executors after her death.[b] The words also, "I do resolve not to give my natural son J. S. more than 20*l.* per ann. for life, to be paid him quarterly," have been held not to amount to a devise, so that J. S. could take nothing.[c]

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II. If a man gives a legacy to A. willing or desiring,[d] hoping,[e] recommending,[f] requesting,[g] entreating,[h] not doubting,[i] or in the fullest confidence,[k] that he do at his death give it, or a particular part of it, to J. S., this is a trust in equity, and amounts to a legacy to J. S. on the death of A. So where Sir T. L. by will "in consideration that Lady L. has promised to give what I shall give her to her and my

[a] Frederick *v.* Hall, 1 Ves. J. 396; and see Upton *v.* Lord Ferrers, 5 id. 801.

[b] Constantine *v.* Constantine, 6 Ves. 100.

[c] Holder *v.* Holder, 8 Vin. Ab. 269.

[d] Eales *v.* England, 2 Ver. 466. Pr. Ch. 200. Churchill *v.* Lady Speake, 1 Ver. 251, 2 ed. Mason *v.* Limbury, cited Ambl. 4. Harding *v.* Glyn, 1 Atk. 469. Medlicot *v.* Bowes, 1 Ves. 207. Forbes *v.* Ball, 3 Mer. 437.

[e] Harland *v.* Trigg, 1 Bro. 142. 491.

[f] Malim *v.* Keighley, 2 Ves. J. 333. 529, which explains the grounds of Cunliffe *v.* Cunliffe, Ambl. 686. Paul *v.* Compton, 8 Ves. 375.

[g] Pierson *v.* Garnet, 2 Bro. 38. Eade *v.* Eade, 5 Mad. 118.

[h] Prevost *v.* Clarke, 2 Mad. 458.

[i] Massey *v.* Sherman, Ambl. 520. Parsons *v.* Baker, 18 Ves. 476.

[k] Wright *v.* Atkyns, 17 Ves. 255. Coop. 111. 19 Ves. 299. 1 Turn. 143.

children at her death, I give her," &c. the children were held entitled.[a] And where a testator, by a codicil to his will, desired and earnestly requested his son to make up his mother's jointure 500*l.* a year, on a bill by the mother against the son, an infant, the jointure was ordered to be made up.[b] So also where N. bequeathed to his wife all his real and personal estate, and added, that he made no provision expressly for his dear daughter, knowing that it was his wife's happiness, as well as his own, to see her comfortably provided for; but in case of death happening to his wife, in that case he requested his friends S. & H. to take care of and manage to the best advantage for his daughter all and whatsoever he might die possessed of; Lord Thurlow directed the whole of the fund, in which the testator's property had been invested, to be appropriated, and the interest to be paid to the wife so long as she maintained the daughter:[c] for it was evident some benefit was intended for the daughter; and none could be assured to her, except by limiting her mother to an interest for life.[d]

To raise a trust, however, the property bequeathed, and the objects to whom it is given, must be certain. If the amount of the property is by the terms of the gift left uncertain, the first legatee is absolutely entitled.[e] Where, therefore, it is in his power to diminish the amount of what is bequeathed to him, and he is only desired to give away so much of it as he shall

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[a] Clifton *v.* Lombe, Ambl. 519.
[b] Vernon *v.* Vernon, Ambl. 1.
[c] Nowlan *v.* Nelligan, 1 Bro. 489.
[d] See 8 Ves. 22.
[e] Le Maitre *v.* Bannister, cited 2 Bro. 40. Curtis *v.* Rippon, 5 Mad. 434. Buggins *v.* Yates, 9 Mod. 122.

be possessed of, or as shall be left, at his death;[a] this, though valid when given in terms of positive and direct devise,[b] is not sufficient to create a trust. So where J. S. devised the residue of his estate to his wife, and desired her to give all *her* estate at her death to his and her relations, Lord Harcourt thought the words too general to amount to a devise over; but if the testator had desired his wife to give all the estate which he had devised to her, it would have been different.[c] In a late case a testator gave his personal estate to his wife, relying on her, that if she should afterwards marry she would secure to herself whatever she should possess herself of by virtue of his will, and recommended her that she should by her will give what she should die possessed of under his will to certain persons: the V. Chancellor considered the testator had in view the whole property, which she should possess under his will; and that the expression was equivalent to a recommendation to give the whole property, which she should so possess.[d]

Where a testator, having two daughters, bequeathed his personal estate to his wife, to be distributed among his daughters during her widowhood, and she married again, and afterwards gave the whole to one of the daughters, the other was relieved, because the wife's power had determined.[e] But where a man devised all his real and personal estate to A. in trust;

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[a] Att. Gen. *v.* Hall, Fitzg. 314. 8 Vin. Ab. 103, cited 2 Cox, 355. Bland *v.* Bland, 2 Cox, 349. Wynne *v.* Hawkins, 1 Bro. 179. Sprange *v.* Barnard, 2 Bro. 585. Pushman *v.* Filliter, 3 Ves. 7. Wilson *v.* Major, 11 Ves. 205. Bull *v.* Kingston, 1 Mer. 314.

[b] Surman *v.* Surman, 5 Mad. 123; and see Upwell *v.* Halsey, 1 P.W. 651. 10 Mod. 441.

[c] Palmer *v.* Schribb, 8 Vin. Ab. 289. Eade *v.* Eade, 5 Mad. 118.

[d] Horwood *v.* West, 1 Sim. and St. 387.

[e] Case cited, 1 Ch. Ca. 310.

to give to the testator's children and grandchildren, according to their demerits, and A. gave all the land to one of the children, the Court thought they could not relieve, as the words did not create a certainty of right or interest as to any certain proportion in any of the children or grandchildren; and they were only to come in by the act of the devisee, who was the judge as to their demerits.[a] So neither, when the payment of a legacy is made to depend upon the discretion of the executor, will the Court control his judgment, unless he acts *malâ fide*.[b]

If a person is merely "*empowered*" to give away at his death property in which he himself takes no interest, this is no trust, and no charge is created unless the power is executed.[c] But it is sometimes difficult to determine, whether the words of a gift amount to a trust or confer merely a power. Where there was a bequest in these words, "I give to my daughter H. 1000*l*. to be ordered and disposed by her, and for the benefit of her children, as she pleaseth, without giving an account to any body," and H. died without making any disposal; the Court was doubtful whether any interest vested in the children by this devise; and the cause, it is supposed, was afterwards compromised.[d] In another case, in which a man gave a legacy to his wife for life, and after her decease to be divided among such of his children, and in such manner and proportions as she should appoint, and to no other use or purpose what-

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[a] Civil *v.* Rich, 1 Ch. Ca. 309. 2 Ch. Rep. 141; and see Randal *v.* Hearle, 1 Anstr. 124. Devese *v.* Pontet, 1 Cox, 188.

[b] French *v.* Davidson, 3 Mad. 396. Walker *v.* Walker, 5 id. 424; and see Pink *v.* De Thuisey, Post.

[c] Bull *v.* Vardy, 1 Ves. J. 270; and see Coxe *v.* Basset, 3 Ves. 155.

[d] Hillier *v.* Hillier, 2 Freem. 110.

soever; Lord Hardwicke thought this a mere power, and not a trust; and that there was no gift to the children, otherwise than as they might take by execution of the power, the legacy being to such children as she should appoint, and to nobody else.[a] But where J. B. was authorized and empowered to receive the rents of a leasehold estate, and, after taking 100*l.* every year for his own use, to employ the remainder to such children of A. as the said J. B. should think most deserving; and J. B. died in the lifetime of the testator; Lord Alvanley, after great consideration, held that this was not a mere power; and that there was a valid bequest to all the children of A.[b] So again where a man desired that a third part of his estate be left entirely to the disposal of his wife among such of her relations as she might think proper, and the wife died without making any disposition, her relations were held entitled.[c]

The persons also, we have seen, who are intended to be benefited, must be described with certainty, in order to raise a trust in their favour. Hence where R. H. devised an estate to his son A. for life, remainder to his first and other sons in tail, with remainder to the testator's second, and other sons successively in like manner; and A. by will gave some leasehold estates to the trustees of his father's will to the same uses to which the lands were limited by it, as far as by law he could, and bequeathed all his

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[a] D. Marlborough *v.* Lord Godolphin, 2 Ves. 61.

[b] Brown *v.* Higgs, 4 Ves. 708. 5 id. 495. 8 id. 561. Affirmed in the Lords, 18 Ves. 192. Lord Eldon observes this case is very difficult to reconcile with the one last cited. See also Harding *v.* Glyn, 1 Atk. 469. Prevost *v.* Clarke, 2 Mad. 458.

[c] Birch *v.* Wade, 3 Ves. & Bea. 198. See in real estate the distinction whether the first gift is absolute, or for life only. Crossling *v.* Crossling, 2 Cox, 396; and see 19 Ves. 300.

other leasehold estates to J. his next brother for ever, *hoping he would continue them in the family;* and J. on the death of A. entered, and devised these leaseholds to his wife, against whom the son next in succession filed his bill, insisting that the devise in the will of A. subjected these estates to the same uses as those declared by the will of R. H.: Lord Thurlow said the will did not import a devise, as the words did not clearly demonstrate an object, and dismissed the bill.[a] It is to be observed, this case did not turn upon the mere uncertainty of the word family, because the testator had two daughters, who were his co-heiresses at law, and next of kin; and unless, therefore, the plaintiff made out from the context that by the word family was meant remainder-men, he did not advance a step.[b] The word family is a sufficient designation of the heir,[c] or next of kin,[d] according as the property given is real or personal. So also the terms "relations"[e] and "descendants,"[f] are certain enough to create a trust.

A distinction should be noticed between express trusts for an indefinite purpose, and those cases where, from the indefinite nature of the purpose, the Court concludes that a proper trust could not be intended, though words may have been used which, had the objects been definite, would by construction import a trust. Thus where a testatrix bequeathed all her personal estate to the Bishop of Durham, *upon trust*, to pay her debts, &c., and to dispose of

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[a] Harland *v.* Trigg, 1 Bro. 142.

[b] See Coop. 122.

[c] Wright *v.* Atkyns, 17 Ves. 255 Coop. 111. 19 Ves. 299. 1 Turn. 143; and see Hob. 33.

[d] Cruwys *v.* Colman, 9 Ves. 319.

[e] Harding *v.* Glyn, 1 Atk. 469, Post.

[f] Pierson *v.* Garnet, 2 Bro. 38 226.

the ultimate residue to such objects of benevolence and liberality, as he in his own discretion should most approve of, and appointed him sole executor; it was held, that the trust being too indefinite to be executed by the Court, the property, which was the subject of the trust, was undisposed of; and the benefit of the trust resulted to those to whom the law gave the ownership in default of disposition by the former owner, and must therefore be distributed among the next of kin.[a] But where a testatrix gave the rest and residue of the monies arising from the sale of her estates, and all the residue of her personal estate unto her trustees and executors (H. R. and J. R.), to be disposed of unto such person and persons, and in such manner and form, &c. as they in their discretion should think proper and expedient; Sir W. Grant thought this case differed from the last, in which there was an express trust; that the first words of the residuary clause amounted clearly to an absolute gift to them, as the mere circumstance of giving them the description of trustees and executors could not make them trustees as to that part of the property expressly bequeathed to them; and that the subsequent words not being sufficient to raise a trust, neither the heir at law, nor the next of kin had a right to call upon the executors to account for the residue.[b] In the same way if a sum of money is given to A. to be disposed of as the testator should appoint by a private note, and there is no such note, it is a legacy to A. himself.[c]

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[a] Morrice *v.* Bishop of Durham, 9 Ves. 399. 10 id. 522. James *v.* Allen, 3 Mer. 17. Vesey *v.* Jamson, 1 Sim. & St. 69; and see Ommanney *v.* Butcher, 1 Turn. 260.

[b] Gibbs *v.* Rumsey, 2 Ves. & B. 294. Hinton *v.* Toye, 1 Atk. 465.

[c] 3 Salk. 224. Martin *v.* Douch, 1 Ch. Ca. 198; and see 14 Ves. 370.

III. The intention of a testator to give a legacy may be implied, although there are no direct words of gift: as if a man gives 500*l.* besides the cloak, &c.; which is a good bequest of the cloak, as well as of the 500*l.*[a] So if a legacy is given in trust for A. till twenty-one, A. is entitled to the legacy by implication on attaining that age.[b] Hence also, where a man gave all his property to his wife for life, and after her death to be equally divided between his two daughters, to be by each of them divided among the children of their respective bodies, as each of them should by will appoint; it was held that an interest for life passed to each of the daughters.[c] And where again a testator directed his executors to secure to his niece the annual interest of a legacy, by placing it in the funds in trust for her, she to enjoy the interest or dividends during her life, and at her decease without child or children, the principal sum to go to her sisters; and the niece died, leaving children; they were held by necessary implication entitled to the legacy.[d]

If a man devise lands to his heir after the death of his wife, the wife has an estate for life by necessary implication, for, the heir being postponed, there is no one else to take;[e] but if the devise be to a stranger after the death of the wife, she takes nothing.[f] Whether the devise of a term to the executors

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[a] Godolph. 282. Bac. Ab. Leg. B; and see Crosbie *v.* Murray, 1 Ves. J. 555.

[b] Newland *v.* Shephard, 2 P W. 194. Peat *v.* Powell, 1 Ed. 479. Ambl. 387. Hale *v.* Beck, 2 Ed. 229. Atkinson *v.* Paice, 1 Bro. 91. Crowder *v.* Clowes, 2 Ves. J. 449. Wainwright *v.* Wainwright, 3 Ves. 558; and see 2 Bulst. 127. Lord Thurlow calls Newland *v.* Shephard 'a very strong case.' See 1 Cox, 76

[c] Ramsden *v.* Hassard, 3 Bro. 236.

[d] Ex parte Rogers, 2 Mad. 449.

[e] 1 Roll. Ab. 843. Bro. Dev. 52. Vaugh. 263. Cro. Jac. 75. Com. Dig. Dev. N. 12. 2 Ves. 280.

[f] 2 Roll. Ab. 844. Vaugh. 265. 2 Ver. 572. 5 Ves. 806. Smartle *v.* Scholler, Sir T. Jo. 98. 1 Vent. 323.

after the death of the wife gives her an estate for life seems to have been doubted.[a] It was indeed afterwards held, in the devise of a term to the testator's daughter M. *after the decease of his daughter B.* that B. took an estate for life by implication; and the Judges seemed to consider the case of Horton *v.* Horton of no authority.[b] But in a late case, in which a testator, among other specific bequests, gave to T. L. "at the demise of Mrs. B. his silver bread-basket," Lord Eldon said, that though no human being could doubt he meant her to have, and thought that she would take, it for her life under these words, yet she would not be entitled to it, unless there was some subsequent clause which gave it to her; because, as the person to whom it was given would not have taken his personal estate, there was no necessary, or at least no legal inference, that she was to have it for life.[c]

Nor can an implication arise, but where the property is undisposed of; and if, therefore, there be a bequest to A., and, after the death of him and his wife, to his children, this gives no estate to the wife on the death of A., for the property goes to his executors.[d] The presumption, however, will be against a testator's dying intestate as to any part of his property. Thus where a man, after giving, among other legacies, 50*l.* to his brother A. whom he made one of his executors, directed the rest of his money to be put into government security, and M. to have the

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Fawlkner *v.* Fawlkner, 1 Ver. 21. Aspinall *v.* Petvin, 1 Sim. & St. 544; and see Higham *v.* Baker, Cro. Eliz. 15. Dyer *v.* Dyer, 19 Ves. 612. 1 Mer. 414.

[a] Horton *v.* Horton, Cro. Jac. 74; and see Vaugh. 267.

[b] Roe *v.* Summerset, 5 Burr. 2608; and see 2 Bulstr. 127.

[c] Bland *v.* Lamb, 2 Jac. & W. 408.

[d] Brown *v.* Clark, 3 Ves. 166.

interest to maintain her as long as she lived single, and no child; and when it should please God to call her, that the money should come to the children of the testator's brothers and sisters; and M. after the testator's death married, and had a child: the Master of the Rolls thought the interest of the money was given to her for life by implication; that he could not suppose that the testator meant to leave a partial interest in the property undisposed of, and it was clear the children were not to take till her death.[a]

See Turner v. Frederick 3 Ves. 466

Survivorship among legatees may be implied in personal bequests upon the same ground as cross remainders in real estates; so that if a legacy is to be equally divided among several persons, payable at a certain time, with a gift over of the whole to J. S. in case of the death of all the legatees before that time, the shares of any so dying will by implication go to the survivors.[b]

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IV. A legacy might formerly be given by parol, and even, it is said, by signs and nods.[c] But the statute of frauds[d] enacts, that no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of 30*l.* that is not proved by the oaths[e] of three witnesses (at the least) that were pre-

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[a] Bird *v.* Hunsdon, 2 Swanst. 342. 1 Wils. C. C. 456; and see Whittell *v.* Dudin, Post.

[b] Scott *v.* Bargeman, 2 P. W. 68. Mackell *v.* Winter, 3 Ves. 536. Beaumon *v.* Stock, 2 B. & B. 406; and see Moore *v.* Godfrey, 2 Ver. 620, and N. 1, Raithby's ed.

[c] Godolph. 12. 282.

[d] 29 Car. II. c. 3. s. 19, 20.

[e] See Philips *v.* Parish of St. Clement Danes, 1 Eq. Ab. 404. The witnesses must be such as are admissible upon trials at common law, 4 Ann, 16. 14.

sent at the making thereof;[a] nor unless it be proved that the testator, at the time of pronouncing the same, did *bid the persons present, or some of them, bear witness that such was his will, or to that effect*;[b] 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. And 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. And further,[c] 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 unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.

Where a residue was bequeathed to a wife, and she was made executrix, and died in the lifetime of the testator, who made a nuncupative codicil giving to R. all he had given to his wife: this was held good

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[a] See Davis *v.* Glocester, 1 Eq. Ab. 403.

[b] That there must be sufficient proof of this fact, see Bennett *v.* Jackson, 2 Phill. 190. Parsons *v.* Miller, id. 194; for the statute is construed strictly.

[c] S. 22

notwithstanding this last clause in the statute; for by the death of the wife there was no will, and the codicil was as a new one, and not an alteration of the old: and it was said that if a man, possessed of an estate of 1000*l.* by will in writing gave 500*l.* to B, he might give the residue by a nuncupative will, so as he did not alter the executor.[a]

Soldiers in actual military service, and mariners at sea, are excepted from the operation of the statute. But the wills of seamen are subjected to a variety of regulations by later statutes.[b]

Notwithstanding the statute of frauds, gifts may sometimes be valid, which do not appear upon the will. Thus if a testator is prevented from inserting a legatee's name by the promise of the executor, residuary legatee, or devisee, to pay the legacy, the payment will be enforced in Chancery,[c] if there is sufficient after satisfaction of the legacies in the will.[d] Hence also, where the obligee of a bond in his last sickness told his executrix, that the obligor should have the bond, and should not be asked or troubled for it; and the executrix afterwards promised the obligor to deliver up the bond; it was accordingly decreed to be delivered up, and cancelled.[e] And where a man, being displeased with his son, devised his estate

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[a] Stonywell's Ca. Sir T. R 334.

[b] See Toll. Ex. 60.

[c] Chamberlaine *v.* Chamberlaine, 2 Freem. 34, cited Pr. Ch. 4. Oldham *v.* Litchford, 2 Freem. 284, though in 2 Ver. 506, it appears not to have been omitted. Drakeford *v.* Wilks, 3 Atk. 539. Barrow *v.* Greenough, 3 Ves. 152; and see 9 Ves. 519. 11 Ves. 638. Thynn *v.* Thynn, 1 Ver. 296. Parry *v.* Juxon, 3 Ch. Rep. 38. Chamberlain *v.* Agar, 2 Ves. & B. 259. That assumpsit lies, see Rookwood's Ca. Cro. Eliz. 163. Dutton *v.* Poole, 1 Vent. 318. 332.

[d] Reech *v.* Kennegal, 1 Ves. 123. Ambl. 67.

[e] Wecket *v.* Raby, 3 Bro. P.C 16.

to a stranger, who in his answer admitted that the testator had advised him that he might allow the son 40*l.* a quarter, according as he should think the son deserved it; the Court decreed the 40*l.* a quarter to the son during his life.[a] So again, where a daughter, having deposited 180*l.* in the hands of her mother, made her will, and appointed her mother executrix; and afterwards, by word of mouth, desired the mother to give this 180*l.* to the plaintiff, if she thought fit: it was held, upon the authority of the last case, to be a trust in the mother.[b] It is added however in the report, that this decree was against the opinion of several at the bar, who thought it too hard on the election left in the mother.

But where a testator bequeathed to the plaintiff 20*l.* per annum, and after talking of making a codicil, and leaving him 15*l.* per annum more, the attorney told him, that if B. C. & D. (the devisees of his estate) would give the plaintiff a bond to pay him 15*l.* per annum more, it would be sufficient; and B., being present, promised that he and the other devisees would do so; and a draft was prepared but not executed, and the testator lived five weeks afterwards, and the plaintiff remained nine years without demanding the performance of the promise, and then brought his bill; Lord Hardwicke thought the circumstances not such as to entitle him to relief.[c] And where a man by his will gave a legacy to the eldest son of his sister out of certain real estates, and after his death a paper was proved in the ecclesiastical court, signed by the executor (who was also devisee of the real

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[a] Kingsman *v.* Kingsman, 2 Ver. 559. Gilb. Eq. R. 146. 10 Mod. 404.
[b] Jones *v.* Nabb, 1 Eq. Ab. 404.
[c] Whitton *v.* Russell, 1 Atk. 448.

estate) and others, stating that, at the request of the testator, they were called in to hear his will, touching the other sons of his sister, and that *they understood* that the testator was willing and desirous that the other sons should each receive the same sum of money as the eldest, and that the executor promised that the same should be observed; Lord Kenyon said, the effect of this codicil was only that the parties understood it to be the will of the testator, that the other sons should have legacies, and the heir promised to perform this; but the Court could not convert the promise of the heir into the will of the testator; and his Honour, therefore, thought that this paper, though testamentary, yet operated nothing.[a]

## SECTION II.

### *Of Specific Legacies.*

A SPECIFIC legacy is a gift of a particular specified thing; as of a horse, a piece of furniture, a term of years, and the like. There is this advantage attending it, that if, after payment of debts, the assets fall short, and there is nothing left for the pecuniary legacies, the specific legatee shall have his legacy entire.[b] On the other hand, he can have only what is expressly devised to him; and if the thing given is not to be found at the testator's death, he can claim no contribution from the general legatees. Thus where a freeman of London bequeathed a chattel

[a] Gawler *v.* Standerwick, 2 Cox. 15. 1 P. W. 421. Cotterell *v.* Chamberlain, Bunb. 32.

[b] 2 Ves. 624. Mos. 8. Brown *v.* Allen, 1 Ver. 31. Masters *v.* Masters,

Specific Legatee entitled to have his Legacy answered in case of Abatement Knight v Davis 3 Ves. & Be. 358.

lease and all his books to two persons, who were evicted of a moiety by the widow under the custom; and the question was whether they should have satisfaction made for what was so evicted against the legatees at large, or against the legatee of the surplus: it was adjudged they should not, but must be contented with a moiety.[a]

But two species of gifts are included under the denomination of specific legacies. The first, where a particular chattel is specified and distinguished from all other things of the same kind. The second, where an article of a certain species is given without any particular identification. The bequest in the one instance can be satisfied only by the delivery of the identical subject, so that, if it be not found among the testator's effects, the gift altogether fails; unless it be only in pawn, in which case, the executor, it is said, must redeem it for the legatee:[b] while a bequest of the latter description is of a more liberal nature, and may be fulfilled by the delivery of any thing of the same kind. Thus if a man bequeaths his grey horse, and has no horse, the legacy fails: but if he gives a horse, or an ox, and has neither, the legacy is not therefore void, but the executor is bound to deliver a horse, or an ox.[c] So if the testator makes a specific bequest of stock, and leaves no stock, nothing passes by the gift:[d] but if he gives a general legacy of stock, it is a direction to the executor to purchase such stock.[e]

If the testator bequeaths one of his horses, not

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[a] Webb *v.* Webb, 2 Ver. 110.
[b] 2 Bro. 113. Anon. 2 Freem. 272.
[c] Swinb. P. 3. S. 6. Godolph. 438. Toll. Ex. 301. 1 Atk. 416. 6 Mod. 92.
[d] Evans *v.* Tripp, 6 Mad. 91.
[e] For. 227. Ambl. 58. 1 Atk. 416. 1 Bro. 566. 7 Ves. 399. Chambers *v.* Minchin, 4 Ves. 675.

naming which, to J. S.; or wills that J. S. shall have a horse, J. S. is at liberty to choose which he will, excepting the best. But if the words of the disposition are directed to the executor, as if the testator says, I will that my executor give J. S. a horse, the election appertains to the executor.[a] So where a man willed, if he should not have so much as 10,000*l.* capital stock in the three per cent. Reduced or Consolidated Bank Annuities, or one or both of them, that his executors should make up the capital sum of 10,000*l.* in the Reduced or Consolidated Bank Annuities, or one or both of them, and should hold the same in trust, &c.: the executors, it was held, had the election in which fund the legacy was to be made good.[b]

A specific legacy may also consist of a quantity of chattels described collectively; as in a gift of all the testator's pictures,[c] of a library of books,[d] or of all his personal estate at W.;[e] and these bequests will pass all the testator's pictures, all the books found in his library, and all the personal estate existing at W. at the time of his death; including therefore any books that he may have added to the library, or any personal chattels, such as a coach and horses, that he may have brought to W. since the making of the will: and such gifts will take place although there be a deficiency of assets for payment of the pecuniary legacies.[f] Hence, where a man bequeathed to his executors, in trust for certain

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[a] Swinb. P. 7. S. 10. Off. Ex. 253. Godolph. 397. 438. 468. Touch. 447.

[b] Fontaine *v.* Tyler, 9 Pri. 94.

[c] Dean of Christchurch *v.* Barrow, Ambl. 641. Gayre *v.* Gayre, 2 Ver. 538.

[d] All Souls Coll. *v.* Codrington, 1 P.W. 597.

[e] Sayer *v.* Sayer, Pr. Ch. 392. 2 Ver. 688. Gilb. Eq. R. 87; and see Touch. 446. 1 Ves. 273. 9 Pri. 98. Nisbett *v.* Murray, 5 Ves. 149.

[f] Sayer *v.* Sayer, ante N. *e.*

persons, all his Exchequer Bills, and all sums of money in the funds to which he might be entitled at his death; and after making his will became insane, during which his wife caused several sums of ready money belonging to him to be invested in stock and Exchequer Bills in his name; it was held, that these sums were to be taken in the state in which they were found at his death, and therefore passed as included in the specific bequest.[a] In the same way, if a man devises his flock of sheep now on such a hill, or in such a pasture, the bequest being in its nature subject to increase and diminution, and being the case of a collective body, the sheep produced afterwards shall pass.[b] But, if a man bequeaths all the corn now in his barn, or all the horses in his stable, and the corn be afterwards spent and new corn put in, or new horses purchased, these will not pass; because they are particular chattels, and not part of a collective body, as a flock of sheep, or a library of books.[c]

The construction indeed of a gift of this kind is often confined to the state of property at the date of the will. Thus, where a testatrix bequeathed a house, and *all the goods she brought into the house*; the Court held, that no part of the goods passed, except what were in the house at the time of making the will.[d] And here also we may notice a case in which a man devised to his son the furniture of his house at B.; and after making his will, bought a

[a] Browne *v.* Groombridge, 4 Mad. 495.

[b] 1 P. W. 598. Ambl. 280. 641.

[c] 1 P. W. 598; and see Swinb. P. 7. S. 11. Godolph. 272. Off. Ex. 23.

[d] Dormer *v.* Bp. Burnet, cited Ambl. 281. Gift of a moiety of all the donor's goods, to have after his death: held to pass only what was in specie at the time of the gift. Anon. 3 Swanst. 400. N.

considerable quantity of furniture which he caused to be packed up, and agreed with certain persons for the carriage of it to B., but died before it was actually removed: the Lord Chancellor decreed, (affirming the decision of the Master of the Rolls) that the testator's intention to remove the goods to B., and to place them there, was not sufficient to make them pass by the devise.[a]

A bequest of money, if sufficiently distinguished and particularized, may be specific: as in the case of a gift of money in a certain chest or bag;[b] or of a debt, or part of a debt, due to the testator.[c] Hence, bequests of Navy Bills, recited to be in the testator's possession;[d] of a sum of 3,348*l.* sterling, which said sum is in two bills drawn, &c. describing them;[e] of all such sum and sums of money as the testatrix's executors might after her decease receive on the interest note of 400*l.* given to her by Messrs. C. & Co. bankrupts;[f] of 2,000*l.* balance due to the testator from his partner on the last settlement between them, if he (the testator) did not draw it out of trade before he died;[g] have been held specific; although in the last instance, if the latter words had not been added, the legacy would perhaps have been general. So, where a man bequeathed the full interest of 300*l.* upon bond to his sister for life, and after her death gave to her daughter all the interest due on *the said*

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[a] D. Beaufort *v.* Dundonald, 2 Ver. 739. Grandison *v.* Pitt, id. 740. N. Raithby's ed.

[b] 1 Atk. 508. Ambl. 58. 1 P. W. 540. Touch. 432.

[c] 3 Atk. 103. 2 Bro. 109. Lord Castleton *v.* Lord Fanshaw, 1 Eq. Ab. 298

[d] Pitt *v.* Lord Camelford, 3 Bro. 160; and see Pulsford *v.* Hunter, id. 416.

[e] Gillaume *v.* Adderley, 15 Ves. 384. Chaworth *v.* Beech, 4 Ves. 555.

[f] Fryer *v.* Morris, 9 Ves. 360.

[g] Ellis *v.* Walker, Ambl. 309.

*bond* together with the principal; and it appeared that the testator was possessed among other bonds, of one to that exact amount, the bequest was held specific.[a]

A legacy may be partly specific, and partly pecuniary; as, if a moiety of it is specific, and the other moiety to be paid out of the general assets;[b] or, it may be specific in one sense, and pecuniary in another; specific, as given out of a particular fund, and not out of the estate at large; pecuniary, as consisting only of definite sums of money, and not amounting to a gift of the fund itself, or any aliquot part of it.[c] The Court leans against considering legacies specific, and a distinction has been taken between a specific and, what the civilians term, a demonstrative legacy; that is, a legacy of mere quantity, with a specific fund appropriated for the payment of it; the mention of the fund being considered rather by way of demonstration than of condition; rather showing how, or by what means the legacy may be paid, than whether it shall be paid at all. Thus, if a man gives to another the 10*l.* which J. S. owes him, when in truth J. S. does not owe any such money, the devise fails: but, if he gives 10*l.*, and wills that the same be paid out of the money that he has in a certain place, or out of a particular debt due to him, the devise is good, notwithstanding there should appear to be no money in the place, or no such debt owing.[d] Hence, where a testator, after

[a] Innes *v.* Johnson, 4 Ves. 568. Ashburner *v.* Macguire, 2 Bro. 108.

[b] Smith *v.* Pybus, 9 Ves. 566.

[c] Smith *v.* Fitzgerald, 3 Ves. and B. 2.

[d] Swinb. P. 3. S. 5. P. 7. S. 5. Touch. 430. 432. 1 P. W. 779. Ambl. 310. 568. 2 Ves. J. 640. 4 Ves. 565. 9 Ves. 152. Pawlett's Ca. Sir T. Raym. 335. Ford *v.* Fleming, 2 Stra. 823. Anon. *v.*

enumerating his mortgages, bonds, and notes, gave his sister an annuity of 60*l.* per annum out of the annual interest of them, and on her death willed, that the mortgages, bonds, and notes should be vested in the Master and Fellows of Catherine-hall, Cambridge; and several of the mortgages were paid off in the testator's lifetime; Lord Camden thought this was to be construed a bequest of so much money as was equal to the money owing to him on the several securities.[a] So again, where the words were, "I give 1400*l.* for which I have sold my estate this day," &c.; and the testator afterwards received the whole money, paid it to his banker, and drew out 1100*l.* of it; it was held a legacy of quantity, and that receiving it was no ademption.[b] And where J. S. bequeathed 500*l.* to remain and continue at interest on such securities as he should leave at the time of his death, or be put out on government securities, at the election of his executors; and it appeared, the testator had a mortgage for 500*l.* on a certain estate, and had no other sum at interest: the legacy was held not specific.[c] And in another case, in which E. D. by her will recited, that it was the wish of her mother and herself, that the 500*l.* they had *then* out upon mortgage should be given to the plaintiff, and accordingly bequeathed to her executors, immediately after the decease of her mother, the *said sum of* 500*l.* in trust for the plaintiff: the Master of the Rolls thought the thing given

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Wilkinson, 2 Ch. Ca. 25. Culpepper *v.* Aston, id. 115. Hambling *v.* Lister, Ambl. 401. Mann *v.* Copland, 2 Mad. 223.

[a] Att. Gen. *v.* Parkin, Ambl. 566. 1 Dick. 422.

[b] Cartwright *v.* Cartwright, cited 2 Bro. 114.

[c] Lawson *v.* Stitch, 1 Atk. 507; as to Philips *v.* Carey, there cited, see, 2 Bro. 113. 3 Atk. 103.

was not the mortgage, but the money; and that the legacy was due, notwithstanding the testatrix had called in the 500*l.* and applied part of it to her own immediate purposes.[a]

Lord Thurlow is reported to have said,[b] he could not agree to this distinction; but it is difficult to account for this expression, as his Lordship some time afterwards, in giving judgment in another case, observed, that the common and known distinction was between a *legatum debiti vel nominis*, which was specific, and a general pecuniary legacy charged upon a particular fund, which was but making a more anxious provision for payment, and did not alter the nature of the legacy.[c] The distinction also seems to have been expressly recognized in subsequent cases.[d] And where a testator bequeathed to his natural daughter the sum of 5000*l.* sterling, or 50,000 current rupees, with directions for payment of the *said sum of* 5000*l.* sterling, at 21 or marriage, and that the *said sum of* 5000*l. sterling, or* 50,000 *current rupees* then vested in the Company's bonds, be remitted to England, &c.: Lord Eldon observed, if the subject of the bequest was a distinct sum of 5000*l.* sterling, or the sum of 50,000 current rupees secured by the bonds of the East India Company, there was no room for argument: if, on the other hand, the bonds were to pay the sum of 5000*l.* sterling, or 50,000 current rupees, the question fairly arose, whether this was a demonstrative legacy, as it was termed, with a fund pointed

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[a] Le Grice *v.* Finch, 3 Mer. 50.
[b] 2 Bro. 111.
[c] 3 Bro. 432. Belt's note.
[d] Roberts *v.* Pococke, 4 Ves. 150. Chaworth *v.* Beech, id. 565. Raymond *v.* Brodbelt, 5 Ves. 199. Deane *v.* Test, 9 Ves. 146. Smith *v.* Fitzgerald, 3 Ves. and B. 2.

out for payment, or a bequest of that debt constituted by the bond. His Lordship added, his opinion was, that this was originally a legacy of money, 5000*l.* or 50,000 current rupees considered as of the same value; and that, even if the bonds should turn out to be in the alternative, it was not specific; being no more than a bequest of a sum of money, pointing out a particular mode of payment, by a fund provided in the first instance.[a]

Still the boundaries between specific and pecuniary legacies are sometimes very nice. Where T. B. gave two Navy Bills, describing them, and the several sums of money due thereon: the Master of the Rolls held it a pecuniary legacy, and observed, if the latter words had been omitted, it would have made no difference.[b] Where a man by his will, reciting, that he was possessed of a bill of exchange drawn in his favour upon the East India Company, and accepted by their order, and entered in their books for the sum of 1500*l.* gave his wife the interest of the said bill for life, and directed that, after her decease, the said bill should be sold and the produce divided among his nephews and nieces; and it appeard, this bill constituted the bulk of the testator's property: the bequest was held not to have failed by the testator's having received the sum due on the bill, and lent it on personal security.[c] Lord Alvanley remarked on this case, that the India bill was a thing in a course of payment that must come in at a regular time; that the Lord Chancellor laid hold of that as one circumstance to show, the testator

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[a] Gillaume *v.* Adderley, 15 Ves. 384.
[b] Bronsdon *v.* Winter, Ambl. 57.
[c] Coleman *v.* Coleman, 2 Ves. J. 639.

could not mean the legacy to be specific; and that, that might be the reason why, in Bronsdon and Winter, the Master of the Rolls held the bequest of the Navy Bills not to be specific.[a] In a case where J.S. bequeathed to A. & B. 30*l.* each, to be severally paid them out of 200*l.* due from J.C. to the testator on bond; and gave to C. & D. 50*l.* each to be severally paid them also out of the said sum of 200*l.* due from J.C.; and gave to the said J.C. the sum of 40*l.* being the remainder of the said sum of 200*l.* due from him as aforesaid; the bequests were held specific:[b] which the author of a practical work[c] thinks may be reconciled by supposing, that from the manner of the bequest, viz. the gift of different sums of money out of a debt secured by bond, in all the exact amount of the debt, the Court was satisfied that the testator in doing so, intended to make distribution of the individual debt and no more, among the persons to whom it was dealt out in parcels, so as to make the several bequests amount to a specific individual legacy of the bond itself.

With regard to legacies of stock, it seems that a gift of any particular stock, or of a certain sum out of any particular stock, or a direction to purchase so much of a particular stock,[d] is not of itself specific. Bequests therefore "of the sum of 2000*l.* capital stock in the South Sea Company;"[e] "of 5000*l.* in the Old Annuity stock of the South Sea Company;"[f] of "3400*l.* in the 3 per cents. the annual dividends to be divided," &c.;[g] of "the interest of 100*l.* new South

[a] 4 Ves. 574.
[b] Badrick *v.* Stephens, 3 Bro. 431.
[c] 1 Rop. Leg. 17; and see Sleech *v.* Thorington, 2 Ves. 560.
[d] Gibbons *v.* Hills, Dick. 324.
[e] Bronsdon *v.* Winter, Ambl. 57.
[f] Purse *v.* Snaplin, 1 Atk. 414. Webster *v.* Hale, 8 Ves. 410.
[g] Bp. Peterborough *v.* Mortlock, 1 Bro. 565.

Sea Annuities to A. for life," &c.;"[a] of "400*l.* East India Bonds;"[b] of "200*l.* 4 per cent. Consolidated Bank Annuities;"[c] a direction to executors "to transfer 1000*l.* stock in the public funds commonly styled the 3 per cents. Consolidated;"[d] a bequest of an annuity of 50*l.* a year with a direction "that so much capital sum be kept in the same public fund of 3 per cents. Consols," that the dividend will produce 25*l.* every half year;[e] have been held to be general legacies.

But if a testator describes the particular stock bequeathed as being his own, by calling it "*my*" stock, it is evidence of its being specific: for there is a great difference between a testator's describing the quantity in general, and his determining and particularizing it by the word "mine."[f] Hence bequests of "my 400*l.* East India stock;"[g] of "my capital stock of 1000*l.* in the East India Company's stock;"[h] of "3000*l.* stock in the 3 per cents. Consolidated Bank Annuities, being part of my stock now standing in my name;"[i] of "all the stock which I have in the 3 per cents. being about 5000*l.*;"[k] of "10*l.* per annum for life, to be paid out of my dividends of 400*l.* in the joint stock of South Sea Annuities, now standing in the Company's books in my name;"[l] have all been held specific. In a case also, in which a married

[a] Simmons *v.* Vallance, 4 Bro. 344.

[b] Sleech *v.* Thorington, 2 Ves. 560.

[c] Wilson *v.* Brownsmith, 9 Ves. 180. Deane *v.* Test, id. 146.

[d] Sibley *v.* Perry, 7 Ves. 522.

[e] Id.

[f] 1 Atk. 416. 2 Ves. 562. 4 Ves. 750. 1 Jac. & W. 602.

[g] Drinkwater *v.* Falconer, 2 Ves. 623.

[h] Ashburner *v.* Macguire, 2 Bro. 108.

[i] Barton *v.* Cooke, 5 Ves. 461. Sleech *v.* Thorington, 2 Ves. 560. Baugh *v.* Read, 1 Ves. J. 257. Alford *v.* Green, 5 Mad. 92.

[k] Humphreys *v.* Humphreys, 2 Cox, 184.

[l] Drinkwater *v.* Falconer, 2 Ves. 623.

woman having a power of disposing of 14,500*l.* New South Sea Annuities, appointed that the trustees should transfer the annuities to her executors, upon trust to transfer the sum of 1000*l.* New South Sea Annuities, part thereof, to her grandson A.; 1000*l.* like Annuities, other part thereof, to her grandson B. &c.; and as to the residue of the said 14,500*l.* New South Sea Annnities, and all other her personal estate on trust, to invest in New South Sea Annuities, and accumulate till the youngest of her said grandchildren should attain twenty-one, and then to transfer the whole of such New South Sea Annuities unto her said nine grandchildren (naming them;) and by a codicil gave C. 1000*l.* South Sea stock: it was held that the legacies of 1000*l.* to each of the grandchildren were specific; but the remainder of the trust fund of 14,500*l.* South Sea Annuities was part of the general personal estate, and not specifically disposed of; and that the legacy to C. was a pecuniary one.[a]

Where a man devised all his personal property to his daughter, on condition that she paid "to the four daughters of his brother J.C. four hundred pounds out of seven now lying in the 3 per cent. Consolidated;" Lord Alvanley was of opinion the gift was specific.[b] But where there was a "legacy of 1000*l.* out of my Reduced Bank Annuities 3 per cents. by my executor within one month from my decease:" his Lordship decreed it to be pecuniary; adding at the same time, that if the legacy had been expressed thus, "part of my Reduced Bank Annuities," or "in my Reduced Bank Annuities," he could not have con-

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[a] Richardson *v.* Brown, 4 Ves. 177. In Fontaine *v.* Tyler, stated ante 18, the 10,000*l.* was held a specific legacy.

[b] Morley *v.* Bird, 3 Ves. 629.

sidered, that the testator meant any thing but an identical part of that corpus: but when the phrase was "1000*l.* out of my Reduced Bank Annuities," the sense was, that the executor should raise 1000*l.* by selling so much of that stock.[a] A bequest also, after several legacies, of "all other my stocks and funds that I may be possessed of or entitled to at the time of my decease," was held not specific.[b]

In a case in which a man, having only 5360*l.* South Sea Annuity stock, bequeathed by will the sum of 6000*l.* South Sea Annuity stock to trustees in trust to sell and invest in land to be settled on his nephew for life, &c., and until the purchase should be made the nephew to have the interest or dividends of the South Sea Annuity stock for his life; Lord Talbot confirmed the decree of the Master of the Rolls,[c] who held, that no more passed by the will than the 5360*l.*; for the direction to sell and invest in land strongly implied that the testator only intended to give the South Sea Annuities which he was possessed of, and it could not be supposed that he intended his executors should buy stock and immediately sell it again, and buy land with the money;[d] and this case was approved of by Lord Hardwicke.[e] Yet in a later case Sir W. Grant said it had been overruled by modern decisions.[f]

The circumstance of a testator's having at the time of making his will exactly the amount of the particular stock bequeathed, was in one case considered to render the gift specific:[g] but it had been previously

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[a] Kirby *v.* Potter, 4 Ves. 748.

[b] Parrot *v.* Worsfold, 1 J. & W. 594.

[c] Ashton *v.* Ashton, 3 P. W. 384. For. 152.

[d] See 1 Atk. 418.

[e] 1 Atk. 418. 1 Ves. 425.

[f] 9 Ves. 181.

[g] Jeffreys *v.* Jeffreys, 3 Atk. 120; and see Avelyn *v.* Ward, 1 Ves. 424.

held otherwise,[a] and it may perhaps be doubted whether such doctrine would now be followed.[b]

Every gift of land, even a general residuary devise, is specific;[c] and a devise of a rent-charge out of a term is as much a specific devise as if it had been of the term itself.[d] The same has been said of a mere sum of money given out of a lease for years, and that if the lease determines, the legatee shall not resort to the personal estate;[e] yet in a subsequent case a legacy to be paid by the devisee of a farm was held (the L. C. Baron dissentiente) not specific.[f] In a gift of personal and real estate, the personal will not be specific, because combined with the real, which must be taken to be specifically given.[g] And a bequest to be laid out in land and settled is a pecuniary legacy, the direction to apply it to a specific purpose not making the gift itself specific.[h] So if a man gives the sum of 50*l.* for a ring, it is pecuniary.[i]

As the word legacy, if there is nothing to confine it, takes in all sorts of legacies, a bequest of the residue amongst the several legatees before-named, in proportion to their several legacies, was held to include specific legatees, even those to whom mourning rings only were given.[k] But where a testator gave the residue among his said relations, in the proportion he had bequeathed the other part of his fortune:

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[a] Bronsdon *v.* Winter, Ambl. 57.

[b] See Simmons *v.* Vallance, 4 Bro. 345. Sibley *v.* Perry, 7 Ves. 522; but see Fontaine *v.* Tyler, 9 Pri. 94.

[c] 7 Ves. 147. 399. 8 id. 305. 10 id. 605. 1 Ves. & B. 175.

[d] 1 P.W. 403.

[e] Anon. 2 Freem. 22. Morgan *v.* Morgan, Finch. Ch. Ca. 464.

[f] Cotterell *v.* Chamberlain, Bunb. 32.

[g] Howe *v.* E. Dartmouth, 7 Ves. 137.

[h] Hinton *v.* Pinke, 1 P. W. 539; and see 2 Ves. 422. Lord Cowper was of a different opinion, see 1 P.W. 127.

[i] Apreece *v.* Apreece, 1 Ves. & B. 364.

[k] Nannock *v.* Horton, 7 Ves. 391; but see 2 Jac. & W. 401.

the Lord Chancellor thought it clear the word "fortune" must mean money legacies.[a] An annuity is in a sense a legacy, and annuitants legatees. Hence a charge of legacies was held a charge of annuities. But annuitants were not considered legatees, where the testator had contradistinguished them by using the words "legacies and annuities."[b]

## SECTION III.

### *Of Residuary Bequests.*

I. IT is clear, both by our law and the civil law, that the devise of all a man's personal estate passes whatever he dies possessed of, and not that only which he had at the time of making his will; for personal estate being transient and fleeting, and from the necessity of dealing and traffic liable to daily alterations, a contrary resolution would put men under the difficulty of making a new will every day.[c] A bequest therefore to a person of the rest or residue of personal estate; or words of similar import, as of "what remains;"[d] or "ce que ce trouvera," (in a French will);[e] or the appointing him "heir general,"[f] or "residuary legatee to the sums of money which shall remain after payment of debts and legacies;"[g] gives him every thing which may accrue by accident or contingency, and which at the testator's death

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[a] Maitland *v.* Adair, 3 Ves. 231; and see Henwood *v.* Overend, 1 Mer. 23. 719.

[b] Nannock *v.* Horton, 7 Ves. 391; and see id. 534.

[c] Bac. Ab. Leg. B. 3. 1 Salk. 237. 2 Ver. 688. 1 P. W. 424.

[d] See Crooke *v.* De Vandes, 9 Ves. 197. 11 id. 330.

[e] Duhamel *v.* Ardovin, 2 Ves 162

[f] Jackson *v.* Kelly, 2 Ves. 285. Devese *v.* Pontet, 1 Cox, 188.

[g] Lynn *v.* Dubois, 2 Bro. 522. N. 2, Belt's ed.

turns out not to be disposed of. Hence if a bequest is void under the mortmain act,[a] and the residue itself is not given to a charity;[b] or if a legatee dies in the lifetime of the testator;[c] or is incapable of taking;[d] or if the property is given upon a contingency which does not happen;[e] the legacy, in all these cases, falls into the residue, and goes to the person to whom that is given. So if a legacy is directed to accumulate during the minority of an unborn legatee, the excess of accumulation prohibited by the statute becomes part of the residue.[f] And where a man devised a house and its appurtenances to his wife during widowhood, but desired that when his eldest son for the time being should attain twenty-one, he might have it and the appurtenances, on giving notice and paying her 400*l.* per annum during widowhood; and the wife married again during the minority of the eldest son: it was held that the intervening interest of so much as was personal estate fell into the residue.[g] And it makes no difference that the residuary bequest is of "the rest and residue not before particularly" or "specifically disposed of;" for whatever may have been before given, if not effectually given, is, legally speaking, undisposed of,

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[a] Durour *v.* Motteux, 1 Ves. 320. Shanley *v.* Baker, 4 Ves. 732.

[b] See Negus *v.* Coulter, 1 Dick. 326.

[c] 1 Ves. 141. 322. Ambl. 580. 15 Ves. 415. 417. D. Marlborough *v.* Lord Godolphin, 2 Ves. 61. Brown *v.* Higgs, 4 Ves. 708. Cambridge *v.* Rous, 8 Ves. 12. Roberts *v.* Cooke, 16 Ves. 451. It has been said to be otherwise if the legatee were dead at the time of making the will. Sprigg *v.* Sprigg, 2 Ver. 394. But this doctrine seems to have been overruled. Jackson *v.* Kelly, 2 Ves. 285.

[d] See Falkner *v.* Butler, Ambl. 514. Kennell *v.* Abbott, 4 Ves. 802.

[e] Bird *v.* Le Fevre, 15 Ves. 589.

[f] Haley *v.* Bannister, 4 Mad. 275; and see Leake *v.* Robinson, 2 Mer. 363.

[g] D. Bridgwater *v.* Egerton, 2 Ves. 122.

and consequently included in the denomination of residue.[a]

But a residuary bequest will not include property to which the testator had no right or title at the time of his death, and which it could not be supposed he had any contemplation to dispose of. Thus, where A. H. accepted 10*s.* in the pound from a debtor, and made her will, bequeathing the residue of her property among her relations, and died; after which the widow of the debtor bequeathed a sum equal to 10*s.* in the pound to such of the creditors as accepted the composition or their personal representatives: it was held that the residuary legatees of A. H. had no claim to this, which could not by any possibility be considered as part of her estate at the time of her death.[b] So where a legacy was given to A. and if he died before the testator, to his heirs; and A. died in the testator's lifetime, having by will given the residue of his estate and effects upon certain trusts: the legacy was decreed to his next of kin.[c]

Nor will a residue include what has been bequeathed as such, but of which the gift fails; for having been once given away as residue, it never again becomes residue. Thus, if a man bequeaths the residue to two or more as tenants in common, and afterwards revokes the gift to one of them;[d] or

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[a] Jackson *v.* Kelly, 2 Ves. 285. Shanley *v.* Baker, 4 Ves. 732. Roberts *v.* Cooke, 16 Ves. 451. Leake *v.* Robinson, 2 Mer. 393.

[b] Evans *v.* Charles, 1 Anstr. 128. Bridge *v.* Abbot, 3 Bro. 224; stated Post. Ch. 2. S. 2.

[c] Vaux *v.* Henderson, 1 Jac. and W. 388.

[d] Cresswell *v.* Chesslyn, 2 Ed. 123. 6 Bro. P. C. 1. Skrymsher *v.* Northcote, 1 Swanst. 566. 1 Wils. C. C. 248.

if one dies in the testator's lifetime;[a] this share will not accrue in augmentation of the remaining parts, but instead of resuming the nature of residue devolves as undisposed of to the next of kin, unless the testator has specially appointed some person to take upon such an event: as where a man, after giving several legacies, and the remainder of his fortune in fifths, appointed his brother heir to whatever part of his estate should be unappropriated by his will.[b]

And words of residuary import must often of necessity be taken with qualification. Thus the expressions "all I am possessed of;" "the residue of my estate;" "all things not before bequeathed," and the like, have been held, under circumstances, to mean only the remainder of particular funds, or parts of a testator's property.[c] Neither will such residue of any specified portion only of the estate include any prior bequest of it, that fails: as if a man gives certain articles of his plate to A., and the residue of his plate to B., and the residue of his personal estate to C.: here, if A. dies in the testator's lifetime, the things devised to him will go to C. as general residuary legatee, and not to B.[d] Other expressions also in a will may show the intention of a testator to confine a residuary bequest to a more

[a] Bagwell *v.* Dry, 1 P.W. 700. Page *v.* Page, 2 P.W. 489, 2 Stra. 820. Mos. 42. Owen *v.* Owen, 1 Atk. 494, overruling Hunt *v.* Berkeley, id. N. Mos. 47; but reported as a joint tenancy in 1 Eq. Ab. 243. Man *v.* Man, 2 Stra. 905. Peat *v.* Chapman, 1 Ves. 542. Ackroyd *v.* Smithson, 1 Bro. 503. Painter *v.* Salisbury, cited 2 Ves. 93. 99. Androvin *v.* Poilblanc, 3 Atk. 299. Roberts *v.* Cooke, 16 Ves. 451.

[b] Jackson *v.* Kelly, 2 Ves. 285.

[c] Wilde *v.* Holtzmeyer, 5 Ves. 811. Green *v.* Scott, 1 Ves. J. 282 Cook *v.* Oakley, 1 P.W. 302. Att. Gen. *v.* Goulding, 2 Bro. 428; and see Devese *v.* Pontet, 1 Cox, 188. Sadler *v.* Turner, 8 Ves. 617.

[d] Hunt *v.* Berkeley, Mos 47.

limited sense. Thus in a case of frequent reference, where Lord D. gave his wife some of his plate, but declared that he intended to dispose of the residue of it by a codicil; and after giving his house at C. to his wife for life, and declaring he would dispose of the goods and furniture in it after his wife's death by a codicil to his will, bequeathed the residue of his personal estate whatsoever not before disposed of, *or reserved to be disposed of by his codicil*, to his wife; and afterwards made two codicils without disposing of his goods, furniture, or the residue of his plate: the Lord Chancellor was of opinion that these were undisposed of by the will, and went to the next of kin.[a] Again, where a testator gave a legacy of 20,000*l.* to be laid out in lands for the benefit of the Marine Society, and after giving to other charities legacies of 200*l.* each, bequeathed to another charity 100*l.* if there remained enough of his personal estate to satisfy it; but if not, or if there should remain but little, then the 100*l.* was not to be paid, and the small remainder of his personal estate should be left to his executor to be disposed of in favour of certain charity schools; and if his personal estate should sufficiently reach towards satisfying all the legacies, his said executor should also dispose of the remainder in favour of the charity schools; and the 20,000*l.* being a void bequest, was claimed by the schools: Lord Camden was clear they had no right under the description of residuary legatees; that if the testator had circumscribed and confined the residue, then the residuary legatee, instead of being a general legatee, became

[a] Davers *v.* Dewes, 3 P. W. 40.

a specific one; that the intention appeared strong to confine the residue to what should remain after all legacies paid; it was specific, contingent, and conditional; if the estate turned out to pay all other legacies, (which it had not,) and there should be a little more, then the testator gave that little.[a] So where a man devised some leasehold houses to charitable purposes, and gave the residue of his property to his relations, with a declaration that they should have nothing to do with the houses; it was held that they took a special residue only, out of which the houses were expressly excepted.[b]

But without some words to restrain the import of a residuary clause, it must have its legal effect, and pass every thing which the testator possessed at his death, including therefore property to which he was not aware of being entitled. Thus in a late case, where a man by his will observed he took that method of showing the way he would have his small property disposed of, and that he thought he was possessed of 63,000*l.* stock, which he wished to be disposed of in the following manner, &c.; and concluded, "any thing I have forgot I leave at the disposal of B.;" and in a codicil also added, "I may have forgot many things, such as money due to me from government, &c.; if such there is, it is to be thrown into the lump for the benefit of the legatees, to be paid to them in the proportions;" and the testator, a few hours only before his death, acquired a large addition to his fortune by the death of a relation: Sir J. Leach observed, a testator, when he gave his residue, might contemplate only

[a] Att. Gen. *v.* Johnstone, Ambl. 577. [b] Turner *v.* Ogden, cited 15 Ves. 417.

the actual state of his property at the time, and might mean to give, and might think he was giving, next to nothing, but such residuary legatee would nevertheless take an after-acquired million; that the testator, in the principal case, was sensible there might be other things of which he had power to dispose by will, which he might also have forgotten; he had forgotten that residue which might arise by a lapsed legacy or future acquisition, and it could not be said the words he had used would not embrace it.[a] And Lord Eldon seems to have approved of this decision, on the ground that there were not any expressions in the will sufficiently definite to justify him in deciding that the residuary clause should only have a limited effect.[b]

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II. When there is no bequest of the residue the law gives it to the executor for his own benefit. He is the legal residuary legatee; for the naming of an executor is a gift or donation to him of all the personal estate of the testator.[c] In a case, however, in 1687, where a testator devised particular legacies to his children and grandchildren, and 10*l.* apiece to M. and S., whom he made executors, for their care, and there was a surplus of 5000*l.*: Lord C. Jefferies declared that the words in the will amounted to a declaration of trust, by excluding the executors from any property which the law might cast upon them; it being plain the testator never designed the surplus

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[a] Bland *v.* Lamb, 5 Mad. 412.

[b] Bland *v.* Lamb, 2 Jac. and Walk. 399; and see Ommanney *v.* Butcher, 1 Turn. 260. Legge *v.* Asgill, id. 265. N.

[c] Off. Ex. 4. 2 Freem. 263. 1 P. W. 8. 2 Atk. 46. 3 id. 228. Hills *v.* Brewer, 2 Ver. 104.

of his estate should go to his executors.[a] And since this case it has been established in equity, that where there is any thing in the will to show an intent that the testator, by naming an executor, meant only to give the office of executor, and not the beneficial interest or property, the executor shall be considered a trustee of the residue for the next of kin, as under the statute of distributions;[b] or for the crown, if there are no next of kin;[c] or for such other person as it can be shown the testator intended it.[d] In one case, indeed, the surplus was decreed to be distributed among the testator's relations, not according to the statute, but in proportion to the legacies given them by the will;[e] yet subsequent Judges have disapproved of this case,[f] and it has never in this respect been followed.[g] We must observe that the statute will be the guide only as to the persons to take; for as there is no intestacy where an executor is appointed,[h] the next of kin, when the executor is declared a trustee for them, will take the residue as if it had been actually given to them; so that a child advanced by its father will not be obliged to bring its

[a] Foster *v.* Munt, 1 Ver. 473. Lord Eldon doubts whether this was the first case, 2 Mer. 16. 19 Ves. 642; see also Mr. Raithby's note to the case, and Fane *v.* Fane, 1 Ver. 30. It has generally been so considered, see 2 Freem. 226. 263. 2 P. W. 160. Mos. 49. 2 Atk. 46. 2 Ves. 29. 95. 1 Ves. J. 357. It has been said also that the decree went upon fraud, 1 P. W. 116. Gilb. Eq. R. 80; but this seems a mistake, see 2 Eq. Ab. 443. Mos. 49. 2 Ves. 29.

[b] 1 P. W. 9. Wilson *v.* Wombwell, 2 Dick. 477.

[c] Middleton *v.* Spicer, 1 Bro. 201.

[d] Pring *v.* Pring, 2 Ver. 99.

[e] Cordell *v.* Noden, 2 Ver. 148 Pr. Ch. 12.

[f] See Ambl. 568. 2 Ves. J. 471.

[g] 3 Ves. and B. 6; and see Haynes *v.* Littlefear, 1 Sim. and St. 496.

[h] Swinb. P. 4. S. 2. et passim. 2 Ves. 29. Off. Ex. 4. Bac. Ab. Wills D. Finch. 167. If a man gives ever so many legacies, but appoints no executor, he is said to die intestate; while the appointment alone of an executor, even if no legacies are given, is sufficient to make a testament.

share into hotchpot, as required by the statute, which applies only to the case of complete intestacy.[a] For the same reason, the residue will not be subject to the custom of York.[b] In a case also in which a wife had covenanted that if her husband died intestate she should not take out administration to him, nor have any part of his personal estate; and he made a will, appointing his wife executrix, but did not dispose of the residue: the Court thought the covenant intended a general intestacy, and that the wife was not barred by it of her distributive share.[c]

Lord King held that as an express legacy given to an executor was allowed to exclude him from taking the surplus,[d] for the same reason an express legacy to the next of kin would bar him likewise; and then there being exclusion against exclusion, the law must take place, and the executor have the surplus as executor.[e] But notwithstanding this decision, it is now settled that a bonâ fide legacy to the next of kin affords no inference against his title.[f] How far a mere nominal gift may have this effect seems uncertain. Where a man willed that his executors should pay to the two children of his wife (he never having acknowledged them to be his) 10*s.* apiece, *and no more*, and gave legacies to his exe-

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[a] Vachell *v.* Jeffereys, Prec. Ch. 169; and see 14 Ves. 324.

[b] Wheeler, *v.* Sheer, Mos. 288. 301. Wilkinson *v.* Atkinson, 1 Turn. 255; and see Lawson *v.* Lawson, 7 Bro. P. C. 511.

[c] Gobsall *v.* Sounden, 2 Eq. Ab. 444.

[d] See Post. 42.

[e] Att. Gen. *v.* Hooker, 2 P. W. 338.

[f] 10 Ves. 75. 12 id. 309. Ambl. 568. Barn. C. R. 66. Randall *v.* Bookey, 2 Ver. 425. Farrington *v.* Knightley, 1 P. W. 544. Duke of Rutland *v.* Duchess of Rutland, 2 P. W. 209. Davers *v.* Dewes, 3 P. W. 40. Wheeler *v.* Sheer, Mos. 288. 301. Kennedy *v.* Stainsby, 1 Ves. J. 66. N. Knewell *v.* Gardiner, Gilb. Eq. R. 184.

cutors: the two children were held barred, upon the ground of the testator's intention that they should have no more;[a] and the same doctrine was followed in a bequest to relations of twelvepence each.[b] Lord Hardwicke also thought that the bequest of a shilling to the next of kin clearly showed a design that they should have nothing more, and equivalent to a clause declaring the intention to give nothing to them, which would rebut their equity.[c] But Sir J. Strange held that the next of kin were not excluded by such a bequest, and that the Court could not go on the vulgar acceptation of the meaning of giving but one shilling;[d] and Lord Alvanley thought the gift of a shilling not enough to bar the next of kin, although it was different from giving substantial legacies, and might, if coupled with evidence, be a strong circumstance.[e]

Some Judges have been disposed to give way to a very slight indication of intention against executors in these cases, and almost to put them upon proof of an intention in their favour. Lord Thurlow, on the other hand, thought there must appear upon the will an irresistible inference.[f] But Lord Thurlow's expression has been considered too strong, and the modern doctrine is, that the executor shall take beneficially, unless there is a strong and violent presumption that he shall not so take.[g] What will amount to this presumption will of course depend

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[a] Vachell *v.* Breton, 1 Bro. P. C. 167, fol. overruling the decree below, Vachell *v.* Jeffereys, Pr. Ch. 169. Lord Alvanley calls this a very extraordinary case, see 2 Cox, 406.

[b] Harper *v.* Lee, Mos. 3.

[c] Ambl. 137.

[d] Andrew *v.* Clark, 2 Ves. 162. Such a gift will not exclude the heir at law, Denn *v.* Gaskin, Cowp. 657.

2 Ves. J. 476.

[f] 1 Bro. 330.

[g] 2 Ves. 96. 2 Ves. J. 471. 474. 4 id. 729. 14 id. 197. 2 Mer. 17. 19 Ves. 643.

upon the particular language of each will, but there are several circumstances that have been held to be a sufficient indication of intention in this respect.

If the executors are appointed expressly in trust they take nothing but in trust.[a] And if one of several executors is a trustee, they are all trustees; for as they must take jointly they must all be trustees, or all take the residue beneficially among them.[b] This, however, may be met by any thing in the will from which a contrary intention can be inferred; for there is no rule of law making it impossible so to divide the executorship; and to give to one the office, to the other the benefit. Where, therefore, a testator appointed an infant niece and another executors, and gave the latter a legacy for his trouble; it was held that under the circumstances the presumption raised from the legacy to the adult executor did not operate against the infant, and that the residue belonged to her.[c]

But where the trust is only partial, as where the testator desires his executor to be trustee for a particular legatee,[d] the executor will not by that be barred from the residue. Hence, where a man bequeathed a legacy to the children of his nephew, and directed his executors A. and B. to place it out at interest in trust for the said children, the interest to accumulate during minority and be made principal by his said trustees, and gave them also further

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[a] 2 Atk. 18. 14 Ves. 198. Wheeler *v.* Sheer, Mos. 288. 301. Pring *v.* Pring, 2 Ver. 99. Bagwell *v.* Dry, 1 P.W. 700. Read *v.* Snell, 2 Atk. 642. Southouse *v.* Bate, 2 Ves. and B. 396. Woollett *v.* Harris, 5 Mad. 452.

[b] White *v.* Evans, 4 Ves. 21. Milnes *v.* Slater, 8 Ves. 295. Sadler *v.* Turner, id. 617; and see 12 id. 308.

[c] Williams *v.* Jones, 10 Ves. 77.

[d] Batteley *v.* Windle, 2 Bro. 31; and see Griffiths *v.* Hamilton, 12 Ves. 298.

sums for other legatees, with similar trusts, and directed that his *said trustees* and executors should reimburse and indemnify themselves out of the said trust premises the charges and expenses they might be put to by reason of any of the trusts reposed in them: Sir W. Grant thought if the testator imposed specific trusts upon his executors, with regard to which they might with strict propriety be called trustees, it would be a very strained construction, that, because he did so call them, he must mean to make them trustees with regard to the whole of the property they took as executors.[a]

If an executor has a legacy given him for his care, pains, or trouble, it is a declaration that he is to take the office as an office of burden, on account of which the legacy is given him; for it would be absurd to give a man a legacy for his care and pains in managing the estate for himself.[b] So a direction that executors should be paid and saved harmless from all expenses, journeys, and charges they should occasionally be put to in the execution of the will, was considered by Lord Thurlow quite sufficient to show that the testator considered them as trustees.[c] Yet where there was a direction that the funeral expenses, the charges of proving the will, &c. should be paid out of the residue, and that the executors should reimburse themselves, and not be answerable one for the other, nor for any loss by keeping money in the hands of any banker: Sir W. Grant thought

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[a] Pratt *v.* Sladden, 14 Ves. 193.

[b] Foster *v.* Munt, ante 37. Fane *v.* Fane, 1 Ver. 30. Rachfield *v.* Careless, 2 P. W. 158. 9 Mod. 9. May *v.* Lewin, 2 P. W. 159. N. Davers *v.* Dewes, 3 P. W. 40. White *v.* Evans, 4 Ves. 21. Gibbs *v.* Rumsey, 2 Ves. and B. 294; and see 12 Ves. 308. 17 id. 443.

[c] Dean *v.* Dalton, 2 Bro. 634. Belt's ed.

little reliance was to be placed upon the clause; that so many unnecessary directions ordinarily find their way into wills, even those which are not inartificially drawn, that it would be too much to infer direct and clear intention from the use of them in any given case.[a]

Where there was a devise of real estates to an executor upon certain trusts, and there was given to him an annuity of three guineas per annum for his trouble in receiving several rents of the testatrix's real estate; he was held a trustee of the residue of the personal estate.[b] Yet in another case where a woman devised her lands to trustees, whom she appointed executors, upon trust to sell and pay her debts and legacies, and then gave legacies to two persons, and to her executors 20*l.* each in compensation of the trouble they might have in execution of her will, and made no bequest of her personal estate: Lord Redesdale observed, if the legacies were to be taken as a gift only out of the real estate, the words were not sufficient to constitute the executors trustees for the next of kin of the personalty, considering it as not disposed of; because there would then be a fair inference that the gift was intended as a compensation for their trouble in the trust of the real estate.[c]

If a legacy is given to a sole executor, without expressing any thing more, a fair inference arises, that it is given to him as a trustee of the will; as a compensation for the trouble he will have in executing that duty:[d] or, as has sometimes been said, a

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[a] 14 Ves. 201.

[b] Lowson *v.* Copeland, 2 Bro. 156.

[c] M'Cleland *v.* Shaw, 2 Sch. and Lef. 538; and see Pratt *v.* Sladden, ante 41, N. *a*.

[d] 12 Ves. 309. 2 Eq. Ab. 444 1 Bro. 155.

testator, by giving a legacy, is supposed to mean to give no more, as it would be absurd for him to give expressly a part of a fund to a person whom he intended to take the whole.[a] It has long, therefore, been established, that a legacy given to or in trust for an executor excludes him from the surplus;[b] and this, it has been held, notwithstanding the bequest is specific;[c] or is given by a codicil;[d] or consists only of a slight sum of money for mourning,[e] or mourning rings.[f] So if there are several executors, and equal legacies are given to them, they will be held trustees; for their having equal legacies marks them as being intended to discharge laborious duties, and not to take for their own use and benefit what may be left as residue.[g] Specific legacies given jointly to a man and his wife, who were made executor and executrix, have been held to bar them;[h] but no case, it has been observed,[i] occurs in the books, in which distinct specific legacies of equal value to several executors have excluded them from the surplus. In a case where a man appointed two executors, and

[a] 1 P. W. 114. 2 id. 213. 2 Atk. 46. 3 id. 228. 300. 2 Ves. 29. 1 V. and B. 277.

[b] 3 Atk. 228. Anon. 2 Freem. 212. Cooke *v.* Walter, id. 276, cited 2 Ver. 676. Kennedy *v.* Stainsby, 1 Ves. J. 66. N. Knewell *v.* Gardiner, Gilb. Eq. R. 184. Abbott *v.* Abbott, 6 Ves. 343.

[c] Southcot *v.* Watson, 3 Atk. 226. Pawlett *v.* Lady Morley, 2 Freem. 263. Randall *v.* Bookey, 2 Ver. 425. Pr. Ch. 162. Martin *v.* Rebow, 1 Bro. 154. Holford *v.* Wood, 4 Ves. 76; and see 1 Ves. J. 356. 19 id. 643.

[d] Holford *v.* Wood, 4 Ves. 76; and see 6 Ves. 64.

[e] Cooke *v.* Walter, ante N. *b.* Southouse *v.* Bate, 2 V. and B. 396. Held contra Wingfield *v.* Alkinson, 2 Ver. 673. Pr. Ch. 324. cited, but evidence was read. See also 2 Atk. 222. 2 Ves. 166. Lawson *v.* Lawson, 7 Bro. P. C. 511.

[f] Nisbett *v.* Murray, 5 Ves. 149.

[g] Lord Bristol *v.* Hungerford, Prec. Ch. 81. 2 Ver. 645. 3 P. W. 194. N. Petit *v.* Smith, 1 P. W. 6. Farrington *v.* Knightly, id. 544. Pr. Ch. 566. Muckleston *v.* Brown, 6 Ves. 64.

[h] Shrimpton *v.* Stanhope, 1 Cox's P. W. 550. N.; and see Willis *v.* Brady, Barn. C. R. 64.

[i] 1 Cox's P. W. 550. N.

gave them specific legacies, and desired them to be kind to an old servant, and give her some furniture in his house; it is reported that the executors were held not to be barred, from the apparent intention; for otherwise they could not be kind to the old servant, or give her any part of the furniture, if it was not theirs to give.[a] It appears, however, that proofs were read of the testator's intention.[b]

A wife executrix will be excluded from the surplus equally as a stranger:[c] for there is no sort of presumption to be admitted from nearness or remoteness of kin in the person who is left executor, that the testator did or did not intend him the residue.[d] But the wife, although excluded as executrix, will be entitled to her share with the next of kin, as under the statute of distribution.[e]

When the bequest to the executor is not inconsistent with the intent that he should take the whole, it will be no obstacle to his claim. Thus if some executors have legacies, and others none;[f] or if they all have legacies of unequal amount,[g] it affords

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[a] Heron *v.* Newton, 9 Mod. 11.

[b] 2 P. W. 160. 2 Ves. J. 473; and see Sir W. Grant's observations on the last clause in the will in Lord Cranley *v.* Hale, 14 Ves. 312.

[c] Randall *v.* Bookey, 2 Ver. 425. Pr. Ch. 162. Pawlett *v.* Lady Morley, 2 Freem. 263. Lady Granville *v.* Duchess of Beaufort, 2 Ver. 648. 1 P. W. 114. 551. Ward *v.* Lant, Pr. Ch. 182. Gobsall *v.* Sounden, 2 Eq. Ab. 444. Lake *v.* Lake, Ambl. 126. 1 Wils. 313. Martin *v.* Rebow, 1 Bro. 154, overruling Ball *v.* Smith, 2 Ver. 675.

[d] 2 Atk. 46. 1 P. W. 115; and see Petit *v.* Smith, Farrington *v.* Knightly, ante 43, N. *g.* Carey *v.* Goodinge, 3 Bro. 110, where the executors were near relations. Yet it has been said to be material when coupled with other circumstances. See 1 Bro. 155. Ambl. 127. 2 P. W. 215.

[e] Gobsall *v.* Sounden, 2 Eq. Ab. 444. Martin *v.* Rebow, 1 Bro. 154. Oldham *v.* Carleton, 2 Cox, 399.

[f] 2 Ves. 97. Colesworth *v.* Braagwin, Pr. Ch. 323. Gilb. Eq. R. 79. Buffar *v.* Bradford, 2 Atk. 220. Wilson *v.* Ivat, 2 Ves. 166. Johnson *v.* Twist, id. cited. Hawkins *v.* Mason, Mos. 20. 4 Bro. P. C. 1. Oliver *v.* Frewen, 1 Bro. 590. Griffiths *v.* Hamilton, 12 Ves. 298.

[g] Brasbridge *v.* Woodroffe, 2 Atk.

no presumption against them; for the testator might give these by way of preference, or in order to prevent, as to them, the chance of survivorship. Hence where a man gave his executors A. and B. each 100*l.* 3 per cent. stock, and in another part of his will also gave A. 100*l.* 4 per cent. stock; they were held not to be barred.[a] While, on the other hand, where a testator in the first part of his will gave to A. and B. unequal legacies, and afterwards requested A. and B. to be his executors, and gave them as such 100 guineas each; the Master of the Rolls thought the equal legacies to them as executors sufficient to exclude them from the residue.[b] So also they will be excluded if they have equal legacies, notwithstanding they have real estates devised to them; for the inequality in the amount of the testator's bounty as to the real estate will not alter the inference that they are to have only the office of executors; and the equality of the legacies will make them trustees of the residue of the personal estate.[c] The devise of a rent-charge to a sole executor seems not sufficient to exclude him.[d]

Again, it has been held that if the gift to the executor operates as an exception out of a legacy to a third person, as where a library is given to A. with liberty to the executor to choose a certain number of

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69. Blinkhorn *v.* Feast, 2 Ves. 27. 1 Wils. 285. Bowker *v.* Hunter, 1 Bro. 328. 2 Dick. 605. Carey *v.* Goodinge, 3 Bro. 110. Rawlings *v.* Jennings, 13 Ves. 39. As to Bayly *v.* Powell, 2 Freem. 225. 2 Ver. 361. Pr. Ch. 92, which is contra, see 1 Bro. 333.

[a] White *v.* Williams, 3 Ves. & B. 72; and see Batchelor *v.* Searle, Gilb. Eq. R. 125. 1 Eq. Ab. 246.

[b] Ommanney *v.* Butcher, 1 Turn. 260.

[c] Muckleston *v.* Brown, 6 Ves. 64.

[d] Duchess of Beaufort *v.* Lady Granville, 1 Bro. P. C. 305.

books, it does not bar him of the residue.[a] So where a testatrix gave a sum of money out of her partnership stock in trade to be settled upon her son, and gave the residue of her partnership stock to a trustee, with very particular directions as to the management, in trust for the separate use of her daughter E., a married woman, whom she appointed executrix: Lord Hardwicke thought this consistent with intending her the residue; for had it not been done in this manner it must have sunk in the residue, and the husband by these means would have been entitled to it; it was not a legacy, but an exception out of the legacy given to the son.[b] So also where a legacy, whether specific or pecuniary, is given to the executor for life, that does not exclude him; because the testator meant to take that particular legacy out of the residue for the sake of giving him a limited interest.[c] Further, if a testator has given a legacy for life, or years, and the residuary interest over to another, the Court has said, that is not sufficient to exclude the executor from the surplus; because that might be for the sake of taking out the interest given over.[d] But if the residue itself, or that which would include the residue, is given to the executor for life, it implies a negative, that he shall not have it for any longer term.[e]

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[a] Sir Sebastian Smith's case, cited 2 Freem. 276. Griffith *v.* Rogers, Prec. Ch. 231. 1 Eq. Ab. 245.

[b] Newstead *v.* Johnston, 2 Atk. 45.

[c] 2 Ves. 29.

[d] Ibid. Duchess of Beaufort *v.* Lady Granville, 1 Bro. P. C. 305, overruling Lord Cowper's decree, 2 Ver. 648. 1 P. W. 114. Jones *v.* Westcomb, Pr. Ch. 316. 1 Eq. Ab. 245. Gilb. Eq. R. 74. Mackworth *v.* Lewellin, cited 2 Eq. Ab. 444; and see Hoskins *v.* Hoskins, Pr. Ch. 263.

[e] 2 Atk. 47. Joslin *v.* Brewet, Bunb. 112. Gobsall *v.* Sounden, 2 Eq. Ab. 444. Dicks *v.* Lambert, 4 Ves. 725; and see Willis *v.* Brady, Barn. C. R. 64.

Where several legacies were given to a sole executrix upon condition of her remaining single, but another was given to her absolutely, she was held to be excluded from the residue; and Mr. J. Buller remarked, the absolute legacy was material, for it had been determined that the limited interests would not do.[a] Lord Loughborough, however, seems to have thought that the condition itself showed the intention of the testator, which was to prevent her being made a prey of; and that he could not mean to throw out a temptation to marry her by a large residue, which tended to defeat all the provisions he was making respecting her.[b]

Sir W. Grant observed, there was no doubt a reversionary interest after a life interest would exclude an executor; and more than a direct and immediate legacy;[c] but Lord Eldon, speaking of the case before Sir W. Grant, said, that it was singular in its circumstances, and, he thought he might add, singular in its decision: he did not intend by any means to say that the decision might not be right; but if no more was to be found on the subject of reversionary interests, and particularly of contingent reversionary interests, it was a case which he should find some difficulty in following.[d]

Supplicatory words addressed to the executors to take on them the execution of the will, have been considered a strong circumstance to indicate the intention of a testator to impose a burden, and not to confer a benefit.[e] Thus where a man appointed

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[a] Nourse *v.* Finch, 1 Ves. J. 356.

[b] Nourse *v.* Finch, 4 Bro. 239. 2 Ves. J. 80.

[c] 10 Ves. 75.

[d] 1 Turn. 69; and see Jones *v.* Westcomb, Pr. Ch. 316. Gilb. Eq. R. 74. 1 Eq. Ab. 245.

[e] See Lord North *v.* Purdon, 2 Ves. 495. Seley *v.* Wood, 10 Ves. 71. Ommanney *v.* Butcher, 1 Turn. 260.

two persons in conjunction with his wife, executors and executrix of his will, "hoping they will be so good out of respect to my wife to accept the same;" and then, after giving his wife and the executors ten guineas each for mourning, bequeathed to her a life interest in part of his property: the Master of the Rolls was of opinion that the executors were intended to take the office only, and not the beneficial interest; for if they were to take beneficially after the wife's death, they would have had a sufficiently strong inducement to accept the trust, and to manage the estate to the best advantage; the testator seemed to conceive that he was appointing them to an office which, but for their respect to his wife, they might possibly decline.[a]

The peculiar character or situation also of persons appointed executors, has sometimes afforded ground for presuming, the testator did not intend them any benefit. Thus where a man in the East Indies appointed A. and B. his attornies and executors in that country, and the house of Messrs. P. C. and G. (who were partners in trade in London) executors and guardians of his children in England for their education; the Lord Chancellor thought upon the whole will it was impossible to raise an argument for the firm, for no man could be absurd enough to make a partnership executors in order to take the residue.[b] So where a woman appointed the Honourable R. K. Minister Plenipotentiary from the United States, or such other person, who at the time of her death should be Minister Plenipotentiary, and F. G. executors of her will; the Master of the

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[a] Giraud *v.* Hanbury, 3 Mer. 150. [b] De Mazar *v.* Pybus, 4 Ves. 644.

Rolls considered this not immaterial, aiding the other circumstances; and that it was evident she meant to confer an office only.[a]

A direction to keep accounts, Sir J. Leach held, afforded an inference that the executor was not to take beneficially, as otherwise no account was necessary.[b]

In a case in which a man directed that the whole of his property should "pass by this my codicil according to law," except certain sums, which he gave to three persons, and then appointed his brother sole executor, and requested he would make such little arrangements, as he had reason to think the testator wished: Sir W. Grant thought that what the testator meant by the direction, that the whole of his property should pass according to law, was the disposition which the law makes where no contrary disposition is made, rather than the legal effect resulting from the appointment of executor; and that upon the whole, though there were difficulties both ways, he thought the construction in favour of the next of kin was liable to the fewest.[c]

There are a few expressions frequently used by testators, which, although not in themselves sufficient to convert the executors into trustees, have been held to be of some weight when combined with other circumstances. Thus where a woman willed that her legacies should be paid without any deduction of tax or duty, and to that intent gave her executors such a sum as might be necessary to satisfy the duties, expenses, &c.; Sir W. Grant observed, there was no

[a] Urquhart *v.* King, 7 Ves. 225, mentioned with approbation by Lord Erskine, 12 Ves. 309.

[b] Gladding *v.* Yapp, 5 Mad. 56.

[c] Lord Cranley *v.* Hale, 14 Ves. 307.

motive for this special bequest to her executors, except that she supposed it necessary to separate from the residue every thing she meant the executors to have.[a] Again, the making one person *and his heirs* executors; and the appointing another *whole and sole* executor, have been thought of considerable weight.[b] So Lord Loughborough remarked, that though a slight circumstance, yet it was not wholly to be laid out of the case, that in the beginning of the will the testator set out with a declaration of intention to dispose of all his property.[c]

And it is quite settled that any indication of an intention to dispose of the residue is sufficient to exclude the executor. Hence, if the testator bequeaths it, but omits the name of the legatee;[d] or directs it to be disposed of according to private instructions to his executor, and dies without leaving any instructions;[e] the claim of the executor is barred by this incomplete bequest. But the circumstance of a considerable blank space being left between the last line of the will and the signature has been held not sufficient from whence to infer that the testator intended to insert a residuary clause.[f]

In a will bequeathing all the rest and residue of real and personal estate *to the executors thereinafter named*, upon trust to sell for payment of certain

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[a] 7 Ves. 229.

[b] See Clennell *v.* Lewthwaite, 2 Ves. J. 465. 644; but no notice seems to have been taken of such words in Abbott *v.* Abbott, 6 Ves. 343; and see Lord Cranley *v.* Hale, 14 Ves. 307.

[c] 2 Ves. J. 650; and see 2 P. W. 214. 7 Ves. 229.

[d] Bp. of Cloyne *v.* Young, 2 Ves. 91. Lord North *v.* Purdon, id. 495. Mence *v.* Mence, 18 Ves. 348; and see Farrington *v.* Knightly, 1 P. W. 544. 10 Mod. 442. Oldham *v.* Carleton, 2 Cox, 399.

[e] Mordaunt *v.* Hussey, 4 Ves. 117; and see Davers *v.* Dewes, 3 P. W. 40.

[f] White *v.* Williams, 3 V. and B. 72. Coop. 58.

annuities, &c., the executors were held trustees of the residue of the personal estate.[a] But where a man gave by will to his friends J. W. and R. C. all and singular his estate and effects, upon trust, in the first place, to pay all his debts and legacies thereinafter bequeathed; and gave several legacies, and appointed J. W. and R. C. executors: Sir W. Grant distinguished this case from the last, the devise being to the executors by name, and there being no connexion between the appointment of them as executors and the trust in the first part of the will; and held they were entitled to the residue.[b] Lord Eldon, however, although he confirmed the decision upon the intention, as collected from the whole will, considered the distinction between this case and Robinson *v.* Taylor not maintainable: he added, he did not apprehend the law to be, that, if personal property was bequeathed upon trust, and the trust did not exhaust the whole, therefore the executor should take what was not required for the trust; and that there was no case in which the nomination of executor operated as a gift of the personalty beneficially in equity to him, the will containing a bequest of the whole personal estate.[c] Yet Sir W. Grant afterwards said, he still thought that the executors, as such, would have been entitled, even if it had been decided that they did not take by the direct bequest.[d] In a later case also, in which a testator gave the whole of his real and personal estate into the hands of D. and S. as his sole executors, in trust, &c.; and concluded, "to my two executors, whom I appoint to this pur-

[a] Robinson *v.* Taylor, 2 Bro. 589.
[b] Dawson *v.* Clarke, 15 Ves. 409.
[c] Dawson *v.* Clarke, 18 Ves. 247.
[d] 2 Ves. and B. 399.

pose in trust to see the above fulfilled, I bequeath ten guineas, together with the rest residue of my estate, whether real and personal;" the Lord Chief Baron thought the executors were entitled to take the whole of the residue beneficially.[a]

When the residue is bequeathed away, and the residuary legatee is incapable of taking;[b] or dies in the life of the testator;[c] the next of kin is entitled, the executor being excluded by the bequest. Whether an executor, who takes the residue when it is not given away, would take as part of it a mere legacy that has lapsed, seems to be a subject of much doubt. Where a man made his wife and another executors of his will, having given several specific legacies to his wife, who afterwards died in his lifetime: Sir J. Strange thought that where a legacy was given to a person, who died in the lifetime of the testator, it fell of course to the person who by the testator expressly, or by the law, was the proper person in whom the residue was to vest; and dismissed the bill of the next of kin.[d] And Sir W. Grant held the same doctrine, observing, that an executor, if not excluded, stood as residuary legatee to all intents and purposes; taking every thing that became residue in any way, no matter how given originally.[e] Lord Eldon, on the contrary, says, that the proposition that the appointment of an executor gives him

[a] Parsons *v.* Saffery, 9 Pri. 578; and see Dormer *v.* Bertie, Pr. Ch. 94. Wilkinson *v.* Wilkinson, 1 Ver. 23.

[b] Att. Gen. *v.* Tomkins, Ambl. 216.

[c] Nicholls *v.* Crisp, Ambl. 768. Painter *v.* Salisbury, cited 2 Ves. 93. 99. 1 Ves. J. 66. Androvin *v.* Poilblanc, 3 Atk. 299. Bennet *v.* Bachelor, 1 Ves. J. 63. 3 Bro. 28. As to Man *v.* Man, 2 Stra. 905, see 1 Ves. J. 66. N.

[d] Wilson *v.* Ivat, 2 Ves. 166. The wife was not residuary legatee, as stated in the report. See Belt's Suppl. 317.

[e] 14 Ves. 200. Dawson *v.* Clarke, 15 Ves. 417.

every thing not disposed of, is not correct: in the strongest way of putting that, it can only be what the testator does not mean to dispose of: in the case of lapse, for instance, though not disposed of, the executor would not take it.[a]

It has long been established that evidence is admissible in favour of the executors, to answer the presumption raised against them, and to show the intention of a testator in regard to the surplus of his estate.[b] If, therefore, it can be proved that he intended the residue for his executor;[c] or that the next of kin should not have it,[d] the executor will be entitled, notwithstanding he has a legacy given him by the will. The proofs, it has been held, ought to be plain and indisputable.[e] Lord Macclesfield also said, the allowing parol evidence was exceedingly dangerous, and not to be done in case of discourses at a different time from that of making the will;[f] but Lord Eldon observes, "It is unfortunate, but it is certainly settled, that declarations at the time of making the will, subsequent, and previous to it, are all to be admitted. With regard to the evidence of

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[a] 18 Ves. 254, 255.

[b] Littlebury *v.* Buckley, cited 2 Ver. 677. 8 Vin. Ab. 194. 1 Eq. Ab. 245. 1 Bro. P. C. 340. Lady Granville *v.* Duchess of Beaufort, 2 Ver. 648. 1 P. W. 114. Wingfield *v.* Alkinson, 2 Ver. 673, 2nd edit. Batchelor *v.* Searle, Gilb. Eq. R. 125.

[c] Littlebury *v.* Buckley, ante N. *b*. Lady Gaynsborough's case, 2 Freem. 188. Lady Granville *v.* Duchess of Beaufort, ante N. *b*. Duke of Rutland *v.* Duchess of Rutland, 2 P. W. 209. Hatton *v.* Hatton, Bac. Ab. Executors, H. 5. Heron *v.* Newton, cited 2 P. W. 160. Walton *v.* Walton, 14 Ves. 318. Lynn *v.* Beaver, 1 Turn. 63. Gladding *v.* Yapp, 5 Mad. 56.

[d] See Brasbridge *v.* Woodroffe, 2 Atk. 69. Batchelor *v.* Searle, 1 Eq. Ab. 246. Gilb. Eq. R. 125. 2 Ver. 736. Clennell *v.* Lewthwaite, 2 Ves. J. 465. 644. Mr. Justice Buller seems to have expressed a contrary opinion, 1 Ves. J. 359.

[e] 1 P. W. 9; and see 2 Atk. 69.

[f] 2 P. W. 215; and see 1 Ves. J. 359.

declarations made by the testator after the date of his will, I think they amount to very little. They may have been made for the purpose of misrepresenting what he had actually done; but at all events cannot be taken as counteracting the effect of what had been done. The evidence of his declarations before he made his will are of more weight,[a] but still not to be regarded in the same light with respect to authority, with those which passed at the time of making the will, since they are, at the most, explanatory of what was his particular intention at the moment of pronouncing them. In such cases, therefore, the best evidence is the contemporary evidence; and all the rest weighs very little in the scales."[b]

If upon the will the intention to exclude the executor is unequivocal, as where a legacy is given to him for his care and pains, which is said to be beyond all proof, evidence is not admissible; for this would be to contradict the will.[c] And so on the other hand, if there is no bequest to the executor;[d] or if a legacy is so given to him, that it is not inconsistent with his taking the beneficial interest in the residue, evidence shall not be received to show that he shall not take it.[e] In a legacy to one of two executors for his trouble, evidence was admitted in favour of the other, who was an infant; the gift to one being considered to afford only an inference for the exclusion of the other.[f] And where there was a bequest to the executor of the furniture in a certain house, plate only excepted; it was held that the

[a] But see 7 Ves. 518.

[b] 2 Mer. 23. 19 Ves. 649.

[c] Rachfield *v.* Careless, 2 P. W. 158. White *v.* Evans, 4 Ves. 21; and see 17 Ves. 443. 5 Mad. 59.

[d] Lady Osborne *v.* Villiers, Bac. Ab. Executors and Ads. H. 5.

[e] 19 Ves. 644. 2 Mer. 17. White *v.* Williams, 3 Ves. and B. 72. Coop. 58.

[f] Williams *v.* Jones, 10 Ves. 77.

exception of the plate was not such a necessary implication that the executor should not take the residue, into which it would fall, as to prevent the admission of evidence.[a]

Although the next of kin cannot originally read evidence, they may do so in answer to, and to take off the effect of that read by the executors:[b] and if in such case it can be shown that the testator, at the time of making his will, intended to dispose of the residue, notwithstanding he does not afterwards do it, the executor will be excluded.[c] There is no instance of an issue directed to determine the question between the executor and the next of kin.[d]

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## SECTION IV. *Of Donations mortis causâ.*

BESIDES these formal legacies contained in a man's will, there is another disposition of property, derived from the civil law, called a donatio mortis causâ; which is, where a man delivers or causes to be delivered to another the possession of any personal effects to keep in case of the donor's decease. It is so far in the nature of a legacy that it only takes effect in the event of the death of the giver, and is revocable during his life, being made in contemplation of death;[e] it may be made to the wife

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[a] Langham *v.* Sanford, 17 Ves. 435. 2 Mer. 6. 19 Ves. 641.

[b] 2 Ves. 95. 1 Ves. J. 360.

[c] Nourse *v.* Finch, 1 Ves. J. 344. 4 Bro. 239. Hornsby *v.* Finch, 2 Ves. J. 78.

[d] 14 Ves. 323.

[e] 2 Bl. Com. 514. Swinb. P. 1. S. 7. Pr. Ch. 270. 303. 2 Swanst. 99. 102. N.; and see Tate *v.* Hilbert, 4 Bro. 286. 2 Ves. J. 111.

of the donor;[a] it fails by the death of the donee in his lifetime,[b] and is liable to debts,[c] and subject to the duties imposed by act of parliament on legacies.[d] On the other hand, it differs from a legacy, as it need not be proved in the spiritual court as part of the testator's will;[e] for the property vests absolutely on the death of the donor, and the donee may take it without the assent of the executor.[f]

It appears to have been considered that a donatio mortis causâ must be made in the last sickness of the donor, or under the apprehension of danger.[g] Where, indeed, a thing is given in extremis, and in contemplation of death, it is to be inferred that it was the intention of the donor that it should be held as a gift only in case of his death.[h] Yet if the thing be given upon condition only to take effect in case of the death of the giver, it seems to be a valid donation mortis causâ at whatever time the gift is made.[i] In a case in the Exchequer in Ireland, two out of three Barons held a gift to be void in consequence of the donor having desired the donee to pay an annuity out of it to another for life; for that in every case a donation mortis causâ must be unfettered, and free from every condition.[k] A modern work remarks that this doctrine seems inconsistent with later cases;[l] and it has been held

[a] Lawson v. Lawson, 1 P. W. 441. Miller v. Miller, 3 id. 356. Walter v. Hodge, 2 Swanst. 92. 1 Wils. C. C. 445.

[b] 2 Swanst. 99. 102. N.

[c] 1 P. W. 406. 2 Ves. 434. 2 Ves. J. 120. 2 Swanst. 102. N.

[d] 36 Geo. III. 52. 7.

[e] 1 P. W. 441. 3 id. 357

[f] 2 Bl. Com. 514. 2 Ves. J. 120; and see Thomson v. Batty, Stra. 777.

[g] 2 Bl. Com. 514. Gilb. Eq. R. 13. 3 P. W. 357. 1 Ves. J. 547. Pr. Ch. 269. 2 Swanst. 95. N.

[h] Gardner v. Parker, 3 Mad. 184.

[i] See Hill v. Chapman, 2 Bro. 612. Jones v. Selby, Pr. Ch. 300; and 2 Swanst. 100.

[k] Bibby v. Coulter, Ridgw. Ca. T. Hard. 206. N.

[l] Prest. Leg. 158; and see Shanley v. Harvey, 2 Ed. 126.

that a gift for a particular purpose, as to the executor for carrying on a suit in which testator is engaged, does not prevent it being a donation mortis causâ.[a]

An actual delivery of the thing given is the essential requisite to this species of legacy. The possession must be transferred in point of fact.[b] If the delivery will not execute a complete gift inter vivos, it cannot create a donation mortis causâ;[c] and by the law of England, in order to transfer property by gift, there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee.[d] To prove the fact of delivery, the authorities appear not to require a plurality of witnesses, as in the civil law, but only that the proof be satisfactory.[e] A ring, a purse of gold, and suchlike articles, that are capable of being delivered, will, when delivered, be good as a donation mortis causâ.[f] But where a man on his deathbed gave his wife his coach and a pair of his coach-horses, bidding three witnesses take notice of it, who accordingly made a memorandum thereof in writing: it was held that this was not a valid gift, there having been no delivery.[g] Nor will the delivery of a mere symbol in the name of the thing be sufficient.[h] But the delivery of the key of the place where bulky goods are, has been allowed as delivery of the possession, because it is the way of coming at the possession.[i] So the delivery of the key of a trunk

[a] Blount *v.* Burrow, 4 Bro. 72.
[b] 2 Ves. 442. 2 B. and A. 553.
[c] 1 Sim. and St. 245.
[d] 2 B. and A. 552.
[e] 2 Swanst. 100.
[f] Lawson *v.* Lawson, 1 P.W. 440.
[g] Miller *v.* Miller, 3 P.W. 356. The reporter adds a query, why the wife could not be entitled to them, as by a nuncupative will.
[h] 2 Ves. 443. 3 Mad. 185.
[i] 2 Ves. 443.

seems to have been considered a valid gift of what could be proved to have been in the trunk at the time;[a] and it has been said that the delivery of the bill of sale of a ship would be good.[b] The delivery of the receipts for the consideration money for the purchase of South Sea Annuities was held not to amount to a donation mortis causâ; for that of stock there can be no such gift without a transfer, or something amounting to it.[c] In a case also in which the wife of a testator by his direction took certain securities out of a drawer, and put them distinctly and by themselves into another, of which she afterwards kept the key, for and as the property of the testator's infant daughter; and they remained in that state till his death, and were several times spoken of by him as his daughter's own, and the interest which arose on them, subsequent to the gift, paid to her by his direction: it was held that this was not a sufficient delivery.[d]

Gifts of bank-notes may be good,[e] but not perhaps of promissory notes, nor checks on bankers.[f] A bill, indeed, drawn by a man in his last sickness upon a goldsmith, to pay 100*l.* to his wife to buy her mourning, was held a valid donation, operating as an appointment.[g] Lord Hardwicke, however, remarked[h] upon this decision, that he could not say upon what it depended: it was a kind of compound gift; so

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[a] Jones *v.* Selby, Pr. Ch. 300.

[b] Toll. Ex. 234.

[c] Ward *v.* Turner, 2 Ves. 431. 1 Dick, 170.

[d] Bryson *v.* Brownrigg, 9 Ves. 1; and see Bunn *v.* Markham, 7 Taunt. 224.

[e] Ashton *v.* Dawson, Sel. Ca. Ch 14. Miller *v.* Miller, 3 P.W. 356. Shanley *v.* Harvey, 2 Ed. 126. Hill *v.* Chapman, 2 Bro. 612; and see Drury *v.* Smith, 1 P.W. 404, case of a specie bill.

[f] Miller *v.* Miller, 3 P. W. 356.

[g] Lawson *v.* Lawson, 1 P.W. 441.

[h] 2 Ves. 441.

many collateral circumstances were taken into it, that nothing could be inferred from it. And Lord Loughborough said,[a] that though the case was perfectly well decided, he could not say upon that decision that in all events drawing a cash-note upon a banker was an appointment of the money in his hands.

A bond has been held a proper subject for this species of gift.[b] But where a bond, given by a mortgagor at the time of the mortgage, was delivered together with the mortgage deeds by the mortgagee on his death-bed; the gift was held incomplete; as the mortgagor had a right to resist the payment of the money without a reconveyance; and as a court of equity would not inter vivos compel a party to complete his gift, so it would not compel the executor to complete the gift of his testator.[c] If the delivery had been to the mortgagor himself, it might perhaps have operated as a release of the debt.[d]

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[a] 2 Ves. J. 121.

[b] Snellgrove v. Baily, 3 Atk. 214. Ridg. C. T. H. 202. 2 Ves. 441. Gardner v. Parker, 3 Mad. 184. Blount v. Burrow, 4 Bro. 72, India bonds.

[c] Duffield v. Elwes, 1 Sim. & St. 239.

[d] See Hurst v. Beach, 5 Mad. 351. Richards v. Syms, cited 2 Ves. 436.

# CHAPTER II.

## OF LEGATEES.

### SECTION I.

### *Of the Capacity of different Persons to take by Will.*

I. ALMOST all persons are capable of being legatees. Thus a negro slave brought into this country may take a legacy, for as soon as he sets foot on English ground he is free.[a]

A wife may take by the will of her husband, though not by his grant.[b] And in equity a wife may take property bequeathed to her by another independent of her husband. It was, indeed, doubted in the earlier cases, whether a married woman could have a separate property in a personal thing without a trustee;[c] but it has long been settled, that whenever it appears to be the intention of the testator that the husband should take no interest in the bequest, the Court will restrain his legal right, and convert him into a trustee,[d] and decree an account against him or his representatives for what he may have received.[e] Hence legacies given to or in trust for a married woman, for "her own use independent of her husband;"[f] "to be by her laid out in what she shall think fit;"[g] "for her sole and separate use;"[h] "for

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[a] Shanley *v.* Harvey, 2 Ed. 126.

[b] Lit. S. 168.

[c] See Harvey *v.* Harvey, 1 P. W. 125. 2 Ver. 659. Burton *v.* Pierpoint, 2 P. W. 78.

[d] Bunb. 188. Bennet *v.* Davis, 2 P. W. 316.

[e] See Parker *v.* Brooke, 9 Ves. 583.

[f] Wagstaff *v.* Smith, 9 Ves. 520.

[g] Acherley *v.* Vernon, 10 Mod. 531.

[h] Rollfe *v.* Budder, Bunb. 187. Parker *v.* Brooke, 9 Ves. 583.

her sole use and benefit;"[a] "for her own use, and at her own disposal;"[b] "to be at her disposal, and to do therewith as she shall think fit;"[c] to the husband "for the use," or "for the livelihood," of the wife;[d] or to the husband and wife, the husband not to sell without her consent and approbation;[e] or to trustees, in trust to pay the interest, dividends, &c. into the proper hands of the wife;[f] or to pay them to the wife, the trustees not to be troubled to see to the application of them, but her receipts in writing to be a sufficient discharge;[g] have been held to give the wife a separate and independent interest. So where a testator gave his niece certain sums due to him on the bond of her husband, and desired the bonds to be delivered up to her whenever she should demand or require it: Lord Loughborough said, that as these securities were to be given up to the legatee on her demand, the husband could not have obtained them from the executors without a demand made by her, which gave her the dominion over them; and they must therefore be considered as given to her separate use.[h]

But although the courts have gone a great way in abridging the marital rights of the husband, this is only done where the intention of a testator in this respect is clear; and implication is not to be pressed against him to give property to the separate use of the wife.[i] A legacy given merely to A. the wife

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[a] Adamson *v.* Armitage, 19 Ves. 416. Coop. 283. Ex parte Ray, 1 Mad. 199.

[b] Prichard *v.* Ames, 1 Turn. 222.

[c] Kirk *v.* Paulin, 7 Vin. Ab. 95.

[d] 3 Atk. 399. 1 Mad. 208; but this seems doubtful, see 3 Bro. 384.

[e] Johnes *v.* Lockhart, 3 Bro. 383. N. 4. Belt's ed.

[f] 5 Ves. 545. 1 Mad. 208.

[g] Lee *v.* Prianlx, 3 Bro. 381. Woodman *v.* Horsley, id. cited.

[h] Dixon *v.* Olmius, 2 Cox, 414.

[i] 9 Ves. 377. 1 Mad. 207.

of B;[a] or to a trustee in trust to purchase in his own name an annuity for the life of a married woman, and pay the same to her and her assigns;[b] will not bar the husband's right. A bequest for the sole use and benefit of a wife will give her a separate estate; yet if the bequest be only for her own use and benefit, omitting the emphatic and operative word *sole*, it will not have this effect.[c] And where a man gave the interest of the residue of his personal estate to his brother and sister equally between them, and at the death of the sister one half of the principal to be equally divided between her children, her husband by no means to have any part whatsoever, but to be entirely for the poor children: Lord Alvanley thought the restriction applied only to the principal, and not to the interest, which was given to the wife, and which must be subject to the right of the husband.[d] So in another case before him, where a residue was given in trust to pay the interest to a married woman for life, and after her death to pay the residue for such uses, &c. as she, whether coverte or sole, should appoint: his Lordship held that the testator had used words as to the principal, that gave it to her separate use, but not as to the interest and dividends.[e]

Where a man bequeathed the residue of his real and personal estate to A. and B. upon trust, as to one moiety for the wife of A. for life, and as to the remaining moiety upon certain other trusts: the Vice Chancellor thought there was no sufficient

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[a] Rich *v.* Cockell, 9 Ves. 369.

[b] Dakins *v.* Berisford, 1 Ch. Ca. 194.

[c] 1 Mad. 207. Johnes *v.* Lockhart, 3 Belt's Bro. 383. N. Wills *v.* Sayers, 4 Mad. 409. Roberts *v.* Spicer, 5 id. 491.

[d] Brown *v.* Clark, 3 Ves. 166.

[e] Lumb *v.* Milnes, 5 Ves. 517.

ground for the inference that the testator must have intended, that the wife should take the life interest in that trust fund to her separate use; but his Honour abstained from expressing any opinion what might be the inference, if a husband was the sole trustee of a particular fund given to the wife for life.[a]

The right of a wife to a legacy will survive to her, if the husband does nothing in his lifetime to reduce it into possession:[b] and receiving the interest from the executor,[c] or assigning the legacy for a voluntary consideration[d] seems not a sufficient reduction to bar her. Hence where a legacy was given in trust for A., but on her death or marriage, which should first happen, to S. the wife of R. M. who became a bankrupt, and obtained his certificate; and then A. married, after which R. M. died: his wife was held entitled against his assignees to this legacy.[e] In an early case, in which, on a bill by a husband and wife, there had been a decree for the payment of a legacy given to the wife, and the husband died; the wife was held entitled to the money against his representatives, in analogy to a joint judgment at law, which survived to the wife if the husband died before execution.[f] But in later cases, it seems to have been held that a decree operates to change the

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[a] Ex parte Beilby, 1 Glyn & Jam. 167.

[b] 2 Ves. 677. 1 Mad. 373. Macaulay *v.* Philips, 4 Ves. 15. Stamper *v.* Barker, 5 Mad. 157. Contra Withers *v.* Kelsea, 1 Ch. Ca. 189; but the reporter adds a query.

[c] Blount *v.* Bestland, 5 Ves. 515.

[d] Becket *v.* Becket, 1 Dick. 340; but see Atkins *v.* Dawbury, Gilb. Eq. R. 88.

[e] Mitford *v.* Mitford, 9 Ves. 87. Gayner *v.* Wilkinson, 2 Dick. 491.

[f] Nanney *v.* Martin, 1 Ch. Rep. 233. 1 Ch. Ca. 27. 2 Freem. 172.

property, and vest it in the husband,[a] unless the decree be merely interlocutory.[b]

If an estate be made to a husband and wife, and to two other men, the husband and wife take only one-third, they being but one person.[c] So it has been held they should take between them one-third only of a residue bequeathed equally among A. B. *and* C. and D. the wife of C.; but considerable stress, it should be observed, was laid on the circumstance of the wife only being of kin to the testator; and of the insertion of the word "and" before C.'s name.[d]

It is now perfectly settled that a child in the womb is, according to the doctrine of the civil law,[e] to be considered as born. There was formerly some difference of opinion on this point, and in some of the early cases, it was laid down that he might be a devisee, or legatee;[f] while in others, it was held that he was incapable of taking under a bequest to children, relations, or descendants, living at the death of the testator.[g] But in a case in which a man devised certain premises to his brother H. C. for life, and after his death to the use of all and every such child or children of his said brother as should be

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[a] Oglander *v.* Baston, 1 Ver. 396. Heygate *v.* Annesley, 3 Bro. 362; and see Forbes *v.* Phipps, 1 Ed. 502. See also 2 Rop. Husband and Wife 212, where the question is stated to depend upon whether there has been an order for *payment* or not.

[b] Nightingale *v.* Lockman, Mos. 230. 390.

[c] Lit. S. 291.

[d] Bricker *v.* Whatley, 1 Ver. 233.

[e] 2 Freem. 223. 2 Atk. 118.

[f] See Com. Dig. Dev. I. Swinb. P. 4. S. 4. Stanley *v.* Baker, Mo. 220. Northey *v.* Strange, 1 P.W. 340.

[g] Musgrave *v.* Parry, 2 Ver. 710. Webb *v.* Webb, cited 1 Ves. 112. Bennett *v.* Honywood, Ambl. 708. Pierson *v.* Garnet, 2 Bro. 38. Cooper *v.* Forbes, id. 63. Freemantle *v.* Freemantle, 1 Cox 248.

living at the time of his decease; and the question was whether one of the children, who was in ventre sa mere at the time of the brother's death, should take a share or be excluded: Lord Thurlow, who seems himself clearly to have thought the child within the intention of the testator,[a] sent the case, in consequence of some of the above-mentioned decisions, to a court of law. The Judges there were unanimously of opinion, that the after born child came within the description of children living at the time of the decease of H. C.[b] And this case has not only been followed,[c] but it has even been held that such a child shall be considered as in existence to his disadvantage.[d] So in a late case of a legacy in trust for all the children of the nephew of a testatrix "*born in her lifetime;*" a child born a few months after her death was held to come within the description; being equally within the reason and motive of the gift, as in a bequest to children *living* at a testator's death.[e]

It is said that if a legacy be given to a child in ventre sa mere, and the woman is delivered of two or three children, the legacy is to be divided among them: but if the gift were to "*any*" child she might bring forth, that each child might claim a legacy to the specified amount. The case also is put of a testator willing that if the child be a son he should have two parts of the residue, and the mother one; but, if a daughter, that the mother should have two

[a] Clarke *v.* Blake, 2 Bro. 320. 2 Ves. J. 673.

[b] Doe *v.* Clarke, 2 H. B. 399.

[c] Rawlins *v.* Rawlins, 2 Cox, 425. Whitelock *v.* Heddon, 1 Bos. and Pull. 243.

[d] See Thelhusson *v.* Woodford, 4 Ves. 227. 11 Ves. 112; and 2 Ves. and B. 369.

[e] Trower *v.* Butts, 1 Sim. and St. 181.

parts and the daughter only one; and it is said that if the mother be delivered of both a son and a daughter, they shall all take in proportion; the son twice as much as the mother, and the mother twice as much as the daughter.[a]

A bastard, who has acquired a name by reputation, may take by the description of the son of his reputed father;[b] and a devise, therefore, to the testator's son J. is good.[c] Illegitimate children may even take under a general description, if sufficiently certain; as if a man gives a legacy to his own or another's "children," and it appears by necessary implication that by that word the testator had only illegitimate children in his contemplation: such children, if born at the date of the will, may claim.[d] Those born afterwards have been held to be excluded:[e] for a bastard, says Lord Coke, cannot take but after he hath gained a name by reputation; he can take no remainder limited before he be born.[f] This doctrine proceeds upon the ground of uncertainty in the person of the intended legatee, in the case of a bequest to an unborn natural child, described solely as the child of the testator; and it is therefore become an established rule of construction in such cases, that the person of the legatee must be certainly described, or be capable of being clearly ascertained. For this reason, Sir W. Grant thought

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[a] Swinb. P. 4. S. 20.

[b] Co. Lit. 3, *b*.

[c] Jenk. 6 Cent. Ca. 21. Lingen's Ca. Dyer, 323. *a*. Rivers' Ca. 1 Atk. 410.

[d] Metham *v.* D. Devon. 1 P. W. 529. Wilkinson *v.* Adam, 1 Ves. and B. 422. Bayley *v.* Snelham, 1 Sim. and St. 78.

[e] Metham *v.* D. Devon. 1 P. W. 529. Arnold *v.* Preston, 18 Ves. 288; and see 1 Ves. and B. 450.

[f] Co. Lit. 3, *b*.

that if a legacy was given to the natural child, of which a particular woman was enceinte, without reference to any person as the father, there would be no uncertainty in the bequest, and it would probably be held valid.[a] And in conformity with this opinion, in a subsequent case, where a testator had given an annuity for the education of the child of which A. M. was then pregnant; Lord Eldon decided the bequest to be good; and that it was possible to hold, consistently with the doctrine of Lord Coke, that, if an illegitimate child in ventre sa mere was described so as to ascertain the object intended to be pointed out, it might take under that description.[b] But there is a difference between giving to the child with which a woman is pregnant generally, and as being the child with which she is pregnant by a particular man; and hence where a testator gave a legacy to such child or children, if more than one, as A. might happen to be enceinte of *by him*; and A. at the date of the will was pregnant of a daughter, who was born shortly after the testator's death: Sir W. Grant thought he could not hold, without breaking in upon the rule laid down by Lord Coke, that there was sufficient certainty in the description of this legatee.[c] This decision, however, has been thought, in a later case, to have gone too far; and that the true doctrine is, that a legacy may be effectually given to a child with which an unmarried woman is pregnant, unless it be made a *condition precedent to the gift*, that the child should actually be the child of a particular individual, as the father; and so that

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[a] 17 Ves. 532.

[b] Gordon *v.* Gordon, 1 Mer. 141. Blundell *v.* Dunn, cited 1 Mad. 433; and see 2 Roll. Ab. 43.

[c] Earle *v.* Wilson, 17 Ves. 528.

it could not be the testator's intention that the child in question should take at all, unless it were his child. In the case alluded to, a man by his will, reciting that he had two natural children, and the mother supposed to be then carrying a third child, bequeathed the whole of his property in E. to be divided equally between them, that is to say, if another child should be born by the mother of the other two, in the proper time, that such child was to have one third of such property in E.; and he bequeathed the whole of his remaining property, *after paying* HIS *natural children as aforesaid*, to his nephews. The mother of the children was enceinte, at the date of the will, of a child, who was born about seven months after the testator's death. The Chief Baron Richards, after stating the above-mentioned doctrine as the result of the former cases, observed, he had therefore only to inquire whether there was, in the terms of the bequest, worded as it was, such a condition precedent annexed to it by the testator, as by necessary construction required, that in order to give effect to the bequest, the child must be shown to be the testator's child, and that he meant to give it only in case the child should be his; and that not only by matter of implication or argument, but of clear illustration. He held that the allusion of the testator to the child, as being one of *his* children, did not show that he meant the child to take only in case of its being his; nor did it amount to an assertion that the child was his, or that the testator considered that he was giving to it the legacy solely as his child; and that as it had been described with sufficient certainty what child it was whom the testator meant as the object of the bequest,

it took an equal share with each of the other two natural children of the testator.[a]

The words child, issue, and the like, must be taken primâ facie to mean legitimate offspring;[b] so that if there is a bequest to children, and there are both legitimate and illegitimate children to answer the description, the legitimate ones will take in exclusion of the others.[c] And where there was a bequest of the first annuity, that dropped in, to the eldest child of W. H.; and it was proved that the testator knew that W. H., with whom he was very intimate, was a bachelor, and had no legitimate child, but had an illegitimate daughter, and other children, who were treated by him as his children: it was held that the daughter was not entitled as the eldest child of W. H.[d] It has been observed that W. H. being a single man, the event of his marrying and having legitimate children might fairly be looked to, and there was nothing apparent upon the face of the will which showed that the testator meant by the word child to describe an illegitimate child.[e] For evidence is not admissible where the conflict is between the two claims of existing legitimate and illegitimate children; the will must be taken to mean the former.[f] But where there is no legitimate offspring to claim, evidence may be received to show whom the testator meant by the term children. Thus where a testator gave to his children 5000*l.* each,

[a] Evans *v.* Massey, 8 Pri. 22.

[b] 1 Ves. and B. 462.

[c] Cartwright *v.* Vawdrey, 5 Ves. 530. Harris *v.* Stewart, cited 1 Ves. and B. 434. Hart *v.* Durand, 3 Anstr. 684. This was doubted in an early case, (Mo. 10. N. 39.) and clearly thought to be otherwise in a devise by a mother to her children.

[d] Godfrey *v.* Davis, 6 Ves. 43.

[e] 1 Ves. and B. 453.

[f] Swaine *v.* Kennerley, 1 Ves. and B. 469.

and to the mother of his children 6000 rupees; and died a bachelor, but left illegitimate children, who were born at the date of the will; the Vice-Chancellor held, that evidence was admissible to show the state of the testator's family when he made his will; and taking that into consideration, he thought the legatees, whom the testator must have intended to describe, were not the possible progeny of a future marriage, but existing persons, children already born.[a]

In Wilkinson *v.* Adam,[b] the Judges seemed to think, that where a devise evidently points at illegitimate children, and the words are large enough to include legitimate ones, they might both take together; but that if it was an established and inflexible rule that they could in no case take together under the description of children, they would rather be disposed to say, in the case before them, that legitimate children could not take, notwithstanding the generality of the words, than that illegitimate children should be excluded, to the disappointment of the clear and manifest intention of the testator. Lord Eldon, however, said it would be very difficult to persuade him that legitimate and illegitimate children could take under the same description.

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II. Some few persons, by the common law, are incapable of taking a legacy. Thus all traitors are said to be subject to this disability.[c] A bequest to a bankrupt belongs to his assignees,[d] if left to him before his certificate has been allowed by the Lord

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[a] Beachcroft *v.* Beachcroft, 1 Mad. 430. Lord Woodhouselee *v.* Dalrymple, 2 Mer. 419.

[b] 1 Ves. and B. 422.

[c] 2 Bl. Com. 512. The civil law excluded makers of wills, heretics, &c. &c. see Swinb. P. 5. Touch. 414. Godolph. 85. 277.

[d] Toulson *v.* Grout, 2 Ver. 432.

Chancellor, notwithstanding it may have been signed by the creditors and commissioners,[a] and been delayed in consequence of a petition that is afterwards dismissed; unless the proceeding to stay the certificate was without foundation, and merely for that purpose.[b] And if a legacy is given to a bankrupt upon a contingency, which does not happen till after he has obtained his certificate, it will belong to his assignees;[c] provided the contingent interest is such as may be assigned or released.[d]

The express provisions of the legislature have also in a few instances created a disability as to legacies. Thus all children or persons sent beyond seas to be instructed in the popish religion, or to reside in any religious house, are disabled and made incapable, as to themselves only, to inherit, purchase, take, have, or enjoy any lands or tenements, legacies or sums of money, within the realm of England, until they conform themselves and take the oath prescribed.[e]

All persons after having been a second time convicted in a court of justice of having denied the Trinity, or the truth of the Christian religion, or the divine authority of the scriptures, were also rendered incapable of any legacy or deed of gift.[f] But the more liberal and enlightened spirit of modern times has caused the

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[a] Tudway *v.* Bourn, 2 Burr. 716.

[b] Ex parte Ansell, 19 Ves. 208.

[c] Higden *v.* Williamson, 3 P. W. 132. Brandon *v.* Brandon, 3 Swanst. 312. 2 Wils. C. C. 14. Contra Jacobson *v.* Williams, 1 P. W. 382. 1 Eq. Ab. 54. Gilb. Eq. R. 144. See 6 Geo. IV. 16. 63.

[d] See Moth *v.* Frome, Ambl. 394.

[e] 2 Jac. I. 4. 6. 3 Jac. I. 5. 16. The act of 3 Car. I. 2. (3.) which is much to the same purpose, seems in effect repealed by 31 Geo. III. 32. 4. See, on the acts affecting Roman Catholics, Mr. Butler's note to Co. Lit. 391, *a*. Burn. E. L. Popery.

[f] 9 and 10 W. III. 32.

removal of some of the legislative disqualifications; and this act, as far at least as regards persons denying the Trinity, is repealed.[a]

Artificers going abroad to exercise their trade, or who, being abroad, should not return within six months after warning given them, were rendered incapable of taking any legacy, or being an executor or administrator.[b] This is now also repealed.[c]

Persons, again, in certain official situations, and others, not taking the oaths of supremacy and allegiance, or the sacrament, in the manner prescribed, are declared upon conviction in a court of justice incapable of any legacy or deed of gift.[d] The annual indemnity acts, which are prospective,[e] seem to render these disqualifications of little moment.

Two species of incapacity actually in force remain to be noticed. First, for putting an end to doubts that had arisen who were to be deemed legal witnesses to the execution of wills under the statute of frauds, it is enacted, that if any person shall attest the execution of any will or codicil, to whom any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate, except charges on land for payment of debts, shall be thereby given, such devise, legacy, &c. shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void.[f] The express words of this enactment, it has been held, are not restrained by the preamble of the statute, so

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[a] 53 Geo. III. 160. Extended to Ireland, 57 Geo. III. 70.

[b] 5 Geo. I. 27. 3.

[c] 5 Geo. IV. 97.

[d] 25 Car. II. 2. 5, Test Act. 1 Geo. I. 13. S. 8. 17.

[e] In the matter of Steavenson, 2 B. and C. 34.

[f] 25 Geo. II. 6. 1.

that a legacy given to a subscribing witness of a will, where the testator has no real estate, is void.[a]

2ndly. It is enacted by the last mortmain act,[b] that no lands or tenements, or money to be laid out thereon, shall be given for or charged with any charitable uses whatsoever, unless by deed indented, executed in the presence of two witnesses twelve calendar months before the death of the donor, and enrolled in the Court of Chancery within six months after its execution, (except stocks in the public funds, which may be transferred six months previous to the donor's death,) and unless such gift be made to take effect immediately, and be without power of revocation or reservation for the benefit of the donor; and that all other gifts shall be void.

A charity has been defined to be a gift to a general public use, which extends to the poor as well as to the rich.[c] The preamble to the statute of Elizabeth regarding charitable uses,[d] specifies as such, gifts for relief of aged, impotent, and poor people; for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities; for repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; for education and preferment of orphans, and marriages of poor maids; for maintenance of houses of correction; for support and help of young tradesmen, handicraftsmen, and persons decayed; for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants in payment of levies and

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[a] Lees v. Summersgill, 17 Ves. 508.

[b] 9 Geo. II. 36. See on the former mortmain acts, Wilm. 9. Lord Hardwicke said it was a reproach to the law that such construction was put upon them as prevented their having effect. Ambl. 156; and see 1 Ed. 487. 512.

[c] Ambl. 652.

[d] 43 Eliz. 4.

taxes. The signification of charity in courts of equity is derived chiefly from this statute, and those purposes are considered charitable which the statute enumerates, or which by analogies are deemed within its spirit and intendment.[a] Hence devises for the benefit of hospitals, or poor of parishes;[b] for improvement of cities,[c] as for bringing water for the use of the inhabitants;[d] and for preaching a sermon on a certain day, keeping the chimes of a church in repair, and singing psalms,[e] have been held charitable uses and void. So where a testator, after reciting that he had at great labour and expense raised a freehold botanic garden at S., and, not having any relations, was desirous of devising and bequeathing all his freehold estates, and all the residue of his stock, funds, and personal estate to trustees to maintain and improve the collection of plants, &c.; and wished, if occasion required, that the garden might be enlarged by taking in part of his ground adjoining, and the collection of plants increased, as *he trusted it would be a public benefit;* and then proceeded to devise the garden and land adjoining, and all the rest and residue of his real and personal property to trustees, giving special directions as to the management of the gardens: the Lord Chancellor thought that upon the expression of the testator, that he trusted it would be a public benefit, he might venture to declare the disposition void.[f] In a case also in which a man bequeathed an annuity of 10*l.* per annum out of land to a minister to preach a sermon

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[a] 9 Ves. 405. 1 Swanst. 297. 308. 1 Cox, 317. 3 Mer. 19. 2 Sim. and St. 76.

[b] Att. Gen. *v.* Ward, 3 Ves. 327.

[c] Howse *v.* Chapman, 4 Ves. 542.

[d] Jones *v.* Williams, Ambl. 651.

[e] Turner *v.* Ogden, 1 Cox, 316.

[f] Townley *v.* Bedwell, 6 Ves. 194.

once a year to his memory, to keep his tombstone in repair, and the inscription thereon, and upon the stone against the wall, and 2*l.* per annum to the clerk, and 2*l.* more to the sexton, for ever; with 4*l.* per annum to the mayor and corporation of A. for managing and keeping accounts thereof: Lord Hardwicke held the annuities to the minister, clerk, and sexton charitable uses, and void, as well as the 4*l.* per annum to the corporation as attendant on them.[a] But a bequest to erect a monument in a church to the testator's memory is not a charitable use;[b] and where there was a grant of lands in trust perpetually to repair, and if need be rebuild, a vault and tomb standing on the land, and permit the same to be used as a family vault for the donor and her family: the Court thought that as far as concerned the grantor's own interment it was not a charitable use, but inasmuch as it was for her family it might be so considered.[c]

In consequence of the above-mentioned statute all bequests to charitable uses of money charged upon,[d] or to arise by the sale of land;[e] whether freehold or copyhold,[f] and whether specifically given, or included only in a general residuary clause;[g] of money due on mortgage,[h] as on turnpike tolls,[i] or

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[a] Durour *v.* Motteux, 1 Ves. 320.

[b] Lowndes on Legacies, 205, citing Mellish *v.* President of the Asylum, M. S.

[c] Doe *v.* Pitcher, 3 M. and S. 407. 6 Taunt. 359; and see Gravenor *v.* Hallum, Ambl. 643.

[d] Hone *v* Medcraft, 1 Bro. 261.

[e] 14 Ves. 541. Att. Gen. *v.* Lord Weymouth, Ambl. 20. 1 Coll. Jur. 433. Att. *v.* Ward, 3 Ves. 327.

[f] Arnold *v.* Chapman, 1 Ves. 108. Doe *v.* Waterton, 3 B. and A. 149.

[g] Att. Gen. *v.* Graves, Amb. 155. Att. Gen. *v.* Caldwell, id. 635. Att. Gen. *v.* E. Winchelsea, 3 Bro. 374. 2 Cox, 364. Paice *v.* Archb. Canterbury, 14 Ves. 364. Johnston *v.* Swann, 3 Mad. 457.

[h] Att. Gen. *v.* Caldwell, Ambl. 635. Att. Gen. *v.* Meyrick, 2 Ves. 44. Howse *v.* Chapman, 4 Ves. 542. Pickering *v.* Lord Stamford, 1 Ves. J. 272.

[i] Knapp *v.* Williams, 4 Ves. 430, *n.* Howse *v.* Chapman, id. 542.

secured by assignment of poor rates and county rates;[a] of navigation shares;[b] of leaseholds,[c] as a lease from the Crown of the right of laying mooring-chains in the river Thames;[d] have been held void. So where estates were conveyed in trust to sell, and pay a certain sum to A. his executors, &c. after the decease of the survivor of A. and two other persons; another sum to the executors of A.; and a third sum to such person as B. should appoint, who appointed it to A.; and A. by will bequeathed all his real and personal property upon trust to sell, and convert into money, and after satisfaction of debts and legacies, to pay the residue of the money to arise from the real and personal estates to his wife; and she by her will gave the remainder of her property, after paying debts and legacies, to charitable uses: it was held that the sums, not having been raised at her death, continued an interest in land, and did not therefore pass to the charities.[e]

It is equally clear that all bequests of mere personal estate to be laid out or invested in real property,[f] as a gift of 500*l.* to be applied towards the discharge of a mortgage on a chapel,[g] are within the statute, and void.

With regard, however, to personal bequests to be laid out in land, the act has been held only to apply, where the fund must, according to the terms of the will, be so laid out at all events. For where J. N. by his will desired his executors to settle and secure

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[a] Finch *v.* Squire, 10 Ves. 41.

[b] Howse *v.* Chapman, 4 Ves. 542.

[c] Att. Gen. *v.* Graves, Ambl. 155. 1 Coll. Jur. 448. Att. Gen. *v.* Tomkins, Ambl. 216. Shanley *v.* Baker, 4 Ves. 732. Paice *v.* Archb. of Canterbury, 14 Ves. 364. Johnston *v.* Swann, 3 Mad. 457.

[d] Negus *v.* Coulter, Ambl. 367.

[e] Att. Gen. *v.* Harley, 5 Mad. 321.

[f] Att. Gen. *v.* Bowles, 3 Atk. 807. 2 Ves. 547. Att. Gen. *v.* Tyndall, Ambl. 614. 2 Ed. 207.

[g] Corbyn *v.* French, 4 Ves. 418.

by purchase of inheritance, *or otherwise*, as they should be advised, out of his personal estate, an annuity of 50*l.* to be distributed among the poor people of L.: Lord Hardwicke thought if it had rested on the first words, the devise had been clearly void; but as the disjunctive left to the executors two methods to do a particular thing, the one lawful and the other not, the lawful one should be pursued and take effect; and he accordingly decreed the gift to be valid.[a] In this respect, indeed, his Lordship, who had to decide the first cases that occurred after the passing of the act, seems to have carried his distinctions to some nicety. Thus where a testator gave certain parts of his estate to be applied in the clothing and educating of twenty poor boys; and directed such parts to be invested in the funds until the whole could be laid out in a purchase of lands to the satisfaction of the governor and trustees (whom he appointed), which lands were directed to be purchased in the names of the trustees, and the interest and profits and rents of such parts of his estate *or* the lands to be purchased therewith to be applied in clothing the boys: Lord Hardwicke thought there was room to construe this bequest with a discretionary power in the trustees to lay out the money one way or other, either in lands or in the funds.[b] But in a case in the same year, where a man by his will gave his debts, securities, and ready money to trustees in trust, till they could purchase land, to pay the interest of 120*l.* to the poor of H., and willed that the trustees, as soon as they could meet

[a] Soresby *v.* Hollins, 1 Coll. Jur. 439. 9 Mod. 221. Burn, E. L. Mortmain; and see 3 Ves. 144. Att. Gen. *v.* Hartley, 4 Bro. 412. Curtis *v.* Hutton, 14 Ves. 537.

[b] Grimmett *v.* Grimmett, Ambl. 210. 1 Coll. Jur. 454. 1 Dick. 251.

with a suitable purchase, should lay out 120*l.* in lands of inheritance, to be vested in them for ever in trust, &c.: Sir T. Clarke thought the bequest void, for that he would not go further than Grimmett *v.* Grimmett.[a] And in a subsequent case, where a testatrix gave 600*l.* to be laid out in the purchase of land as soon as could be after her decease, and until an eligible purchase could be made, to be placed out at interest by her friend C. whom she appointed trustee for the purpose of receiving and placing out the same until a purchase could be made; and upon trust as soon as he could meet with lands suitable for the purpose to purchase them: the Court held the bequest contrary to the statute; and Lord Commissioner Eyre observed, the case of Grimmett *v.* Grimmett stood upon so much nicety that it was not proper to extend it where every part of the circumstances of that case did not occur: that the principal case was distinguishable from it in this, that the primary destination of the fund was very clearly the purchase of land; and therefore, whatever might be the authority of Grimmett *v.* Grimmett, it did not strictly apply.[b] And where a testator gave the residue of his personal estate for the endowment of two schools, and *recommended* his trustees to lay out the money when collected in land; it was held that the word "recommend," being imperative, left the trustees no discretion, and the bequest was therefore void.[c]

Again, Lord Hardwicke decided that a bequest for *erecting* or *building* a school-house or hospital was not contrary to the intent of the statute; for

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[a] English *v.* Ord, High. on Mtmn. 82.

[b] Grieves *v.* Case, 2 Cox, 301. 1 Ves. J. 548. 4 Bro. 67.

[c] Kirkbank *v.* Hudson, 7 Pri. 212; and see Doe *v.* Wrighte, 2 B. & A. 710.

they might be built on ground hired or given for the purpose, if such could be procured within a reasonable time.[a] But this doctrine has been long overruled, and it seems now clearly settled, that a direction to erect or build must be taken to mean that land shall be bought; and the bequest will therefore be void, unless the testator himself, by his will, manifests his purpose to be sufficiently answered by the land being acquired otherwise than by purchase.[b] Nor is it sufficient that there happens to be a vacant piece of ground belonging to the parish or town for whose benefit the hospital or school is to be built, if the will does not point at it;[c] nor that land has been actually offered to be given by others for that purpose.[d] Thus where a man, after bequeathing a sum of money to build alms-houses, gave the remainder of his property for the use of a certain orphan school, under the direction of the committee of that school, provided they would furnish a piece of ground near the school to build the alms-houses upon; and the committee, in their information, offered to give the ground; the bequest was held void.[e] But where a man by his will, reciting that it was his wish that a school should be erected at O., and an asylum at M., under the management of trustees, gave 20,000*l.* in trust to the said trustees, to each of the charities; but directed that the monies should not be applied in the purchase of

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[a] Vaughan *v.* Farrer, 2 Ves. 182. Cantwell *v.* Baker, id. cited. Att. Gen. *v.* Bowles, 3 Atk. 807. 2 Ves. 547.

[b] 8 Ves. 191. 9 Ves. 541. 544. 3 Mad. 312. Pelham *v.* Anderson, 2 Ed. 296. 1 Bro. 444, N. Foy *v.* Foy, 1 Cox, 163. 3 Bro. 593, cited. Chapman *v.* Brown, 6 Ves. 404.

[c] Att. Gen. *v.* Hyde, Ambl. 751. 1 Bro. 444, N. 2 Dick. 518.

[d] Att. Gen. *v.* Nash, 3 Bro. 588.

[e] Att. Gen. *v.* Davies, 9 Ves. 535.

lands or the erection of buildings, it being his expectation that other persons would, at their expense, purchase lands and buildings for those purposes; and by a codicil willed that the sums so given should continue in the house or firm at O. during the articles of partnership, and for such longer time as his executors considered the principal and interest secure, for the benefit of the charities, it being his will that the interest of the sums should be paid annually to the trustees of the said charities; and by a subsequent codicil revoked a devise of a certain close, it being his intention to appropriate it for the building of the school: the Vice-Chancellor held that the charities must be established.[a]

A bequest of the dividends and proceeds of certain stock to be applied for and towards *establishing* a school in the parish of B. was held good, as the master might teach in his own house, or in the church.[b] And where a testator directed his executors to invest a certain sum in the funds, and apply the dividends in payment of the expenses of *providing a proper school-house*, &c.: the Vice-Chancellor thought a school-house might be hired, and that the intent of the testator might be executed without necessity for the purchase of land.[c] But where a testator gave all his real and personal estate to trustees, with directions that a commodious and proper house should be taken by them in the town of B., upon lease or otherwise, as a school for the children and grandchildren of his relations, (whom he named,) and also for such other children as his trustees should think fit, the foundation to be under the visitation of the

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[a] Henshaw v. Atkinson, 3 Mad. 306. 526. 2 Cox, 387.
[b] Att. Gen. v. Williams, 4 Bro.
[c] Johnston v. Swan, 3 Mad. 457.

mayor of B., and the inscription of the founder's name, &c. over the door: Lord Loughborough thought there was no doubt the testator meant a permanent establishment, and was trying to evade the statute; and accordingly declared the disposition void as far as it went to establish a charity for general purposes, although it was good as long as the school was to be kept open for the children and grandchildren of the relations.[a]

The corporation of Queen Anne's Bounty were enabled, upon their establishment,[b] to take real or personal estate given by will; but after the passing of the mortmain act a legacy to that charity was held void, as the corporation are bound by their rules to lay out their donations in the purchase of land.[c] By an act, however, of his late Majesty,[d] reciting the above-mentioned section of the statute of Anne, and that the beneficial effect and operation of it had been considerably obstructed and retarded by the mortmain act, it was enacted, that so much of the said statute of Anne as therein recited should be and remain in full force and effect notwithstanding the mortmain or any other act or law to the contrary. Lands also, not exceeding five acres, or any goods or chattels not exceeding 500*l*., may be given by deed or will, executed three calendar months before the death of the grantor or testator, to any body politic or corporate, or other persons, for or towards erecting, rebuilding, repairing, purchasing, or providing any church or chapel where

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[a] Blandford *v.* Thackerell, 2 Ves. J. 238. 4 Bro. 394.

[b] 2 & 3 Anne, 11. 4.

[c] Widmore *v.* Woodroffe, Ambl. 636. 1 Dick. 392; and see Grayson *v.* Atkinson, 1 Coll. Jur. 448. Middleton *v.* Clitherow, 3 Ves. 734.

[d] 43 Geo. III. 107.

the liturgy and rites of the church of England are used, or any mansion-house for the residence of any minister officiating in any such church or chapel; or for the out-buildings, offices, church-yard or glebe: provided that no more than one such gift or devise shall be made by any one person: and if any such gift or devise shall exceed five acres or 500*l.* it shall be good to that extent; and the Lord Chancellor, upon petition, may make an order for reducing every such gift or devise within the limits, and allotting the five acres and such specific goods and chattels as in his judgment shall be most convenient.[a]

By charter, 1 Ed. III. the king granted to the city of London liberty to devise lands in mortmain, as was used in time past;[b] and the statute, it has been said, does not affect this privilege.[c] But it is clear the custom is confined to lands within the city.[d] The Bath Infirmary also, by an act of his late Majesty, is enabled to take lands in mortmain not exceeding 1000*l.* a year.[e]

There is nothing in the statute of Geo. II. prohibiting the giving personal estate to a charity, provided it is not to be laid out in land; and mere legacies to charitable uses are valid.[f] In a residue, therefore, bequeathed to charities, although a leasehold house can not pass, those fixtures will, which the testator had a right to remove.[g] If a large per-

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[a] 43 Geo. III. 108.

[b] Com. Dig. London, N. 4.

[c] Bac. Ab. Customs of Lon. A.

[d] Middleton *v.* Cator, 4 Bro. 409.

[e] Makeham *v.* Hooper, High. on Mortm. addenda, 50. 4 Bro. 153. Ld. Hardwicke's decision to the contrary, Mogg *v.* Hodges, 1 Coll. Jur. 442. 2 Ves. 52, was on another statute. See as to other institutions. High. on Mortm. 155.

[f] 1 Coll. Jur. 440; and see Att. Gen. *v.* Clarke, Ambl. 422. Bishop of Hereford *v.* Adams, 7 Ves. 324. Waite *v.* Webb, 6 Mad. 71.

[g] Johnston *v.* Swann, 3 Mad. 457.

sonal estate is left to trustees for a charitable use, which they direct, and there is no occasion to come to a court of equity for direction, there is nothing in the statute restraining the trustees from laying out that in land; because, by the express proviso, all purchases to take effect in possession are good; which, says Lord Hardwicke, is a matter that may perhaps want a remedy.[a]

A bequest to be laid out on land already in mortmain is valid: for the object of the statute was to prevent new acquisitions in mortmain; and land already in that state may be meliorated (contrary indeed to the opinion of Lord Northington[b]) to any extent by building upon it, or in any other manner.[c] Legacies, therefore, to repair churches or chapels;[d] for repairing or building new parsonage houses on the glebe;[e] or for repairing, rebuilding, &c. certain houses effectually given by the testator in his lifetime as alms-houses,[f] have been held good.

When there is a gift of personal property connected with and for the same purposes as a devise of land, which is void, the bequest will not fail if it can be applied separately, and independent of the void devise, to purposes substantially consistent with the intention of the testator. Thus, where A. devised a house to trustees, in trust, to deposit in the house for the use of the Welch charity school, all the religious

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[a] 2 Ves. 188.

[b] 2 Ed. 213. Ambl. 616.

[c] 3 Bro. 594. N. Belt's ed. 4 Ves. 428.

[d] Touch. 415. Att. Gen. v. Ruper, 2 P.W. 125. Harris v. Barnes, Ambl. 651. Att. Gen. v. Bishop of Oxford, 1 Bro. 444. N.

[e] Glubb v Att. Gen. Ambl. 373. Brodie v. D. Chandos, 1 Bro. 444. N. Att. Gen. v. Bishop of Chester, 1 Bro. 444. Att. Gen. v. Munby, 1 Mer. 345.

[f] Att. Gen. v. Parsons, 8 Ves. 186.

books she might have at the time of her death, and for that purpose to permit her servants to live in the house, directing that they should live there during their lives, notwithstanding the books might be given away or otherwise disposed of, for the purposes of the charity; and, after reciting that there might be at her death several religious books bought with the contributions of other persons, bequeathed to her trustees all such books, and all the rest of her personal estate, on trust, to dispose of for the use of the Welch circulating charity schools, and for the increase of Christian knowledge and promoting religion, in such manner as the trustees should think proper and conducive to charitable purposes, and moreover to purchase new books, &c.; and in the mean time should deposit all the said books, &c. in the said house allotted for the keeping and care thereof: Lord Eldon thought the testatrix's object was not necessarily to be executed in the house, and that there was enough in the will to give the personal property to charitable purposes connected with the plan of promoting Christian knowledge; and directed a scheme to be proposed, as far as reasonably and properly might be to that species of charity, which appeared to have been in the contemplation of the testatrix at the time of making her will, denominated the Welch Charities.*

If however the personal bequest is so connected with the devise as not to be applicable, consistent with the intention, but as accessary to the devise, it will be void. As where there was a devise of certain houses as alms-houses; a bequest of personal pro-

* Att. Gen. v. Stepney, 10 Ves. 22; and see Blandford v. Thackerell, 2 Ves. J. 238.

perty for the benefit of the poor inhabitants of them was held void: for there was not sufficient to show any object of the testator independent of or beyond the endowment of the alms-houses; to apply the fund otherwise than to the poor inhabiting them would be contrary to the intention, and the bequest must therefore fail with the object to which it was attached.[a] And where a testatrix gave all the residue of her estate and effects for building or purchasing a chapel, and requested if any overplus should remain after it was built it was to go towards the support of a gospel minister, not to exceed 20*l.* per annum; and if any further overplus should remain, the same to be laid out in charitable uses, as her executors should think proper: the Master of the Rolls was clearly of opinion the testatrix meant a minister in that chapel, which she intended to be purchased; and declared the whole disposition, including the gift of the residue after payment of the minister, void.[b]

There is an exception in the statute of dispositions to or in trust for either of the universities, and their colleges, and the scholars upon the foundations of the colleges of Eton, Winchester, and Westminster. Under this, Lord Northington thought a devise of lands to a certain number of fellows or scholars of a college was good; for that the exception extended to a devise for the benefit of particular members as well as of the whole body.[c] But a gift to a college in

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[a] Att. Gen. *v.* Goulding, 2 Bro. 428. Att. Gen. *v.* Whitchurch, 3 Ves. 141.

[b] Chapman *v.* Brown, 6 Ves. 404. Grieves *v.* Case, 2 Cox, 301. Att. Gen. *v.* Hinxman, 2 Jac. & W. 270; and see Att. Gen. *v.* Davies, 9 Ves. 535.

[c] Att. Gen. *v.* Tancred, 1 Ed. 10. Ambl. 351. 1 Bl. 90.

trust for any other charitable uses than for the benefit of the college is not within the exception.[a] Where therefore a man devised the remainder of his real and personal estate to a college in Oxford, and by a codicil annexed particular regulations, viz. if there should be a senior fellow of a certain age and good character, he should be in possession of the estate and furniture of the house to keep it in repair, and to live in it hospitably, and sometimes to give entertainments to the poor, and distribute to them medicine, books, &c. and to give an annual entertainment to the fellows: the devise was held void.[b] Lord Northington seems also to have considered that the exception in favour of the universities only extended to colleges already established;[c] but Lord Loughborough expressed his doubts of that distinction.[d] The exception was qualified by a proviso, that no college should be capable of purchasing more advowsons than were equal in number to one moiety of the fellows, or students upon the respective foundations; which proviso was afterwards repealed.[e]

The act does not extend to the colonies;[f] nor to the disposition, grant, or settlement of any estate, real or personal, in Scotland;[g] and a bequest of

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[a] 1 Ed. 15.

[b] Att. Gen. *v.* Whorwood, 1 Ves. 534.

[c] 1 Ed. 16.

[d] 3 Ves. 728. N. In the case of Downing College, Cambridge, the testator died after the passing of the act; but the will, having been made before, was held not to be within the operation of it. Att. Gen. *v.* Downing, Wilm. 1. 1 Dick. 414. See on this point Ashburnham *v.* Bradshaw, 2 Atk. 36. Att. Gen. *v.* Lloyd, 1 Ves. 32. Att. Gen. *v.* Heartwell, 2 Ed. 234. Ambl. 451. Att. Gen. *v.* Bradley, 1 Ed. 482. Willet *v.* Sandford, 1 Ves. 178. The same was held as to the statute of frauds. Carvill *v.* Carvill, 2 Ch. Rep. 301. Serjeant *v.* Puntis, Pr. Ch. 77.

[e] 45 Geo. III. 101.

[f] Att. Gen. *v.* Stewart, 2 Mer. 143.

[g] Section 6.

money to be laid out in land in that country,[a] or in Ireland,[b] is valid. But legacies to charities there, of money to arise by the sale of lands in England, are void.[c]

Property given to superstitious uses, as for maintenance of a priest to say mass; for burning of lights before images;[d] for the use of convents, &c.;[e] are void, and given by act of parliament to the king to dispose of as he pleases.[f] A distinction has long been made between superstitious and mistaken charitable uses, or such as are repugnant to that sound constitutional policy, which controls the wills and wishes of individuals when they clash with the interest and safety of the whole community. Where property is thus given, the Court distinguishes between the charity and the use; and seeing a charitable bequest in the intention of the testator, they execute the intention, varying the use.[g] Thus, where R. M. bequeathed 600*l.* to Mr. Baxter, to be distributed by him among 60 pious ejected ministers: the Lord Keeper, taking a difference between the charity and the use, adjudged that the use was void, and not the charity; and upon its then being observed to the Court, that the practice had always been to apply charities in eodem genere, and this, being intended for ejected ministers, ought to go among the clergy, the Lord Keeper decreed it for the maintenance of a

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[a] Oliphant *v.* Hendrie, 1 Bro. 571. Mackintosh *v.* Townsend, 16 Ves. 330.

[b] Campbell *v.* E. Radnor, 1 Bro. 271.

[c] Ibid. Curtis *v.* Hutton, 14 Ves. 537.

[d] See Adams and Lambert's case, 4 Rep. 104.

[e] Smart *v.* Prujean, 6 Ves. 567.

[f] 1 Ed. VI. 14. Wilm. Rep. 32; but see Holloway *v.* Watkins, Cro. Jac. 51.

[g] Wilm. Rep. 32. 7 Ves. 75. 495.

chaplain for Chelsea College.[a] This decree, indeed, on a rehearing, before which the act of toleration passed, was reversed; and the money ordered to be paid to Mr. Baxter, to be by him distributed according to the will;[b] because it was really a legacy to sixty particular ejected ministers, to be named by Mr. Baxter, and as if a legacy to those sixty individuals.[c] But in a subsequent case, in which J. S. charged his real and personal estate with an annual sum for the maintenance of Scotchmen in the university of Oxford, to be sent to Scotland to propagate the doctrine and discipline of the church of England there: it was decreed that the estate should be conveyed to the six senior fellows of one of the colleges mentioned in the testator's will, the end of the decree being for the effectual execution of the trust as near as could be to the intention.[d] So also where a testator gave a sum of money for advancing and propagating the Jewish religion; Lord Hardwicke said, if this was to be considered as a superstitious use, it would be a proper consideration for a court of revenue; for he did not think the crown was obliged to apply a bequest to a superstitious use to a charity: if it was an illegal bequest, then it was another consideration, and the Court might direct the application.[e] And in a modern case of a bequest, for the purpose of educating and bringing up poor children in the Roman Catholic faith: Sir William Grant considered that the gift was not so far void as to let in the heir

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[a] Att. Gen. v. Baxter, 1 Ver. 248.

[b] Att. Gen. v. Hughes, 2 Ver. 105.

[c] 7 Ves. 76.

[d] Att. Gen. v. Guise, 2 Ver. 266, The case there cited is Att. Gen. v. Combe, 2 Ch. Ca. 18.

[e] De Costa v. De Paz, 2 Swanst. 487. Ambl. 228. 7 Ves. 76. 1 Dick. 258.

or next of kin; yet he held that it must go to such use as the king should direct.[a]

Since the toleration act a bequest in favour of dissenters is valid.[b]

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## SECTION II.

### *Of describing Legatees.*

I. THOSE who are capable of being legatees must be named or described with reasonable certainty, otherwise the bequest will fail. For if a man devises his land to his best friend, or to the best men in D.; or bequeaths a legacy to one of the world;[c] or to the son of A. who has several sons, and it cannot be shown which the testator meant;[d] these are void gifts. Hence where there was a bequest of pictures to Lady ——, and a blank was left for the name, but the testatrix had appointed Lady Hort executrix, who was the only person of title mentioned in the will: it was held, that Lady Hort was not entitled to the pictures, but that the bequest was void for uncertainty.[e] Yet a construction will, if possible, be put upon uncertain expressions. Thus where a testator gave his lands to his wife A. for life, and after her decease to M. niece to his said wife, and then

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[a] Cary *v.* Abbot, 7 Ves. 490. Qu. as to Ireland, see Att. Gen. *v.* Power, 1 B. & B. 145.

[b] Att. Gen. *v.* Hickman, 2 Eq. Ab. 193. W. Kel. 34. Att. Gen. *v.* Cock, 2 Ves. 273. Waller *v.* Childs, Ambl. 524; and see 3 Mer. 409.

[c] Touch. 415. Swinb. P. 7. S. 7. Cro. Eliz. 743. Vaugh. 185.

[d] Dowset *v.* Sweet, Ambl. 175; on which see 1 Ves. J. 415. In an early case a gift to two of the children of A. seems to have been thought good. Plumpton *v.* Plumpton, 1 Ch. Rep. 188.

[e] Hunt *v.* Hort, 3 Bro. 311.

added, "Item, I give the use of 500*l.* stock for and during *her* natural life; but after *her* decease I give the 500*l.* among the brothers and sisters of my *said wife:*" Lord Hardwicke was clear, that by *her* the testator intended the wife, and decreed accordingly.[a]

Legacies to charities form an exception to the rule; and uncertain gifts to them will be sometimes supported, which would otherwise be void.[b] Thus bequests "to the poor inhabitants of L.;"[c] "for the good of poor people;"[d] "to be paid and applied to charitable and pious uses;"[e] for the purpose of putting out poor relations apprentices;[f] have been held valid. So where a legacy was given "to the poor," and there were no words in the will which discovered what poor were meant, but it appeared that the testator was a French refugee; the Court directed the legacies to be given to the poor refugees.[g] And where a testatrix, by a codicil, gave 5*l.* per annum to all and every the hospitals, without saying where the hospitals were; and it appeared she lived many years at C. and died there, and took notice by her will of two hospitals there; the legacy was held

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[a] Castledon *v.* Turner, 3 Atk. 257. Fox *v.* Collins, 2 Ed. 107. In a late case, in which a man willed, that his real and personal estate *should be divided according to the statute of distribution, in that case made and provided,* the devise was held void as to the real estate, Thomas *v.* Thomas, 3 B. & C. 825.

[b] Swinb. P. 1. S. 16.

[c] Att. Gen. *v.* Clarke, Ambl. 422. Powell *v.* Att. Gen. 3 Mer. 48. Att. Gen. *v.* Comber, 2 Sim. & St. 93.

[d] Sir W. Jones *v.* Peacock, Rep. T. Finch, 245, cited 1 Ver. 225; and see Touch. 415. A devise "to the poor," or "to the church," was in the civil law a gift to the poor or the church of the parish in which the testator lived, Swinb. P. 7. S. 8.

[e] Att. Gen. *v.* Herrick, Ambl. 712; and see 6 Ves. 410. Doe *v.* Wrighte, 2 B. & A. 710.

[f] White *v.* White, 7 Ves. 423; and see Att. Gen. *v.* Price, 17 Ves. 371. Isaac *v.* Defriez, id. 373. N.

[g] Att. Gen. *v.* Rance, cited Amb. 422.

not to be void for the uncertainty, but to have been intended for all the hospitals in C.[a] But a bequest, we have seen, in trust for such objects of benevolence and liberality as the executor should approve of, is too indefinite and void.[b]

If one give him 10*l.* whose name is written in a schedule in the custody of such a man, and in truth there is no such schedule in the custody of such a man to be found, or if there be no name written therein, the legacy is void for uncertainty.[c] Yet where a testator charged a manor with 1000*l.* to be applied to such charitable uses as he had by writing under his hand formerly directed, and no writing could be found; Lord Keeper North said, it was no question but the charity being general and indefinite, the application of the money was in the king; and his Majesty having declared his pleasure to have it disposed of for the benefit of the mathematical boys of his foundation in Christ's Hospital, he thought it could not be better laid out.[d] So where a testatrix gave the residue of her personal estate to J. V., desiring him to dispose of it in such charities as he should think fit, recommending poor clergymen, who had large families and good characters; and J. V. died in the lifetime of the testatrix: Lord Thurlow declared that the residue passed by the will, and ought to go, and be applied in charity, regard being had to poor clergymen with good characters and large families, according to the recommendation in the will:[e] and

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[a] Masters *v.* Masters, 1 P.W. 421. Att. Gen. *v.* Hudson, id. 674; and see Sir W. Jones *v.* Sir J. Whitchott, Rep. T. Finch, 353. Owens *v.* Bean, id. 395.

[b] Morice *v.* Bp. Durham, ante 9.

[c] Touch. 415. Swinb. P. 7. S. 7.

[d] Att. Gen. *v.* Syderfen, 1 Ver. 224. 2 Freem. 261. 7 Ves. 43. N.; and see Mahon *v.* Savage, 1 Sch. & Lef. 111.

[e] Moggridge *v.* Thackwell, 3 Bro.

his decree, after being confirmed by Lord Eldon,[a] was finally established in the House of Lords.[b] In a later case this subject was again entered into at large. A man by will directed the residue of his effects to be divided for promoting the gospel in foreign parts, and other charitable purposes as he intended to name thereafter, after all his worldly property was disposed of to the best advantage. Sir W. Grant held this bequest void for uncertainty; but Lord Eldon, upon appeal, reversed the decree. His Lordship said, he considered it now established, that although the mode, in which a legacy is to take effect, is in many cases with regard to an individual legatee considered as of the substance of the legacy, where a legacy is given so as to denote that charity is the legatee, the Court does not hold that the mode is the substance of the legacy; but will effectuate the gift to charity as the substance: it was quite impossible, therefore, now to maintain that a disposition to charity is to be construed as a legacy to an ordinary legatee, who must be sufficiently pointed out and described; and without again going through the cases, he recurred to the doctrine in Freeman,[c] that if a sum of money is bequeathed to such charitable uses as the testator shall direct by a codicil or note in writing, and he leaves no direction, the Court may dispose of it to such charitable uses as it shall think fit.[d]

When there is a general indefinite charitable purpose, not fixing itself upon any particular object, the

517. 1 Ves. J. 464; and see White *v.* White, 1 Bro. 12. Att. Gen. *v.* Hickman, 2 Eq. Ab. 193. Doyley *v.* Doyley, id. 194. 7 Ves. 58. N. Baylis *v.* Att. Gen. 2 Atk. 239. As to Wheeler *v.* Sheer, Mos. 288, see per Lord Eldon, 1 Mer. 86. 91. 97.

[a] 7 Ves. 36.

[b] 13 Ves. 416.

[c] Att. Gen. *v.* Syderfen, ante 91.

[d] Mills *v.* Farmer, 1 Mer. 55. 19 Ves. 483.

disposition is in the king by the sign manual; but where the gift is to trustees, with general or some objects pointed out, the Court will take upon itself the execution of the trust.[a] In doing this it will direct an application as near the testator's intention as possible: as if a devise, for example, should be for such schools as the testator should appoint, and he appoints none, the Court may apply it to what school they please, but for no other purpose than a school.[b] So where the whole value of a fund, such as it was at the time, is given to a charitable purpose, and the fund, being actually exhausted by the purpose declared, is afterwards increased by the improved annual produce, the surplus will be applied as nearly as possible to the uses and purposes to which the testator meant his property to be subservient.[c]

Where a residue, Sir W. Grant observed, was to be applied, the Court frequently directed a scheme, even where an unlimited discretion as to distribution was left to a trustee; and where, consequently, a scheme could answer no purpose, but to show that the whole fund was applied to the proper objects. But in the case before him, in which the testator bequeathed the interest of his personal property to his wife for life, desiring that she would, with the advice and assistance of his trustees, yearly expend one moiety in promoting charitable purposes, more especially in relieving such distressed persons, either

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[a] 1 Turn. 270. See Att. Gen. *v.* Berryman, 1 Dick. 168. Clifford *v.* Francis, 1 Freem. 330. Moggridge *v.* Thackwell, 7 Ves. 83. 87. Paice *v* Archb. of Canterbury, 14 Ves. 364.

[b] 2 Freem. 262. See 3 Ves. 144. 11 Ves. 251. Att. Gen. *v.* Baxter, ante 87. Att. Gen. *v.* Pyle, 1 Atk. 435. Bp. of Hereford *v.* Adams, 7 Ves. 324. Att. Gen. *v.* Stepney, 10 Ves. 22.

[c] Att. Gen. *v.* Cooper's Co. 19 Ves. 187. Att. Gen. *v.* Minshull, 4 Ves. 11. Att. Gen. *v.* Wansay, 15 Ves. 231. Att. Gen. *v.* Hurst, 2 Cox. 364. 3 Bro. 374.

widows or children of poor clergymen, or otherwise as she should judge most worthy and desirable objects; his Honor thought that the wife had a discretionary power, not subject to the control of the trustees, and that a scheme was not necessary, it not being alleged that any part of the fund had been or was likely to be withheld.[a]

It is a well known maxim, that id certum est quod certum reddi potest; and hence, if a testator make that man executor, or give him 100*l.* who shall marry the testator's daughter, in this case, whosoever shall marry the daughter is to be admitted to the executorship, or may obtain the legacy, as if he had been named at first.[b] A bequest to A. or B. which of them J. S. shall appoint, or at his discretion, is good; he that J. S. appoints shall have it; and if J. S. makes no appointment it will go equally between them.[c]

Or if a man merely give to J. S. *or* J. D. 20*l.* this, it is said, is a good devise, although somewhat uncertain; and the disjunctive shall be construed a copulative, and J. S. and J. D. both take;[d] which Swinburne says was at last established for law after great dissension and conflicts in opinion. So where a testatrix bequeathed money in trust for such of her daughters, *or* daughters' children, as should be living

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[a] Waldo *v.* Caley, 16 Ves. 206.

[b] Swinb. P. 7. S. 7. Touch. 415; and see Bate *v.* Amherst, Sir T. R. 82.

[c] Touch. 415. Brown *v.* Higgs, 4 Ves. 708. 5 id. 495. 8 id. 561. Longmore *v.* Broom, 7 Ves. 124.

[d] Swinb. P. 4. S. 20. P. 7. S. 9. Godolph. 278. Touch. 415. Contra 7 Ves. 128. It is laid down, that if one be nearer of kin to the testator than the other, the former shall have it for life, and the other afterwards. It is also said, that if one devise his land for so many years as his executor shall name, the devise is not good. But in a modern work (Prest. Touch. 415. 420) both these points are, with great reason, doubted. See also Plow. 523.

at her son's death; and some of the daughters at the son's death were living, and had children, and others were dead leaving children: Sir J. Jekyll, after having taken time to consider of it, decreed, that all the children, as well of the living as of the deceased daughters, should come in for their shares; for that the word *or* should be taken for *and*, otherwise the whole devise would be void for uncertainty; and that it was the same as if the devise had been to such of my daughters and their children as shall be living at my son's death.[a] It was held indeed in a bequest of "*500l.* to the sole use of E. N. *or* of her children for ever;" that E. N. took an interest for life, and that the children should take it amongst them after her death.[b] But in a subsequent case, where a testatrix gave certain stock in trust, after the decease of A., among all and every the nephews and nieces that should be then living, as well on the side of her late husband as of her own, (to wit,) the said J. B. *or* her children; the said P. B. *or* his children; and D. L. *or* his children; and P. L. *or* his children; and S. E. *or* her children; to be equally divided between them, share and share alike; and directed the share of the said J. B. to be paid into her own proper hands; and P. B., D. L., P. L., and S. E., all died in the lifetime of A., but S. E. left two children, the plaintiffs: Lord Alvanley held that the word *or* was not to be construed as making a substitution, but a description of all the persons to take; that was, that the testatrix meant to give the fund to all such persons, whether they had the character of nephews and

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[a] Richardson *v.* Sprag, 1 P. W. 434; and see Le Farrant *v.* Spencer, 1 Ves. 97.

[b] Newman *v.* Nightingale, 1 Cox. 341.

nieces, *or* the children of nephews and nieces: that the plaintiffs and J.B. therefore must take equally; and if J.B. had had any children, such children would have taken equally with their mother.[a]

If a legatee is correctly named, and a wrong addition or description of him is also subjoined, the latter will be rejected. Thus a bequest to A. & B. the legitimate children of C., is valid, although A. & B. are illegitimate.[b] Where a man made his will in the East Indies, and desired his property to be sent home and equally distributed among his nearest surviving relations in his native country, Ireland; and at his death it appeared he had a brother and two sisters living in Ireland, and two sisters residing in America: Sir William Grant thought the latter entitled to a share; that the testator only meant to designate the place where he supposed his relations would be found, and it was merely the addition of a mistaken description, which would not vitiate a gift to persons otherwise sufficiently ascertained.[c]

In the same way, if a legatee can be ascertained by the description, a mistake in the name will not affect the gift.[d] As where T. S. gave a legacy to his namesake T. S., the second son of his brother J. S.;

[a] Eccard *v.* Brooke, 2 Cox, 213. 1 Cox's, P. W. 434. N.; and see Longmore *v.* Broom, 7 Ves. 124. Lord Alvanley, in the first cited case, said he did not agree with the construction offered in the note subjoined to Richardson *v.* Spraag (ante 95. N. *a.*) that such of the daughters who were living should take, and the children of such as were dead should take their mother's shares.

[b] Standen *v.* Standen, 2 Ves. J. 589; and see Careless *v.* Careless, 1 Mer. 384. 19 Ves. 601. Hussey *v.* Berkeley, 2 Ed. 194. Ambl. 603.

[c] Smith *v.* Campbell, 19 Ves. 400. Coop. 275.

[d] Swinb. P. 7. S. 5. Com. Dig. Dev. I. 2 P. W. 142. Pitcairne *v.* Brase, Rep. T. Finch, 403. S. C. 2 Freem. 9. Gynes *v.* Kemsley, 1 Freem. 293. Dowset *v.* Sweet, Ambl. 175. Parsons *v.* Parsons, 1 Ves. J. 266. Smith *v.* Coney, 6 Ves. 42.

this was held a good bequest to W. S., the second son of J. S., who had no son named T. S.[a] Where also a testator left the residue of his estate to his six grandchildren by their Christian names, but the name of one was repeated, and that of another omitted; it was held that the latter should take the share mistakingly given to the other by the repetition of the name.[b] And where again a man gave a residue to be equally divided among his seven children A. B. C. D. E. & F. (naming only six): the Court decreed the seven children to take the residue equally amongst them.[c]

It appears essential in these cases, that there is no person who exactly answers the description. Where a legacy was given to Catherine Earnley, which was claimed by Gertrude Yardley, the Master of the Rolls, upon evidence of the mistake, held that it was a good legacy to Gertrude Yardley, observing, it was very material that there was no such person as Catherine Earnley claiming the legacy.[d] Hence where a testator gave the residue of his estate to all the children of his two sisters R. & E.; and R. many years before the date of the will had changed her religion, and become a nun, and had been baptized by the name of M. H.; but the testator had another sister A., who was married, and had children, on whose behalf the legacy was claimed, on the ground that the testator intended A. when he named R.: the Lord Chancellor thought the name of R. was not extinguished by her conventual name, and that to decree for the children would be to go far beyond any de-

[a] Stockdale *v.* Bushby, 19 Ves. 381. Coop. 229.

[b] Garth *v.* Meyrick, 1 Bro. 30.

[c] Humphreys *v.* Humphreys, 2 Cox, 186.

[d] Beaumont *v.* Fell, 2 P.W. 140.

cided case, and very dangerous.[a] And where a man gave a legacy to the children of R. H. late of N., and now of L.; and it appeared that R. H., a relation of the testator, had left N. at an early age, and resided in L., and was dead at the date of the will, leaving one child, the plaintiff; but G. H., also a relation, had been formerly of N., but lived at the testator's death in L., and had several children, some of whom residing at N. were in habits of intimacy with the testator; and it was contended that the name of R. H. had been inserted by mistake instead of G. H.: the Master of the Rolls said, that if it had not been a case of competition, the name of R. H. being found in the will, very strong evidence would have been necessary; but considering it as a case of competition, none of the circumstances would do; he could not vary the will upon the evidence, and must decree for the plaintiff.[b]

It is said, that if one intending to give 20*l.* to J. S., devise to J. N. 20*l.*, the bequest is void both to J. S. and J. N.;[c] or if one devise to the abbot of St. Peter, when the foundation is the abbot of St. Paul, it is also void.[d] But where a man bequeathed 100*l.* upon trust, to pay the interest to his niece M. C. till her daughter A. C. should attain twenty-four, and then he gave the said sum, and the interest then due, *to her said mother Mrs. M. C.;* who, by her answer, said she believed the legacy was meant for her daughter and not for herself: the Lord Chancellor held it a mistake, and decreed the dividends to be paid to

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[a] Delmare *v.* Robello, 1 Ves. J. 412. 3 Bro. 446.

[b] Holmes *v.* Custance, 12 Ves. 279.

[c] Touch. 416. Swinb. P. 7. S. 5. 2 P.W. 143.

[d] Touch. 416.

the mother, till the daughter should attain the age of twenty-four, and then with liberty for her to apply.[a]

If the uncertainty with regard to the person to take appears upon the will, as in some of the above instances, evidence is not admissible to explain it; for the construction of a will ought to be collected from the words of it, and not by averment out of it.[b] But where no uncertainty appears upon the will, and it turns out that the testator has mistaken the name or description of the legatee, or more persons than one answer the description, it is said to be a latent ambiguity; and evidence is admitted to show whom the testator intended. Thus if a man gives to his son John, and has two sons of that name;[c] or to John, the son of W., when his name is James;[d] or to A., and to the children of B., when B. is not married, and A. has died before the making of the will, leaving children:[e] or devises an estate to A., he paying 100*l.* due on bond to B., when in fact the debt is due to C.;[f] or to his own right heirs of his mother's side, there being an heir of his mother's mother as well as of his mother's father:[g] parol evidence in these cases will be admitted, to show the intention of the testator. So where a legacy was given to Mrs. Sawyer, and there was no such

[a] Clarke *v.* Norris, 3 Ves. 362.

[b] 5 Rep. 69. 1 Salk. 234. Baylis *v.* Att. Gen. 2 Atk. 239. Castledon *v.* Turner, 3 id. 257. Beaumont *v.* Fell, 2 P.W. 140; and see Phill. Ev. P. 2. Ch. 10.

[c] 5 Rep. 69. Careless *v.* Careless, 1 Mer. 384. 19 Ves. 601. Jones *v.* Newman, 1 Bl. 60.

[d] Dowset *v.* Sweet, Ambl. 175. Rivers' case, 1 Atk. 410. Parsons *v.* Parsons, 1 Ves. J. 266. Contra Andrews *v.* Dobson, 1 Cox, 425.

[e] Bradwin *v.* Harpur, Ambl. 374.

[f] Hodgson *v.* Hodgson, 2 Ver. 593. Pr. Ch. 229.

[g] Harris *v.* Bp. of Lincoln, 2 P.W. 135.

person ever known to the testatrix, but it was alleged she meant one Mrs. Swopper; it was referred to the Master to examine whether the testatrix meant Mrs. Swopper, and if so, then she was to receive the legacy.[a] Hence also where a testatrix gave a legacy of 100*l.* to the four children of her late cousin E. B., and in another clause gave unto the children of her late cousin E. B. 300*l.*; and E. B. had four children by her husband B., but had also two more by a former husband: Sir J. Strange observed, the distinction as to admitting evidence was, that in no instance it should be admitted in contradiction to the words of the will; but any thing to explain, not to contradict, the will was always admitted. His Honor therefore admitted evidence as to the legacy of 100*l.* to show that the testatrix intended the four children by B., for that did not contradict the will, but determined what four children were to have the benefit; but he refused to admit it as to the legacy of 300*l.*, as the words plainly took in all the children of E. B.[b]

Where there is an inadequate description of the legatee, evidence has sometimes been admitted, notwithstanding a certain degree of uncertainty on the face of the will. Thus where the legatee was described by the initials of his name;[c] and where a blank was left for the Christian name,[d] evidence was admitted to show the persons intended. But it was was rejected where a blank was left for the name altogether.[e]

A legacy to the son of A, who had several sons,

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[a] Masters *v.* Masters, 1 P.W. 420.
[b] Hampshire *v.* Peirce, 2 Ves. 216.
[c] Abbot *v.* Massie, 3 Ves. 148.
[d] Price *v.* Page, 4 Ves. 680.
[e] Baylis *v.* Att. Gen. 2 Atk. 239. Hunt *v.* Hort, 3 Bro. 311.

has been held void for uncertainty,[a] and evidence, it is said,[b] was refused. But Lord Thurlow, speaking of this case, observed, it was almost impossible to say, that if there was a bequest to the son and daughter of one, who at the time of the bequest had four sons and a daughter, there was not such a dissonance between the state of the facts and of the bequest, as to let in satisfactory evidence that one son was meant; for it was clear the testator meant one: it was within all the rules of latent ambiguities, and he therefore fancied the Court went upon the ground, that the evidence was not sufficient to show the intention, and then it became uncertain.[c]

If a legatee was by mistake described by any quality, which was the cause or motive of the bequest, the error, in the civil law, was fatal. As if a testator gave his cousin J.S. 100*l.* and J.S. was not his cousin: the cause being false the legacy was void.[d] And although a mere false reason given for a legacy did not destroy it,[e] yet there was an exception if any fraud was practised, from which it might be presumed the person giving the legacy would not, if that fraud had been known to him, have given it. Hence in a case in which a married woman, having a power to dispose of her property, gave by her will "*to her husband T. L.* 150*l.*;" and T. L. at the time of his marriage with the testatrix was married to another: Lord Alvanley thought he was warranted to make a precedent, and to determine, that wherever a legacy is given to a person under a particular character,

[a] Dowset v. Sweet, Ambl. 175.
[b] 1 Ves. J. 414.
[c] 1 Ves. J. 415.
[d] Swinb. P. 7. S 5. Godolph. 447.
[e] Godolph. 282. 286.

which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it; and T. L. therefore could not demand the legacy.[a]

Where there was a legacy to a kinswoman, in case she married with any person of the surname of B., with a bequest over upon her marrying any person not bearing that surname; and the legatee married a man, who, upon the occasion of the marriage, and not before, assumed the name of B.: the House of Lords reversed the decree of the Master of the Rolls, who was of opinion that the condition was complied with by the assumption of the name.[b] And where there was a devise to A. for life, remainder to the first and nearest of the testator's kindred, being male and of his name and blood; a person, not of the name, but who was the first and nearest of kin of the testator, and who had, previous to the death of A., obtained the king's licence to take the surname of the testator, was held not entitled, as not answering the whole of the description.[c] So neither could a woman nearer of blood than others, by marrying a stranger in blood, but of the proper name, claim under such a devise.[d]

An act of parliament, it may be observed, giving a new name, does not take away the former name, and a legacy given by it may be taken.[e]

How far a woman's name is extinguished by marriage, so as to prevent her taking a legacy by it,

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[a] Kennell *v.* Abbott, 4 Ves. 802; but see Gilbert *v.* Gilbert, Belt's N. 1 Ves. 33. Meadows *v.* Duchess of Kingston, Ambl. 756.

[b] Barlow *v.* Bateman, 3 P.W. 65. 4 Bro. P.C. 194.

[c] Leigh *v.* Leigh, 15 Ves. 92.

[d] 1 Ves. 338.

[e] 15 Ves. 100.

seems not very clearly settled. In an early case a daughter was held not entitled under a devise to the testator's next heir of his name; for though she was next heir, she was not of the testator's name, that being lost by her marriage.[a] And in another case in the same reporter, in which a remainder, after an estate tail, was devised to the next of the testator's kin of his name; a brother's daughter, who was married, was held for the same reason to have no title; but it is added, it would be otherwise if she had been unmarried at the time of the devise and death of the donor, although she had been married at the time of the death of the tenant in tail without issue.[b] But in a subsequent case, in which there was a devise of both real and personal estate to trustees for the benefit of the testatrix's nearest relations "*of the Pyots:*" Lord Hardwicke said he was not quite satisfied with the resolution in Jobson's case, and thought it a very odd one; and that Bon *v.* Smith was a case put at the bar by Serjeant Glanville, which was often done in those times, and could not be any authority. His Lordship indeed in the case before him decreed, that a married sister took together with two unmarried ones;"[c] but the bequest, it seems, was in the terms above stated, and not "*to the nearest relations of the name of Pyot,*" as in the report; so that the decision is not inconsistent with those in Croke.[d] In a late case a remainder was limited *to the nearest of kin to D. M. of the name of B.;*" and an ejectment was brought by a man in right of his wife, whose maiden name was B.; but it appeared that a Mrs. M., whose mother's surname was B., was more nearly

[a] Bon *v.* Smith, Cro. Eliz. 532.
[b] Jobson's case, Cro. Eliz. 576.
[c] Pyot *v.* Pyot, 1 Ves. 335.
[d] See Belt's Suppl. to Ves. 161.

related to D. M. than the plaintiff's wife. The Court were of opinion that the claim could not be supported; because, if the word "name" was to be understood in its primary sense, the wife was not a person of that name; and if it was to be understood in a figurative sense, as denoting a house, family, or stock, then there was another person of that description, who was nearer of kin. But they forbore to intimate any opinion, as to the sense in which this word ought to be taken; and also upon a question much debated in the argument, namely, whether both parts of the description, that is, nearest of kin and name of B., must concur in the same individual; it not being necessary to decide either of those points.[a]

It seems sufficient if a legatee answers the description at the date of the will, although it is no longer applicable to him at the death of the testator. As if one devise a thing to the wife of J.S., and before the devisor's death J.S. die, and she takes another husband, and is called by another name; this devise still remains good.[b] Or if a testator give 10*l.* to the parish where he lives, and afterwards removes his habitation to another parish, that in which he lived at the time of the will shall have the legacy.[c] So it is said a bequest to the testator's wife refers to that person who was his wife at the date of his will, and not to an after-taken wife, who may survive him.[d] And here we may add the case of the man devising, that if his wife, who was enceinte, should have a "*posthumous daughter*," she was to have 500*l.*: the

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[a] Doe *v.* Plumptre, 3 B. & A. 474.

[b] Plow. 344. Touch. 416. 453.

[c] Com. Dig. Chancery, 3 Y. 16. Touch. 446. Godolph. 272. 468. 471.

[d] Prest. on Leg. 230, citing Waring *v.* Ward, 5 Ves. 670; which however was under special circumstances. See also Post. Ch. 4. S. 1.

daughter, though born in his lifetime, was held entitled to the legacy.[a]

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II. Legacies are sometimes given, not nominatim, but in general terms to a class of individuals; and a question often arises as to the persons intended to be comprised. We may observe, in the first place, that there may be some who come within the description, but who will nevertheless not be entitled, if from the context of the will there is reason to infer that the testator did not intend to include them. Thus where the produce of some stock was given amongst *all and every* the nephews and nieces that should be living, as well on the side of the testatrix's late husband, as her own, (to wit,) A. or her children, B. or his children, &c. the Master of the Rolls, after some consideration, thought he must consider the testatrix as having, by the enumeration made, described whom she meant by all the nephews and nieces; and consequently that a nephew, not named under the videlicet, could not take.[b] And where also a man, amongst other legacies in his will, gave the interest of some stock to his son for life, with a power to dispose of part of it by will, and gave the remainder after his son's death to and amongst the several persons *thereinbefore mentioned*, to whom he had given legacies; and gave the residue of his estate unto and amongst the several legatees thereinbefore named, except his said son: the son was held excluded from a share in the remainder of the stock, upon the ground that it was not the intention of the testator to con-

[a] Jaggard *v.* Jaggard, Prec. Ch. 175. [b] Eccard *v.* Brooke, 2 Cox, 213.

sider him as one of the persons "thereinbefore mentioned."[a] The mere gift, however, for life to a person will not prevent his taking a vested interest in the remainder of the property as one of the class of persons to whom it is given after his death.[b]

It has been laid down, that if one possessed of a term of years devise it to J.S., and after his death that the heir of J.S. shall have it; in this case J.S. shall have so many years of the term as he shall live, and the heir of J.S., and the executor of that heir shall have the residue of the term.[c] So where there was a bequest of all the testator's goods in C. house to the heir of J.D., the Court seemed to take it for granted that the property vested in the heir, and went to his executors.[d] But Lord Alvanley inclined to think that as a word of purchase "heirs" must mean such person as the law points out to succeed to personal property; or heirs quoad the property, that is next of kin.[e] And in a case in which a man gave a legacy to A., and "failing him, by decease before me, to his heirs;" and A. died in the testator's lifetime: it was held that the legacy belonged to the next of kin of A.[f] There is no doubt, however, that the heir at law, properly and technically speaking, may take personal property bequeathed to him by that description; and so it was held in a case where the personal and real property were given to the testator's nearest heir at law; on the ground, that it would be contrary to the intention to divide the

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[a] Nannock v. Horton, 7 Ves. 391.

[b] Holloway v. Holloway, 5 Ves. 399; and see Jones v. Colbeck, 8 Ves. 38.

[c] Touch. 446.

[d] Danvers v. E. Clarendon, 1 Ver. 35; and see Pleydell v. Pleydell, 1 P.W. 748.

[e] 5 Ves. 403; and see Lowndes v. Stone, 4 Ves. 649.

[f] Vaux v. Henderson, 1 Jac. & W. 388; but see Forster v. Sierra, 4 Vs. 766.

one species of property from the other.[a] In some cases from the peculiar expressions in the will the word heirs has been considered synonimous to "children."[b]

The word "issue" may, and frequently does, mean children only;[c] but if there is nothing to show that the testator used it in this confined sense, it has always, as a word of purchase, been considered as synonimous with "descendants;" and whoever can make himself out a descendant of the person, to whose issue the bequest is made, has a right to be considered as persona designata in that bequest. Under a legacy therefore to the issue,[d] or descendants[e] of any person, grandchildren, great grandchildren, &c. will be equally entitled with children. And a gift for the benefit of the issue of a woman will include children by any husband.[f]

"Issue" is generally a word of limitation, and a bequest to A. and to his issue vests absolutely in A. himself.[g] But this use of the word will be easily qualified by other expressions. Thus where stock was given to A. and B. each one moiety, and *to their issue*, and if either died and *left no issue*, her share to go to the survivor; and A. died in the lifetime of the testatrix; it was held that her share did not vest

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[a] Gwynne *v.* Muddock, 14 Ves. 488.

[b] Loveday *v.* Hopkins, Ambl. 273. 1 Jac. & W. 33. Crawford *v.* Trotter, 4 Mad. 361; and see Wilson *v.* Vansittart, Ambl. 562. So in marriage articles, 2 P.W. 342.

[c] 3 Ves. & B. 67. Sibley *v.* Perry. 7 Ves. 522.

[d] Cook *v.* Cook, 2 Ver. 545. Wyth *v.* Blackman, 1 Ves. 196. Ambl. 555. Davenport *v.* Hanbury, 3 Ves. 257. Freeman *v.* Parsley, id. 421. Bernard *v.* Montague, 1 Mer. 434; and see 1 Ves. J. 150. 13 id. 344.

[e] Crossly *v.* Clare, Ambl. 397. 3 Swanst. 320. 2 Bro. 228. N. Butler *v.* Stratton, 3 Bro. 367.

[f] See Champion *v.* Pickax, 1 Atk. 472. Barrington *v.* Tristam, 6 Ves. 345.

[g] 3 Atk. 398. Lyon *v.* Mitchell, 1 Mad. 467; and see Post. Ch. 4. S. 4.

in her absolutely so as to lapse, but that it went to her issue.[a] So where all the real and personal property was given to the testator's wife for life, to be by her divided according to the best of her judgment and discretion among such of his children, and their issue, as should be surviving at the time of her decease; and one of the children died before her, leaving issue: it was held that the wife was authorized by the power to give a share to such issue; and that the word was not to be construed as a limitation, but as enumerating the persons among whom the widow was to dispose of the estate.[b]

In bequests to "relations" the Court, in order to set bounds to so indefinite a term, has confined it to such relations as would be entitled under the statute of distributions.[c] Gifts to "all relations;"[d] and "next relations,"[e] have received the same construction. So a bequest to each of the testator's relations by blood or marriage was confined to persons entitled, and those who had married persons entitled under the statute.[f] The inconvenience of not so doing appeared in a case in which a testator gave 20,000*l.* to his executors, upon trust to distribute among such of his relations who should not appear to his executors to be worth each person more than 2000*l.*; applications were in consequence made to the executors by 456 persons claiming shares in the 20,000*l.*,

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[a] Lampley *v.* Blower, 3 Atk. 396.

[b] Ex parte Williams, 1 Jac. and W. 89.

[c] Roach *v.* Hammond, Pr. Ch. 401. Gilb. Eq. R. 92. Anon. 1 P.W. 327. Harding *v.* Glyn, 1 Atk. 469. Whithorne *v.* Harris, 2 Ves. 527. Green *v.* Howard, 1 Bro. 31. Contra Jones *v.* Beale, 2 Ver. 381.

[d] Thomas *v.* Hole, 1 Dick. 50. For. 251; see 1 Bro. 33. Rayner *v.* Mowbray, 3 Bro. 234.

[e] Stamp *v.* Cooke, 1 Cox, 234; but see Smith *v.* Campbell, Post. 110.

[f] Devisme *v.* Mellish, 5 Ves. 529.

who resided in different parts of the world, viz., in England, Scotland, Ireland, Spain, Portugal, Antigua, Jamaica, and South Carolina.[a] The addition of the word "poor," it has been thought, would admit a larger construction, and include whatever relations were objects of charity.[b] But in other cases this has not been allowed.[c] Neither perhaps would the word be considered of any effect in other respects, upon the ground of the difficulty of distinguishing between degrees of poverty;[d] although that, and similar words have in some instances been considered as a substantial part of the description, and to entitle those only who answered to it;[e] and in others to have rendered the devise void for uncertainty.[f] Lord Redesdale also, where a testator bequeathed to his executor 1000*l.* to be distributed among his poor relations, seems to have thought that a relation, who was poor at the time of the testator's death, but became rich before the fund was distributed, could not claim.[g] But his Lordship thought the testator's design was to give to them as objects of charity, and not merely as relations:[h] and upon the whole, it has been observed,[i] there appears to be great reason to contend that the true rule is, that the epithet poor,

[a] Bennett *v.* Honywood, Ambl. 708.

[b] Case cited 8 Vin. Ab. 289. Att. Gen. *v.* Buckland, cited Ambl. 71. 1 Ves. 231; and see Griffith *v.* Jones, 2 Freem. 96; though in 2 Ch. Rep. 394 it is different.

[c] Carr *v.* Bedford, 2 Ch. Rep. 146. Brunsden *v.* Woolridge, 1 Dick, 380. Ambl. 507; and see Goodinge *v.* Goodinge, 1 Ves. 231. Ambl. 70, nomine Edge *v.* Salisbury.

[d] Widmore *v.* Woodroffe, Ambl. 636. Anon. 1 P.W. 327. Doyley *v.* Att. Gen. 4. Vin. Ab. 485, stated 7 Ves. 58. N.

[e] See Carr *v* Bedford, 2 Ch. Rep. 146. Gower *v.* Mainwaring, 2 Ves. 87. 110. Brunsden *v.* Woolridge, 1 Dick. 380. Ambl. 507.

[f] Webb's case, 8 Vin. Ab. 47. Hasel *v.* Rumney, 1 Ver. 226, Mr. Raithby's note.

[g] Mahon *v.* Savage, 1 Sch. and Lef. 111.

[h] See also Att. Gen. *v.* Price, 17 Ves. 371. Isaac *v.* Defriez, id. cited.

[i] Sugd. Pow. 517, 2d ed.

necessitous, or the like, is merely nugatory, although certainly there is a considerable weight of authority in favour of the contrary doctrine.

The mere circumstance of the testator's having given legacies to more distant relations is not sufficient to vary the construction.[a] But if from any expressions in the will it can be reasonably inferred what persons the testator intended by the word "relations" they of course will be entitled.[b] As where a woman gave a residue to be divided between her relations, that is, the Greenwoods, the Everits, and the Dows: here the Everits, who were not within the degree of relationship limited by the statute, were decreed to take jointly with the Greenwoods and Dows, who were.[c] And under a bequest to "*my nearest surviving relations*," a brother and sister were held entitled in exclusion of nephews and nieces, children of a deceased brother: for there was no uncertainty in these words, and no necessity, therefore, for resorting to construction to confine or extend them.[d] Nor will the statute be followed, where there is a discretionary power given to any person of selecting objects; and if a legacy is given among such relations as A. shall think fit, A. may give to any of the kindred, though not within the statute.[e] But if

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[a] Green *v.* Howard, 1 Bro. 30.

[b] See Falkner *v.* Butler, Ambl. 514.

[c] Greenwood *v.* Greenwood, 1 Bro. 32, N.

[d] Smith *v.* Campbell, Coop. 275. 19 Ves. 400; and see Marsh *v.* Marsh, 1 Bro. 293.

[e] Harding *v.* Glyn, 1 Atk. 469, on which see 5 Ves. 502. 19 id. 302. Coop. 118. 1 Turn. 161. Supple *v.* Lowson, Ambl. 729. In Warburton *v.* Warburton, (2 Ver. 420. 1 Bro. P. C. 34,) which was the case of a bequest to daughters to be disposed of by them to the use of themselves, their brothers and sister, or such of them, and in such proportion as they should think most fit according to their needs and necessities; the eldest son was decreed to have a double share.

he makes no distribution, and it is left to the decision of the Court what relations shall take, the next of kin only will be entitled, for the statute is the only guide the Court can have.[a]

It is not allowed to show by evidence what relations a testator intended to comprehend:[b] and where therefore there was a bequest to descendants, a pedigree, found among the testator's papers, was not admitted to explain what was meant by the word descendants.[c] Evidence however is admissible to show the knowledge of the testator as to what relations he had.[d]

The same rule is applied to limit the extent of the word "kindred," as "relations."[e] But in a bequest to the "next of kin in equal degree" brothers will exclude nephews and nieces.[f] And it seems the same construction would now be given to the words "next of kin" alone. There has indeed been a difference of opinion on this point. Lord Kenyon in such a case thought the statute the rule to go by;[g] and Mr. J. Buller held, that there was no difference between a devise to "the next of kin" and "relations."[h] But Lord Thurlow, Lord Eldon, and Sir W. Grant, all expressed a doubt of this decision;[i] and in a late case, in which under a marriage settlement certain monies were to go on the death of the wife without issue to her "nearest and next of kin:" Sir T. Plumer

[a] Cole *v.* Wade, 16 Ves. 27. 19 id. 424; and see 9 Ves. 324. 1 Sch. and Lef. 112. 2 Ves. 110.

[b] Goodinge *v.* Goodinge, 1 Ves. 231. S. C. Ambl. 70.

[c] Crosley *v.* Clare, 3 Swanst. 320.

[d] Goodinge *v.* Goodinge, ante N. *b*.

[e] Carr *v.* Bedford, 2 Ch. Rep. 146. Griffith *v.* Jones, id. 394; but see 2 Freem. 96.

[f] Wimbles *v.* Pitcher, 12 Ves. 433. Anon. 1 Mad. 36.

[g] 1 Cox, 236.

[h] Phillips *v.* Garth, 3 Bro. 64; and see Lowndes *v.* Stone, 4 Ves. 649.

[i] See 3 Bro. 69. 14 Ves. 385. 19 Ves. 404. Coop. 277.

held the wife's brother entitled in exclusion of the children of a deceased sister; and treated the case of Phillips *v.* Garth as overruled.[a]

A wife and a husband are not of kin, nor, strictly, relations to each other. If a husband therefore bequeaths to his next of kin, that, primâ facie, does not include his wife; and it is quite clear, that, if a married woman under a power by settlement bequeaths to her "next of kin," it would be impossible to hold, that under the construction of such a will, without more, the husband would take as sole next of kin.[b] So under bequests among the testator's "relations according to the statute for distribution of intestate's estates where no will is made;"[c] to "such of the testator's relations as would be entitled thereto by the laws in force of distribution to be divided as the said laws direct;"[d] "to be divided amongst my next of kin as if I had died intestate,"[e] a wife was held not entitled to share. But it seems clearly to have been the intentions of the testators in these cases not to include their wives under the terms. Lord Alvanley held a husband to be included in the word "family" upon the true construction of the will; but his Honour thought that the word would not include him, except from the context it must do so.[f]

Relations by affinity are not included in the general term "relations."[g] So where the residue

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[a] Brandon *v.* Brandon, 2 Wils. C. C. 14. 3 Swanst. 312.

[b] 14 Ves. 381. Watt *v.* Watt, 3 Ves. 244; and see Bailey *v.* Wright, 18 Ves. 49. 1 Swanst. 39. 1 Wils. C. C. 15; see also 15 Ves. 537.

[c] Worseley *v.* Johnson, 3 Atk. 758; and see 1 Bro. 33.

[d] Davies *v.* Baily, 1 Ves. 84.

[e] Garrick *v.* Lord Camden, 14 Ves. 372; and see Nicholls *v.* Savage, 18 Ves. 52.

[f] M'Leroth *v.* Bacon, 5 Ves. 159.

[g] Maitland *v.* Adair, 3 Ves. 231.

was to be divided between the testatrix's grandchildren named in her will; Lord Northington thought there was no colour for considering the widow of a grandson as a grandchild.[a] But a bequest to relations by blood *or marriage* will extend to those who have married persons entitled under the statute.[b] And the whole and the half blood will take together as "next of kin."[c]

It seems not very easy to lay down any general rule as to the word "representatives." In a case where a testatrix gave the residue of her personal estate to A. and B. (her executors) and six other persons equally, &c.; and directed, that in case of the death of any of them before her, the share of the one so dying should go to and be had and received by *his or her legal representatives;* and A. died before the testatrix, who died shortly afterwards; and the question was between A.'s executors, his residuary legatees, and his next of kin: the Master of the Rolls was of opinion that the true construction was, that by legal representatives the testatrix meant such persons as could claim A.'s property in their own right, which he declared to be those who would have been entitled as next of kin of A. at the death of the testatrix, in case he had at that time died intestate.[d] While in a case not long afterwards in which a creditor accepted a satisfaction of 10*s.* in the pound from his debtor, and then died; after which the widow of the debtor devised certain estates in trust to raise a sum equal to 10*s.* in the pound, and pay

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[a] Hussey *v.* Berkeley, 2 Ed. 196. Ambl. 603.

[b] Devisme *v.* Mellish, 5 Ves. 529.

[c] Cotton *v.* Scarancke, 1 Mad. 45.

[d] Bridge *v.* Abbot, 3 Bro. 224.

the same to such of the creditors as accepted the composition, "*or their personal representatives:*" the Court held that the administratrix, and not the next of kin, or residuary legatee of the creditor, was beneficially entitled to this sum; observing, that they did not therefore mean to dispute the authority of the case of Bridge *v.* Abbot, which would stand upon its own grounds.[a] In subsequent cases "legal representatives" were held to mean next of kin, but this was from apparent intention;[b] and Lord Loughborough thought the determinations both in Bridge *v.* Abbot, and Evans *v.* Charles, perfectly right, and showed that the words were to be explained according to the subject matter.[c] Lord Alvanley also observed there was an obvious distinction between the two cases, and it had been truly said the words must always be taken together with the context; they must have their legal meaning, unless clearly intended otherwise.[d] Hence where there was a bequest unto and amongst all and every the issue, child or children, male or female, of the body of the said J. H. by the said M. his wife, and their representatives, equally, share and share alike; and one of the children (a daughter) of J. and M. H. had died leaving children, and her husband took out administration to her; the Lord Chancellor thought the word issue qualified the word representatives, and held the daughter's children entitled as such against their father as administrator.[e]

It has been laid down that under a limitation to

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[a] Evans *v.* Charles, 1 Anstr. 128.

[b] Jennings *v.* Gallimore, 3 Ves. 146. Long. *v.* Blackall, ibid. 486.

[c] Ibid. 490.

[d] 5 Ves. 402.

[e] Horsepool *v.* Watson, 3 Ves. 383.

the "family" of J. S. the real estates go to the heir at law; the personal to the next of kin.[a] And in a bequest of personal property to a sister for life, with a request that she would bequeath it at her death to those of her own family; this word was held equivalent to "her own kindred," or "her own relations."[b] But "family" may according to the context have different significations in different wills, and may be restrained to mean only the children; as in a gift to A.'s and B.'s families, which entitles the children in exclusion of the parents.[c] In one case a devise was held void for uncertainty, the Court not being able to make out whom the testator meant by the word "family."[d]

"Children" will be held to have a co-extensive sense with "issue," where there can be no other construction, and the will without it would remain unoperative; or where the testator has clearly shown by other words that he did not use the term in the proper sense, but meant it in a more extensive signification:[e] as where he indifferently uses the words "children" and "issue;" showing he meant the one in the same sense as the other.[f] If neither of these circumstances occur, the word must have its natural signification,[g] and under a bequest therefore to the children of A., an only surviving child was held entitled to the whole, although the

[a] 17 Ves. 263. Hob. 33. 19 Ves. 301.

[b] Cruwys *v.* Colman, 9 Ves. 319; and see 2 Ves. 110.

[c] Barnes *v.* Patch, 8 Ves. 604.

[d] Doe *v.* Joinville, 3 East, 172.

[e] 2 Ves. 200. 4 Ves. 698. 10 id. 201. Edwards *v.* Allen, 3 Ch. Rep. 86.

[f] Wyth *v.* Blackman, 1 Ves. 196. Ambl. 555. Gale *v.* Bennett, Ambl. 681; and see Royle *v.* Hamilton, 4 Ves. 437. D. Manchester *v.* Bonham, 3 Ves. 61.

[g] See 3 Ves. and B. 69. So the word "enfans" in a French will primâ facie means children not issue. Duhamel *v.* Ardovin, 2 Ves. 163.

other children of A. had died leaving children.[a] So also where a testator left the residue of his property among all the children of William, Henry, John, Thomas, and Ann, his late brothers and sister deceased, all of whom at the date of the will had died leaving children, and grandchildren, but the children of Ann were also dead at the date of the will: it was held that the children of the four brothers were entitled in exclusion of all the grandchildren of the brothers, and of Ann; and that the knowledge of the testator that there were no children of Ann was not alone sufficient to alter the construction the words properly bore.[b]

A great-grandchild may take under a bequest to a grandchild;[c] or a grand-nephew under the description of nephew,[d] if such appear to be the intention. Lord Northington even inclined to think that the word "grandchildren" would without further explanation comprehend great-grandchildren: for in common parlance it was used rather in opposition to, and exclusive of children, than as confined to the next descent, the children of children; and must have the effect of comprehending both, unless the intention appeared to the contrary.[e]

"Children" in its natural import is a word of purchase, and not of limitation, unless to comply with the intention of a testator: so that if one devise to J. S. and his children, J. S. and his children will take the thing devised together as joint-tenants.[f]

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[a] Crooke *v.* Brokeing, 2 Ver. 106. Loveday *v.* Hopkins, Ambl. 273.

[b] Radcliffe *v.* Buckley, 10 Ves. 195.

[c] Hussey *v.* Berkeley, 2 Ed. 194. Ambl. 603.

[d] 6 T. R. 675.

[e] 2 Ed. 196. Ambl. 604; but see E. Orford *v.* Churchill, 3 Ves. & B. 59.

[f] Touch. 415. Buffar *v.* Bradford, 2 Atk. 220. Alcock *v.* Ellen, 2 Freem. 186.

But where there was a bequest in trust for W. P., and for such younger sons as he should have, equally between them, and in case there should be but one younger son, then the whole to that one: it was held that W. P. took only for life, with remainder to his younger sons.[a] And where the bequest was "to Lady S., and to her heirs (say children);" the Vice Chancellor was of opinion that Lady S. was entitled for life, with remainder to her children: the word "heirs," which was used as synonimous with "children," importing that they were to take after her death.[b]

The words "younger children" in gifts by will or settlement have received in equity great latitude of construction to answer the occasions of families, and intent of the parties; and are considered such as do not take the estate; are not the head and representative of the family. Every one but the heir is a younger child in equity. Where therefore there is a son, or where the estate is limited over to collateral relations in default of male issue, a daughter, though first born, is a younger child:[c] as is also an eldest son, when the family estate is given away from him;[d] and an only son, though a younger child by birth, will not, if he takes the estate, be entitled under a bequest to younger children.[e] It was an observation of Lord Hardwicke that there was no case where the Court had considered a younger

[a] Garden v. Pulteney, 2 Ed. 323. Ambl. 499; and see Crone v. Odell, 1 B. & B. 449. Jeffery v. Honeywood, 4 Mad. 398.

[b] Crawford v. Trotter, 4 Mad. 361.

[c] Beale v. Beale, 1 P. W. 244. Butler v. Duncombe, id. 448. Heneage v. Hunlocke, 2 Atk. 456. Pierson v. Garnett, 2 Bro. 38.

[d] Duke v. Doidge, 2 Ves. 203. N.

[e] Bretton v. Bretton, 2 Freem. 158. 3 Ch. Rep. 1. Nels. 63. Mead v. Cave, 1 Ch. Rep. 224.

child as an eldest, but between parent and children, or those who stood in loco parentis.[a] A practical work remarks that this distinction does not appear to be attended to at the present day.[b]

"Younger children" mean those who answer the description at the period of the vesting of the legacy. Thus where a sum of money was given, in the case of the death of A. without children, to the younger children of H.; and the eldest son of H. died in the lifetime of A.; the second son of H. was held not entitled to the benefit of the legacy, which did not vest till the death of A., and then only in such persons as were at that time younger children of H.[c] So where a testatrix bequeathed a residue to A. for life, and after her death to the younger children of H. duke of N., who at the date of the will had three sons, the eldest of whom died before the testatrix; Lord Eldon thought upon the whole will the meaning of the testatrix was to give to those answering the description of younger children at her death, and the youngest son therefore was alone entitled.[d] And in a late case where a fund was directed to accumulate till a certain period, and thereupon to be assigned and transferred to all and every the younger children of the testatrix's daughter, if more than one, except *an* eldest son, equally, &c.; and the eldest son of the daughter survived the testatrix, but died before the period of distribution; the second son was held to be excluded; but considerable stress, it may be observed, was laid upon the

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[a] Ambl. 204.

[b] Sugd. Pow. 509. 2d ed.; and see Duke *v.* Doidge, 2 Ves. 203. N.

[c] Hall *v.* Hewer, Ambl. 203; and see Loder *v.* Loder, Mos. 356. 2 Ves. 531. Bowles *v.* Bowles, 10 Ves. 177. Lord Teynham *v.* Webb, 2 Ves. 198. See also Sugd. Pow. 506. 2d ed.

[d] Lady Lincoln *v.* Pelham, 10 Ves. 166.

use of the indefinite article as denoting the person who sustained the character of eldest son at a future period.[a]

Where, however, a testator gave 3000*l.* to J. for the use of her younger children as she should appoint, and in default of appointment, among them equally; and one of the younger children after the death of the testator became the eldest: Lord Hardwicke held that as he was a younger child at the making of the will, and at the death of the testator, he must be considered a younger child, notwithstanding the accident that had happened since of the death of the elder; observing, there were several instances in which such a child who was then a younger had been entitled both to the portion of a younger child, and a settled estate also.[b]

In a case in which a man by codicil desired that his executor would at his decease bequeath one thousand guineas to Lord C. for the use of his seventh, or youngest child, in case he should not have a seventh living; and at the time of making the codicil, Lord C. had six children, and had had a seventh, who had died; and after the testator's death had S. and four more children; and after the birth of M., the youngest of these, the executor made his will, and by it gave to Lord C. one thousand guineas for the use of his seventh, or youngest child, in discharge of the bequest of his testator, which he recited: it was held that S., being in fact the eighth child born, could not take by the description of seventh child;

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[a] Matthews *v.* Paul, 3 Swanst. 328. 2 Wils. C. C. 64.

[b] Coleman *v.* Seymour, 1 Ves. 209; and see Trafford *v.* Ashton, 2 Ver. 660. Graham *v.* Lord Londonderry, cited 2 Ves. 199. Leake *v.* Leake, 10 Ves. 477. Driver *v.* Frank, 3 M. & S. 25. 6 Pri. 41.

and that the legacy went to the youngest child of Lord C. at the death of the executor.[a]

Under a bequest among "children" the eldest son, notwithstanding he takes the estate out of which the legacy is to arise, will be entitled to a share;[b] and where a testator gave each of his younger children a legacy, and the residue of his personal estate to his eldest son, but if he died under twenty-one, then to his other children in succession; and in case either of his younger children should die before twenty-one, then his or her legacy to go equally among *all* the survivors; and if he should have no child who should attain twenty-one, then all his estate to go to a charity; and one of the younger children died under twenty-one: Lord Camden held the eldest son entitled to a share of the legacy of the one dying; and the decree was confirmed by Lord C. Apsley, after the Lords Commissioners on a rehearing had differed in opinion.[c] An only child also has been held entitled under a bequest to the youngest child of A., if A. should have any child or children at the testator's decease.[d]

In a case where a man, having two sons by different wives, bequeathed 3000*l.* to W. his son by his first wife at the age of twenty-four, and gave the residue of his property to his wife B. for life, and after her death to any child or children *he might have by his wife B.*, to be equally divided between them that attained twenty-one, the survivor of his children to possess what was bequeathed to the other; but should not *either* of his children attain twenty-one,

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[a] West *v.* Lord Primate of Ireland, 3 Bro. 148. 2 Cox, 258.

[b] Incledon *v.* Northcote, 3 Atk. 438.

[c] Hiern *v.* Ley, Ambl. 569.

[d] Emery *v.* England, 3 Ves. 232.

then he bequeathed the 3000*l.* left to his son W. to the children of P.; and the testator left only W., his son by B. having died in his infancy: it was held that W., as surviving child, was entitled to the residue, as well as to the sum expressly given to him, from the apparent intention of the testator to include all his children.[a]

A legacy to "first and second cousins" was held to include a great niece, and first cousins once removed; on the ground that the intention was to give to relations not more remote than second cousins.[b] And for the same reason Sir J. Leach, under a similar clause, decreed, that great-grandchildren of the testator's uncles and aunts, who, his Honour observed, were first cousins twice removed, and not second cousins, were entitled.[c]

Under a bequest to "servants" living with the testator, Lord K. Cowper held that stewards of courts, and such who were not obliged to spend their whole time with their master, but might also serve any other master, were not servants within the intention of the will: but he would not narrow it to such servants only that lived in the testator's house, or had diet from him.[d] And in a late case of a similar gift by a man, who used to hire a carriage and horses by the year; it was decided that a coachman, supplied and paid by the jobmaster, and who did not board or lodge in the testator's house, but received from him a certain sum per week as board wages, and a livery, and was returned by him as his

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[a] Hill *v.* Smith, 1 Swanst. 195. 1 Wils. C. C. 134.

[b] Mayott *v.* Mayott, 2 Bro. 125.

[c] Silcox *v.* Bell, 1 Sim. & St. 301.

[d] Townshend *v.* Windham, 2 Ver. 546. It seems to have been so confined; Jones *v.* Henley, 2 Ch. Rep. 361.

coachman under the act imposing a duty on male servants, did not come within the description; there being no contract, out of which the relation of master and servant could grow.[a] It has been held also that a legacy to all servants includes those only who were servants at the date of the will, and continued so till the death of the testator.[b]

If the circumstances are such as to render it doubtful how far a servant is actually in the testator's service at the time of his death, it seems clear that the conversations or declarations of the testator are evidence whether he considered the service dissolved or not; but that they are not admissible to show an intention that the servant should have the legacy, although he might not be in the testator's service.[c]

It remains to observe that in these bequests to children, relations, and the like, the legatees, as they claim in their own right, must take per capita, and not per stirpes.[d] Hence in a legacy to A. and B., and the children of C., each of C.'s children take an equal share with A. and B., as if they had been individually named.[e] Or if there is a gift to the children of A. and B., and A. leaves no children, the children of B. take the whole.[f] So in the case of a bequest to the issue of A., a son, and two grandchildren (children of a deceased daughter) were held to

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[a] Chilcot *v.* Bromley, 12 Ves. 114.

[b] Jones *v.* Henley, 2 Ch. Rep. 361.

[c] Herbert *v.* Reid, 16 Ves. 481.

[d] Northey *v.* Strange, 1 P. W. 340. Weld *v.* Bradbury, 2 Ver. 705. Thomas *v.* Hole, For. 251. Barnes *v.* Patch, 8 Ves. 604. Dyer *v.* Dyer, 1 Mer. 414.

[e] Blackler *v.* Webb, 2 P. W. 383. Lugar *v.* Harman, 1 Cox, 250. Eccard *v.* Brooke, 2 id. 213. Butler *v.* Stratton, 3 Bro. 367. Longmore *v.* Broom, 7 Ves. 124; and see 10 Ves. 176.

[f] Wicker *v.* Mitford, Harg. L. T. 513. Smith *v.* Streatfield, 1 Mer. 358.

take per capita.[a] This is the rule in the absence only of any expressions indicating a contrary intention. Thus where money was by settlement directed at the death of A. to be equally divided between the three sisters and a niece of the settlor, or the respective issues of their bodies, in case they, or any of them, should happen to be dead at the time, share and share alike, viz. to each of them, or their respective children, one fourth part; and of the four persons, who all died in the lifetime of A. one sister left children only, another grandchildren, and the third children and great-grandchildren, and the niece died without issue: Lord Hardwicke thought the settlement had shown in what manner all these descendants were to take; per stirpes as to the stock, viz. that which would have belonged to each sister, if living, to go to their respective issues; but to be divided per capita among themselves.[b] And where again a testator, as to the residue of his fortune, willed that the descendants or representatives of each of his first cousins, deceased, should partake in equal shares and proportions with his first cousins then alive; the Master of the Rolls, after some doubt, thought that no person taking as representative could take otherwise than as the statute gave it to representatives, i. e. per stirpes.[c]

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III. The doctrine of the earlier books is that in a bequest to the children of J. S. a child born after the date of the will but before the death of the tes-

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[a] Davenport *v.* Hanbury, 3 Ves. 257.

[b] Wyth *v.* Blackman, 1 Ves. 196. Ambl. 555.

[c] Rowland *v.* Gorsuch, 2 Cox, 187; and see Crone *v.* Odell, 1 B. & B. 449. 3 Dow. 61.

tator can not take,[a] unless J. S. had no child at the time of the devise; for then the intention to include after born children must be inferred, or the bequest would altogether fail.[b] It has however long been established that where legatees are not personæ designatæ, but are described under such general terms, the time at which the legacy is made payable is that for ascertaining the objects of the bequest; and all those answering the description at that time are the persons to claim. If a legacy, therefore, is given to the children of J. S., all his children in existence at the death of the testator will be entitled to share.[c] Or if it be given to them at a future time, as at the death of A.;[d] or to be paid them at their respective ages of twenty-one;[e] all the children born previous to the death of A. or to the time when the eldest child attains twenty-one, will be included in the bequest. Thus in a case, which was much considered by Lord Thurlow, and seems to have settled the law upon this subject, where a testator gave certain stock to W. for life, and at his death to the testator's godson S., son of W., and at his decease, if before he was

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[a] Swinb. P. 7. S. 11. Touch. 446. Bac. Ab. Leg. B. Com. Dig. Chan. 3 Y. 16. Northey *v.* Strange, 1 P. W. 342. Pr. Ch. 470. Gilb. Eq. R. 136.

[b] Weld *v.* Bradbury, 2 Ver. 705. Haughton *v.* Harrison, 2 Atk. 329; and see 3 Bro. 434. Belt's N.

[c] Garbrand *v.* Mayott, 2 Ver. 105. 2 Freem. 105. Cook *v.* Cook, 2 Ver. 545. Roberts *v.* Higman, 1 Bro. 532. N.

[d] Ellison *v.* Airey, 1 Ves. 111. Baldwin *v.* Karver, Cowp. 309. Bartlett *v.* Hollister, Ambl. 334. 1 Bro. 531. Congreve *v.* Congreve, 1 Bro. 530. Att. Gen. *v.* Crispin, id. 386. Jee *v.* Audley, 1 Cox, 324. Viner *v.* Francis, 2 id. 190. Simmons *v.* Vallance, 4 Bro. 345. Malim *v.* Barker, 3 Ves. 150. Walker *v.* Shore, 15 Ves. 122. Crone *v.* Odell, 1 B. & B. 449. 3 Dow. 61. Leake *v.* Robinson, 2 Mer. 363. Tebbs *v.* Carpenter, 1 Mad. 290.

[e] Gilmore *v.* Severn, 1 Bro. 582. Hughes *v.* Hughes, 3 Bro. 352. 434. 14 Ves. 256. Pulsford *v.* Hunter, 3 Bro. 416. Curtis *v.* Curtis, 6 Mad. 14; and see Scott *v.* Harwood, 5 Mad. 332. Contra Freemantle *v.* Freemantle, 1 Cox, 248.

of age, to be divided equally among his brothers; and S. died an infant in the lifetime of the testator, leaving two brothers, but after the death of the testator W. had another son born: his Lordship held that this son being born before the time of distribution of the fund was entitled to a share.[a] And where a legacy was given for the benefit of all and every the child and children of the testator's niece A., the wife of B., to be transferred to such of them as were sons at twenty-one, &c.; and B. died, and A. married again, and had another child born before any of her sons by B. had attained twenty-one: such after-born child was held entitled.[b]

In bequests by parents to children there is every reason for including, if possible, all the children, as it is the natural duty of a parent to provide for all his offspring. Hence in a case where J. M. bequeathed all his real and personal estate to trustees to apply the rents and profits unto and for the maintenance of his wife A., and the maintenance and education and bringing up of his *children;* and directed his trustees to sell a particular estate, and invest the produce in the funds, and apply the dividends in the same manner with power to sell out any part as a premium to place out his son T. M. as a clerk, or for the advancement of *either* of his daughters; and after the decease of his wife, in trust to convey a particular estate to his son, and to pay to *each and every of* his daughters who might be then living the sum of 1000*l.* clear, unless they or *either* of them should have been previously advanced, and in that case only so much as would make up the

[a] Devisme *v.* Mello, 1 Bro. 537.
[b] Barrington *v.* Tristam, 6 Ves. 345; and see Hutcheson *v.* Jones, 2 Mad. 124.

portion of *either* of his daughters 1000*l.*; and in trust to assign to *all his said children* severally and respectively his household furniture, goods, &c. and to assign over to his son all the rest of his property; and the testator at the time of making his will had a son and three daughters, and afterwards had two more sons, and the question was whether these, being born after the date of the will, could have the benefit of the provision for the maintenance and education of the testator's children during the life of his widow: the Master of the Rolls observed, if it had not been the case of parent and child he must have made the inference, that the testator intended only to provide for the son and the daughters; but he would construe it every way, if possible, to apply the words to after-born children, and he would not deprive them of the provision which under the general words they might be supposed to have: he therefore declared that during the life of the testator's wife the rents and profits were applicable to the maintenance and education and bringing up of all the children.[a]

It is equally clearly settled in these general gifts, that all those born after the period of the distribution of the fund will be excluded from any share; and the children of J. S., therefore, in the respective cases abovementioned, who happen to be born after the death of the testator,[b] or of A.;[c] or after the time

[a] Matchwick *v.* Cock, 3 Ves. 609. Freemantle *v.* Taylor, 15 Ves. 363. Coles *v.* Hancock, 2 Ch. Rep. 210.

[b] Heathe *v.* Heathe, 2 Atk. 121. Coleman *v.* Seymour, 1 Ves. 209. Roberts *v.* Higman, 1 Bro. 532, *n.* Singleton *v.* Gilbert, 1 Cox, 68. 1 Bro. 542, *n.* Hill *v.* Chapman, 3 Bro. 391. 1 Ves. J. 405. Sprackling *v.* Ranier, 1 Dick. 344. Horsley *v.* Chaloner, 2 Ves. 83. Davidson *v.* Dallas, 14 Ves. 576.

[c] Ayton *v.* Ayton, 1 Cox, 327. 1 Bro. 542, *n.* Paul *v.* Compton, 8 Ves. 375.

when the eldest attains twenty-one,[a] will not be entitled to participate with those born previous to those periods. This doctrine indeed has not been altogether approved of;[b] but it seems so well established, that in a case in which the words were "all the other children hereafter to be born," it was admitted by the counsel that children born after the time of payment must be excluded.[c] So in a gift of several annuities, with a direction that the first of them that fell in was to devolve upon the eldest child of A., and at the death of the first annuitant A. had no child; it was held that an after-born daughter was not entitled.[d]

Lord Alvanley appears also to have thought, that after-born legatees must be excluded where distinct and separate bequests were made to them. For where a testator gave "to J. R.'s children 50*l.* to every child he hath by his wife E.," to be paid to them as they should come of age; and "to C. R.'s children, that he hath by his wife P., 50*l.* to every child when they come of age;" and there were eleven children of J. R. and C. R. at the time of making the will, thirteen at the death of the testator, and three born afterwards: his Lordship distinguished this case from those above cited,[e] which were of a gross sum to be divided among the legatees, and which might without inconvenience be set apart; but if he was in the principal case to let in all the children of the two persons born at any future time, he must postpone the distribution of the testator's estate, until

[a] Andrews *v.* Partington, 3 Bro. 401. Prescott *v.* Long, 2 Ves. J. 690. Hoste *v.* Pratt, 3 Ves. 730. Whitbread *v.* Lord St. John, 10 Ves. 152. Mills *v.* Norris, 5 Ves. 335.

[b] See 1 Ves. J. 407. 3 Bro. 392. N. Belt's ed., and ibid. 404.

[c] Gilbert *v.* Boorman, 11 Ves. 238.

[d] Godfrey *v.* Davis, 6 Ves. 43.

[e] Ante 124 N. *e*.

the death of J. R. and C. R.: and he decreed therefore the thirteen children only, who were living at the death of the testator, entitled to legacies of 60*l.* each.[a] Yet in a subsequent case, in which a man gave to all the children of his sister T. G., "whether now born, or hereafter to be born, the sum of 2000*l.* each, payable on attaining the age of twenty-one years;" and directed his executors, as soon as might be after his decease, to set apart and provide a sufficient fund for paying the said legacies as they became due: Sir W. Grant thought the testator's intention was not to exclude any child born in the lifetime of his sister, and that its being impracticable to know what provision to make for children not born, and whose number it was impossible to ascertain, was not a sufficient reason for excluding any of the children to whom the testator had expressly given legacies, and that the intention must be complied with, even to the extent of impounding the whole residue, should that appear to be necessary. An inquiry was accordingly directed as to what would be a proper sum to be set apart to answer the legacies of 2000*l.* each due to the children who might thereafter be born, having regard to the age of T. G.[b]

The effect of these general bequests must of course yield to any words indicative of a testator's intention to restrain them. Where there was a legacy to the descendants of A., "*now living* at S., or hereafter living any where else:" it was held that a descendant born after the date of the will could not take.[c] And in the case of a legacy to be equally

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[a] Ringrose *v.* Bramham, 2 Cox, 384.

[b] Defflis *v.* Goldschmidt, 19 Ves. 566. 1 Mer. 417. 2 Bro. 228. N. 3 Swanst. 320.

[c] Crossley *v.* Clare, Ambl. 397.

transferred and divided between the six children of J.S. and M. his wife, who had six children at the date of the will, but had another born afterwards, and before the death of the testator: it was held the operation of the will must be confined to the date.[a]

In a case in which a man bequeathed the residue of his estate to all and every the child or children of his brothers and sisters as aforesaid, who should be living at the time of his decease, on their respectively attaining the age of twenty-five; but in case of the decease of any of the aforesaid brothers or sisters, having issue born in wedlock, then the child or children to have and enjoy the same share, as if the parent had been living at the time of the testator's decease: Sir W. Grant observed he was by no means satisfied, that under any construction of the will after-born children would be entitled; but his opinion was, that according to the better construction the nephews and nieces, living at the testator's death, were entitled to take the whole residuary estate.[b]

In concluding this part of our subject we may notice a class of cases in which legacies have been given to a specified number of persons by a general description, and there are more than that number answering to it: as for example, 50*l.* apiece to the three children of A., when A. has four children;[c] or 500*l.* to each of the daughters of A., if *both* or *either* survive B., when A. has three daughters:[d] the Court in these cases has rejected the specified number, and admitted all such persons to take. So where a testatrix gave unto the *two* servants that should live

[a] Sherer *v.* Bishop, 4 Bro. 55.
[b] Barker *v.* Lea, 3 Ves. and B. 113.
[c] Tomkins *v.* Tomkins, cited 3 Atk. 257. 2 Ves. 564. 2 Bro. 86. N. Belt's ed.
[d] Scott *v.* Fenoulhett, 1 Cox, 79.

with her at the time of her death 100*l.* equally between them, and the testatrix had but two at the time of making her will, but afterwards took another, who lived with her to the time of her death: Sir T. Clarke observed, that living with the testatrix at the time of her death was the circumstance of her bounty; and if she had taken two more, he should think the legacy would be divisible among the four.[a] Lord Kenyon did not approve of this doctrine,[b] but said he yielded to the authority of the cases, which were also followed by Sir W. Grant.[c]

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[a] Sleech *v.* Thorington, 2 Ves. 560.

[b] Stebbing *v.* Walkey, 2 Bro. 85. 1 Cox, 250. [c] Garvey *v.* Hibbert, 19 Ves. 125.

# CHAPTER III.

## OF CONDITIONAL LEGACIES.

### SECTION I.

*Of express Conditions.*

I. CONDITIONS are of two kinds, precedent and subsequent; but there are no technical terms to distinguish them, and the same words may indifferently make either, according to the intention of the person who creates it.[a] In real property it is a well known maxim that where an estate is given upon a condition precedent, no interest can vest till the condition is performed.[b] This seems also to be the case with regard to bequests of interests arising out of land; for these having nothing testamentary in them are not subject to the jurisdiction of the ecclesiastical court, nor to be governed by the rules of the civil law.[c] Thus where Sir T. A. by settlement created a term of years in trust to raise and pay certain portions to daughters, provided they married with the consent of the defendant their mother, till which a yearly sum to be paid them out of the rents and profits; and afterwards Sir T. A. by will, taking notice of the settlement, directed that out of his personal estate there should be paid to each of his daughters a further sum as and for an augmentation

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[a] For. 166. 1 T. R. 645. 6 id. 668; and see, as to what words make conditions, Swinb. P. 3. S. 4. P. 4. S. 3. 5. Godolph. 39. 288.

[b] Co. Lit. 206, *b*. Com. Dig. Condition. D. 1 Ver. 83.

[c] 2 Freem. 244. 1 Atk. 379. 3 id. 333. 2 Dick. 719. Reves *v* Herne, 5 Vin. Ab. 343.

of their portions subject to the same conditions as their original portions; and Sir J. Jekyll held that two of the daughters, who had married without the consent of their mother, were nevertheless entitled both to their original and additional portions;[a] Lord Hardwicke, assisted by the Lords Chief Justices Lee and Willes, and Mr. J. Comyns, reversed the decree, on the ground that the original portions were given on a condition precedent, and the additional ones being bequeathed upon the same condition, nothing could vest in the daughters unless that was performed.[b] So if portions are devised out of land, to be considered as vested at the expiration of two years after the testator's death, *if his debts shall then be paid*;[c] or a legacy is given *if an estate shall sell for a certain amount*,[d] these gifts are upon conditions precedent, and not due if the debts are not paid within the time, or the estate does not produce the specified amount.

In the civil law, if a precedent condition annexed to a legacy were impossible at the time of creating it, it did not prevent the legatee from taking his legacy: as if a man left J. S. 100*l*., if he should drink up all the water in the sea: J. S. would be entitled notwithstanding the condition.[e] It was the same with regard to conditions contrary to law, or to good manners, or repugnant to the nature of the gift; as in the case of a legacy to a man if he committed murder: the law considering such a condition impossible.[f] Hence where a testator, after giving his

[a] Hervey *v.* Aston, For. 212.

[b] Harvey *v.* Aston, 1 Atk. 361. Com. 726. Willes, 83.

[c] Bernard *v.* Mountague, 1 Mer. 422.

[d] Stonehouse *v.* Evelyn, 3 P. W. 252.

[e] Swinb. P. 4. S. 5. 1 Ed. 117.

[f] Swinb. P. 4. S. 5. Godolph. 44.

niece 15*l.* for mourning, directed, that if she lived with her husband, the executors should pay her 2*l.* per month, and no more; but if she lived from him, and with her mother, then they should allow her 5*l.* per month: Lord Northington held, that the niece was entitled to the monthly payment of 5*l.*; for the condition annexed being contra bonos mores, the legacy was simple and pure.[a] So if a legacy is given to one, his heirs, executors, &c. with a clause of forfeiture if he attempts to dispose of it;[b] or with a condition that if he does not make use of it, or dies before he receives it, that it shall go over to another;[c] the qualification, being inconsistent with the gift, is void; and the property vested absolutely in the legatee. A proviso, however, against alienation, or for determining the bequest, may in some cases be valid. Thus an annuity bequeathed to A. during life, to be paid into his own hands, and to cease and determine if alienated, was held to cease on the bankruptcy of A., and not to go to his assignees.[d] "There is no doubt," says Lord Eldon, "that property may be given to a man, until he shall become bankrupt. It is equally clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents to a life-estate; and a disposition to a man, until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a proviso that

[a] Brown *v.* Peck, 1 Ed. 140; and see 3 Atk. 332.

[b] Bradley *v.* Peixoto, 3 Ves. 324.

[c] Ross *v.* Ross, 1 Jac. & W. 154. Hutchin *v.* Mannington, 1 Ves. J. 366.

[d] Dommett *v* Bedford, 6 T. R. 684. 3 Ves. 149; and see De Mierre *v.* Turner, 5 Ves. 306. Shee *v.* Hale, 13 Ves. 404. Wilkinson *v.* Wilkinson, Coop. 259. 2 Wils. C. C. 47. 3 Swanst. 515. Cooper *v.* Wyatt, 5 Mad. 482. Such a bequest is not forfeited by the outlawry of the legatee. The King *v.* Robinson, Wight. 386.

he shall not sell or alien it. If that condition is so expressed as to amount to a limitation, reducing the interest short of a life-estate, neither the man nor his assignees can have it beyond the period limited."[a] So an annuity given to A. during the life of the testator's wife (who was executrix) on condition he behaved himself civilly to her, was held to fail by the death of A. in her lifetime:[b] the condition showing it to be a *personal* bequest, without which it would have gone to A.'s executors.[c] We may notice also a case in which a testator directed that his wife might inhabit his house in Liverpool for a year, and ordered his executors to pay and allow her a guinea weekly during her stay in Liverpool for and towards housekeeping: it was held that she was not entitled to the guinea a week beyond the year, though she continued to reside in Liverpool.[d]

But even in the civil law, if a condition precedent were possible, or, if impossible, yet if supposed possible by the testator, it must have been accomplished before the bequest could take effect: as if for example he gave a legacy, if his ship returned from Venice: here the legatee could claim nothing till the happening of that event.[e] So a legacy to A., if he survives B.;[f] or in case he shall be living with the testator at the time of his death;[g] or when he shall be admitted a partner in a commercial concern;[h] is conditional or contingent; depending upon an event which must happen to entitle him. When it takes

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[a] Brandon *v.* Robinson, 18 Ves. 429.

[b] Neal *v.* Hanbury, Pr. Ch. 173.

[c] Savery *v.* Dyer, 1 Dick. 162.

[d] Walker *v.* Watts, 3 Ves. 132.

[e] Swinb. P. 4. S 6.

[f] Hodges *v.* Peacock, 3 Ves. 735.

[g] See Allen *v.* Callow, 3 Ves. 289.

[h] Wainwright *v.* Waterman, 1 Ves. J. 311.

place the bequest becomes absolute; so that where there was a gift to A. for ever in case she should have children, in failure of which to B.: A. was held entitled on having a child, notwithstanding that child died in her lifetime.[a] In the same way where a man by his will directed that if he died before his return from a journey he was going to take, his property should be sold and his debts paid, and then gave some legacies: it was held that the whole disposition was conditional, and void upon his return.[b] Conditions of giving up low company and frequenting public-houses;[c] and of not interfering with the education of a child,[d] have been held valid precedent conditions. Again, where a man devised a term to an infant in ventre sa mere, if it should be a son; and if it should be a son and die during his minority then he devised it to his grandson; and the child proved a daughter: it was adjudged without argument, that the executrix, and not the grandson, should have the term; because the latter was not to have it but upon a precedent condition, which must first be performed.[e] So where a legacy was given to A. when she should attain twenty-one, and *in case she died under that age* leaving children then to such children; and A. attained twenty-one, but died in the lifetime of the testatrix leaving children: it was held (contrary to the opinion of Lord Thurlow) that the children were not entitled; the event upon which they were to take not having happened.[f]

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[a] Wall *v.* Tomlinson, 16 Ves. 413.

[b] Parsons *v.* Lanoe, 1 Ves. 189. Bac. Ab. Wills. F. Ambl. 557; and see Sinclair *v.* Hone, 6 Ves. 607.

[c] Tattersall *v.* Howell, 2 Mer. 26.

[d] Colston *v.* Morris, 6 Mad. 89. Bea. on Costs, 390.

[e] Grascot *v.* Warren, 12 Mod. 128. 2 Eq. Ab. 361. Comb. 437; but see Post. 140, and Gulliver *v.* Wickett, 1 Wils. 105.

[f] Doo *v.* Brabant, 3 Bro. 393. 4

Nor, if the condition were at first possible, would the impossibility of afterwards performing it, prevent the disposition becoming void: as if a legacy were given to J. S. when he should be married, or if he married the testator's daughter, and J. S., or the daughter died before marriage.[a] Hence where a man by will, after reciting that it would be advantageous for A. and B. to exchange their estates, gave 30,000*l.* in trust for A. until such time as B. should convey his estate to A., A. also conveying his to B.; and directed that if either of them refused, he should not have any share of the legacy, which should go to the other; and in case what he had so recommended was made good and completed by A. and B. the 30,000*l.* should be equally divided between them; and B. died about a year after the testator having devised away his estate, and the exchange therefore after his death became impossible: it was held that his executors could make no claim to a moiety of the money.[b] So where a man gave a legacy to his son abroad, but, stating the probability that he might not be living, declared it was given him upon the express condition that he should not be entitled to it unless he should return to England, and personally claim it; and he died when on the point of embarking for England: a bill by his executor for the legacy was dismissed.[c] In a case also, in which a woman requested her exe-

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T. R. 706; and see Calthorpe *v.* Gough, 3 Bro. 394. N. Miller *v.* Faure, 1 Ves. 85. Scott *v.* Chamberlayne, 3 Ves. 302. 491. Holmes *v.* Cradock, 3 Ves. 317. Parsons *v.* Parsons, 5 Ves. 578. Swayne *v.* Smith. 1 Sim. and St. 56. Humberstone *v.* Stanton, 1 Ves. and B. 385.

[a] Swinb. P. 4. S. 6. Godolph. 46. Touch. 453, 454. 1 Ed. 116, 117.

[b] Lowther *v.* Cavendish, 1 Ed. 99. 5 Bro. P. C. 349.

[c] Tulk *v.* Houlditch, 1 Ves. & B. 248; and see Burgess *v.* Robinson, 3 Mer. 7.

cutor to give every year the revenues of a certain sum to E. and to give him the principal only in case of an establishment or acquisition for him, which should seem advantageous to her executor, this disposition being an essential condition of the legacy; but the testatrix nevertheless left her executor at liberty to give E. the said sum if he found the thing proper, although there should be neither establishment nor acquisition; and E. died: it was held that the legacy must be considered as given on condition, which not being performed, (as the executor had not thought it proper to advance the legacy,) the persons to whom E. had bequeathed it had no claim.[a]

A legacy given to an executor as such is upon condition that he undertakes the office; and if therefore he refuses to act, he can neither claim the legacy,[b] nor the residue when undisposed of.[c] Thus, where a man appointed A. and B. executors of his will, and requested them to accept of 100*l.* each as a small mark of his gratitude for the friendship they had always favoured him with: Lord Alvanley said the parties could not take without acting as executors, notwithstanding the legacy was given as an acknowledgment of past favours; and he thought it would be so even between a father and child, on a legacy given to the child.[d] Yet where a testator, as an encouragement to his executors to accept of the trust, had given to each of them 100*l.* and 12*l.* apiece for mourning, and to each of them a ring, and 10*l.* a year for their trouble: the Lord Chancellor

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[a] Pink *v.* De Thuisey, 2 Mad. 157.

[b] Abbot *v.* Massie, 3 Ves. 148. Freeman *v.* Fairlie, 3 Mer. 24. Contra Touch. 456.

[c] See Rawlings *v.* Jennings, 13 Ves. 39.

[d] Read *v.* Devaynes, 3 Bro. 95. Belt's ed. 2 Cox, 285.

said that notwithstanding the condition of the acceptance might seem to run to all the legacies, the executors, though they did not act, should have their rings and mourning; these being intended them immediately, and not to wait their time of acceptance; but that they should not have their 100*l.* and an annuity of 10*l.* each, unless they accepted the trust.[a]

A bequest to the person who is appointed executor is primâ facie a presumption that it is given to him as executor.[b] But circumstances may show that it was intended for him in a distinct character. Thus where a man gave A. and B. 50*l.* each, whom he appointed executors in trust of his will, the said bequests to be upon condition of their taking upon them the trust thereinafter mentioned; and then devised to them his real estate in trust, and gave, after some other legacies, to his cousin T. K. the sum of 50*l.* whom he appointed as joint executor in trust in his will; and T. K. declined to act: the Vice-Chancellor thought him nevertheless entitled to the legacy, considering the gift rather intended to be in respect of his relationship than of his office.[c]

Although an executor dies before probate, yet if he has done as much as he could do in showing demonstrably that he meant to undertake the office, his representatives will be entitled to the legacy:[d] while if he proves the will without any intention really to perform the trusts of it, he has no claim.[e]

In a late case in which a man bequeathed to his

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[a] Humberston *v.* Humberston, 1 P. W. 332; and see Brydges *v.* Wotton, 1 Ves. and B. 134.

[b] Stackpoole *v.* Howell, 13 Ves. 417.

[c] Dix *v.* Reed, 1 Sim. & St. 237.

[d] Harrison *v.* Rowley, 4 Ves. 212; and see Touch. 456. Dyer 367, *a.*

[e] Harford *v.* Browning, 1 Cox, 302.

acting trustees (who were also executors) for the time being, the yearly sum of five guineas apiece, so long as they should respectively live, and the trusts of the will should continue, as a small recompence for the care and trouble they might have in the execution of the trusts; it was held that the trustees were justified in paying a person to collect the weekly rents of several houses in London belonging to the testator, and that they did not thereby lose their annuities.[a]

If a legacy is given on condition to release all claims, it is a condition precedent, and the legacy will be forfeited by the legatee's insisting on his claim, or refusing to execute a release.[b] Or if a man gives a legacy in discharge or satisfaction of any claim that the legatee has upon him, the legatee must elect between the legacy and the claim, and if he insists on the latter he must wave the benefit under the will.[c] The bringing a bill for the legacy is an acceptance on record, and a release in equity.[d] These conditions are to be construed distributively, so that if legacies are given to several upon condition to release all claims, those only who refuse to release will forfeit their legacies, and the others will not be prejudiced by such refusal.[e]

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[a] Wilkinson *v.* Wilkinson, 2 Sim. and St. 237.

[b] Hawes *v.* Warner, 2 Ver. 477. Wheddon *v.* Oxenham, 2 Eq. Ab. 546. Cleaver *v.* Spurling, 2 P. W. 526. Mos. 179. Vernon *v.* Bethell, 2 Ed. 110. E. Northumberland *v.* E. Aylesford, Ambl. 540. 657. 1 Ed. 489. Taylor *v.* Popham, 1 Bro. 168. Simpson *v.* Vickers, 14 Ves. 341; and see Acherley *v.* Vernon, Com. 513. Lord Mohun *v.* D. Hamilton, 1 Bro. P. C. 54.

[c] Jenkins *v.* Jenkins, Belt's Suppl. to Ves. 250. Graves *v.* Boyle, 1 Atk. 509. Newman *v.* Newman, 1 Bro. 186. Macnamara *v.* Jones, id. 481. Hoare *v.* Barnes, 3 Bro. 316. Webb *v.* E. Shaftesbury, 7 Ves. 480.

[d] Franco *v.* Alvares, 3 Atk. 342.

[e] Hawes *v.* Warner, 2 Ver. 477; and see Godolph. 421.

But a mere condition not to disturb the will or controvert the disposition of the testator, on pain of forfeiting the legacy, seems to be considered only as in terrorem, and the legacy not to be forfeited by the legatee contesting any disputable matter in a court of justice, provided there be probabilis causa litigandi.[a] And where a testator gave a legacy to his sister, but if she acted in any respect so as to endeavour to oppose, cross, set aside his will, or make any further claim or demand whatsoever on his estate, goods, or chattels, all he had in his will given her he declared to be null and void; and made no residuary bequest: the Lord Chancellor observed, the claim to the residue might be safely made by the sister as next of kin without incurring the penalty.[b]

When a gift by will is made defeasible upon a subsequent condition, as to be void for instance upon the legatee's succeeding to certain real estates, he will be entitled to his legacy without giving security to refund: for the Court cannot keep it to wait the event, notwithstanding a limitation over to another.[c]

There are many cases in which words of apparent condition have not been construed so strictly; and devises of this sort not considered as conditions precedent, but the party allowed to take the benefit, whether the event has happened or not. Thus where a man devised a term to his wife for life, and after her death to the child she was then enceinte

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[a] See Powell *v.* Morgan, 2 Ver. 90. Mosely *v.* Mosely, 2 Ch. Rep. 105. Lloyd *v.* Spillet, 3 P. W. 344. Bac. Ab. Wills. G. Morris *v.* Burroughs, 1 Atk. 399. Webb *v.* Webb, 1 P. W. 136.

[b] Att. Gen. *v.* Parkin, Ambl. 566; and see Clare *v.* Acmooty, cited Mos. 181.

[c] Griffiths *v.* Smith, 1 Ves. J. 97. Fawkes *v.* Gray, 18 Ves. 131; and see Osborn *v.* Brown, 5 Ves. 527. Brydges *v.* Wotton, 1 Ves. & B. 134.

with, and if such child died before it came to the age of twenty-one, then the testator devised one-third part of the term to his wife, her executors, &c.: the devise of the third part to the wife was adjudged good, although she happened not to be enceinte at all.[a] So where a legacy was given to A., *but if he should not be in life*, to B.; and A. was alive at the making of the will, but died in the testator's lifetime, the legacy was decreed to B.[b] And where there was a bequest in trust for A. for life, and afterwards to her children, and if none, in trust to pay the interest to her husband B. for life; and after his decease *in case he should become entitled to such interest* to the testator's cousins: it was held that B.'s taking for life was not a condition precedent, and the cousins were entitled, notwithstanding B. died in the lifetime of his wife, who afterwards herself died without issue.[c]

Where also a legacy is bequeathed for a particular purpose, it is not conditional so as to fail with the purpose for which it is given. Thus if one devise to W. S. 20*l.* towards his marriage, and W. S. dies unmarried, the money will go to his executors:[d] or if the gift is to place him out apprentice, he may claim it whether put out or not;[e] and if he dies before he is of a sufficient age to be put out, it will pass to his representatives.[f] So a legacy to a woman

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[a] Jones *v.* Westcomb, Pr. Ch. 316. 1 Eq. Ab. 245. Gilb. Eq. R. 74. Meadows *v.* Parry, 1 Ves. & B. 124. Murray *v.* Jones, 2 id. 313; and see Statham *v.* Bell, Cowp. 40. Doug. 66. N. Fonnereau *v.* Fonnereau, 3 Atk. 315.

[b] Parry *v.* Boodle, 1 Cox, 183.

[c] Pearsall *v.* Simpson, 15 Ves. 29. Massey *v.* Hudson, 2 Mer. 130.

[d] Dame Latimer's case, Dyer, 59. Swinb. P. 4. S. 17. P. 7. S. 23. Godolph. 46. 382. Touch. 454.

[e] Nevill *v.* Nevill, 2 Ver. 431. Barton *v.* Cooke, 5 Ves. 461; and see Cope *v.* Wilmot, Ambl. 704. Isherwood *v.* Payne, 5 Ves. 677.

[f] Barlow *v.* Grant, 1 Ver. 255. 2 Freem. 89; and see Neale *v.* Willis, Barn. C. R. 43.

for the maintenance of her children is good, notwithstanding she has no children, or they all die.[a] So also where lands were given to a mother for education and maintenance of her daughter till eighteen years old, and the daughter died under eighteen; it was adjudged a good term to the mother till the daughter would have attained eighteen, had she lived.[b] And where again a man seised of an estate of 600*l.* a year devised 300*l.* a year of it to an infant (whose father was the testator's heir at law), and the other 300*l.* a year to the father for his care and pains in looking after the son's estate, until he should come to twenty-one; and the father died during the infancy of the son: the annuity was held an absolute interest in him, which he might dispose of by will.[c] It has been said, however, that a legacy to a woman for and towards her marriage with any particular specified person is conditional, and fails if she dies before marriage.[d]

When an addition is made by a codicil to a legacy given by will, the addition will be subject to the same qualities or conditions as the original gift.[e] So it is if a testator substitutes a person to take a legacy that has been given to another; mere substitution being primâ facie attended with the same incidents.[f] Hence where a man devised his real estate in trust for the payment of his legacies, among which

[a] Pr. Ch. 219. Hammond *v.* Neame, 1 Swanst. 35. 1 Wils. C. C. 9.

[b] Case cited in Carter *v.* Church, 1 Ch. Ca. 113. Warwick *v.* Cutler, 2 Ch. Rep. 136. Taylor *v.* Biddall, 2 Mod. 289. Boraston's case, 3 Rep. 19; but see Manfield *v.* Dugard, 1 Eq. Ab. 195. Gilb. Eq. R. 36; and Swinb. P. 4. S. 17.

[c] Anon. Prec. Ch. 597.

[d] Swinb. P. 4. S. 17.

[e] 6 Mad. 31. Crowder *v.* Clowes, 2 Ves. J. 449. Cooper *v.* Day, 3 Mer. 154.

[f] 6 Mad. 31. Swinb. P. 7. S. 21. Godolph. 450

were several to charities; and afterwards by a codicil revoked these, and gave instead a smaller legacy to one of the same charities, and another legacy to a totally different one: these were still held to be payable out of the real estate; and consequently void.[a] But this, as a general doctrine, is to be taken with great qualification, and controllable by the circumstances of each case. Where therefore a man bequeathed 60,000*l.* to trustees, upon trust, to pay to his daughter 20,000*l.* for her separate use, and then to pay the interest of the rest to her for her life, with remainder to her children; and concluded his will by declaring that his legacies thereinbefore mentioned were to be free of legacy duty; and the testator by a codicil, noticing his daughter's death, and the lapse of the legacies given to her, gave, instead thereof, to her husband the sum of 20,000*l.*: it was held, that the husband was not entitled to this legacy free of the duty under the general direction in the will; because that applied only to the legacies given by the will, and the legacy given to him by the codicil was an original one.[b] Nor will the substitution of a larger sum to a tenant for life enure for the benefit of the remainder-man of the original gift. For where the interest of some stock was given by will to one for life, with remainder over to others; and the testator by a codicil gave the interest of a larger sum of stock to the same person for life, in lieu of the said stock mentioned in his will: Sir W. Grant thought that as nothing new was given to the legatees over by the codicil, they could claim no more on the

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[a] Leacroft *v.* Maynard, 1 Ves. J. 279. 3 Bro. 233.

[b] Chatteris *v.* Young, 6 Mad. 30.

death of the tenant for life than the sum originally bequeathed them by the will.[a]

The shares also accruing by survivorship among legatees are subject to the same conditions as the original ones. Thus where 1500*l.* was given among three nieces, payable on their respective marriages, and if any died unmarried her share to go to the survivors; and one niece married, after which a second died unmarried: it was decreed that the condition of marriage went to the whole, as well to what accrued by survivorship as to the original devise; that the married niece took a moiety of the second's share, and would be entitled to the whole 1500*l.*, in case the third should die unmarried.[b]

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II. The most usual conditions annexed to gifts by will are those in restriction of marriage. A general prohibition of marriage when in words of limitation, as in a gift of the use of the testator's goods *so long* as the legatee shall remain unmarried, seems to be good.[c] But a devise, it is said, upon condition not to marry at all, or not to marry a person of such a profession or calling, is void, as being against that liberty of marriage, which the law favours.[d] And it has long been established in equity that all subsequent conditions annexed to mere pecuniary legacies, which even partially only restrain marriage, as by re-

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[a] Newton *v.* Ayscough, 19 Ves. 534.

[b] Moore *v.* Godfrey, 2 Ver. 620; and see Feltham *v.* Feltham, 2 P. W. 271.

[c] See Swinb. P. 4. S. 12. 1 Atk. 379. Mitford *v.* Mitford, 9 Ves. 87.

[d] Bac. Ab. Leg. F. 1 Eq. Ab. 110, marginal note. Godolph. 381. 3 Ridg. P. C. 261. See Lowe *v.* Peers, 4 Burr. 2225, *covenant* with A. not to marry any other woman held void.

quiring the consent of particular persons, and which are not followed by a gift over upon a breach of the condition, are merely looked upon as declarations of the testator in terrorem; so that a marriage contrary to the terms will not cause a forfeiture of the bequest.[a] Where therefore a man left to his daughter 400*l.* to be paid her within twelve months after his decease, but if she married A. he revoked and made void the said legacy, and in lieu thereof gave her one shilling; and the daughter married A. about fourteen months after his death: the legacy was nevertheless decreed to her.[b] So where a man bequeathed to his wife *should she continue unmarried* all his estate during her life, and after her death disposed of the same; and the wife married again: the Vice-Chancellor thought this a condition as much as if the words had been *if* or *provided* she continued unmarried; and being a condition subsequent, and no bequest over, it was only in terrorem, and she was therefore entitled to the property for her life.[c]

Conditions in the civil law, by which marriage was not absolutely prohibited but only in part restrained, as in respect of time, place, or person, were to a certain degree valid; for if a legacy was given upon marriage with the consent of a particular person, a marriage must at all events have taken place before the legatee could claim.[d] To this extent the doctrine is followed in equity. Thus where a legacy

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[a] 1 Ver. 20. 1 Atk. 375. Com. 729. 4 Burr. 2055. 3 Mer. 117. Anon. 1 Freem. 302. Wheeler *v.* Bingham, 3 Atk. 364. 1 Wils. 135. Keily *v.* Monck, 3 Ridg. P. C. 205; and see Jones *v.* E. Suffolk, 1 Bro. 528, where there was a gift over. As to Garret *v.* Pritty, 2 Ver. 293, see 3 Mer. 119.

[b] Osborn *v.* Brown, 5 Ves. 527.

[c] Marples *v.* Bainbridge, 1 Mad. 590.

[d] Swinb. P. 4. S. 12. P. 7. S. 23. Godolph. 46. 381. 2 Dick. 721.

was given to a woman, provided she married with the consent of her father and mother, but there was no gift over of the legacy, and the legatee before marriage brought her bill alleging the gift was a vested interest, and the proviso only in terrorem: it was held that marriage was a condition precedent to the vesting of the legacy; and the bill was accordingly dismissed.[a] Although in a case in which the residue was given in trust to pay the dividends and produce equally between A. and B. until their respective marriages, and from and immediately after their respective marriages to assign and transfer their respective moieties unto them respectively; and A. died unmarried, having bequeathed her share by will to B.: Lord Alvanley, upon the ground of its being a residue, and upon the words of the bequest, was of opinion that B. was entitled; observing it was a principle that had been laid down by Lord Mansfield, that where an absolute property was given, and a particular interest given in the mean time, as until the devisee should come of age, and when he should come of age, then to him, the rule was, that should not operate as a condition precedent, but as a description of the time when the remainder-man was to take in possession. But his Honour would not order payment of the moiety that B. claimed in her own right, she not being married.[b]

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[a] Garbut *v.* Hilton, 1 Atk. 381. 9 Mod. 210. Atkins *v.* Hiccocks, 1 Atk. 500. Elton *v.* Elton, 3 id. 504. 1 Ves. 4. 1 Wils. 159; and see 2 Freem. 244. Parker *v.* Parker, id. 58. Randal *v.* Payne, 1 Bro. 55. Ellis *v.* Ellis, 1 Sch. & Lef. 1. Ward *v.* Trigg, cited 3 Atk. 505, seems contra.

[b] Booth *v.* Booth, 4 Ves. 399. Mr. Preston (Leg. 67) observes, that this legacy might have been supported as a vested bequest; 1st, because the *corpus* was given to the trustees; 2dly, because interest was given till an event happened, which never arose; 3dly, because the period of marriage related to the transfer, and not to the vesting, of the bequest.

If the legatee marries without the requisite consent, it seems to be the better opinion that the legacy cannot be demanded, as the condition has not been fulfilled.[a] This, however, is a subject of considerable difficulty. Such a marriage was no bar by the civil law;[b] and in an early case it was said that equity in some respects took notice of the civil law, and that was the reason why, if a man bequeathed a legacy to a son or a daughter, provided that he or she married with the consent of the executor, &c., if the party married without such consent, yet he should have the legacy.[b] So where a man willed, that if his daughter married with the consent of trustees, then and not otherwise, he gave her 800*l.* charged on his real estate: Lord Hardwicke said, if this had been merely a personal legacy, he would have been of opinion that as the marriage without consent would not have precluded the daughter of her right to the legacy in the ecclesiastical court, no more would it have done in equity;[c] and his Lordship expressed a similar opinion in other instances, and that there was no difference in this respect between conditions precedent and subsequent.[d] In a case, however, which seems to have been much considered by Lord Thurlow, where a man bequeathed 10,000*l.* in trust to pay out of the dividends 100*l.* per annum for the maintenance of the testator's god-daughter M. C. T. until twenty-one, and at her age of twenty-one one moiety of the capital to be paid to her in case she should be

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[a] Swinb. P. 4. S. 12. Godolph. 46. 381.

[b] 2 Freem. 21; and see Semphill *v.* Bayly, Pr. Ch. 562. Shipton *v.* Hampson, Rep. T. Finch. 145.

[c] Reynish *v.* Martin, 3 Atk. 330.

[d] 3 Atk. 366. 507. 1 Wils. 21; and see what Sir T. Plumer says, 2 Mad. 353.

then unmarried, and at her age of twenty-five, if then unmarried, the other moiety; and *in case she should marry before twenty-one with the consent of her mother* he willed that one moiety should be settled for her separate use, and the other moiety as she should think fit; but in case she should die before twenty-five unmarried, then he gave the 10,000*l.* to her mother; and M. C. T. married under twenty-one against the consent of her mother: his Lordship was of opinion that M. C. T. never came under the description to which the gift attached, and the bequest was therefore void.[a] So where there was a legacy to a daughter to be paid, one moiety upon her marriage with consent if under twenty-one, and the other moiety within two years afterwards; and the daughter married without the required consent: Lord Loughborough, approving of Lord Thurlow's decision, held her not entitled; emphatically remarking, he thought himself free to say, there was nothing illegal in such a condition, and therefore not to determine that this legacy, which the testator directed to be paid only under certain circumstances, should be paid, not only though those circumstances had not happened, but where every thing had been done directly in opposition and defiance of the directions of the will.[b] Yet in a case subsequent to that before Lord Thurlow, we find it broadly laid down by the Lord Chancellor in Ireland, that in every case of a legacy, where a condition in restraint of marriage is annexed to it, whether it be a condition precedent, or subsequent, whether the legacy vests before mar-

[a] Scott *v.* Tyler, 2 Bro. 431. 2 Dick. 712.

[b] Stackpole *v.* Beaumont, 3 Ves. 89. Holmes *v.* Lysaght, 4 Bro. P. C. 103.

riage, or whether it does not, the rule of the civil law is, that the condition is rejected, and the legatary takes the gift absolutely; and that this rule is invariably adopted in equity, where the legacy arises out of a personal fund, with one only exception, and that is, where there is a bequest over of the legacy to another upon non-performance or breach of condition.[a] Lord Loughborough, in Stackpole *v.* Beaumont,[b] seems not to have approved of the doctrine of the civil law having been so much followed in these cases; and it is perhaps to be lamented that the plain and intelligible distinctions of the common law between precedent and subsequent conditions had not been adhered to with regard to personal as well as to real property. For although this distinction may not nominally be admitted in the civil law, yet there seem to be such numerous limitations or exceptions to the general rule, making void all conditions in restraint of marriage, that we might almost be tempted to apply the words used by Swinburne in another place; "others labouring to reconcile these contradictions, and to pacify these contentions, have waded so for fine and dainty distinctions, that they seem to swim up and down, and to float hither and thither, I know not whither, in a deep and bottomless sea of intricate and confused divisions."[c]

In the civil law a condition in restrainst of marriage was void notwithstanding a limitation over to another;[d] unless the gift over was in pios usus, in which case even a general condition against marriage was good, by reason, it was said, that the law more

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[a] 6 Ridg. P. C. 246.
[b] Ante 148.
[c] Swinb. P. 7. S. 14.
[d] 1 Eq. Ab. 110, marginal note. 2 Freem. 21. 2 P. W. 528. Com. 730.

favoured piety than the liberty to marry.[a] But in equity it was early established, that where the legacy is given over to another upon the marriage of the legatee without the required consent, whether the condition be precedent or subsequent, the Court will not relieve against the forfeiture; for this would be to do an injury to a person in whom a right becomes thereby vested, and whose provision and benefit the testator considered and had in his thoughts.[b] And a condition in such case requiring consent to a marriage seems valid, although not restrained to a marriage under the age of twenty-one:[c] as is also a general condition restraining a widow from marrying, which even in the civil law was good.[d]

It may now perhaps be laid down that a residuary bequest does not amount to a devise over of the legacy. For notwithstanding one case to the contrary,[e] it seems in others to have been so held;[f] and Lord Thurlow said, a residuary bequest had been repeatedly and well enough determined to leave the conditional legacy in statu quo.[g]

But a different effect is to be ascribed to a direc-

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[a] Swinb. P. 4. S. 12. Godolph. 381. 1 Dick. 320.

[b] Com. 730. 1 Dick. 320. 19 Ves. 14. Stratton v. Grymes, 2 Ver. 357. Aston v. Aston, 2 Ver. 452. Pr. Ch. 226. Parker v. Parker, 2 Freem. 58. Reves v. Herne, 5 Vin. Ab. 343. Hemings v. Munckley, 1 Cox, 38. 1 Bro. 303. Lloyd v. Branton, 3 Mer. 108. Malcolm v. O'Callaghan, 2 Mad. 349. Underwood v. Morris, 2 Atk. 184, contra, has been denied to be law; see 2 Dick. 723. 1 Bro. 304.

[c] Aston v. Aston, 2 Ver. 452; and see 3 Mer. 116. Wheeler v. Bingham, 3 Atk. 364. Dashwood v. Lord Bulkeley, 10 Ves. 230.

[d] 2 Dick. 721. Com. 736. Bac. Ab. Leg. F. Barton v. Barton, 2 Ver. 308. Lucas v. Evans, 3 Atk. 260.

[e] Amos v. Horner, 1 Eq. Ab. 112. See on this case, Forr. 215. 1 Atk. 378. Willes, 96.

[f] Paget v. Haywood, cited 1 Atk. 378. 3 id. 365. Wheeler v. Bingham, 3 Atk. 364. 1 Wils. 135. Cage v. Russel, 2 Vent. 352.

[g] 2 Dick. 723; and see 3 Mer. 118. Ridg. P. C. 252.

tion that the legacy shall sink into the residue. This in one case was considered of no avail, and the same as if the testator had said nothing about its sinking into the residue, and the condition, therefore, to be construed as in terrorem only.[a] But Lord Hardwicke thought that an express devise, that if the legatee should not perform the condition, the legacy should sink into the residue, amounted to a devise over.[b] And this doctrine was adopted by Sir W. Grant, in a case in which there was a proviso, that if any of the legatees should marry without consent, such legatee should forfeit her legacy, which should sink into and constitute part of the residue. His Honour observed that when it was decided that a residuary clause did not carry such a legacy, it was by consequence decided that it did not fall into the residue; for if it did, the residuary legatee would be entitled to it: that what was declared in the principal case was, that that residue, which was thereinafter given, should include in it the legacies declared to be forfeited; and he thought that there was a valid devise over.[c]

There has been some difference of opinion as to the effect of an alternative bequest substituted in case of a legatee marrying without consent.[d] Where 500*l.* was bequeathed to A., if she married with the consent of certain trustees, and in case she did not then 20*l.* per annum for her life, and she married without the consent; it was urged that this was

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[a] Case cited by M. R. in Reves *v.* Herne, 5 Vin. Ab. 343. So in Cage *v.* Russel, 2 Vent. 352, a direction that the devise should be void and go to the executors was considered not sufficient, and no more than what the law implied. See also Rose *v.* Rose, 17 Ves. 347.

[b] 3 Atk. 368.

[c] Lloyd *v.* Branton, 3 Mer. 108.

[d] See 2 Dick. 722. Godolph. 382.

tantamount or as strong as a devise over, when the party himself saith that if she married without consent she should have but 20*l.* per annum: but the Lord Chancellor held that this differed not from the reason of the common case of a devise in terrorem, and decreed the 500*l.* to the legatee.[a] So in another case before Lord C. Clarendon, Lord C. B. Hale, and Hide, J., where a legacy of 8000*l.* was given to the plaintiff, provided she married with the consent of A., and if not, then to have but 100*l.* per annum: the Court all declared this was but in terrorem.[b] And in a subsequent case where B. gave his two daughters 20,000*l.* apiece, to be paid them at twenty-one or marriage, so as such marriage were had after the age of sixteen and with the consent of certain persons, and if either of them married before sixteen, or without such consent, then that daughter to have only 10,000*l.*; and one of the daughters married under sixteen but with the consent required: she had a decree in Chancery for the 20,000*l.*;[c] and upon appeal to the House of Lords the case of Bellasis *v.* Erwin was cited, and the decree affirmed.[d] This case indeed is involved in some obscurity. The decision in one report seems contrary, but there is a devise over there stated;[e] while in another book it is said the decree was upon the ground of there being no disposition of the money over.[f] According to Nelson and Vernon it appears that the marriage was treated of in the lifetime of the father; and Lord

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[a] Hicks *v.* Pendarvis, 2 Freem. 41.

[b] Bellasis *v.* Erwin, 2 Freem. 171. 1 Ch. Ca. 22.

[c] E. Salisbury *v.* Bennet, 2 Ver. 223. Nels. 170. Skin. 285.

[d] Bennett *v.* Lord Salisbury, 2 Freem. 118.

[e] Lord Salisbury's case, 2 Vent. 365.

[f] See 3 Ch. Ca. 135.

C. J. Willes said the Court went upon this foot, that there was a dispensation by the father as to one part, and a consent of the mother and trustees as to the other.[a] The doctrine of the two prior cases was followed by Sir J. Trevor; for where a man gave his grandaughter 200*l.*, but in case she should marry against the consent of his executors then he gave her but 10*l.*; and she married without the consent of the executors; his Honour decreed her the legacy. Lord K. Cowper, however, reversed that decision, declaring that the 200*l.* was given upon a condition precedent, and decreed the payment of the 10*l.* only:[b] and in a subsequent case before him, when Chancellor, where a man gave his grandaughter an annuity of 10*l.* per annum for life, and afterwards by a codicil declared that if his grandaughter should marry with the good liking of his trustees then she should have 150*l.*, in lieu of the annuity which was to cease; and the grandaughter married without the consent of the trustees; and it was urged on her behalf that the condition was only in terrorem: his Lordship decreed the contrary, saying, here was a provision made either way, and when the provision for the child is in the alternative, and there is a condition precedent to the gift of the portion, and that is not performed, and the child is still provided for, although not with the greater portion, equity in that case does not relieve.[c]

These conditions in restraint of marriage being

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[a] 1 Atk. 377. Willes, 92; and see 3 Ch. Ca. 135.

[b] Creagh *v.* Wilson, 2 Ver. 572.

[c] Gillet *v.* Wray, 1 P. W. 284. The author of a practical work (1 Rop. Leg. 323) thinks it probable that the decision of Lord Cowper will be followed. It seems acknowledged by Lord Thurlow. See 2 Dick. 722.

considered odious in law, the most favourable construction has been put upon them to prevent a forfeiture. Thus, for example, where real estate was devised to a son, with a gift over in case he married any woman not having a competent portion, *or* without the consent of certain trustees; and the son married a woman of competent fortune, but without the required consent; it was held he had performed the condition, and that no forfeiture attached unless he broke both parts of it.[a]

Whether the consent necessary to the marriage has been actually obtained, or not, is generally a question of circumstances. In this respect also the Court has gone a long way. Thus in a case, which Lord Eldon calls extremely strong,[b] where the intended husband made certain proposals to the trustees, whose consent was required, and who had agreed not to consent but under certain terms; and one of them in a letter, written in consequence at the request of the rest, said, if the husband's father would make the settlement proposed, they (the trustees) believed the young folks were too far engaged for them to attempt to break off the match, and therefore they should be obliged to consent to it; and the parties married without the husband having complied with the terms: Lord Hardwicke thought the marriage had been substantially with the consent of the trustees.[c]

When a writing is not required, a consent may under circumstances be implied. As where a legacy was given to M., but on her marriage without the

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[a] Long *v.* Dennis, 4 Burr. 2052. Lord Eldon (19 Ves. 20) seems to intimate a doubt as to this case.

[b] 10 Ves. 241. 19 Ves. 12.

[c] Daley *v.* Desbouverie, 2 Atk. 261.

consent of the executors the legacy was to go to the children of D., who was one of the executors; and M. afterwards went to reside at D.'s house, and was there married to his son, and the other executors admitted they had notice such match was carrying on, but did not contradict, nor disapprove of it: the Court declared it sufficiently appeared that she had married with the consent of all the executors, and that the condition was performed.[a]

Lord Alvanley observed, a consent after marriage had been held sufficient where it was not required to be in writing.[b] In a devise of land this has not been allowed.[c] Yet in a case where a man devised all his real and personal estate to A., in trust, in case his daughter married with the consent *and* approbation, testified in writing, of A., to convey them for her benefit, with a devise over if she married without such consent *or* approbation; and the daughter married without even applying to A., who afterwards approved of the marriage: Lord Hardwicke said, it being the case of an only child, who, by forfeiting the devise, would lose all her provision, the Court would not make such construction unless compelled to it by the circumstances of the case; and his Lordship, distinguishing between consent and approbation, thought he was not compelled to do it in this instance, the condition in the latter clause being in the alternative; and that the subse-

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[a] Mesgrett *v.* Mesgrett, 2 Ver. 580; and see on this case 10 Ves. 243. 19 Ves. 12. 18. See also D'Aguilar *v.* Drinkwater, 2 Ves. & B. 225.

[b] 4 Bro. 328.

[c] Fry *v.* Porter, 1 Ch. Ca. 138. 1 Mod. 300. In the last book it is said to have been held, where a consent in writing was required, that a consent by parol was sufficient. See P. 306. 310.

quent approbation therefore was sufficient.[a] Lord Thurlow however denied this;[b] and in a late case where a man gave his daughter a legacy to be paid her on her day of marriage, provided such marriage were had with the consent and approbation of the executors, whom he directed to invest the legacy and apply the interest for the maintenance and education of his daughter until her marriage with such consent as aforesaid; and the daughter married without the consent of the executors, but they afterwards approved of the marriage: the Vice-Chancellor held, that the consent subsequent to the marriage did not satisfy the words of the will, and that the daughter was therefore entitled to the interest of the legacy for her life, but not to the principal.[c]

Lord C. B. Comyns is reported to have said, that where the major part of the trustees consented, it was sufficient:[d] but Lord Eldon, in a case where this point occurred, considered this passage as spurious, and seemed to dissent from the doctrine, remarking, he had not found any case in which the Court had said, where the consent of trustees was required, that the consent of the major part, without more, was sufficient.[e]

When the condition has become impossible by the death of the parties, whose consent was required, it has been considered an excuse.[f] And where one only of two executors, whose consent was required, died, and the legatee married without the consent of

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[a] Burleton *v.* Humfrey, Amhl. 256.

[b] 19 Ves. 21.

[c] Malcolm *v.* O'Callaghan, 2 Mad. 349.

[d] 1 Atk. 375.

[e] Clarke *v.* Parker, 19 Ves. 1.

[f] Graydon *v.* Hicks, 2 Atk. 16. Aislabie *v.* Rice, 3 Mad. 256; and see Grant *v.* Dyer, 2 Dow. 73.

the other; the Master of the Rolls thought the condition having become impossible by the act of God; the legatee was discharged from it; and dismissed a bill by the person, to whom the legacy was given over, with costs as frivolous.[a] Hence also it was adjudged in a case in which a man gave a legacy to his daughter, upon condition, that *if she would not marry* T. S., then it should be taken from her, and given to him; and the daughter died before she was capable of marriage, or of age to give her consent; that this condition was only in terrorem, and that T. S. should not have the legacy, though it was devised over to him; because the daughter was not in any fault, and therefore ought not to be punished.[b]

Where one of the executors, whose consent has been required, has refused it without just cause,[c] or has declined to interfere,[d] the Court has relieved. And where the condition was that the marriage should be with the consent of trustees, and that the intended husband should, previous to the marriage, settle a certain sum on his wife, which he accordingly offered to do, but owing to the mistake or neglect of the acting trustee the marriage took place without the required settlement being made: it was decreed that this should not prejudice the right of the parties.[e] Lord Hardwicke indeed held, in a case in which the sole executor of a will, whose consent

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[a] Peyton *v.* Bury, 2 P. W. 626. The reader will not perhaps wonder to find it remarked, that this case went a great way; see 1 Bro. 529.

[b] Swinb. P. 4. S. 12, citing Godbolt, 51; and see Thomas *v.* Howel, 4 Mod. 67. 1 Salk. 170.

[c] 2 P. W. 628; and see Ashby *v.* Baillie, Belt's Sup. to Ves. 362. Eastland *v.* Reynolds, 1 Dick. 317. Wainwright *v.* Waterman, 1 Ves. J. 311.

[d] Goldsmid *v.* Goldsmid, 19 Ves. 368. Coop. 225.

[e] O'Callaghan *v.* Cooper, 5 Ves. 117.

was required to a marriage, renounced, that a marriage without his consent was a forfeiture; it being a power not annexed to the office of executor, but independent from the rest of his duty as such.[a] Yet in a later case, where a marriage was to be with the consent of the trustees (who were also executors) or the survivor of them, the Vice-Chancellor held, that the authority to consent was annexed to the office of trustee; and, like other authorities annexed to that office, vested in the single trustee who acted.[b]

A general consent given to the legatee to marry whom she likes has been held sufficient, without a consent having been given to the particular marriage.[c] A trustee, who once gives his consent, can not from any personal motives retract it.[d] The cases, says Lord Eldon, have gone this length; that, if consent is once given, it shall not be withdrawn by adding terms, that do not go to the propriety of giving the consent.[e] Yet there may be instances in which it would be a duty to retract it. Thus where the trustees consented, in consequence of the offer of the intended husband to settle a certain provision on the wife, which he afterwards refused to do, and the trustees thereupon gave him notice that they thought it would be inconsistent with their duty to give their consent without a settlement being made; and the marriage took place under these circumstances: the legacy was held to be forfeited.[f]

If the legatee marries in the lifetime and with the

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[a] Graydon *v.* Hicks, 2 Atk. 16.

[b] Worthington *v.* Evans, 1 Sim. & St. 165; and see 19 Ves. 16.

[c] Pollock *v.* Croft, 1 Mer. 181. Mercer *v.* Hall, 4 Bro. 326.

[d] Lord Strange *v.* Smith, Ambl. 263. Merry *v.* Ryves, 1 Ed. 1; and see Campbell *v.* Lord Netterville, cited 2 Ves. 534.

[e] 10 Ves. 242.

[f] Dashwood *v.* Lord Bulkeley, 10 Ves. 230; and see 19 Ves. 13.

consent of the testator, it dispenses with the condition;[a] and in such case his approbation given subsequently to the marriage is sufficient.[b] Mr. J. Buller observed, the intention of these conditions was to prevent children from making inconsiderate engagements; they did not therefore extend to the case of a widow, or to a second marriage; that being complied with by the first marriage, the legacy was vested, and the condition gone.[c] So where the legatee married in the lifetime of the testator, her father, who approved of the marriage; and having become a widow, married, after his death, without the required consent: it was held that having once married she was not intended to be subject to the condition.[d]

In a bequest to be paid when the legatee attains twenty-one, or is married with consent, with a gift over on marrying without consent, the condition is restrained to a marriage under twenty-one; on the legatee's attaining that age the legacy vests, and a marriage without consent after that time is of no consequence.[e] So where N. bequeathed to his daughters 1500*l.* each, to be paid them respectively at the time of their several marriages with the consent of his executors, and if any of them should marry without such consent then only 500*l.*, and gave the 1000*l.* to the rest on their respective mar-

[a] Clarke *v.* Berkeley, 2 Ver. 720. 8 Vin. Ab. 154. 5 id. 88. Parnell *v.* Lyon, 1 Ves. & B. 479.

[b] Wheeler *v.* Warner, 1 Sim. & St. 304. Coffin *v.* Cooper, cited 1 Ves. & B. 482; and see id. 484.

[c] Hutcheson *v.* Hammond, 3 Bro. 128. So in a deed Fenwick *v.* Woodroffe, 2 Ch. Rep. 363.

[d] Crommelin *v.* Crommelin, 3 Ves. 227.

[e] King *v.* Withers, Gilb. Eq. R. 26. Pr. Ch. 348. 1 Eq. Ab. 112. Desbody *v.* Boyville, 2 P.W. 547. Pullen *v.* Ready, 2 Atk. 587; and see 3 Mer. 116. Hanson *v.* Graham, 6 Ves. 239.

riages with such consent; and appointed his executors *guardians* of his daughters during their minority, with a clause for *maintenance and education till the portions became payable:* Lord C. Camden thought the condition of marriage with consent must mean at an earlier time than twenty-one.[a] In the same way where a man bequeathed legacies to his two daughters, to be paid within six months after his decease, and willed that if either of his daughters died under twenty-one her portion should go to the survivor; and one of the daughters received her legacy and died after the six months, but under age: this was held to have vested in her at the end of six months, and that the contingency must be confined to her dying under twenty-one within the period appointed for payment.[b]

Or if a legacy is given to a woman to be paid at twenty-one, or marriage with consent, with a gift over in case of death before twenty-one or marriage, and the legatee marries under twenty-one without consent; although she can not then claim the legacy, she will be entitled to it if she afterwards attains the age of twenty-one.[c]

There was a variety of distinctions in the civil law as to the time within which conditions must have been performed. Some were to take place before the making of the will; some only after the testator's death; while others might be performed at any time, as in the case of a legacy upon condition to release

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[a] Knapp *v.* Noyes, Ambl. 662.

[b] Clent *v.* Bridges, Rep. T. Finch, 26.

[c] Knight *v.* Cameron, 14 Ves. 389 Jones *v.* E. Suffolk, 1 Bro. 528. N. 3. Belt's ed.; and see Austen *v.* Halsey, 13 Ves. 125.

a certain debt; because this was a condition that could not be iterated.[a]

A condition to marry a particular person, however, was understood of a first marriage only; for if a legacy was given to A., if he married the testator's daughter, and A. married some other woman who died, and he then married the testator's daughter, this did not entitle him to the legacy.[b] But this, as to real estates at least, does not seem to have been adopted in equity. For where a testator gave certain legacies, and if either of the legatees married into the families of G. or R., and had a son, he gave all his estate to him; but if they should not marry, then the testator gave all his estate to the plaintiff; and the legatees married, but not into the families of G. or R.: Lord Thurlow dismissed the bill, as the legatees had their whole lives to perform the condition; and by being once married, they had not lost all chance of marrying into the families of G. or R.[c]

If a legacy is given upon a condition to be performed within a certain number of months, these are to be reckoned calendar months, that being the rule in the ecclesiastical court,[d] and the day of the testator's death is not to be included.[e]

It has long been a rule in equity to relieve against the breach or non-performance of conditions, whether precedent or subsequent, that are said to lie in compensation; for if the Court can put the parties in the

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[a] Swinb. P. 4. S. 14.

[b] Ibid. P. 4. S. 12.

[c] Randal *v.* Payne, 1 Bro. 55; and see Page *v.* Hayward, 2 Salk. 570.

[d] Franco *v.* Alvares, 3 Atk. 342; and see 2 Ver. 222.

[e] Lester *v.* Garland, 15 Ves. 248.

same situation, as if the condition had been performed, it will never suffer a forfeiture to attach.[a] Hence if an estate be devised upon condition to pay a sum of money within a certain time, which elapses, the Court will relieve upon payment of the legacy and interest, notwithstanding there is a devise over.[b]

The executor is not bound, unless required by the will, to give notice to a legatee of a condition; he must of himself take notice of it.[c] In a devise or grant of real estate to the heir upon condition, he must have notice of the condition, as he has a title by descent.[d] And where a man devised his real and personal estate in trust, if his daughter (who was his heir) should marry with the consent of the trustee, to be conveyed to her use, but if she married without such consent then over; and the daughter married without consent: Lord Hardwicke held she had not forfeited the real estate for want of notice, and seemed to doubt even as to the personalty, upon the ground, that the testator intended them both to go together, and that if the whole was not forfeited, no part should.[e]

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[a] 1 Ver. 223. 2 id. 222. Com. 745. 1 Bro. 168. Cage *v.* Russel, 2 Vent. 352; and see 1 Mad. Ch. 42, 2d ed.

[b] 1 Ver. 83. Wheeler *v.* Whithall, 2 Freem. 9. Rep. T. Finch, 403. Barnardiston *v.* Fane, 2 Ver. 366. Grimston *v.* Bruce, id. 594. 1 Salk. 156. Woodman *v.* Blake, 2 Ver. 222, which however it seems was reversed. Dom. Proc. See Mr. Raithby's note.

[c] Chauncy *v.* Graydon, 2 Atk. 616.

[d] Fraunces's case, 8 Rep. 177. Malloon *v.* Fitzgerald, 3 Mod. 29. Skin. 125. 179. Doe *v.* Beauclerk, 11 East, 657.

[e] Burleton *v.* Humfrey, Ambl. 256.

## SECTION II.

### *Of implied Conditions.*

I. A TESTATOR is never to be supposed to mean to give to any but those who shall survive him;[a] and every legacy, therefore, with the exceptions after mentioned, may be considered to be conditional or contingent upon the event of the legatee surviving the testator. If the legatee die in his lifetime, the legacy is said to lapse, and merges into his estate.[b] Hence where the trusts of a term were declared to be for raising a sum of money for such persons as A. should by deed, or will appoint; and A. appointed it to her nephew, who died in her lifetime: Lord Hardwicke held, that having executed her power by will, it must be construed to all intents like a will, and that by the appointee's death the appointment lapsed and determined, and his representative had no claim.[c] And as in a devise of land to A. and his heirs, if A. die in the lifetime of the devisor, the devise is void, and the heir can not take,[d] so is it also in the case of a personal bequest to A. and his heirs,[e] or to A. or his executors, administrators, or assigns:[f] for these words are void, being but surplusage, and

[a] 4 Ves. 435.

[b] Com. Dig. Chan. 3 Y. 13. Touch. 454. Wilson *v.* North, Mos. 185.

[c] Oke *v.* Heath, 1 Ves. 135. D. Marlborough *v.* L. Godolphin, 2 Ves. 61. E. Salisbury *v.* Lambe, 1 Ed. 465. Ambl. 383; and see Vanderzee *v.* Acklom, 4 Ves. 771. Brookman *v.* Hales, 2 Ves. & B. 45. As to Burnet *v.* Helgrave, 1 Eq. Ab. 297, contra, see Lord Hardwicke's observations in the two first cited cases.

[d] Brett *v.* Rigden, Plow. 340; and see Com. Dig. Dev. K. Bac. Ab. Dev. L.

[e] Miller *v.* Faure, 1 Ves. 85. Smith *v.* Pybus, 9 Ves. 566.

[f] Elliot *v.* Davenport, 1 P. W. 83. Maybank *v.* Brooks, 1 Bro. 84. 2 Dick. 577. Stone *v.* Evans, 2 Atk. 86. Hutcheson *v.* Hammond, 3 Bro. 128.

expressio eorum quæ tacitè insunt: for the executors, &c. are by supposition of law named only to take in succession, and by way of representation, as an heir represents the ancestor in case of an inheritance. So where legacies were given to several persons to be paid by the trustees at the end of one whole year next after the testator's decease, or to their several and respective heirs: a legacy was held to have lapsed by the death of one of the legatees in the testator's lifetime; although it seems to have been thought, that if the direction had been that the legacies should at the testator's death be paid to the legatees, or their heirs, it might have been otherwise.[a] So also where the directions of a will were, that in case of the death of any of the legatees before their legacies should become payable, the legacy of each of them dying should go to and be paid amongst his, her, or their children; and if no children, to his or her executors or administrators: the share of one who died without children in the lifetime of the testatrix was held to have lapsed.[b] Nor is evidence admissible to show that the testator knew of the death of the legatee at the time of making his will.[c]

The same rule in general takes place when the legacy operates by way of release of a debt. There has however been some contrariety of opinion upon this point. Where a woman gave and bequeathed to W. E. his executors, &c. the sum of 400*l.*, which he owed her, and desired her executors not by any means to claim or meddle with the said 400*l.*, but to

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[a] Tidwell *v.* Ariel, 3 Mad. 403; and see Corbyn *v.* French, 4 Ves. 418.

[b] Bone *v.* Cooke, 13 Pri. 332. 1 M'Clel. 168.

[c] Maybank *v.* Brooks, 1 Bro. 84. 2 Dick. 577.

deliver up the security into the hands of W. E. his executors, &c. and execute such releases and discharges as he should think fit; and W. E. died in the lifetime of the testatrix: Lord K. Cowper held it to be a lapsed legacy; while the Master of the Rolls was of a contrary opinion, and Lord Cowper himself admitted it to be a doubtful case.[a] Again where a testatrix by will forgave her son-in-law R. C. a debt of 500*l.* due to her on bond, and desired her executor to deliver up the bond to be cancelled; and R. C. died in her lifetime, and his wife, (the daughter of the testatrix,) claimed the benefit of the legacy: Lord Hardwicke thought it hard to say, that because the son-in-law died in the testatrix's lifetime the daughter, who was so nearly related in blood, should lose all benefit; and decreed the bond to be delivered up to her.[b] But his Lordship thought this also a doubtful case; and in a subsequent one in the Exchequer, where there was the following clause in a will, "I give to my kinsman N. D. the sum of 400*l.*, which he owes me on mortgage of his estate in S., and I further order my executor to give *him* up all bonds owing from him to me, and which shall be found in my custody at the time of my decease, together with all interest due thereon;" and N. D. died in the lifetime of the testator: the Lord Chief Baron, in delivering the judgment of the Court, observed, that the main ground of the decision in Sibthorp *v.* Moxom was, that there was nothing in the will to confine the delivery of the bond to the person of the son-in-law, and therefore it was not ancillary

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[a] Elliott *v.* Davenport, 1 P.W. 83. 2 Ver. 521.

[b] Sibthorp *v.* Moxom, 3 Atk. 580. 1 Wils. 178. 1 Ves. 49.

to the former bequest to him, but it amounted to a declaration that in all events the bond should be delivered up, and therefore of necessity operated for the benefit of the representative: that in the principal case the word was "give," not "forgive,"[a] and the direction for the delivery up of the bond was to N. D. personally, and there was no direction at all for the delivering up of the mortgage, so that the gift of the mortgage depended entirely on the first member of the devise; and he accordingly held it to be a lapsed legacy.[b] So in a later case where a testator gave 2000*l.* to his brother, and added, "I also return him his bond for 400*l.*, with interest due thereon, which he owes me;" and the brother died in the testator's lifetime: Lord Loughborough thought it was distinctly a legacy to the brother, and there was no foundation for his executor, who was also a co-obligor, to have the bond delivered up.[c]

A legacy, it is said, will lapse in spite of the declared intention of the testator. For if a man devises a real estate to J. S. and his heirs, and signifies his intention, that if J. S. die before him, it shall not lapse; yet unless he nominates another to take, the heir at law is not excluded: so in the devise of a personal legacy to A., the mere declaration of intention that it shall not lapse in case A. die before the

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[a] In Vesey's report of Sibthorp *v.* Moxom (ante 165) the words are "*I give,*" not, "*I forgive;*" and Lord Hardwicke thought that had it been said in Elliott *v.* Davenport (ante 165), *I forgive* my son such a debt, and the bond had been ordered to be delivered up by the executor to be cancelled, it had been held a discharge. Yet Lord C. B. Thomson said, he had always been at a loss to understand the distinction between *giving* and *forgiving* a debt. 2 Pri. 43.

[b] Toplis *v.* Baker, 2 Cox, 118. 1 Cox's P. W. 86. N. 2. Izon *v.* Butler, 2 Pri. 34.

[c] Maitland *v.* Adair, 3 Ves. 231.

testator is not sufficient to exclude the residuary legatee or next of kin.[a]

But although neither the intention of the testator, nor the circumstance of the gift being made to the legatee, his executors, &c. is of itself sufficient to prevent a lapse, yet if both these concur it is different. Thus where a testatrix declared, that if any of her legatees died before their legacies were payable they should not be deemed lapsed legacies; and then, among others, gave to A. *and to her executors or administrators* 50*l.*; and A. died in the lifetime of the testatrix: Lord Hardwicke decreed the legacy to her administrator.[b]

And the general rule that a legacy fails by the death of the legatee in the lifetime of the testator is subject to some limitations. If the legatee be merely a trustee for another, his death will not affect the interest of the cestui que trust.[c] Hence it seems now settled, for it was at first held otherwise,[d] that if an estate be devised or a legacy given to A. upon condition to pay an annuity or sum of money to B.;[e] or if the words only amount to a constructive trust, as where a man bequeaths 100*l.* to A. and desires him to give it, or any particular part of it, to B.;[f] the bequest to B. does not lapse by the death of A.

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[a] 3 Atk. 573. 3 Bro. 225. 2 Cox, 121. Mr. Belt in his edition of Brown, vol. i. 84. N., thinks it questionable whether the Court would now decide according to these dicta.

[b] Sibley *v.* Cook, 3 Atk. 572; and see 2 Cox, 121. Lampley *v.* Blower, ante 108. Bridge *v.* Abbot, 3 Bro. 224. Vaux *v.* Henderson, 1 Jac & W. 388. Rose *v.* Rose, 17 Ves. 347.

[c] Van *v.* Clark, 1 Atk. 510. Lord Inchiquin *v.* French, 1 Cox, 1; and see Att. Gen. *v.* Hickman, 2 Eq. Ab. 193. Moggridge *v.* Thackwell, ante 91. Brown *v.* Higgs, ante 7.

[d] See Birkhead *v.* Coward, 2 Ver. 115. 2 Freem. 107.

[e] Elliott *v.* Davenport, 2 Ver. 521; 1 P. W. 83. Wigg *v.* Wigg, 1 Atk. 382. Oke *v.* Heath, 1 Ves. 135; and see Hills *v.* Wirley, 2 Atk. 605.

[f] Eales *v.* England, Pr. Ch. 200. 2 Ver. 466. Mason *v.* Limbury, cited Ambl. 4.

Again in a devise to A. for life, remainder to B., if A. dies in the testator's lifetime, B. takes immediately on the testator's death.[a] So where there was a bequest of the residue in trust for the testator's sisters equally, &c. for their lives, and in case any of them should die leaving issue, the share to which she was entitled at or before the time of her decease to go to her children; and one of the sisters died in the lifetime of the testator: Lord Thurlow thought her children were entitled to this as an executory devise.[b] But where an estate was devised to a wife for life, and after her decease to be sold, and the money divided among the testator's nephews and nieces, the children of such as should be then dead standing in the place of their father and mother deceased: it was held that the children of nephews and nieces who died before the testator were not entitled to any share.[c] And in another case in which J. F. bequeathed 800*l.* to each and every of the child and children of his brother and sisters A. B. C. and D, which should be living at the time of his decease; but if any child of his said brother and sisters should happen to die in his (the testator's) lifetime and leave issue, then he gave the legacies intended for the child so dying to the issue, such issue taking only the legacy which the parent would have been entitled to if living at the testator's death; and the children of one of the sisters had died before the making of the will, leaving issue: it was held that such issue could not claim; for nothing was given to

[a] 2 P.W. 331. Chatteris *v.* Young, 6 Mad. 30. Vachel *v.* Vachel, 1 Ch. Ca. 129; and see Allen *v.* Callow, 3 Ves. 289.

[b] Rheeder *v.* Ower, 3 Bro. 240. Bretton *v.* Lethulier, 2 Ver. 653.

[c] Thornhill *v.* Thornhill, 4 Mad. 377.

the issue, except in the way of substitution; and of the parents, the original legatees, none could have taken besides those who were living at the date of the will.[a]

It seems also settled notwithstanding some former doubts[b] that where a person gives a legacy at a future time, and bequeaths it over to another on the death of the legatee before the time of payment, as in the case of a gift to A. at twenty-one, and if he die before that age to B.; the legacy will not laspe by the death of A. under twenty-one in the lifetime of the testator, but will vest in B. as a new substantive and original devise to him.[c] But if A. should attain twenty-one, and afterwards die in the testator's lifetime, the legacy will lapse.[d]

When the legatees are joint-tenants the share of any one dying before the testator will survive to the rest, and not lapse into the general estate for the benefit of the residuary legatee, as would be the case if they were tenants in common.[e] And it may per-

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[a] Christopherson *v.* Naylor, 1 Mer. 320. Judd *v.* Arnold, Rep. T. Finch. 182.

[b] See 1 Ves. & B. 388. Rider *v.* Wager, 2 P.W. 328.

[c] Com. Dig. Chan. 3 Y. 14. Prigg *v.* Clay, 2 Ch. Rep. 187. Ledsome *v.* Hickman, 2 Ver. 611. Northey *v.* Strange, 1 P. W. 340. Pr. Ch. 470. Gilb. Eq. R. 136. Willing *v.* Baine, 3 P. W. 113. Scolding *v.* Green, 1 Eq. Ab. 298. Pr. Ch. 37. Hornsby *v.* Hornsby, Mos. 319. Walker *v.* Main, 1 Jac. & W. 1. So in Bone *v.* Cooke, ante 164, the Lord C. Baron thought, that if there had been children of the deceased legatee living at the time of the death of the testatrix, they would have taken. It is remarkable that Miller *v.* Warren, and Darrel *v.* Molesworth, 2 Ver. 207. 378, although recognized in subsequent cases, seem not to have been correctly reported: see Mr. Raithby's notes to his valuable edition of Vernon.

[d] Doo *v.* Brabant, Calthorpe *v.* Gough, ante 135. Humberstone *v.* Stanton, 1 Ves. & B. 385.

[e] 2 P.W. 331. 489. 1 Ves. 71. 72. Scolding *v.* Green, 1 Eq. Ab. 298. Pr. Ch. 37. Buffar *v.* Bradford, 2 Atk. 220. Morley *v.* Bird, 3 Ves. 629. So if the testator revokes the gift to one, or one is incapable of taking. Humphrey *v.* Tayleur, Ambl. 136. 1 Dick, 161. So also in real estate; see Com. Dig. Dev. K.

haps be said that a lapse will take place, when the gift is made generally to a class of persons as tenants in common. For although in a bequest to the children of the testator's late sister, to be equally divided among them, it was held that the share of one of the children who died after the making of the will, in the lifetime of the testator, went among the rest; on the ground that the fund was divisible, according to the rule before noticed,[a] among the children living at the time of its distribution.[b] Yet in a subsequent case, in which however Viner *v.* Francis was not cited, where there was a bequest to the children of the testator's late cousins A. and B. equally, &c.; and A. and B. had at the date of the will one child each, and the child of A. died in the testator's lifetime: it was held that a moiety of the fund lapsed, and went to the personal representative of the testator.[c] So where the will consisted of a letter addressed by the testator to his mother and sisters, in which he said, "should any thing remain after paying my debts, I could wish it to be divided amongst you;" and his mother and one of his sisters died before him: Sir W. Grant considered that the testator meant by the word "*you*," all those to whom the letter was addressed, viz. the mother and then living sisters; adding, that it was therefore a tenancy in common, and the shares of those who died in his lifetime were lapsed.[d]

We may here add a case in which a man be-

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[a] Ante 124.

[b] Viner *v.* Francis, 2 Cox, 190. 2 Bro. 658. See also Bird *v.* Lockey, 2 Ver. 744. Freemantle *v.* Freemantle, 1 Cox, 248. Thornhill *v.* Thornhill, ante 168.

[c] Martin *v.* Wilson, 3 Bro. 324. Belt's ed.; and see Sperling *v.* Toll, 1 Ves. 71.

[d] Ackerman *v.* Burrows, 3 Ves. & B. 54.

queathed to his son Joseph 1500*l.*, and 1000*l.* to each of his two daughters, and directed that if any of them should die before twenty-one, their portion or share should go to the survivors; and the son and one of the daughters died, and the testator afterwards had another son, whom he called Joseph, and then made a codicil by which he confirmed his will, and thereby also, taking notice that since the last it had pleased God to give him another son, gave a legacy of 500*l.* apiece to his son Joseph and his surviving daughter over and above what he had given them by his will; and it was contended that the 1500*l.* became a lapsed legacy: the Lord Chancellor said, it was improper to call this a lapsed legacy; that the making of the codicil was a republication of the will, and amounted to a substituting the second Joseph in the place of the first; as if the testator had made his will anew, and had written it over again, by which new will the second Joseph must take.[a]

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II. It is not always sufficient that a legatee survives the testator: for if the bequest is made payable at a future period, the question arises, whether it is contingent, and depending upon the event of his being in existence at that time; or whether, in case of his previous death, the right to it is so vested in him, as to be transmissible to his representatives.

The general rule in the civil law, as well as ours, is, that where a legacy is given to a person at a future uncertain time, that may or may not arrive, the

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[a] Perkins *v.* Micklethwaite, 1 P.W. 274.

legatee must be in existence at that time. Thus in a bequest to A. "*at his age of twenty-one*," or "*if*," or "*when*," he attains twenty-one, the law considers the attainment of that age as a condition annexed to the legacy, and the legatee entitled only upon the fulfilment of the condition. If A. therefore dies under twenty-one the legacy fails, and will not go to his representatives.[a] Thus where a man devised lands to his eldest son he paying legacies to the testator's other children at their respective ages of twenty-one; and one of the children, a daughter, married and had children, and died two months before her age of twenty-one; it was held that her husband as her administrator had no claim to the legacy.[b]

In the civil law, however, there existed a distinction between a legacy given to a person at the age of twenty-one, and a legacy "*payable*" or "*to be paid*" at that age. In the latter case the time was said not to be annexed to the substance of the legacy, but merely to the payment. The gift was considered as debitum in præsenti solvendum in futuro; and the legatee was held to have such an interest vested in him as was transmissible to his representatives, if he died before the time of payment.[c] This distinction has been continually disapproved of in our courts, and even characterized as idle, absurd, and a distinc-

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[a] Swinb. P. 4. S. 17. Godolph. 383. 453. Touch. 454. 2 Vent. 342. Pr. Ch. 318. 1 Bro. 123. Taylor *v.* Wood, Nels. 193. Cruse *v.* Barley, 3 P. W. 20. Hanson *v.* Graham, 6 Ves. 239; and see Phipps *v.* Lord Mulgrave, 3 Ves. 613. Ford *v.* Rawlins, 1 Sim. & St. 328. As to May *v.* Wood, 3 Bro. 471; and Love *v.* L'Estrange, 3 Bro. P. C. 337, see Sir W. Grant's observations in Hanson *v.* Graham. Grice *v.* Goodwin, Pr. Ch. 260, seems also contra.

[b] Carter *v.* Bletsoe, Pr. Ch. 267. 2 Ver. 617. Gilb. Eq. R. 11.

[c] Swinb. P. 4. S. 17. Godolph. 383. Pr. Ch. 318.

tion without a difference:[a] yet as the ecclesiastical court has a concurrent jurisdiction with equity in matters of this nature, it was adopted in an early case,[b] and has ever since been an established rule.[c]

But to make a legacy a vested interest in these cases the words "to be paid" must merely refer to the time of payment. Where therefore a legacy was given to A. at the age of twenty-one *to be paid by the executors in England:* this was considered only as a designation of the person by whom the legacy was to be paid; and A. having died under twenty-one, the bequest lapsed.[d] So if the direction of the payment is the substance of the legacy, it will be conditional.[e] Thus where the residue was willed to be equally paid and divided to and between A. & B. at such time as they should severally attain their respective ages of twenty-one, or sooner if the testatrix's daughter should think fit: Lord Hardwicke thought if it had not been for the latter words the legacies would not have vested till twenty-one: for there being no bequest but what was contained in the direction of payment, it was the same thing as if the testatrix had said, I give it them at the age of twenty-one.[f]

The above distinction having been adopted only for the sake of making the decisions of the temporal

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[a] See 2 Freem. 244. 2 Ver. 417. 1 Eq. Ab. 295. margin. 2 P.W. 612. 3 Ves. 543.

[b] Clobberie's case, 2 Vent. 342. 2 Freem. 24. 2 Ch. Ca. 155. 2 Eq. Ab. 539. Skin. 147. Rowley *v.* Lancaster, 2 Ch. Rep. 25.

[c] Bro. Ab. Dev. 27. 45. Bac. Ab. Leg. E. 2. Touch. 454. Com. 722. Gilb. Eq. R. 76. 1 Burr 227. Willes, 90. Prec. Ch. 317. 3 P.W. 21. 138. 1 Atk. 377. 501. 3 id. 114. 427. 1 Bro. 123. 3 Ves. 543. 6 Ves. 245. 13 Ves. 113. Harrison *v.* Buckle, 1 Stra. 238. Bolger *v.* Mackell, 5 Ves. 509.

[d] Onslow *v.* South, 1 Eq. Ab. 295.

[e] Van *v.* Clark, 1 Atk. 510; and see Batsford *v.* Kebbell, post 181.

[f] Steadman *v.* Palling, 3 Atk. 423.

courts consistent with those of the ecclesiastical, it has been held not to apply to legacies payable out of real estate; for in these the latter courts have no jurisdiction. If, therefore, a legacy be given to A. to be paid at twenty-one, and the testator has not said that it shall vest immediately,[a] it will sink into the estate in the event of A.'s death under twenty-one:[b] provided it becomes necessary for the payment of it to resort to the real assets; for as the personal estate, if the land is merely charged, is primarily liable for the payment of a legacy, so much of it as the personal estate will extend to pay will go to the representatives of A.;[c] although where it is payable out of a mixed fund of real and personal estate there appears to be some doubt.[d]

If the time is certain and such as must eventually arrive, as in the case of a legacy to be paid on a particular day in a particular year, or within three years after the testator's death, it is clearly, as to a mere personal bequest, a vested interest:[e] and it is the same perhaps (for there seems some authority to the contrary[f]) when the legacy is payable out of land.[g]

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[a] See Watkins *v.* Cheek, 2 Sim. & St. 199.

[b] Smith *v.* Smith, 2 Ver. 92. Yate *v.* Fettiplace, Pr. Ch. 140. 2 Freem. 243. 2 Ver. 416. Jennings *v.* Looks, 2 P.W. 276. Prowse *v.* Abingdon, 1 Atk. 482. Gawler *v.* Standerwick, 2 Cox, 15. Harrison *v.* Naylor, id. 247. 3 Bro. 108. Pearce *v.* Loman, 3 Ves. 135; and see Pr. Ch. 318. 3 P.W. 138. 1 Atk. 377. 3 id. 115. 1 Bro. 123. As to Jackson *v.* Farrand, 2 Ver. 424, which seems contra; see Mr. Raithby's note to the case, and 1 Atk. 486. 556.

[c] Jennings *v.* Looks, 2 P.W. 276. Harrison *v.* Buckle, 1 Stra. 238; and see Harvey *v.* Harvey, 2 P.W. 21. D. Chandos *v.* Talbot, id. 612.

[d] See 1 Atk. 512. 3 id. 69. Basset *v.* Basset, id. 207.

[e] Anon. 2 Roll. Rep. 134. Sheldon *v.* Sheldon, 9 Mod. 211. Jackson *v.* Jackson, 1 Ves. 217; and see 1 Bro. 300.

[f] See Brewen *v.* Brewen, 2 Freem. 254. 2 Ver. 439. Pr. Ch. 195.

[g] Innocent *v.* Tayler, Rep. T. Finch. 112. Whaley *v.* Cox, 2 Eq. Ab. 549. Wilson *v.* Spencer, 3 P.W. 172.

A bequest indeed "*at the end of ten years after my decease*" was held to have failed by the death of the legatee within the ten years, upon the general rule that the time was annexed to the legacy itself, and not to the payment.[a] But this case has been doubted;[b] and where there was a devise upon trust within six years after the testator's death to raise and pay portions for daughters; this was held a vested interest, which went to the administrator of one of them, who died within the six years.[c]

The general rule requiring a legatee to be in existence at the time when his legacy becomes payable, is subject also to a variety of other exceptions. If there is a bequest to one for life, and at or after his decease to another; the interest of the first and second legatees vest at the same time; so that the representatives of the latter, if he die in the life of the prior taker, will be entitled.[d] Hence in a bequest to A. for life, and after her decease to her son and daughter equally between them; but if either should die before their mother, the whole to the survivor; and the son survived the daughter, but died himself in the lifetime of his mother: it was held that this legacy vested in him on the death of his sister, and went to his representatives on the death of the mother.[e] Nor is it any objection to this doctrine that the gift itself depends upon a contingency; for

[a] Smell *v.* Dee, 2 Salk. 415; and see Nicholls *v.* Judson, 2 Atk. 300.

[b] For. 124.

[c] Cowper *v.* Scott, 3 P.W. 119.

[d] Corbett *v.* Palmer, 2 Eq. Ab. 548. Medlicot *v.* Bowes, 1 Ves. 207. Exel *v.* Wallace, 2 id. 118. Hatch *v.* Mills, 1 Ed. 342. Monkhouse *v.* Holme, 1 Bro. 298. Att. Gen. *v.* Crispin, id. 386. Benyon *v.* Maddison, 2 Bro. 75. Molesworth *v.* Molesworth, 3 Bro. 5. 4 Bro. 408. Blamire *v.* Geldart, 16 Ves. 314. Walker *v.* Shore, 15 Ves. 122. Norris *v.* Huthwaite, 1 Bro. 182. N. contra, has always been reprobated.

[e] Scurfield *v.* Howes, 3 Bro. 90.

a contingent interest may vest in right, though it does not in possession. Thus in a case, which Lord Loughborough said he took to be good law, where 100*l.* was devised to J. S. at twenty-one, and *if he died under age*, then to J. N. and A. B., or the survivor of them; and J. N. and A. B. both died in the lifetime of J. S. who afterwards died under age; the administrator of J. N., who survived A. B. sued, and obtained a decree for the 100*l.*[a] So where a legacy was given to L. for life, and in case he did not marry, and leave children, to revert to W.'s children; and he died unmarried: it was held that the representative of one of the children of W., that died in the lifetime of L., was entitled to a share.[b]

The doctrine also above noticed was originally determined upon portions for reasons personal to the children, who were not supposed to want the portions if they did not live till the time at which they were made payable.[c] Hence even with respect to legacies charged upon real estate, it has been held not to apply where the postponement of the gift arises from circumstances of conveniency with regard to the estate, and not to the person of the legatee; as in the case of an estate devised to one for life, or in

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[a] Anon. 2 Vent. 347. Pinbury *v.* Elkin, 1 P.W. 563. 2 Ver. 758. 766. Pr. Ch 483. Atkinson *v.* Paice, 1 Bro. 91. Barnes *v.* Allen, id. 181. 3 Ves. 208. N. Devisme *v.* Mello, 1 Bro. 537. Stanley *v.* Wise, 1 Cox, 432. Perry *v.* Woods, 3 Ves. 204. Brown *v.* Bigg, 7 Ves. 279. Lady Lincoln *v.* Pelham, 10 Ves. 166; and see Harman *v.* Dickenson, and Wilmot *v.* Wilmot, post 185 See also a case which seems contra, Fenhoulet *v.* Passavant, 1 Ed. 344. N. to which however there is a query.

[b] Devisme *v.* Mello, 1 Bro. 537; and see Taylor *v.* Langford, 3 Ves. 119. Middleton *v.* Messenger, 5 Ves. 136. Smith *v.* Streatfield, 1 Mer. 358.

[c] See 3 Atk. 321. For. 122. Ambl. 169. 1 Bro. 123. Pawlett *v.* Pawlett, the first case, and which was by settlement, is in 1 Ver. 204. 321. 2 Vent. 366. 2 Ch. Rep. 286.

tail, with remainder over to another charged with legacies; here if the legatee dies in the lifetime of the tenant for life, or in tail, his legacy is considered as vested, so as to entitle his representatives.[a] Thus where H. P. devised his estate to his wife for life, remainder to his daughter M. in fee, chargeable with 400*l.* to his four younger daughters within one year after the death of his wife; and two of the younger daughters died in the lifetime of the mother, and M. also died before her, so that she was never possessed of the remainder in fee, but it descended to her son: it was held that the legacies to the younger daughters were vested interests, and transmissible to the representatives of those who had died.[b] In a leading case on this subject, C.W. bequeathed to his daughter M. at her age of twenty-one, or marriage, 2500*l.*, and willed that if his son C. should die without issue male, that his daughter should have and receive at her age of twenty-one, or marriage, the further sum of 3500*l.*; but in case the contingency of his son's dying might not happen before the said age or marriage of his daughter, that then she should receive and be paid the sum of 3500*l.* whenever it might after happen; and devised his real estate to his son in tail with remainder to his brother in fee, and

[a] Stickland *v.* Garnet, 2 Ch. Rep. 97. Hutchins *v.* Foy, Com. 716. Hodgson *v.* Rawson, 1 Ves. 44. Embrey *v.* Martin, Ambl. 230. Manning *v.* Herbert, id. 575. Thompson *v.* Dow, 1 Bro. 193. N. Jeal *v.* Tichener, Ambl. 703. 1 Bro. 120. N. 2 Dick. 444. Clarke *v.* Ross, 1 Bro. 120. N. 2 Dick 529. Pawsey *v.* Edgar, 1 Bro. 191. N. 2 Dick. 531. Godwin *v.* Munday, 1 Bro. 191. 2 Dick. 551. Dawson *v.* Killet, 1 Bro. 119. Bayley *v.* Bishop, 9 Ves. 6. Walker *v.* Main, 1 Jac. & W. 1. There are some cases however that seem to be contra. See Hall *v.* Terry, 8 Vin. Ab. 383, said to be misstated in 1 Atk. 502. Loder *v.* Loder, Mos. 356. Att. Gen. *v.* Milner, 3 Atk, 112. May *v.* Andrews, 1 Bro. 122. N.

[b] Morgan *v.* Gardiner, 1 Bro. 193. N.

charged the premises with the payment of the 3500*l.* whenever it should become due and payable. The daughter married, attained twenty-one, and died in the lifetime of her brother, who afterwards died without issue male. Lord Talbot decreed the 3500*l.* to be raised;[a] and his decree was affirmed in the House of Lords.[b] So again where a man devised lands to his sister in fee, paying 100*l.* per annum to his wife for her life, and also several legacies to his nephews and cousins within twelve months after the death of his wife: these were held vested interests, and not to have failed by the deaths of the legatees in the lifetime of the wife.[c]

It follows from these principles that a legacy to heirs, relations, and the like, after a previous life interest, vests in those who answer the description at the testator's death.[d] Thus where the residue was given to the testator's wife for life, with remainder to his son, but in case of the son's death before twenty-one, and without issue, the testator directed his wife to dispose of the residue among his relations in such manner as she should think fit; and the son died under twenty-one, and without issue; this was held to be a vested interest in the next of kin of the testator at the time of his death, and to go to the representatives of those of them who died in the lifetime of the wife.[e] But if a power of selection be given,

[a] King *v.* Withers, For. 117.

[b] 3 P.W. 414. 4 Bro. P. C. 228; and see Lowther *v.* Condon, 2 Atk. 127. Emes *v.* Hancock, id. 507. Sherman *v.* Collins, 3 id. 319. Kemp *v.* Davy, 1 Bro. 120. N.

[c] Tunstall *v.* Brachen, Ambl. 167. 1 Bro. 124. N.

[d] Danvers *v.* E. Clarendon, 1 Ver. 35. Rayner *v.* Mowbray, 3 Bro. 234. Masters *v.* Hooper, 4 id. 207. Holloway *v.* Holloway, 5 Ves. 399. Doe *v.* Lawson, 3 East, 278; but see Crook *v.* Brooking, 2 Ver. 50. 106. Doe *v.* Over, 1 Taunt. 263.

[e] Pope *v.* Whitcombe, 3 Mer. 689. Hands *v.* Hands, cited 1 T. R. 437. N.

as in the case of a gift to A. for life, and after his death to *such* of the testator's relations as A. shall appoint, and A. makes no appointment; it vests in those only who are the next of kin at the death of the donee of the power.[a] Or the context of the will may require this construction. Thus where a man gave the residue of his estate to his wife for life, and after her decease in moieties to his two sons, his only children; but if they should both die in her lifetime, to be divided among the testator's next of kin: it was held that the next of kin at the death of the wife were entitled; for the testator having expressly provided for his sons, who were his next of kin at his death, must have meant by the terms next of kin those who were so at some other time.[b]

A bequest after a previous life interest, or where the future time is merely annexed to the payment, will of course not be vested, if such upon the whole will appears to be the intention of the testator.[c] Hence where an Exchequer annuity was devised in trust for A. for life, and after her decease for her children equally, &c.; and if but one child, then to that one; and A. had only one child, who died in her lifetime: the bequest it was held did not vest in the only child, but was contingent during A.'s life; and no child therefore was to take but such as was living at the death of the mother.[d] And so on the

[a] Harding *v.* Glyn, 1 Atk. 469. Doyley *v.* Att. Gen. 4 Vin. Ab. 485. Cruwys *v.* Colman, 9 Ves. 319. Birch *v.* Wade, 3 Ves. & B. 198. But see Harrington *v.* Harte, 1 Cox, 131.

[b] Miller *v.* Eaton, Coop. 272; and see Spink *v.* Lewis, 3 Bro. 355. Long *v.* Blackall, 3 Ves. 486. Reeves *v.* Brymer, 4 Ves. 692. Jones *v.* Colbeck, 8 Ves. 38. Kennedy *v.* Kingston, 2 Jac. & W. 431.

[c] See Mackell *v.* Winter, 3 Ves. 536. Pyle *v.* Price, 6 Ves. 779.

[d] Smith *v.* Vaughan, 8 Vin. Ab. 391. Spencer *v.* Bullock, 2 Ves. J. 687. 3 id. 120; and see Thickness *v.* Liege, 7 Bro. P. C. 223.

other hand if a gift to a person at a future time is coupled with other circumstances, showing it was not meant conditionally, but only to mark the time when the interest vests in possession, that sense is put upon the words, which the will requires. Thus where there was a bequest to two persons *when* they should attain twenty-one, and the testator appointed J. B., their father, in trust for the same, and trustee for them during their minority: the appointment of the trustee was held to control the terms of the bequest so as to postpone the possession only, and not the vesting.[a]

Another exception to the general rule exists in those cases where the interest is bequeathed as well as the principal. For if a testator gives a legacy at a future time, and directs that it shall be paid with interest, or that the interest shall be applied for the maintenance or benefit of the legatee; the legacy will be vested.[b] But this exception does not extend to bequests payable out of real estate.[c] Nor in a personal legacy will the gift of a mere annual sum for maintenance of the legatee, till the time at which the legacy is payable, cause it to vest.[d]

With regard also to the interest, a distinction has

[a] Branstrom *v.* Wilkinson, 7 Ves. 421; and see Wadley *v.* North, 3 Ves. 364. Booth *v.* Booth, ante 146. Lane *v.* Goudge, 9 Ves. 225.

[b] Clobberie's case, 2 Vent. 342, ante 173. Collins *v.* Metcalfe, 1 Ver. 462. Stapleton *v.* Cheele, 2 Ver. 673. Pr. Ch. 317. Gilb. Eq. R. 76. Fonnereau *v.* Fonnereau, 1 Ves. 118. 3 Atk. 645. Hoath *v.* Hoath, 2 Bro. 3. Walcott *v.* Hall, id. 305. Dodson *v.* Hay, 3 id. 404. Hanson *v.* Graham, 6 Ves. 239.

[c] Carter *v.* Bletso, Pr. Ch. 267. Gilb. Eq. R. 11. Gawler *v.* Standerwick, 2 Cox, 15; and see 1 Atk. 512. Pearce *v.* Loman, 3 Ves. 135. Watkins *v.* Cheek, 2 Sim. & St. 199. Cave *v.* Cave, 2 Ver. 508, contra, was denied by Lord Hardwicke (1 Atk. 556.); and it seems the decree is at variance with the report. See Mr. Raithby's N.

[d] Atkins *v.* Hiccocks, 1 Atk. 500; and see Pulsford *v.* Hunter, 3 Bro. 416.

been taken, where it is so given as to be in itself a distinct and independent bequest. Thus in a legacy to A. of the dividends that should become due upon 500*l.* 3 per cent. Bank Annuities, until he should arrive at the full age of thirty-two years, at which time the executors were to transfer to him the principal sum of 500*l.* of the 3 per cent. Annuities; and A. died under thirty-two: the Lord Chancellor said that dividends were always a distinct subject of legacy, and capital stock another subject of legacy: in the principal case there was no gift but in the direction for payment, which attached only upon a person of the age of thirty-two; and as A. did not come within the description the legacy fell into the residue.[a]

If a bequest is in the first instance by the terms of it a vested interest a subsequent clause rendering it liable to be devested will not prevent its continuing a vested interest, till the happening of the event upon which it is made defeasible. In a legacy therefore to be divided among the children of A., with benefit of survivorship in case any of them die under twenty-one; this is an immediate interest vested in the children; and in case of the death of any of them under age, the produce, at least the interest accrued from the death of the testator, would go to that child, though that child would take nothing in the capital.[b] And where the bequest was to A. for life, and after her death among her three children, "*or*

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[a] Batsford *v.* Kebbell, 3 Ves. 363; and see Sansbury *v.* Read, 12 Ves. 75. Leake *v.* Robinson, 2 Mer. 363. Billingsley *v.* Wills, 3 Atk. 219, seems to have been decided upon the intention as collected from the particular penning of the will.

[b] Deane *v.* Test, 9 Ves. 146. Shepherd *v.* Ingram, Ambl. 448.

*such of them as should be living at her decease;*" and they all died before her: it was held that the will gave them vested interests, to be devested only in the event of there being some or one of them living at the mother's death;[a] and, that not having happened, their shares passed to their representatives.[b] So if there is a bequest to A. for life, and after his death to his children in such shares, &c. as he shall appoint, and in default of appointment among them equally: the children take vested interests in their shares subject to be devested, as to the proportions at least, by the execution of the power:[c] and if A. appoints the fund by will among his children, and they all die in his lifetime, so that the gifts under the appointment lapse,[d] their shares will nevertheless go to their representatives.[e] Yet where an estate was devised for life, with a power to raise thereout for portions for younger children a sum not exceeding 3000*l.*, and in neglect of appointment the estate to stand charged with 3000*l.* as a portion, payable at twenty-one, &c.: Lord Hardwicke thought that nothing vested under this devise, the sum to be raised being uncertain.[f]

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[a] In which case the children of those who were then dead would have no claim. See Howes *v.* Herring, 1 M'Clel. & Y. 295.

[b] Sturgess *v.* Pearson, 4 Mad. 411. Danseu *v.* Hawes, Ambl. 276; and see Weedon *v.* Fell, 2 Atk. 123. Reeves *v.* Brymer, 4 Ves. 692. Harrison *v.* Foreman, 5 id. 207. Smither *v.* Willock, 9 id. 233. Hallifax *v.* Wilson, 16 Ves. 198. Bayard *v.* Smith, post. Ch. 4. S. 3. Skey *v.* Barnes, 3 Mer. 335. Bromhead *v.* Hunt, 2 Jac. & W. 459. Browne *v.* Lord Kenyon, 3 Mad. 410.

[c] Coleman *v.* Seymour, 1 Ves. 209. Vanderzee *v.* Acklom, 4 Ves. 771. Malim *v.* Barker, 3 id. 150. Skey *v.* Barnes, 3 Mer. 335. As to Maddison *v.* Andrew, 1 Ves. 58; see 5 Ves. 748. See also Gordon *v.* Levi, Ambl. 364. Boyle *v.* Bishop of Peterborough, 1 Ves. J. 299.

[d] See ante 163.

[e] E. Salisbury *v.* Lambe, 1 Ed. 465. Ambl. 383.

[f] Loder *v.* Loder, 2 Ves. 531. Mos. 356.

The case of a legatee dying before the time at which his legacy is payable is often specially provided for in the will; but even then a question sometimes occurs as to the vesting. Thus where the produce of real and personal estate was to be applied for the maintenance of all and every the children of the testator's three daughters until the youngest of his said grandchildren should attain twenty-one; and in case of the death of any of the grandchildren before that time leaving children, such children to have the share their parents respectively would have received if they had lived till the youngest of the grandchildren attained twenty-one; and when the youngest should have attained twenty-one, then the capital to be divided among such of the grandchildren as should be then living, and the children and child of the said grandchildren in case of the death of any of them leaving issue, who were to receive the share their parents would have been entitled to in case they had been living at the time of distribution, and to the heirs, executors, and administrators of such the said grandchildren and great grandchildren respectively: it was held that the share of one of the grandchildren, who died before the time of division without issue, was not vested; upon the ground of the intention of the testator that a legatee so dying should take only by children and not by representatives.[a]

Where there was a gift over of the legacies if any of the legatees died before they might have received them: the Court thought this too uncertain; that it could not compute what time would be sufficient to enable the legatees to receive their legacies, and

[a] Hughes *v.* Hughes, 14 Ves. 256.

they must therefore be considered as vested from the death of the testator.[a] But where a man devised his real estates to his wife for life, and directed his executors as soon after her death as conveniently might be to sell the same, and gave the produce among his five nephews at such time as the sale should be completed in case they should be then living; but in case any of them should die before the sale should be completed, then the share of the one dying to go to his children; and if no children, then to the surviving nephews; and one of the nephews, who survived the wife, died before a sale took place: it was held he did not take a vested interest.[b] And Lord Eldon observes, if a testator thinks proper, whether prudently or not, to say distinctly, showing a manifest intention, that his legatees, pecuniary or residuary, shall not have the legacies, or the residue, unless they live to receive them in hard money, there is no rule against such intention, which, if clearly expressed, must be carried into execution: but from the inconvenience and fraud to which this would open, if the words will admit of not imputing to the testator such an intention, it shall not be imputed to him.[c] *Vide Law v. Thompson 4 Ves. jun. 22.*

In an early case in which a man having three daughters devised them 300*l.* apiece, payable at twenty-one, or marriage; and if either died before that time her portion to be equally divided between the *survivors;* and the eldest married, and died, leaving issue, after which the youngest died under

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[a] Hutchin *v.* Mannington, 1 Ves. J. 366. 4 Bro. 491. N.; and see Stapleton *v.* Palmer, 4 Bro. 490.

[b] Elwin *v.* Elwin, 8 Ves. 547. Faulkener *v.* Hollingsworth, ibid. cited.

[c] Gaskell *v.* Harman, 11 Ves. 497.

twenty-one, and unmarried: the whole of her portion was decreed to the surviving daughter.[a] But the word "survivor" is not now taken in so strict a sense. Thus where a man gave to his son and his two daughters each one-third of his property, payable at twenty-one, and willed, in case of the death of either of his children before the age at which their respective shares were made payable, that the third part of the one dying should be equally divided between the two surviving children; and in the event of the death of two of his above-mentioned children before attaining such respective ages, then the whole to devolve to the surviving child; and one of the daughters attained twenty-one, married, and died, after which the son died under twenty-one; and it was contended that the surviving daughter must take the whole; Lord Eldon said there was a number of authorities for construing the word "surviving" to mean "other;"[b] and decreed the son's share to be divisible between the administrator of the deceased daughter, and the surviving one.[c]

III. In every will there is a tacit condition annexed both in law and equity, that whoever will derive a benefit under it must acquiesce in the whole of it: he can not take a bounty to himself, and deprive any other person of a bounty under the same will. If therefore a legacy is bequeathed, and an estate, or a specific thing belonging to the legatee, is devised to another, the legatee can not claim his

[a] Anon. 1 Freem. 301. Ferguson v. Dunbar, 3 Bro. 469.

[b] Harman v. Dickenson, 1 Bro. 91; and see 5 Ves. 467. 14 Ves. 578. 17 id. 482.

[c] Wilmot v. Wilmot, 8 Ves. 10.

own, and the legacy also, but must elect.[a] Thus if a freeman of London, before the statute enabling him to dispose of his personal estate,[b] gave a legacy to his wife or child, and disposed of his whole estate, the wife or child could not claim both the legacy and the customary part.[c] Hence where a sum of money was settled in trust for A. for life, and after his decease among such of his children as he should appoint, and in default of appointment among them equally; and A. by will, after giving his children legacies, appointed the fund among his grandchildren: it was held that the children, the appointment being bad, must elect to take under the settlement or the will.[d]

Lord Northington thought that the doctrine of election must be confined to plain and simple devises of the inheritance, and could not be extended to limitations, as it would cause great confusion; for the devise would be good or not just as the devisee in remainder chose to submit to the will:[e] but this

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[a] See Noys *v.* Mordaunt, 2 Ver. 581. Streatfield *v.* Streatfield, For. 176. Molyneux *v.* Scott, 1 Bl. 376. Kirkham *v.* Smith, 1 Ves. 260. Billing *v.* Dacres, 2 id 30. cited. Lewis *v.* King, 2 Bro. 600 Walpole *v.* Lord Conway, Barn. C. R. 153. Finch *v.* Finch, 4 Bro. 38. 1 Ves. J. 534. Blake *v.* Bunbury, 1 Ves. J. 514. Wilson *v.* Lord J. Townshend, 2 Ves. J. 693. Blount *v.* Bestland, 5 id. 515. See the doctrine of election, which mostly arises on devises of real estates, succinctly stated in Sug. Pow. 374. 2d ed.; see also Dillon *v.* Parker, 1 Swanst. 359, and notes.

[b] 11 Geo. I. 18. 17.

[c] Kitson *v.* Kitson, Pr. Ch. 351. Gilb. Eq. R. 28. Cowper *v.* Scott, 3 P.W. 119. Hender *v.* Rose, ibid. 124. N. Wilson *v.* Philips, Bunb. 195. Hervey *v.* Desbouverie, For. 130. Morris *v.* Burroughs, 1 Atk. 399. 2 id. 627; and see Babington *v.* Greenwood, 1 P.W. 530. Pugh *v.* Smith, 2 Atk. 43. Car *v.* Car, id. 277, contra Bravell *v.* Pocock, 2 Freem. 67. There is an exception in the statute of those cases in which freemen have covenanted on their marriage that their estates shall remain subject to the custom, so that the question may now sometimes arise.

[d] Whistler *v.* Webster, 2 Ves. J. 367.

[e] Forrester *v.* Cotton, 1 Ed. 532. Ambl. 388.

objection, it has been said, is not now attended to.[a] Lord Hardwicke also seems to have doubted whether a remainder-man after an estate tail should be subject to this equity;[b] yet in another case, where there was a devise of freehold and copyhold estates in strict settlement, with a remainder for life to the heir at law after estates tail to the first and other sons of the first devisee, his Lordship held, that the heir must give up that remote remainder or surrender the copyhold estate to the use of the will;[c] and the doctrine, it has been since observed, applies to interests of married women; interests immediate, remote, contingent, of value, or not of value.[d]

An heir at law will be put to his election where the estate is devised to him in fee, although by the rule of law the devise is unoperative, and he takes by descent.[e] If a devisor is an infant,[f] or the will is not duly attested,[g] it has been decided not to be a case of election; for the Court can not take notice that there is any will at all of the real estate. Yet it was held (previous to 55 Geo. III. 192,) that if copyholds were devised away without having been surrendered the heir must elect;[h] as is the case also with regard to the heir at law of heritable property

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[a] Sug. Pow. 376. 2d ed.; and see Ward *v.* Baugh, 4 Ves. 623. Post. 192. Highway *v.* Banner, 1 Bro. 584.

[b] See Bor *v.* Bor, 5 Bro. P. C. 181.

[c] Graves *v.* Forman, 3 Ves. 67, cited.

[d] 2 Ves. J. 697. 3 Ves. 385.

[e] Anon. Gilb. Eq. R. 15. Welby *v.* Welby, 2 Ves. & B. 187.

[f] Hearle *v.* Greenbank, 3 Atk. 695. 1 Ves. 298.

[g] Cary *v.* Askew, 1 Cox, 241. 2 Bro. 58. N. Belt's ed. Sheddon *v.* Goodrich, 8 Ves. 481. Gardiner *v.* Fell, 1 Jac. & W. 22. 2 Wils. C. C. 32.

[h] Allen *v.* Poulton, 1 Ves. 121. Unett *v.* Wilkes, 2 Ed. 187. Ambl. 430. Ardesoife *v.* Bennet, 2 Dick. 463. Frank *v.* Standish, 1 Bro. 588. N. 15 Ves. 391. N. Wilson *v.* Mount, 3 Ves. 191. Rumbold *v.* Rumbold, id. 65. Pettiward *v.* Prescott, 7 id. 541.

in Scotland, when the will is not conformable to the solemnities required by the law of that country.[a] And where a man by his will, duly executed, directed that any estates which he might afterwards contract to purchase should be conveyed to his trustees to the uses of his will; and did subsequently contract for some; the heir at law, who claimed these, was put to his election.[b]

Another distinction on this subject was taken by Lord Hardwicke; for in a case in which by an unattested will a legacy among others was given to the heir, and the real estate devised away, but there was a clause, that if any of the legatees should controvert or not comply with the whole will they should forfeit all claims under it: his Lordship thought this differed from the case of Hearle *v.* Greenbank,[c] being an express condition annexed to a personal legacy; and therefore the heir could not take both the real and personal estate.[d]

The intention to devise away that property which is claimed by the legatee must be clear.[e] Hence where there was a devise of "all the rest, residue, and remainder, of my real and personal estate and effects whatsoever and wheresoever and of what nature or kind soever;" and the testator died seised of some copyhold premises, with which some freehold was intermixed: it was held that the intention to pass the copyholds, which had not been surrendered, was not sufficiently apparent to put the heir to his elec-

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[a] Brodie *v.* Barry, 2 Ves. & B. 127.

[b] Thellusson *v.* Woodford, 13 Ves. 209. 1 Dow. 249.

[c] Ante 187.

[d] Boughton *v.* Boughton, 2 Ves. 12; and see Newman *v.* Newman, 1 Bro. 186. Heather *v.* Rider, 1 Atk. 425.

[e] 1 Ed. 535. 13 Ves. 173; and see Forsyth *v.* Grant, 1 Ves. J. 298.

tion.[a] Lord Northington indeed observed, there was no instance where general words had been held to come within the rule; and that he did not see how the testator's intention could be collected with sufficient certainty from them.[b] In one case in which a testator, who was entitled only to part of an estate, devised in general terms all his real and personal estate, and it was proved by evidence that he considered himself entitled to the whole of the estate: the Lord Chancellor thought he could not so construe the gift unless there was something in the will to show it, and that if he was to receive evidence of the testator's fancy it would introduce a very desperate rule of property.[c] Yet in subsequent cases papers containing statements of the testator as to his property have been admitted to show what he considered as his estate, and consequently to determine what passed under a general devise so as to put a party to his election.[d]

Where A. was tenant for life, with remainder to J. S. in fee, and A. devised the estate, under a mistaken idea that she had power to do so, to J. S. for life, with remainders over, and gave him the residue of her personal estate: it was held not to be matter of election, as there was no proof that the testatrix meant to dispose of the estate if she knew she had no power to dispose of it.[e] But Lord Alvanley observed,[f] nothing could be more dangerous, than to speculate upon what a testator would have done, if

[a] Judd *v.* Pratt, 13 Ves. 168.

[b] 1 Ed. 535. Ambl. 390; but see Rutter *v.* Maclean, 4 Ves. 531.

[c] Stratton *v.* Best, 1 Ves. J. 285.

[d] Druce *v.* Denison, 6 Ves. 385; and see Pole *v.* Lord Somers, id. 309. Hinchcliffe *v.* Hinchcliffe, 3 Ves. 516. Baugh *v.* Read, 1 Ves. J. 257; but see Doe *v.* Chichester, 4 Dow. 65. Judd *v.* Pratt, 13 Ves. 174.

[e] Cull *v.* Showell, Ambl. 727.

[f] 2 Ves. J. 370, 371.

he had known one thing or another; and he was obliged to say the case was erroneous, if founded upon that argument.

The claim of the legatee must be clearly contradictory to the will; for there never can be a case of election, but upon a presumed intention of the testator.[a] Where therefore a freeman of London gave to his wife and others legacies that did not exceed the testamentary part: the wife was allowed to take both by the will and the custom.[b] So where a testator declared that the provision he had made for his wife should be in satisfaction of all dower, or thirds: it was held that she was not, by accepting that provision, barred of her share of part of the residuary estate, of which the bequest was void, and therefore undisposed of: for if the Court could have looked at the will, which it could not between one next of kin and another, the intention did not go in favour of the next of kin to prohibit the wife from taking any part of the personal estate.[c] And where a man by his will, after giving his housekeeper an annuity, recited that he was, according to his computation, indebted to her in a certain sum, and directed it to be paid: the Court thought she might claim the annuity, and dispute the amount of the debt, the testator's design being to pay the whole debt; and that his bounty was unconnected with it.[d]

If a man devises lands for payment of debts, and the heir, being also a creditor, claims part of the lands devised as heir, he may nevertheless come in

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[a] 1 Ves. J. 557; and see East *v.* Cook, 2 Ves. 30. Huggins *v.* Alexander, id. cited.

[b] Babington *v.* Greenwood, 1 P.W. 530. Wilson *v.* Philips, Bunb. 195.

[c] Pickering *v.* Lord Stamford, 3 Ves. 332. 492.

[d] Clark *v.* Guise, 2 Ves. 617.

upon the residue of the fund;[a] for the doctrine of election is not applicable to creditors.[b] An appointee, by taking part of a fund under the execution by will of a power to appoint among certain persons, is not precluded from claiming another part of the fund as to which the appointment is bad.[c] Nor if a particular demand of any person, taking a benefit under the will, subjects the personal estate to a debt, have the cases reached so far, as that the benefit of putting a party to election can ever go to a residuary legatee of the personal estate.[d]

No person can be put to elect without a clear knowledge of both funds;[e] and the party may file a bill to have the state of the fund ascertained.[f] How far a person will be considered by acquiescence to have made his election will depend upon the circumstances of each case, and may be a question for a jury.[g] The Court will not easily hold the election concluded: it will never hold persons to have made an election, without fully understanding that they were cognizant of the nature of the rights between which they were to choose, and of the claim upon them to elect, and that in consequence of that knowledge they did actually elect.[h] Where a woman received a legacy, and was paid an annuity for three years under the will of her husband: Mr. J. Buller thought after three years only he could not say she

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[a] Deg v. Deg, 2 P. W. 418.

[b] Kidney v. Coussmaker, 12 Ves. 136.

[c] Bristow v. Warde, 2 Ves. J. 336.

[d] 3 Ves. 385; and see 2 Ves. J. 561.

[e] 2 Ves. J. 371; and see Hender v. Rose, 3 P. W. 124. N. Pusey v. Desbouverie, id. 315. Newman v. Newman, 1 Bro. 186, and N. Belt's ed. Boynton v. Boynton, id. 445.

[f] 1 Ves. J. 172.

[g] 2 Bro. 73.

[h] 2 Ves. J. 697. Edwards v. Morgan, 1 M'Clel. 541.

was not entitled to elect.[a] While in another case a bill filed by a wife, claiming to elect after five years enjoyment under the will, was dismissed: but the estate in this case was a free fund from the beginning; and the Lord Chancellor said he wished it to be understood, that his decision turned upon the particular circumstance, that the bill was filed without any ground; and no suggestion, that the real or personal estate was in such a situation as to render it doubtful what the result would be: that no line could be drawn from mere length of time, but it must be from circumstances showing the intent of the party.[b] Nor was a person held bound by an election made under a mistaken impression of the extent of the claims against the fund elected.[c]

The election of a person will of course bind his representatives.[d] But where in marriage articles the husband covenanted to pay a certain sum to trustees in trust to be paid to the children of the marriage; and afterwards by his will gave in lieu certain sums to each of his children for their lives, with remainder to their respective children: it was held that the election of the children to claim under the articles did not exclude the grandchildren from the benefit of the will.[e]

Where an estate tail was devised away, and the issue in tail, a married woman, elected to take the estate; it was held that her husband, who became tenant by curtesy, might nevertheless claim benefits

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[a] Wake *v.* Wake, 1 Ves. J. 335. 3 Bro. 255.

[b] Butricke *v.* Broadhurst, 1 Ves. J. 171. 3 Bro. 88; and see 3 Atk. 616. E. Northumberland *v.* E. Aylesford, Ambl. 540. 657. 1 Ed. 489. Ardesoife *v.* Bennet, 2 Dick. 463.

[c] Kidney *v.* Coussmaker, 12 Ves. 136.

[d] 2 Ves. 525. 593. 668. Ardesoife *v.* Bennet, 2 Dick. 463.

[e] Ward *v.* Baugh, 4 Ves. 623.

given him by the will, the estate of the wife taking place with all its legal effects; and there was nothing therefore to affect his interest under the will; he stood as a stranger.[a]

In the case of infants the Court has suspended the right of election during minority,[b] while in that of married women it has referred it to the Master to inquire whether it would be most beneficial to take under or against the will.[c] If the husband and wife are abroad a commission must issue to take her consent.[d]

It seems to be the better opinion that a person who elects to take in opposition to a will does not thereby forfeit all benefits given by the will, but only so much as will be sufficient to compensate by an equivalent the interest which his election frustrates.[e]

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[a] Lady Cavan *v.* Pulteney, 2 Ves. J. 544. 3 id. 384; and see Brodie *v.* Barry, 2 Ves. & B. 127.

[b] Streatfield *v.* Streatfield, 1 Swanst. 447. Boughton *v.* Boughton, 2 Ves. 12. Hervey *v.* Desbouverie, Forr. 130; but see 2 Sch. & Lef. 267.

[c] 2 Ves. 61. 2 Ves. J. 560. 696. 3 id. 385. See on this subject, 1 Swanst. 413. N.

[d] Parsons *v.* Dunne, 2 Ves. 60.

[e] See the subject fully discussed and the cases, 1 Swanst. 433. N.

# CHAPTER IV.

## OF CONSTRUCTION.

### SECTION I.

### *Of general Rules in the Construction of Wills.*

THE grand maxim in the construction of wills in law and equity (for the rules are the same in both, and the latter has no greater latitude in this respect than the former[a]) is, that the Court is bound to find out the intention of the testator, if it be possible so to do, however inartificially the will may be expressed; and to make such a construction as will effectuate that intention.[b] This is often a most difficult task; for as Lord Northington remarks,[c] it is is the fate of all courts of justice upon wills to be the authorized interpreters of nonsense, and to find the meaning of persons that had no meaning at all. The intention is to be collected, not from any particular or detached clause of the will, but from the whole taken together, and from any codicil which forms a part of it. Every word is to have its effect, provided an effect can be given to it not inconsistent with the general intent of the whole will taken together: for a testator is not to be supposed to have used words without meaning, if it is possible to give them a consistent meaning; and the rule is, not to reject any words, unless there can not be any rational construction of those words as they stand.[d] Where there-

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[a] 2 Ves. 74. Gilb. Eq. R. 88. 1 Bl. 377. 5 Ves. 805.

[b] 1 Ed. 43. Wilm. 233. Willes, 3.

[c] 2 Ed. 4.

[d] 1 Roll. Rep. 319. 2 Bulstr. 178. Wilm. 233. 9 East, 272. 4 Ves. 329. 5 id. 818. 6 id. 102. 8 id. 306. 10 id. 203. 1 B. & B. 480.

fore there was a devise to the use of the *said* Thomas B. and his assigns for life, "and after his decease to the use of the *said* Thomas B., son of my nephew S. B., his heirs and assigns for ever;" and Thomas B. the son of S. B. was the only person of that name previously mentioned in the will, but the testator left also a nephew of the name of Thomas B.: the Court thought the inconsistency of giving an estate for life, and also an estate in fee to the same person was not sufficient to authorize the rejection of the word "said;" and consequently that the nephew Thomas B. had no claim.[a]

If however the words can not be reconciled some may be rejected;[b] as may also loose general words.[c] Thus in a bequest to be equally divided between A., B., and C. and their heirs or the survivor of them *in the order they are now mentioned:* the latter words were rejected as unmeaning.[d] On the other hand the Court may supply words if it appear necessary to do so to effectuate the intention.[e] If two parts of a will are totally irreconcilable, Lord Alvanley said he knew of no rule but by taking the subsequent words as an indication of a subsequent intention.[f]

Every inaccuracy of grammar, and every impropriety of terms shall be corrected if the intention be clear and manifest;[g] although a greater latitude of construction is perhaps allowable in an inaccurate will drawn by the testator himself, than in one more accurate.[h] Nor is it necessary to take all the words

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[a] Chambers *v.* Brailsford, 18 Ves. 368. 19 Ves. 652. 2 Mer. 25.
[b] 1 Ves. 14. 2 id. 279.
[c] Hob. 65. 6 Mod. 112.
[d] Smith *v.* Pybus, 9 Ves. 566.
[e] See Doe *v.* Micklem, 6 East, 486.
[f] 5 Ves. 247. 6 id. 102; and see 18 id. 421. 1 Swanst. 163. Touch. 88.
[g] 4 Ves. 311; and see 1 Mer. 651.
[h] 5 Ves. 804; and see 5 T. R. 721.

in the order that they are, as the Court will range them in a different order, and transpose them to comply with the intention.[a] But in no case, where the words are plain and sensible, is a transposition to be made in order to create a different meaning, and construction; much less to let in different devisees and legatees:[b] nor where a former clause is express and particular, shall a subsequent one enlarge it.[c] And the construction in the first instance must be according to the ordinary rules of grammar; for where the bequest was to "all and every the child and children of my late cousin E. L. *and my cousin* P. F., and their lawful representatives:" this was held to be a gift to P. F. himself, and not to his children; for otherwise the word "*of*" must be understood; whereas the words as they stood had a plain grammatical sense, viz.: to the children of E. L., and to P. F. himself.[d]

In trying the meaning of phrases in a will the Court may look at all the circumstances, in which it might have been called upon to determine the meaning of the same phrases, applied to a different state of circumstances.[e] Arguments, says Lord Thurlow, from supposition of what a testator would have done, if he had been aware of all circumstances, are not very good grounds for giving a construction; but they may be fairly used to assist a dubious floating construction.[f]

When the words of two devises are different the

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[a] 2 Ves. 32. 74. 248. 279. Willes, 3.

[b] 2 Ves. 74. 19 Ves. 653.

[c] Barn. Ch. R. 261.

[d] Lugar *v.* Harman, 1 Cox, 250; and see Doe *v.* Joinville, 3 East, 172, devise to "*brother and sister's family*" held void for uncertainty.

[e] 11 Ves. 457.

[f] 1 Bro. 529.

more natural conclusion is, that as the testator's expressions are varied, they were altered, because his intention in both cases was not the same.[a] Thus where a legacy of stock was given to A., in terms that rendered it doubtful whether it was intended that A. should take an absolute or a life interest; but the testator had given another legacy of stock to B. "during his natural life:" this was thought a circumstance whence a difference of intention might be collected; and A. therefore was held entitled to the absolute interest.[b] So in a gift of the residue to a woman *for her own use and benefit*, which it was contended gave her a separate estate: the Vice-Chancellor observed, that the testator, as to the same person with respect to another gift, had appointed a trustee, and expressly directed the application of it to her sole and separate use; he knew, therefore, the technical form of excluding the right of the husband; and the Court could not infer that, as to this legacy, he intended what he had not expressed.[c]

A will speaks quoad the real estate from the time of making it; quoad the personal from the death of the testator.[d] Yet it is said that the construction (at least with regard to legatees and to specific legacies) is to be made as matters stood at the time of making

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[a] 9 East, 273. 11 Ves. 546. 19 id. 537.

[b] Rawlings *v.* Jennings, 13 Ves. 39. Baddeley *v.* Leppingwell, Wilm. 228. Hack *v.* Tuck, 3 Swanst. 270. Bayley *v.* Bishop, 9 Ves. 6.

[c] Wills *v.* Sayers, 4 Mad. 409; and see Saunders *v.* Drake, 2 Atk. 465. Hearle *v.* Greenbank, 3 id. 714. Hodgson *v.* Rawson, 1 Ves. 44. Arnold *v.* Chapman, id. 108. Ellison *v.* Airey, id. 111. Harland *v.* Trigg, 1 Bro. 142. Billings *v.* Sandom, post S. 2. Longdale *v.* Bovey, 2 Anstr. 570. Chester *v.* Painter, 2 P. W. 335.

[d] 2 Ed. 161. 2 Mer. 537. 1 B. & B. 542. 1 Sim. & St. 294; and see Att. Gen. *v.* Heartwell, 2 Ed. 234. Ambl. 451.

the will:[a] so that if a man bequeaths to another all his debts, this will only include debts then due:[b] or if he gives his black gelding, and afterwards sells it and buys another black one, this latter will not pass.[c] It is clear that if the words are sufficient to show that the testator intended only to give what he had at the time, the bequest will have that limited effect.[d] But the general rule that the time of the testament, and not the testator's death is regarded, admits of a variety of distinctions and exceptions: a will may speak at different times for different purposes;[e] and we have already seen in the course of this treatise instances in which its operation has been sometimes referred to its date, and sometimes to the death of the testator.[f]

A codicil, we have observed, is part of a will, both making but one testament; and hence where a man bequeathed the residue of his estate among *such of his relations only as were mentioned in that his will;* and afterwards by a codicil gave legacies to two relations, whom he had not noticed in his will: Lord Commissioner Eyre held these two persons entitled to a share in the residue.[g] But this decision seems at best doubtful. It is added in the report that the other Lords Commissioners hesitated a good deal at this extension of the word "will." Lord Hardwicke, in a previous case somewhat similar, taking the same distinction as Lord C. Eyre between the testament,

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[a] 2 Ver. 653. 1 Ves. 295. Ambl. 280. 4 Bro. 59. Godolph. 272. 463.

[b] Swinb. P. 7. S. 11. Godolph. 273. 465; and see Smallman *v.* Goolden, 1 Cox, 329. Post. S. 2.

[c] Off. Ex. 23.

[d] 2 Jac. & W. 405, 406. Att. Gen. *v.* Bury, 1 Eq. Ab. 201. Downes *v.* Townsend, Ambl. 280. Graves *v.* Hughes, 4 Mad. 381.

[e] 1 T. R. 437. N.

[f] Ante 18, 19. 30. 66. 104. 123—9. 168. 178

[g] Sherer *v.* Bishop, 4 Bro. 55.

and the instrument, thought that the testator meant to refer to the instrument, and not to the testament, which takes in all the parts.[a] And in a later case, in which a man gave the residue of his estate among the legatees in proportion to the sums bequeathed to them "*by this my will*;" legatees, named only in a codicil, "*to be added to and taken as part of*" his said last will and testament, were excluded.[b]

A testator is not to be supposed ignorant of the state of his property unless it appears upon the will to be so.[c] The amount however of the property is not to be taken into consideration in order to raise an argument in favour of a particular construction,[d] unless the testator himself enters into the state of his property in the will.[e] In one case in which a testatrix gave to four legatees sums (amounting to 1300*l.*) of stock in Long Annuities, and gave the residue of her property to her two nephews: Lord Thurlow thought at first he could not admit evidence of the state of the testatrix's property in order to construe the will against the direct and natural meaning of the words, and that the legatees were therefore entitled to 1300*l.* per annum, notwithstanding by this construction she must be held to have given away ten times as much as she had to give: yet on a rehearing his Lordship altered his opinion, and thought he could let in evidence of the value of

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[a] Fuller *v.* Hooper, 2 Ves. 242, and Suppl. 333.

[b] Henwood *v.* Overend, 1 Mer. 23. 719; and see Bonner *v.* Bonner, 13 Ves. 379; post Ch. 6.

[c] 15 Ves. 328. 1 Turn. 268. N.

[d] Walker *v.* Collier, Cro. Eliz. 378. Goodtitle *v.* Edmonds, 7 T. R. 640. Oldham *v.* Carleton, 2 Cox, 399. Sibley *v.* Perry, 7 Ves. 522. Kellett *v.* Kellett, 1 B. & B. 533. Choat *v.* Yeats, 1 Jac. & W. 102. Doe *v.* Dring, 2 M. & S. 448.

[e] 1 Swanst. 565; and see post Ch. 6. S. 4. III.

the estate.[a] In a subsequent case, in which a testator gave several legacies of sums per annum Bank Long Annuities, and made one bequest of 100*l.* Long Annuities stock: Sir W. Grant held that he must abide by the words of the will; and observed, that in a case precisely the same as that before Lord Thurlow he might be disposed to follow the precedent, although even there it was not without great difficulty that the Court was prevailed upon to admit the extrinsic evidence.[b] It seems also settled that the amount of a testator's personal property is not to be inquired into to determine how far he intended to execute a power.[c] But the state of his family, and the relation of the parties are always to be taken into consideration, and evidence as to this admitted;[d] although a testator's knowledge in this respect is not alone sufficient to alter the construction that words properly bear.[e]

Some certainty of description is requisite as well in regard to the thing given, as to the persons to take.[f] For if a man uses such general words that his mind can not be known; as if he says, "I bequeath goods;" or "I bequeath," or the like; such devises are void for uncertainty.[g] So where a woman gave all the goods in her house, except what were mentioned in a schedule, and no schedule could be

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[a] Fonnereau *v.* Poyntz, 1 Bro. 472; on which see 6 Ves. 401. See also Finch *v.* Inglis, 3 Bro. 420. King *v.* Philips, 1 Ves. 232.

[b] Att. Gen. *v.* Grote, 3 Mer. 316.

[c] Molton *v.* Hutchinson, 1 Atk. 558. Andrews *v.* Emmot, 2 Bro. 297. Standen *v.* Standen, 2 Ves. J. 589. Jones *v.* Tucker, 2 Mer. 533. Jones *v.* Curry, 1 Swanst. 66. 1 Wils. C. C. 24. Webb *v.* Honnor, 1 J. & W. 352.

[d] 3 Ves. 540, 541. 1 B. & B. 481.

[e] Radcliffe *v.* Buckley, ante 116.

[f] See ante 89, as to persons.

[g] Swinb. P. 7. S. 5. Touch. 433.

found; the exception was held void, and all the goods in the house passed.[a] But where one bequeathed to A. all the household goods in the schedule annexed, he paying certain annuities, and left no schedule: the annuities were nevertheless held to be payable out of the household goods in the hands of the executor, and if they were not sufficient, then out of the personal estate.[b]

In the same way if a man gives money, wheat, oil, or the like, without saying how much; or bequeaths "some of his best linen;"[c] the legacy is void for uncertainty; or at least the executor may deliver what quantity he will;[d] unless the gift is for the performance of some act, or other certain consideration, as for building a bridge, or maintaining a person at school; for then so much, it is said, passes as is necessary for the purpose required.[e] So also in a case before cited, it being quite impossible to ascertain how much would have been employed for the purposes that could not take effect, the gift of the residue, after the satisfaction of those purposes, was quite uncertain, and void.[f]

But the Court will endeavour, if possible, to construe the expressions, and never hold a devise void, unless so absolutely dark that they can not find out the testator's meaning.[g] Where a man gave one of his daughters five hundred and fifty, omitting

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[a] Dormer *v.* Bishop Burnet, cited Ambl. 281; and see Mildred *v.* Robinson, 19 Ves. 585, direction to pay debts except those mentioned in the margin, and none mentioned.

[b] Hills *v.* Wirley, 2 Atk. 605.

[c] Peck *v.* Halsey, 2 P.W. 387.

[d] Touch. 433.

[e] Swinb. P. 7. S. 10. Godolph. 424. 2 Atk. 606.

[f] Chapman *v.* Brown, 6 Ves 404, ante 85. Att. Gen. *v.* Hinxman, 2 J.& W. 270; and see Jones *v.* Hancock, 4 Dow. 145.

[g] 1 Atk. 412. Coop. 122.

"pounds," and gave another daughter five hundred and fifty pounds: the first bequest was held good, the second explaining what the testator meant.[a] And where there was a bequest to be laid out in the purchase of lands of 300*l.* or 400*l.* a year: the Lord Chancellor said, he would construe it in the most liberal sense, and that it should be 400*l.* per annum.[b] If there is any doubt about a legacy from the writing in the will being illegible, an issue will be directed at once.[c]

A mere mistake as to the subject of a bequest will not invalidate it: as if a man having only one horse called A., devises his horse B.: this legacy is good enough.[d] Or if he bequeaths 30,000*l.*, and it is plain from other parts of his will that he meant to give only 20,000*l.*: no more than that sum will pass.[e] And the state of a testator's property in these cases of mistake may be taken into consideration. Thus if a man gives a legacy out of his capital in a particular stock, and has no such stock; evidence of this fact is admissible to entitle the legatee to some other species of stock, which the testator really had, or to have his legacy made good out of the personal estate.[f] Errors also in computation will be relieved against;[g] and if a man gives a certain sum, as a debt

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[a] Freeman *v.* Freeman, 8 Vin. Ab. 51.

[b] Seale *v.* Seale, 1 P.W. 290.

[c] Norman *v.* Morrell, 4 Ves. 769. In Masters *v.* Masters, 1 P.W. 421, it was referred to the Master.

[d] Swinb. P. 7. S. 5. Touch. 432. 1 Ves. 256. 3 Ves. 310; and see Skerratt *v.* Oakley, 7 T. R. 492.

[e] Philips *v.* Chamberlaine, 4 Ves. 51; and see Godolph. 447.

[f] Door *v.* Geary, 1 Ves. 255. Finch *v.* Inglis, 3 Bro. 420. Selwood *v.* Mildmay, 3 Ves. 306. Dobson *v.* Waterman, id. 308. N. Penticost *v.* Ley, 2 J. & W. 207. Alford *v* Green, 5 Mad. 92. Hewson *v.* Reed, id. 451.

[g] Milner *v.* Milner, 1 Ves. 106. Clark *v.* Guise, 2 id. 617. Phipps *v.* Lord Mulgrave, 3 Ves. 613. Brackenbury *v.* Brackenbury, 2 Ed. 275. Ambl. 474.

owing, and there is not so much due;[a] or bequeaths a residue stating it to amount to a certain sum, and miscalculates it;[b] the gifts will not be affected; and the sum mentioned, or the residue, whether more or less, will go to the legatee. Yet in a case in which a woman recited in her will that she was possessed of a certain sum in the funds, and bequeathed the same, or so much of such stock as should be standing in her name at the time of her death; and had more than that quantity of stock both at the time of making her will, and of her death; it was held that no more than the specified quantity passed.[c]

A mistake however can not be corrected, nor an omission supplied, unless it is perfectly clear by fair inference from the whole will that there is such mistake or omission.[d] For where a man bequeathed to his natural daughter A. a legacy; and, in case of her death under twenty-one, the legacy to be considered part of the residue of his estate; and then gave the residue of his estate among his natural daughters B., C., and D., but in case of the death of any of them the said A., B., C., and D. under twenty-one, her part or share to go to the survivors of them; and if all his said children but one died under age then to that one: Lord Alvanley, after mature consideration, thought there was not sufficient upon the will to denote that the name of A. was inserted by a clear clerical mistake without any intention of the testator; and that she was therefore entitled upon

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[a] Whitfield *v.* Clemment, 1 Mer. 402. Williams *v.* Williams, 2 Bro. 87. Pettiward *v.* Pettiward, Rep. T. Finch, 152; and see Swinb. P. 7. S. 5.

[b] Danvers *v.* Manning, 2 Bro. 18. 1 Cox, 203.

[c] Hotham *v.* Sutton, 15 Ves. 319.

[d] 4 Ves. 57; and see Molesworth *v.* Molesworth, 1 Cox, 75.

the death of one of the other daughters under twenty-one to a share of the residue by survivorship.[a] Nor it seems can a mistake be corrected without some guide for ascertaining what would have been the testator's disposition had he known of the mistake. Thus where a woman by her will gave legacies to several persons after the death of her husband under a mistaken idea that he was entitled by settlement to the property during his life: the Lord Chancellor thought he could not correct the mistake, and give the legatees instant legacies; there being nothing to show that the testatrix would, have done so, if she had not mistaken her power.[b]

If a man bequeaths a sum of money to a person, and afterwards in the same instrument gives him another legacy of the same amount, the second is merely considered a repetition of the former; and only one sum can be recovered.[c] If the gifts were of unequal amount the legatee was by the civil law entitled to both:[d] and so in equity, where a second legacy was greater than the first, it was held accumulative.[e]

When the same specific thing is given by two testamentary instruments to the same person, it can be only a repetition. But when a sum of money is bequeathed by one instrument, and an equal, greater, or less sum is bequeathed to the same person by a subsequent one; as one 100*l.* by the will, and

[a] Mellish *v.* Mellish, 4 Ves. 45.

[b] Smith *v.* Maitland, 1 Ves. J. 362.

[c] Swinb. P. 7. S. 21. 2 Atk. 638. 1 Bro. 390. N. Garth *v.* Meyrick, 1 Bro. 30. Greenwood *v.* Greenwood, id. N. Holford *v.* Wood, 4 Ves. 76.

[d] Swinb. P. 7. S. 21.

[e] Curry *v.* Pile, 2 Bro. 225. Windham *v.* Windham, Rep. T. Finch, 267.

another 100*l.* by the codicil; the latter legacy is presumed to be intended as accumulative.[a] Lord Alvanley, admitting this general rule, said, he must always guard it with the circumstance that the two instruments bore different dates, and hoped the ecclesiastical court would not go on to prove papers without date.[b] For where a man by his will gave legacies to his brother and two sisters, and upon the same paper under the will gave them in his own handwriting the same legacies; and it did not appear when this was written, but in the ecclesiastical court probate was granted of these two writings as a will and codicil: Lord Kenyon considered the probate conclusive to show they must be taken as distinct instruments, and consequently that the legatees, according to the general rule, were entitled to double legacies.[c]

This presumption that legacies by different instruments are accumulative is a very slight one, and small circumstances will raise an inference against it.[d] If in two testamentary instruments the legacies are not given simpliciter, but the motive of the gift is expressed, and in both instruments the same motive is expressed, and the same sum is given; the Court considers these two coincidences as raising a presumption that the testator did not by the second

[a] Swinb. P. 7. S. 21. 2 H. B. 219. Wallop *v.* Hewett, 2 Ch. Rep. 70. Newport *v.* Kinaston, id. 110. Finch Ch. Ca. 294. Pit *v.* Pidgeon, 1 Ch. Ca. 301. Cliffe *v.* Gibbons, 2 Stra. 1324. Ridges *v.* Morrison, 1 Bro. 389. Hooley *v.* Hatton, id. N. 2 Dick. 461. Hodges *v.* Peacock, 3 Ves. 735. Hurst. *v.* Beach, 5 Mad. 351.

[b] 3 Ves. 294. His Lordship had previously (3 Ves. 160) made some strong observations on the habit of the spiritual court of granting probate of loose papers.

[c] Baillie *v.* Butterfield, 1 Cox, 392. But the probate of an instrument is not conclusive of its being *testamentary*. Pigott *v.* J'Anson, 1 Ed. 469.

[d] 2 Bro. 529. 3 Ves. 294. 5 id. 384.

instrument mean a second gift, but only a repetition of the former one.[a] Thus where all the sums given by the second instrument were different from those given by the first, except one, and that one was expressed to be for the same cause, viz. the legatee's trouble as executor: it was held that he was entitled only to one sum, while the rest of the legacies were accumulative.[b] But the Court only raises this presumption of the second gift being a repetition, where the double coincidence occurs, of the same motive, and the same sum, in both instruments. It will not raise it, if in either instrument there be no motive, or a different motive expressed, although the sums be the same; nor, if the same motive be expressed in both instruments, and the sums be different.[c]

This reasoning however has no application to cases where the second instrument affords intrinsic evidence that it was intended by the testator in substitution of the first. Thus where a testatrix by will declared her intention to dispose of the residue of her personal estate by a codicil or codicils, and afterwards made four codicils, and the first and last of these were nearly alike, the legatees in each being mostly the same; some of them having the same specific articles given to them by both codicils, but some of the pecuniary legatees had less, and some more given them by the last than by the first: Lord Hardwicke thought it manifest the testatrix intended to substitute one codicil in the place of the other; and held the legatees entitled only to the legacies under the last.[d] So where a man by his will gave to

[a] 5 Mad. 358.

[b] Benyon v. Benyon, 17 Ves. 34.

[c] 5 Mad. 359. 4 id. 267; and see 17 Ves. 41, 42.

[d] D. St. Albans v. Beauclerk, 2 Atk. 636; and see Jackson v. Jackson, 2 Cox, 35. Campbell v. E. Radnor, 1 Bro. 271. Coote v. Boyd,

his wife his goods, plate, &c., together with 1000*l.*, in satisfaction of all her claims; and afterwards by a codicil, reciting that there was 1000*l.* given her by his former will, did then give 1600*l.*, and whatsoever was in his former will to his wife, and his former will to stand in full force notwithstanding the codicil: it was held that the wife only took the 1600*l.* given by the codicil.[a]

Lord Thurlow observed, that the question, whether by giving two legacies, the testator did not intend the legatee to take both, is a question of presumption, donec probetur in contrarium; and would let in all sorts of evidence.[b] But in a late case it was held that evidence is not admissible in the first instance to show that a testator meant to substitute a legacy in his codicil in the place of one in his will; for this would be to contradict the expressed effect of a written instrument: but where the circumstances are such as to raise a presumption against the accumulation, evidence, as in other cases,[c] is admissible to repel this presumption.[d]

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2 Bro. 521. Moggridge *v.* Thackwell, 1 Ves. J. 464. 3 Bro. 517. James *v.* Semmens, 2 H. B. 213. Allen *v.* Callow, 3 Ves. 289 Barclay *v.* Wainwright, id. 462. Osborne *v.* D. Leeds, 5 Ves. 369. Currie *v.* Pye, 17 Ves. 462. Att. Gen. *v.* Harley, 4 Mad. 263. Gillespie *v.* Alexander, 2 Sim. & St. 145. Hemming *v.* Gurrey, id. 311. As to Foy *v.* Foy, 1 Cox, 163, cited 2 Bro. 524, see 3 Ves. 467.

[a] City of London *v.* Russell, Rep. T. Finch, 290.

[b] 2 Bro. 527.

[c] See ante 53. Post Sect. 5, cases of portions satisfied by legacies.

[d] Hurst *v.* Beach, 5 Mad. 351.

## Section II.

### *Of the Construction of certain Words most commonly used to describe the Property bequeathed.*

Words in general are to be taken according to their natural and common import, and to the sense, which usage has put upon them: and if words of art are used, they are to be construed according to the technical sense, unless upon the whole will it is plain they were not so intended.[a] For the law presumes every testator to know its rules;[b] and the Court cannot reject words, having an obvious meaning, upon a suspicion, that the testator did not know what he meant.[c] The same words also in different parts of a will are primâ facie to be taken to have the same meaning;[d] but they may have a different construction even in the same sentence when applied to different matter.[e]

The word "estate" is genus generalissimum, and includes all things real and personal.[f] A bequest, therefore, of all personal estate at W. will pass arrears of rent issuing out of lands there.[g]

"Goods" and "estate" mean the same thing, and are co-extensive;[h] and "all goods," or "all goods and chattels" will pass all the personal estate,[i] including leases for years, cattle, corn, debts, and

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[a] 4 Ves. 329. Wilm. 278. 1 Bro. 128. 3 id. 68. 5 Ves. 401. 7 id. 368. 9 id. 205. 2 B. & B. 204. 506.

[b] 1 Ves. J. 110. 1 Mer. 79. 2 id. 22.

[c] 8 Ves. 306.

[d] See 2 Ch. Ca. 168. 6 Ves. 559. 10 id. 203.

[e] 2 Ves. 616. Forth v. Chapman, 1 P.W. 663.

[f] 1 Salk. 237. Holt, 281. Lee v. Hale, 1 Ch. Ca. 16. 2 Freem. 157.

[g] Sayer v. Sayer, Pr. Ch. 392. Gilb. Eq. R. 87.

[h] 2 Ves. 163. So the word "bien" in a French will though in the singular number, id.

[i] Swinb. P. 7. S. 10. 3 Atk. 62. 11 Ves. 666.

the like.[a] Thus running horses were held to be included in a bequest of other goods and chattels in and about the testator's dwelling-house and outhouses at T.[b] And if one devise to J. S. all his goods, or all his chattels, by either of these is devised as much as by both of them.[c]

The word "effects" also is equivalent to property, or worldly substance; and if used simpliciter, as in a gift of "all my effects," will carry the whole personal estate.[d] Thus where a man, after bequeathing various specific articles of furniture and a few sums of money to different persons, gave all his other effects to A., to be sold for his benefit: this was held clearly to comprehend the property generally; and the direction to sell only implied a general intention on the part of the testator that his residuary property should be converted or collected for the benefit of his residuary legatee.[e]

It has, however, been repeatedly held that a gift of "my estate and effects," or "all my personal estate," or the appointment of executors, is not sufficient to carry property, which a testator has only a power to dispose of; unless an intention to pass the subject of the power can be collected.[f]

The civil law made bona mobilia, and bona immobilia the membra dividentia of all estates.[g] By a

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[a] Touch. 447. Off. Ex. 256. Portman v. Willis, Mo. 352. Cro. Eliz. 386; but see as to leases, Bro. Ab. Done. 43.

[b] Countess Gower v. E. Gower, 2 Ed. 201. Ambl. 612.

[c] Touch. 447. Co. Lit. 118, b. Godolph. 392. Swinb. P. 7. S. 10.

[d] 15 Ves. 507. 5 Mad. 71.

[e] Hearne v. Wigginton, 6 Mad. 119.

[f] 8 Ves. 588. Andrews v Emmot, 2 Bro. 297. Standen v. Standen, 2 Ves. J. 589. Langham v. Nenny, 3 Ves. 467. Croft v. Slee, 4 Ves. 60. Mac Leroth v. Bacon, 5 Ves. 159. Bradly v. Westcott, 13 Ves. 445. Webb v. Honnor, 1 Jac. & W. 352. Sanders v. Franks, 2 Mad. 147. Pease v. Mead, Hob. 9.

[g] 1 P.W. 267.

devise of "moveables" pass all personal goods, both quick and dead, including bonds and specialties. By "immoveables" pass leases, rents, and the like.[a] But debts have been held not to pass by a gift of "all my moveable goods and chattels."[b] Nor will "moveables" carry corn, nor fruit growing on the ground, nor stone, nor timber prepared for building.[c]

A mere bequest of "all goods" has been held to pass bonds;[d] but a bequest of all "goods and chattels," or of "personal estate and effects" in a particular place, extends only to goods and chattels in possession, and not to choses in action; and will not therefore pass bonds or securities for money, which have no locality; being merely evidence of title to things out of the place, and not things in it.[e] Hence where a man bequeathed to Mrs. E. F. all his property of whatever nature or kind the same might be, that should be found in her house in D., except a bond in a writing box there: it was held that a mortgage and bond, and bankers' receipts did not pass; and that the exception was not sufficient evidence of the testator's intention to pass the choses in action.[f] Lord Hardwicke and Lord Redesdale indeed held that Bank notes in such case would pass, they being quasi cash:[g] but Lord Eldon seems to doubt this, and to consider Bank notes in the same situation as other securities.[h] A gift in the civil law of things in a

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[a] Touch. 447. 8winb. P. 7. S. 10. Godolph. 392. 416. Mos. 297.

[b] Sparke *v.* Denne, Sir W. Jo. 225.

[c] Off. Ex. 252

[d] Anon. 1 P.W. 267.

[e] Chapman *v.* Hart, 1 Ves. 271, & Supplement, 138. Moore *v.* Moore, 1 Bro. 127. Green *v.* Symonds, id. 129. N. Jones *v.* L. Sefton, 4 Ves. 166.

[f] Fleming *v.* Brook, 1 Sch. & Lef. 318.

[g] Popham *v.* Lady Aylesbury, Ambl. 68, cited 1 Ves. 273. 11 Ves. 662. Fleming *v.* Brook, 1 Sch. & Lef. 318.

[h] 11 Ves. 662.

particular place at the testator's death, only carried what was usually there, and not what might be there by chance; and on the other hand things which were usually there, but by chance were not then there, passed.[a] Where there was a bequest of the residue of personal estate and effects, except such parts as should be in and about the testator's house, which were given to another: it was held that cash arising from rents, and kept by the steward in an iron chest in the house, did not pass under the exception.[b]

Moreover the effect of these general and comprehensive words will be restrained whenever the context of the will shows that the testator has used them in a more confined sense;[c] and they are often, when accompanied by words of a more limited signification, construed to mean things only ejusdem generis. Thus where a man, after bequeathing some legacies, gave and devised all the rest and residue of his estate and chattels, real and personal, to his wife: this was restrained to personal estate only; for the testator having before only given legacies, and not lands, the words "rest and residue of his estate" were relative, and must be intended estate of the same nature with that he had before devised.[d] So "goods and chattels," or "other things" coming after the word "furniture," &c., will not pass stock in trade,[e] nor ready money.[f] And where a man devised to his daughter all goods and things of every

[a] Swinb. P. 3. S. 6. Godolph. 409.

[b] Jones v. Lord Sefton, 4 Ves. 166.

[c] Woolcomb v. Woolcomb, 3 P.W. 112.

[d] Marhant v. Twisden, Gilb. Eq. R. 30.

[e] 11 Ves. 666.

[f] Trafford v. Berrige, 1 Eq. Ab. 201. Timewell v. Perkins, 2 Atk. 103; and see 15 Ves. 326.

kind and sort whatever which should be found in her closet at his death: Lord Hardwicke held that money found in it would not pass; for the testator had in the outset of his will given her a money legacy, which must be presumed to be the whole he intended his daughter by way of money legacy; besides goods were first named in the clause, and therefore the subsequent word "things" must be confined to household goods, and what was of the same species.[a] So also in a gift of linen and clothes of all kinds except laces: the word linen was restrained to mean body linen.[b] And a bequest of "all my goods, wearing apparel, of what nature and kind soever, except my gold watch," was held to pass wearing apparel, ornaments of the person (except the watch) household goods and furniture, but no other part of the personal estate.[c] Again where "wagon ways, rails, staiths, and all implements, utensils, and *things*," which at the testator's death should or might be used or employed together with or in or for the working, management, or employment of certain collieries, and which might be considered or deemed to be as or of the nature of personal estate, were bequeathed in trust to be held, used, or enjoyed by the devisee of the collieries: Lord Loughborough held this to include corn, hay, horses, timber, and a variety of other things, as well as debts and cash balances due from several persons, as being necessary for the carrying on of the trade:[d] but his decree, as

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[a] Roberts *v.* Kuffin, 2 Atk. 112. Barn. C. R. 259. Sanders *v.* Earle, 2 Ch. Rep. 188. Pr. Ch. 8 cited; and see Rawlings *v.* Jennings, 13 Ves. 39. Lord Hardwicke in the first cited case laid some stress upon the circumstance of a closet being an improper place to refer to for money.

[b] Hunt *v.* Hort, 3 Bro. 311.

[c] Crichton *v.* Symes, 3 Atk. 61.

[d] Stuart *v.* E. Bute, 3 Ves. 212. 11 Ves. 657.

to the debts and cash balances, was reversed in the House of Lords; where it was also held that coals raised did not pass; for these were not in their nature within the meaning of the word "things," as used in the will, but rather by gone profits.[a]

Yet notwithstanding these general words are accompanied by others of a more limited signification, they will sometimes be allowed to have their full effect. Thus where there was a gift of "all and singular the testator's plate, linen, china, household goods, *and* furniture, *and effects that he should die possessed of:*" the word effects was allowed to have its unrestricted sense, and carry all the personal estate.[b] And where a testatrix, having given the residue of her estate between her two children, by a codicil revoked the share of one of them as to her plate, linen, household goods, and other effects (money excepted;) and gave the whole thereof to the other: this was held a revocation of a moiety of the residue; for the express exception of money out of the "other effects" showed the understanding of the testatrix, that it would have passed by those words; that express words were required to exclude it; and the disposition must therefore be taken to comprehend all that she had not excluded, which was money only.[c] It seems also that the general effect of the word "estate," &c., will not be restrained by a subsequent mere enumeration of articles, of which the testator supposes his property to consist. For

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[a] 1 Dow. 73.

[b] Michell *v.* Michell, 5 Mad. 69; and see Campbell *v.* Prescott, 15 Ves. 500.

[c] Hotham *v.* Sutton, 15 Ves. 319; but see Fleming *v.* Brook, ante 210. Evidence in such case has been admitted, Pendleton *v.* Grant, 1 Eq. Ab. 230. 2 Ver. 517, but query.

where a man gave the remainder of his estate, viz, his Bank stock, India stock, South Sea stock, and South Sea Annuities, to his son C., and appointed him sole executor: it was held that the words following the viz. were added by way of enumeration or description only of the chief particulars whereof his estate consisted; and did not restrain the word "estate" to those particulars.[a]

By goods, it is said, the law understands no more than a man's clear property, his debts deducted; and that a bequest therefore of a moiety of all the testator's goods passes only a moiety of the surplus after all debts paid.[b] Yet it has been held that if a man devise to his wife a moiety of all his goods, the wife shall have a moiety of the whole without deducting debts, which shall come out of the other moiety;[c] or that if the testator bequeaths one half of his goods to one person, and makes another his executor, willing and appointing that all his goods shall be divided betwixt them; that the legatee shall have half before debts paid, and the executor the remainder after debts paid.[d] This doctrine however as far as regards a mere gift to a wife seems to be overruled. For where a man bequeathed to his wife the third part of all his property that should become due to him after his decease, and then, after giving some legacies, bequeathed the rest, residue, and remainder of his estate and effects, subject to the payment of all his

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[a] Bridges v. Bridges, 8 Vin. Ab. 295. Chalmers v. Storil, 2 Ves. & B. 222.

[b] Swinb. P. 7. S. 10. Off. Ex. 252.

[c] Dyer, 164, *a*. Godolph. 409, citing Goldsb. 164. Lee v. Hale, 2 Freem. 157. 1 Ch. Ca. 16; but see 8 Vin. Ab. 434.

[d] Suppl. to Off. Ex. 185, citing Cowel's Inst. 146.

debts, funeral expenses, and legacies, to his executors in trust to collect and invest, after payment of debts, &c. for the benefit of certain persons: it was decreed that the wife must take a third of the personal estate after payment of the debts; although the legacies were not charged upon that third, but were to come out of the residue.[a]

"Household furniture" comprises every thing that contributes to the use or convenience of the householder, or ornament of the house; and will carry household linen, and china, both useful and ornamental.[b] So it is said if one devise to another all his "household stuff," hereby do pass his plate, coaches, tables, stools, forms, beds, vessels of wood, brass, pewter, earth, and the like: but not his apparel, books, weapons, tools for artificers, cattle, victuals, corn, plowgeer, and the like.[c] "Household furniture" has indeed been held not to include, among other things, a silver sun-dial, camera obscura, telescope, globes, nor a case of butterflies, as not being such articles as were in use, or in any respect necessary or convenient for a householder.[d] Yet in a late case of a bequest of a testator's dwelling-house and premises at R., and also all and singular the household furniture and other household effects of and belonging to him in the said dwelling-house and premises at the time of his decease: the legatee was held entitled to a turning apparatus, models of a cutter and mortar, and an organ, and to a pair of pistols, they being primâ facie intended for the protection of the house: but not to a cow, a

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[a] Reed v. Addington, 4 Ves. 575.

[b] Kelly v. Powlet, Ambl. 605. 1 Dick, 359. Boon v. Cornforth, 2 Ves. 277. Hele v. Gilbert, id. 430.

[c] Touch. 447. Swinb. P. 7. S. 10.

[d] Kelly v. Powlet, 1 Dick. 359.

pony, nor a parrot in a cage; nor to fowling pieces, unless it was proved that they were kept for the defence of the house, which primâ facie they were not; nor to a hay-stack, if for sale, and not for use.[a] Pictures, both hung up and in cases, have been held to be furniture;[b] but books not.[c] Under the above bequest however in Cole *v.* Fitzgerald,[d] about one hundred volumes of books in general circulation were held to pass; but Sir J. Leach said, that he expressed no opinion whether such a bequest would or would not comprehend a gallery of pictures, kept as specimens of art, or a library of scarce books.

It was formerly held that by the devise of all the testator's furniture or household goods, plate would not pass;[e] but as the nation grew richer and plate became a more common furniture it was construed to be included within those words.[f] Yet a distinction was then taken whether the plate was in use or not; and it was said that "household stuff" or "goods" would carry only plate in use.[g] This distinction was afterwards denied, and it was held that if a person of rank bought a service of plate suitable to his quality, and never used it, it would nevertheless pass by the words "household furniture."[h]

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[a] Cole *v.* Fitzgerald, 1 Sim. & St. 189. Lowndes on Leg. 62. The two reports differ as to the parrot. See, as to the guns and pistols, 3 P. W. 335, where a clock was also held to be "household goods."

[b] Kelly *v.* Powlet, Boon *v.* Cornforth, ante 215. N. *b*.

[c] Kelly *v.* Powlet, ante 215. N. *b*. Harvey *v.* Badcock, 1 Dick. 359, cited. Bridgman *v.* Dove, 3 Atk. 201. Allen *v.* Allen, Mos. 112. Porter *v.* Tournay, 3 Ves. 311.

[d] Ante N. *a*.

[e] Jesson *v.* Essington, Prec. Ch. 207.

[f] Swinb. P. 7. S. 10. 1 P.W. 425. N. Franklyn *v.* E. Burlington, Prec. Ch. 251. 2 Ver. 512. Lillcot *v.* Compton, 2 Ver. 638.

[g] Phillips *v.* Phillips, 2 Freem. 11. Flay *v.* Flay, id. 64. Masters *v.* Masters, 1 P. W. 424. Nicholls *v.* Osborn, 2 id. 419. Snelson *v.* Corbet, 3 Atk. 370. Stapleton *v.* Conway, Belt's Suppl. to Ves. 187.

[h] Kelly *v.* Powlet, Ambl. 605. 1

Things whose use is in their consumption, as corn, malt, beer, wine, and the like, have been held not to pass as "household goods," or "furniture."[a] Yet they were held to pass under "household furniture and other household effects;" which words, it was said, comprise all property intended for use or consumption on the premises.[b]

But "household goods" will only include things in domestic use, and not what a testator has in the way of trade. Thus where a wife was entitled by her marriage articles to all the household goods, or utensils of household stuff, rings, plate, jewels, or linen of her husband at the time of his death; and the husband, besides the house in which he lived, had a house at G., which was used by the government as an hospital, and he had provided for the invalids there a great number of beds, sheets, and other furniture: the House of Lords, reversing Lord King's decree, held clearly that the wife was not entitled to these.[c]

It was agreed in one case that plate and jewels do not pass by a devise of all "utensils."[d]

The mere word "money" will not include stock.[e] But in a bequest of all the testator's money in the Bank of England; 3 per cent. and 5 per cent. Bank Annuities were held to pass; it appearing that the testator never had any money in the Bank.[f] And a

[a] Slanning *v.* Style, 3 P.W. 334. Porter *v.* Tournay, ante N. *h.* Hele *v.* Gilbert, 2 Ves. 430, Belt's N.

[b] Cole *v.* Fitzgerald, 1 Sim. & St. 189.

[c] Pratt *v.* Jackson, 2 P.W. 302. 3 Bro. P.C. 199. Le Farrant *v.* Spencer, 1 Ves. 97; and see 11 Ves. 666.

[d] Dame Latimer's case, Dyer, 59, *b.*

[e] Hotham *v.* Sutton, 15 Ves. 319; and see Com. Dig. Chan. 3 Y. 7. Gilb. Eq. R. 202. Ommanney *v.* Butcher, 1 Turn. 260.

[f] Gallini *v.* Noble, 3 Mer. 691.

bequest of monies and securities for money, Sir J. Leach thought sufficient to carry stock in the public funds; giving however no opinion with regard to Bank stock.[a] "Money" will pass all money due on mortgage or security, and arrears of rent.[b]

A bequest to A. of whatever debts might be due to the testator at the time of his death was held to pass a cash balance at a banker's.[c] And where the testator, after making such a gift by his will, lent some stock, and took a bond for replacing it, the bond was held to pass.[d] But a gift to the testator's son of "all sum and sums of money due to me from him on bond" was held not to release a bond debt contracted by the son after the date of the will.[e]

In a bequest of all the debts that should be due to the testator at his death, whether by *mortgages, bonds, or open accounts*, by J. C. of D. estate; debts by judgment and otherwise were held included; the testator having, in a subsequent part of his will, referred to a prior and similar clause, and considered it as a gift of all sums owing by the debtor.[f] And where a man, after reciting by his will that his brother J. was indebted to him 300*l.* upon bond, gave the same in thirds to J. and his two other brothers; and the debt due from J. was as executor of A., who was indebted to the testator in 200*l.* by bond, and 100*l.* by covenant; the whole debt was held to pass.[g]

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[a] Bescoby *v.* Pack, 1 Sim. & St. 500, and see Dicks *v.* Lambert, 4 Ves. 725.

[b] Com. Dig. Chan. 3 Y. 7. Gilb. Eq. R. 202.

[c] Carr *v.* Carr, 1 Mer. 541. N.

[d] Essington *v.* Vashon, 3 Mer. 434.

[e] Smallman *v.* Goolden, 1 Cox, 329.

[f] Stenhouse *v.* Mitchell, 11 Ves. 352.

[g] Williams *v.* Williams, 2 Bro. 87.

Where a man bequeathed all the debt which should be owing to him by the late J. C. on a certain day, and died before that day: the legatee was held entitled to the debt undiminished by consignments made to the executors, which had been carried by them to the credit of the debt, and which according to the usual course of dealing would not have been so carried, if the testator had lived.[a] Where also there was a bequest by a testator in Jamaica of whatsoever balance might be in the hands of his agents in London at the time of his death; and he afterwards by letter desired them to purchase some stock, and then died; and the agents after his death, but before they received intelligence of it, bought the stock: this, it was held, was to be considered as part of the balance in the hands of the agents at the time of the testator's death, and belonged to the legatee; the power having been revoked, and become of no effect by the death.[b]

A devise of all "my arrears of rent *and interest* due at my death" is sufficient to carry the arrears of an annuity.[c] But a bequest of arrears of rent will not pass a bond given to secure the arrears:[d] nor will the arrears of a mortgage carry the mortgage itself.[e] A gift of a sum of money due on bond or mortgage entitles the legatee to the principal only of the debt, and not to the interest due, either at the execution of the will, or the death of the testator.[f] But it has been thought that if a man gives or for-

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[a] Innes *v.* Mitchell, 6 Ves. 461.
[b] Hill *v.* Mason, 2 Jac. & W. 248.
[c] Hele *v.* Gilbert, 2 Ves. 430.
[d] Jones *v.* L. Sefton, 4 Ves. 166.
[e] See Hamilton *v.* Lloyd, 2 Ves. J. 416.
[f] Roberts *v.* Kuffin, 2 Atk. 112. Barn. C. R. 259. Hawley *v.* Cutts, 2 Freem. 24.

gives to another the debt which the latter owes the testator, this would carry the interest as an appendant to the debt.[a]

A bequest of "100*l.* Long Annuities" or "Long Annuities stock," is a gift of a Long Annuity of that yearly amount;[b] but a bequest of "60*l.* of the 4 per cent. consolidated Bank Annuities" is only a gift of 60*l.*[c]

Under "all stock in trade" it was insisted that all the testator's book debts, cash, bills, and money in goldsmith's hands, which were applied to the carrying on of his trade, should be included: but the opinion of three Barons against the Lord C. Baron was, that nothing should be deemed stock in trade but the shop goods and utensils in trade; although Baron Price thought the ready money in the till might come within that construction.[d]

"Live and dead stock" have been held not to include books, or wines: but this was in consequence of the particular wording of the will; and Lord Alvanley said it must never be quoted as a governing case, because it did not determine what "live and dead stock" might mean not coupled with other words.[e] In a case where a man having a lease of a farm, malt-house, &c., bequeathed all his household goods, cattle, corn, hay, and implements of husbandry, and stock *belonging to his house, messuage, farm, and premises in the said lease:* the legatee was held entitled to the stock in the malt trade as well as the stock in husbandry.[f] And where a

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[a] Hawley *v.* Cutts, ante 219. N. *f.*

[b] Stafford *v.* Horton, 1 Bro. 482. Att. Gen. *v.* Grote, 3 Mer. 316; and see Fonnereau *v.* Poyntz, ante 200.

[c] Oldham *v.* Carleton, 2 Cox, 399.

[d] Seymour *v.* Rapier, Bunb. 28.

[e] Porter *v.* Tournay, 3 Ves. 311.

[f] Brooksbank *v.* Wentworth, 3 Atk. 64.

man bequeathed to his wife, her executors, &c., his furniture, plate, wines, &c., and also *all his stock of cattle*, horses, and carriages, and also the harness, &c. thereto belonging; and then gave her a messuage or tenement, with the farm and lands (and stock and crop thereon) called L. for life only: the live stock on the farm was held to pass to her absolutely under the first clause.[a] "Stock on a farm" will carry the emblements against the devisee of the land.[b]

A bequest of "jewels" by a nobleman was held not to pass his collar and garter, nor the buckle in his bonnet.[c] Nor will a watch pass as "jewels" or "plate."[d]

By "medals," Lord Hardwicke thought that current coin, if curious pieces, and kept with medals, would pass; as even medals themselves were once current coin.[e] Where there was a bequest of "my cabinet of curiosities, consisting of coins, medals, gems, and oriental stones, and other valuable things," &c.: diamond ear-rings, a pearl necklace, and other ornaments of the person, which were usually kept in and shown as part of the testatrix's cabinet, but which were also occasionally worn by her, were held not to pass; the wearing making the distinction.[f]

The devise of a "house," it seems, will not carry hangings and looking-glasses, which are matters of ornament and furniture, and not to be taken as part of the house or freehold.[g]

Where a termor for ninety-nine years, who had

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[a] Randall *v.* Russell, 3 Mer. 190.

[b] Cox *v.* Godsalve, 6 East, 604. N. West *v.* Moore, 8 East, 339.

[c] Earl of Northumberland's case, Owen, 174.

[d] Allen *v.* Allen, Mos. 112.

[e] Bridgman *v.* Dove, 3 Atk. 201.

[f] Cavendish *v.* Cavendish, 1 Bro. 467. 1 Cox, 77.

[g] See Beck *v.* Rebow, 1 P. W. 94. Allen *v.* Allen, Mos. 112.

let underleases for sixty-three years, and reversionary leases of nineteen years more, bequeathed to A. his "leasehold ground-rents:" A. was declared entitled to the whole of the leasehold premises for the remainder of the testator's term of ninety-nine years.[a]

Under a gift of a silver tea-kettle, and lamp, with its appurtenances: the latter word was held to carry nothing but the stand or frame that supported the tea-kettle, and not the tea-pot and other things.[b]

Where a man by his will, after giving a legacy to his servant, acquitted, exonerated, and discharged him of all debts, accounts, reckonings, and demands whatsoever: this was held not to pass a trunk containing jewels, &c., which was in the servant's hands at the time to the will and death of the testator.[c]

A devise to trustees of a sum of money to be laid out in the purchase of an annuity "clear" for A., means free from taxes.[d]

"Unmarried" or "without being married" means prima facie never having been married: such will be the construction in a gift over upon the death of the legatee unmarried.[e]

The word "item" Lord Hardwicke said had never been construed a disjunctive; and therefore where a testator, after giving 5*l.* a year to the school at Y., added, "Item, I give to the poor of Y. 50*s.* a year out of my estate of H.;" he held that this word ought to be construed as a conjunctive in the sense

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[a] Kaye *v.* Laxon, 1 Bro. 76.

[b] Hunt *v.* Berkley, Mos. 47. 1 Eq. Ab. 201.

[c] Fish *v.* Jesson, 2 Ver. 114. Raithby's ed.

[d] Hodgworth *v.* Crawley, 2 Atk. 376.

[e] Maberly *v.* Strode, 3 Ves. 450. Bell *v.* Phyn, 7 id. 453.

of "and," or "also,"[a] to connect the two sentences together, and make the estate at H. as much liable to one annuity as the other.[b] Yet where a man bequeathed 500*l.* to his grandson J., and 500*l.* to his grandson T., and charged his land with the payment of those legacies; and then went on, "Item, I give to my grandson A. 500*l.*, and to my grandson B. 500*l.*," &c.: it was held that these latter legacies should not be charged upon the lands.[c] And in a late case Mr. J. Bayley said, it is an old observation, that the introduction of the word "item" shows that the testator is dealing with a new subject, and that the words following apply to that only, and not to the preceding matter, unless the intention that they should do so is plain.[d]

Either in a deed or a will the word "or" may be construed as "and," and "and" as "or," to give effect to the intention.[e] Where therefore there was a bequest to the testator's daughter her executors, &c. for ever, provided that in case she should die under twenty-one, *or* without leaving a husband living at her death, then over: the testator, it was held, intended the limitation over to take place on the happening of only one event consisting of two circumstances; that the word "or" must be construed "and;" and the daughter, having married and attained twenty-one, became absolutely entitled to the legacy.[f] So where a legacy

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[a] See as to the word "*also*," Richards *v.* Baker, 2 Atk. 321. Doe *v.* Westley, 4 B. & C. 667; and as to the word "*with*." Leeke *v.* Bennett, 1 Atk. 470.

[b] Cheeseman *v.* Partridge, 1 Atk. 436.

[c] Grise *v.* Goodwin, 2 Freem. 264.

[d] Doe *v.* Westley, 4 B. & C. 669.

[e] Wright *v.* Kemp, 3 T. R. 470. Co. Lit. 225, *a*. Grant *v.* Dyer, 2 Dow. 73; and see ante 94. The numerous other cases are referred to in 2 Bridg. Eq. Dig. 139. 742. 3d ed. 6 Crui. Dig. 183. 2d ed.

[f] Weddell *v.* Mundy, 6 Ves. 341; and see 2 Freem. 209.

was given over in case of the death of the legatee without being married *and* having children; Sir W. Grant remarked, this contingency could not properly be said to mean any thing more than the latter event; as, legally speaking, there could be no children without a marriage; and therefore to give effect to all the words it was almost necessary to construe the copulative as disjunctive.[a] But the intention of a testator requiring this construction must appear:[b] and it has even been said, that the word "or" is a disjunctive, and not to be taken as a copulative, but where it would make the whole clause nonsense to construe it otherwise, and where there is an absolute necessity for doing so.[c]

In a gift to A., and *in case of his death* to B.; or to A. *but should he happen to die*, to B.: these words, as they import a contingency, and are yet applied to an event that is certain, have been understood to mean in case of the death of A. in the testator's lifetime; if therefore he survives the testator he will be entitled absolutely, and the bequest over defeated.[d] So if legacies are given to several persons, and, if any of them happen to die, the legacy to go to such of them as shall be then living; these words refer to the time at which the legacies are payable, that is the death of the testator.[e] So also where the residue was given in trust for a wife for life, and after her death to be divided between the testator's two daughters, and *in*

[a] Bell *v.* Phyn, 7 Ves. 453. Hepworth *v.* Taylor, 1 Cox, 112.

[b] 6 Ves. 560.

[c] Fitzgib. 215. 222.

[d] Hinckley *v.* Simmons, 4 Ves. 160. Turner *v.* Moore, 6 id. 557. Cambridge *v.* Rous, 8 id. 12. Webster *v.* Hale, id. 410. Ommaney *v.* Bevan, 18 id. 291. Slade *v.* Milner, 4 Mad. 144.

[e] Trotter *v.* Williams, Pr. Ch. 78. Post. 229. King *v.* Taylor, 5 Ves. 806.

*case of the death* of them, or either of them, leaving children, in trust for the children: the death of the daughters on the same principle was considered to refer only to their deaths in the lifetime of the wife; so that having survived her they took the absolute interest.[a] The context of the will, indeed, has sometimes shown that the testator did not employ these words in the above sense, and meant to speak generally of death whenever it might happen. Lord Thurlow, in Nowlan *v.* Nelligan[b] thought it too much to determine that "in case of death happening" meant dying in the testator's lifetime; and the meaning therefore must be supposed to be in the event of the wife's death whenever it should happen. And in another case, in which a man bequeathed to his sister S. 1000*l.*, "*and* in case of her demise" gave to A. 800*l.*, and to B. the remaining 200*l.*; and after some other legacies, gave to his sister the residue of his property *to be disposed of as she should think proper;* his Lordship decreed the sister to take a life interest only in the 1000*l.*, with remainder to A. and B.:[c] for the mode of giving the residue contrasted with the mode of giving the particular legacy, afforded evidence, that one was given absolutely, and a limited interest only in the other.[d] Parol evidence is of course not admissible to show the intention of a testator in these cases.[e]

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[a] Galland *v.* Leonard, 1 Swanst. 161. 1 Wils. C. C. 129. Hervey *v.* M'Laughlin, 1 Pri. 264.

[b] Ante, 4.

[c] Billings *v.* Sandom, 1 Bro. 393; and see Lord Douglas *v.* Chalmer, 2 Ves. J. 501.

[d] 8 Ves. 22.

[e] Lowfield *v.* Stonehain, 2 Stra. 1261.

## SECTION III.

### Of Joint-tenancy and Tenancy in common.

IN the civil law there was no survivorship among legatees; for if goods were devised to two jointly, and afterwards one of them died, his executor had his share:[a] and it seems in equity to have been once doubted whether there could be any joint-tenancy in personal bequests.[b] The rule, however, of the common law has long been adopted; and if a legacy, whether pecuniary or specific, is given to two or more persons; as for example, to A. and B.,[c] or to the issue of C.,[d] and there are no words to sever the interest, the legatees will be joint-tenants; so that if one is incapable of taking,[e] or dies before any severance of the property has been made,[f] the others take the whole. Hence where a testatrix gave one third of the residue *unto and amongst* the children of her sister R. C.; another third *unto* the children of her niece E. L.; and the remaining third *unto and amongst* the children of her niece C. B.: the children of E. L. were held to take as joint-tenants, and the children of R. C. and C. B. as tenants in common.[g] So a bequest of 400*l.* to the four daughters of the testator's brother was held a joint-tenancy.[h] Where also the interest of a legacy

[a] Swinb. P. 1. S. 7. 2 Lev. 209.

[b] See 1 Bro. 118. Sanders *v.* Ballard, 3 Ch. Rep. 214.

[c] 9 Ves. 204. Scoolding *v.* Green, Pr. Ch. 37. Webster *v.* Webster, 2 P.W. 347. Keys *v.* Luffkin, 1 Dick. 392. Whitmore *v.* Trelawny, 6 Ves. 129.

[d] Davenport *v.* Hanbury, 3 Ves. 257; and see Crooke *v.* De Vandes, 9 Ves. 197.

[e] Dowset *v.* Sweet, Ambl. 175; and see Godolph. 400.

[f] See Frewen *v.* Relfe, 2 Bro. 220. Baldwyn *v.* Johnson, 3 id. 455. White *v.* Williams, 3 Ves. & B. 72. Coop. 58.

[g] Campbell *v.* Campbell, 4 Bro. 15. See post 227, as to the word "amongst" creating the tenancy in common.

[h] Morley *v.* Bird, 3 Ves. 629.

was given for a limited time in common, the principal was held to go in joint-tenancy after that time; there being no words to show that the capital was intended to go in the same way as the interest.[a] And in another case legatees were decreed to take joint equitable interests during the life of the executors, and legal interests afterwards as tenants in common.[b] It seems also now settled that executors, whether they take the residue as such, or as residuary legatees, are joint-tenants;[c] and if one therefore renounces the executorship,[d] or the devise to him is afterwards revoked,[e] the others take the whole.

Under some circumstances a joint-tenancy may be most beneficial to the legatees. Thus where a man appointed his two natural children to be his sole heirs and executors to his estate: Lord Loughborough thought it clearly a joint-tenancy; observing, that as the legatees were natural children, and could not succeed to each other, that circumstance was a strong inducement to leave it to them jointly, if the testator had consulted how to leave it to them in the best way.[f] But in general with respect to personal, as well as real property, the Court leans against survivorship, and will decree a tenancy in common when it can.[g] Hence the words "to and amongst;"[h]

[a] Crooke *v.* De Vandes, 9 Ves. 197; and see Jackson *v.* Jackson, 7 Ves 535. 9 id. 591.

[b] Gardiner *v.* But, 3 Mad. 425.

[c] 9 Ves. 598. 2 Ch. Ca. 64. Cox *v.* Quantock, Rep. T. Finch. 176. 2 Freem. 140. Lady Shore *v.* Billingsly, 1 Ver. 482. Cray *v.* Willis, 2 P.W. 529. Mos. 184. Willing *v.* Baine, 3 P.W. 113. Frewen *v.* Relfe, 2 Bro. 220. Baldwyn *v.* Johnson, 3 id. 455. Griffiths *v.* Hamilton, 12 Ves. 298. White *v.* Williams, 3 Ves. & B. 72. Coop. 58. Hall *v.* Digby, 4 Bro. P. C. 224.

[d] Rawlings *v.* Jennings, 13 Ves. 39.

[e] Humphrey *v.* Taylcur, Ambl. 136. 1 Dick. 161.

[f] Stuart *v.* Bruce, 3 Ves. 632.

[g] 1 Ves. 166. 2 id. 258. 3 Bro. 27.

[h] Campbell *v.* Campbell, 4 Bro. 15. Trundell *v.* Eames, id. cited. Casterton *v.* Sutherland, 9 Ves. 445.

"equally amongst;"[a] "equally to be divided;"[b] "equally;"[c] "respectively;"[d] "between;"[e] "jointly and between;"[f] "in joint and equal proportions;"[g] "in equal moieties;"[h] "share and share alike;"[i] have been held sufficient to create a tenancy in common. So a direction that the interest of each legatee's lot or share should be applied in his education;[k] a bequest to six persons to each of them a sixth part;[l] a devise of a term to two persons, they paying yearly to another 25*l.*, viz.: each of them yearly 12*l.* 10*s.* out of the premises;[m] a bequest of the residue to daughters (after other gifts to them as tenants in common) for their own sole use to "be paid into their own proper hands,"[n] have all been construed tenancies in common. And where a man bequeathed the interest of a sum of pagodas to A. for life, and after her death to his residuary legatees after-named, and then gave the residue of his estate to P. and B. as tenants in common: it was held that the pagodas were part of the residue, and the legatees tenants in common of them, as well as of the other parts of the residue.[o]

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[a] Warner *v.* Hone, Pr. Ch. 491. Gilb. Eq. R. 146. 1 Eq. Ab. 292.

[b] Thickness *v.* Vernon, 1 Ver. 32. Hamell *v.* Hunt, Pr. Ch. 163. Edwards *v.* Fashion, id. 332. Owen *v.* Owen, 1 Atk. 494. Peat *v.* Chapman, 1 Ves. 542. Jolliffe *v.* East, 3 Bro. 25. Contra Cock *v.* Burrish, 1 Ver. 425.

[c] Case cited 1 Ver. 32. Lewen *v.* Cox, Cro. Eliz. 695. Denn *v.* Gaskin, Cowp. 657; and see 1 Ves. 14. 2 Bro. 224. 9 East. 276. Contra 1 Ch. Ca. 239.

[d] Stephens *v.* Hide, For. 27. Heathe *v.* Heathe, 2 Atk. 121; but see 1 P.W. 18.

[e] Lashbrook *v.* Cock, 2 Mer. 70.

[f] Perkins *v.* Baynton, 1 Bro. 118.

[g] Ettricke *v.* Ettricke, Ambl. 656.

[h] Harrison *v.* Foreman, 5 Ves. 207.

[i] Draper's case, 2 Ch. Ca. 64. Heathe *v.* Heathe, 2 Atk. 121. Perry *v.* Woods, 3 Ves. 204.

[k] Dodson *v.* Hay, 3 Bro. 404.

[l] Page *v.* Page, 2 P.W. 489.

[m] Kew *v.* Rouse, 1 Ver. 353.

[n] Mathews *v.* Bowman, 3 Anstr. 727.

[o] Pitt *v.* Benyon, 1 Bro. 589.

Yet if the context of a will shows a joint-tenancy to have been intended the construction must be so, notwithstanding the words are otherwise sufficient to create a tenancy in common. A devise therefore to two equally between them, and the whole to the survivor of them, is a joint-tenancy.[a] And where a testator gave the children of A., deceased, and the children of B., deceased, the interest of 1500*l.* for life, to be equally divided between them, and at their decease, the same to be divided between the grandchildren of each, A. and B.: it was held that the gift over after the decease of all rendered it a joint-tenancy.[b]

It is difficult indeed to reconcile the cases, where after a tenancy in common words of survivorship are added, and the testator has not fixed the precise period to which they shall relate: but it seems to be settled that if a legacy be given to two or more, equally to be divided between them, or to the survivors or survivor of them, and there is no special intent to be found in the will, the survivorship is to be referred to the period of division. Thus in a leading case in which there was a bequest to five persons, "equally to be divided between them and the survivors and survivor of them:" it was held to be a tenancy in common, and not a joint-tenancy; and that the latter words were to be understood of such of them as should be living at the testator's death, that being the period of division.[c] The same

[a] Clerk *v.* Clerk, 2 Ver. 323. Folkes *v.* Western, 9 Ves. 456; and see Oakley *v.* Young, 2 Eq. Ab. 537.

[b] Malcolm *v.* Martin, 3 Bro. 50. Armstrong *v.* Eldridge, id. 215.

[c] Stringer *v.* Phillips, 1 Eq. Ab. 292. Trotter *v.* Williams, Prec. Ch. 78. Rose *v.* Hill, 3 Burr. 1881. L. Bindon *v.* E. Suffolk, 1 P.W. 96. This last case was reversed in the Lords, on the ground, it is said (1 Ves. 14. 2 Ves. J. 638. 3 Mad. 15.) of the nature of the particular property. See also Brodhurst *v.* Richardson, 2 Ch. Rep. 153. Shergold *v.* Boone, 13 Ves. 370.

doctrine has been applied in some cases where there has been a previous life interest, and the words of survivorship referred to the death of the testator to prevent a lapse:[a] but in others the survivorship has been held to refer to the death of the tenant for life.[b] So where a man bequeathed some stock to his wife for life, and after her death in thirds between his son and his two daughters, if then living, and if not, the share of the one dead to go to his other children; provided that if either of his daughters died unmarried and without issue, the surviving sister to take the share of the one so dying: it was held that the deaths of the daughters unmarried and without issue were plainly referrible to their deaths in the lifetime of the wife, and that by surviving her they were entitled absolutely.[c] In a late case also of a legacy in trust to pay the interest to A. for life, and upon his decease the principal to be equally divided between B. C. and D. and the survivors or survivor of them; it was held that the terms of survivorship were to be referred to the death of A.; and that as a general principle, in the case of a previous life estate, the period of division was the death of the tenant for life, and the survivors at such death would take the whole legacy.[d]

But the question in these cases is always attended with a degree of uncertainty, and must depend upon

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[a] Roebuck *v.* Dean, 2 Ves. J. 265. 4 Bro. 403. Perry *v.* Woods, 3 Ves. 204. Maberly *v.* Strode, 3 Ves. 450. See however the ground of Perry *v.* Woods stated in 19 Ves. 537. Rose *v.* Hill, 3 Burr. 1881.

[b] Brograve *v.* Winder, 2 Ves. J. 634. Russell *v.* Long, 4 Ves. 551. Daniell *v.* Daniell, 6 Ves. 297. Jenour *v.* Jenour, 10 Ves. 562. Newton *v.* Ayscough, 19 Ves. 534. Hoghton *v.* Whitgreave, 1 Jac. and Wal. 146.

[c] Laffer, *v.* Edwards, 3 Mad. 210.

[d] Cripps *v.* Wolcott, 4 Mad. 11.

the apparent intention collected either from the particular disposition or the general context of the will. Thus the survivorship, by reference to other clauses in the will, has been held to mean a survivorship in case any of the legatees died under twenty-one.[a] And it has been said, that if legacies are given to children, and if any die, their legacies to survive, yet after twenty-one, or marriage, there shall be no survivorship, though the words are general.[b] In a case in which the residue was given to be equally divided among the children of the testator's daughters E. and M. to be paid at their respective ages of twenty-one, or marriage, with benefit of survivorship *in case of the death of any of them before his or their share became payable;* the issue of any child dying in the life of E. and M. to stand in the place of their parents respectively; and in case his said daughters should die without issue, or, having had issue, such issue should die without issue in the lifetime of his said daughters, then all the real and personal estate to go to the testator's brothers J. and A.; and one of the children of M. attained twenty-one, and died in the lifetime of E. and M.: Sir W. Grant thought that the case had not happened in which that child's share was to survive; that the gift over to the brothers was not sufficient to imply a further case of survivorship beyond what was expressed, and that the representatives of the child took such interest, absolute or defeasible, as he himself had in the funds in question.[c] Again where property was given in trust to pay the testator's daughter A. an annuity for life, and after her death

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[a] Haws *v.* Haws, 3 Atk. 524. 1 Ves. 13. 1 Wils. 165. Mendes *v.* Mendes, 3 Atk. 619. 1 Ves. 89.

[b] Strick *v.* Hudson, Bac. Ab. Leg. E. 2.

[c] Bayard *v.* Smith, 14 Ves. 470.

upon trust to divide the said annuity among all her children who should survive her, in equal shares if more than one; and if but one then to that one; *such annuity to be paid during the lives of such children, and the life of the survivor of them:* it was held that the share of one of the children, who died after having survived the daughter, went to its representatives; it being a tenancy in common, and the latter words only describing how long the annuity was to last, but not the persons who were to participate in it; and that it was only a conjecture, that because the annuity was for the lives of the survivors, therefore the survivors were to enjoy it.[a]

It was held by Lord C. J. Holt, in a case where a man devised several houses to his different children, and willed that if any of them died under twenty-one the part or share of the one dying should go over to the survivors; that the share which survived on the death of any one of the devisees would not go over again a second time.[b] It is the same in regard to distinct legacies given to several persons, with a similar clause of survivorship: if one die his share will survive; but if a second die, nothing but his original share will go over to the rest; for the accruing share is as a new legacy, and there is no further survivorship.[c] Lord Hardwicke held otherwise in a case before him upon the particular penning of the will, admitting at the same time the general rule:[d] but Lord Thurlow did not think the case an

Pickett v. Gullomand 2 Salk. 68.

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[a] Jones *v.* Randall, 1 Jac. & W. 100.

[b] Woodward *v.* Glasbrook, 2 Ver. 388.

[c] Perkins *v.* Micklethwaite, 1 P. W. 274. Barnes *v.* Ballard, cited 3 Atk. 79. For. 125. Rudge *v.* Barker, For. 124. Exparte West, 1 Bro. 575. 1 P.W. 275. N.

[d] Pain *v.* Benson, 3 Atk. 78.

exception, although he agreed in disapproving of the rule itself.[a] Lord Hardwicke also was of opinion that the law was the same, where a sum of money was given among several as tenants in common: but in a case in which personal estate was directed to be invested in trust for four children, with benefit of survivorship on the death of any under twenty-one, and a bequest over *of the said trust money after the decease of all*: Mr. J. Buller determined to the contrary, upon the ground of the testator's intention to keep it as an aggregate fund, to which it had been thought the rule did not apply; and he accordingly decreed the whole to the only surviving child.[c]

In a case where L. bequeathed to her executors three Exchequer annuities in trust to permit each of her three children G., E., and M., to receive the yearly produce of one of the annuities, and in case of the death of any of them leaving children then the annuity of him or her so dying to be equally divided among such children: and in case of the death of either of her said three children without issue then the annuity of him or her so dying to go to the survivors or survivor of them equally; and in case of the death of all without issue then over; and E. died without issue, after which G. died leaving two children, and it was contended that upon his death, though his original share went to his children, the moiety of E.'s share that accrued to him survived to M.: the Master of the Rolls thought the words would not bear that construction, although if the

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[a] 1 Bro. 576.

[b] 3 Atk. 80.

[c] Worlidge *v.* Churchill, 3 Bro. 465; and see Moore *v.* Godfrey, 2 Ver. 620, Raithby's ed. N. 1. In Nicholls *v.* Skinner, Pr. Ch. 528, the question does not seem to have arisen; see 2 Mer. 135.

testator had said it should go to the survivors for their lives it might have been contended that it survived to the last.[a]

## SECTION IV.

### *Of absolute and qualified Interests.*

In a devise of real property words of limitation must be added to give more than an estate for life: in the case of personalty words of qualification are required to restrain the extent and duration of interest. Thus in a devise of freehold and leasehold to A. and B. during their joint lives, and to the survivor of them; the survivor takes the absolute interest in the leasehold, but a life estate only in the freehold.[b]

Originally there could be no limitation over of a chattel, and a gift for life carried the absolute interest.[c] This seems now the better opinion as to those articles of which the use consists in the consumption; and that of these a gift for life is a gift of the property; unless included in a residuary bequest for life; for then they are to be sold, and the interest enjoyed by the tenant for life.[d] With this exception it is settled that a limitation over after a bequest for life, or for a determinate number of years,[e] of personal property is good, if limited to take place within the time the law allows in the case

[a] Vandergucht *v.* Blake, 2 Ves. J. 534.

[b] Awse *v.* Melhuish, 1 Bro. 519; and see Belt *v.* Mitchelson, Belt's Suppl. to Ves. 227. Savile *v.* E. Scarborough, 1 Swanst. 537. 1 Wils. C. C. 239.

[c] Fearne, Cont. Rem. 402, 6th ed. Warner *v.* Borsley, 2 Ch. Rep. 151.

[d] Randall *v.* Russell, 3 Mer. 190. Devise over held good, Hayle *v.* Burrodale, 1 Eq. Ab. 361.

[e] Jolly *v.* Wills, 2 Ch. Rep. 137.

of executory devises. Now it is 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.[a] Hence a bequest of personal estate in trust to pay and divide it unto and between A. and B., and in case of the death of either of them leaving children, in trust for such children, restricts the parents to an estate for life:[b] while a bequest, after the death of C., among her children when they shall severally attain the age of twenty-seven, is too remote and void.[c]

Devises for accumulation are restrained by the legislature within still narrower bounds, and no real or personal property can now be settled by deed or will (except for payment of debts, raising portions for children, or preserving timber) so as that the profits shall be wholly or partially accumulated for any longer term than the life of the settlor; or twenty-one years from his death; or during the minority of any person who shall be living at his death; or during the minority of any person who under the settlement would, if of full age, be entitled to the profits so directed to be accumulated: and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the profits, so long as the same shall be directed to be so accumulated, shall belong to such person as

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[a] 7 T. R. 102. Fearne, C. R. 430, 6th ed. See as to the difference of opinion how far the twenty-one years can be added at all events, without reference to the infancy of the person to take; 4 Ves. 337. Beard *v.* Westcott, 5 Taunt. 393. 5 B. & A. 801. The Lord Chancellor's opinion seems against the addition, 1 Turn. 25. As to the executory devise of an annuity, see Turner *v.* Turner, 1 Bro. 315. Ambl. 776.

[b] Farthing *v.* Allen, 2 Mad. 310.

[c] Cambridge *v.* Rous, 8 Ves. 12.

would have been entitled, if such accumulation had not been directed.[a]

A direction for accumulation contrary to the terms of this statute is void only for the excess, and is good to the extent allowed by it. The true doctrine seems to be, that in a trust for accumulation which, prior to the act, would have been good, so much as is now within the act will be good, but the excess will be bad; but if there be a trust for accumulation, and part of it would have been bad before the act, that part remains bad notwithstanding the act.[b]

It has long been established that a bequest over of personal property, in the event of a person dying without heirs, or without issue, is too remote and void:[c] for these words have been wrested and tortured out of their common and natural signification (that of dying without leaving issue at the time of death,) and by a solecism in law held to mean failure of issue at whatever length of time it may take place; producing the absurdity of making a dying "with issue" and dying "without issue" to mean the same thing. It is settled also that a limitation, which if the property were freehold would create an estate tail, gives the absolute interest in personalty; and a gift over is too remote and void.[d] Thus where a man by his will gave to A. the dividends on some

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[a] 39 & 40 Geo. III. 98.

[b] Griffiths *v.* Vere, 9 Ves. 127. Longdon *v.* Simson, 12 Ves. 295. L. Southampton *v.* M. Hertford, 2 Ves. & B. 54. Marshall *v.* Holloway, 2 Swanst. 432; and see 2 Mer. 389.

[c] Fearne, C. R. 460. Everest *v.* Gell, 1 Ves. J. 286. Gray *v.* Shawne, 1 Ed. 153. Grey *v.* Montagu, 2 id. 205.

[d] Fearne, C. R. 463. Bray *v.* Buffield, 2 Ch. Ca. 236. Salkeld *v.* Vernon, 1 Ed. 64. Fereyes *v.* Robertson, Bunb. 301. Gibbs *v.* Bernardistone, Gilb. Eq. R. 79.

Bank stock, and the payments growing due on some Exchequer Annuities during her life, and after her death gave the Bank stock and Exchequer Annuities to the heirs male of her body, and for want of such issue to B., the plaintiff; and A. died unmarried: Sir T. Sewell considered the above rule too strong to be got over, and dismissed the bill.[a] This decision was indeed reversed by the Lords Commissioners,[b] but upon appeal to the House of Lords the decree of the Master of the Rolls was established,[c] and the decision ever since considered as conclusive, and followed in subsequent cases.[d] A distinction was once taken between words creating an express estate tail, and those passing an entail only by construction and implication;[e] but this distinction has been considered as exploded.[f] Thus Sir W. Grant, speaking of the above case of Lord Chatham *v.* Tothill, said, he apprehended it to be ever since settled, that whatever would, *directly* or *constructively*, constitute an estate tail in land, would pass an absolute interest in personal estate.[g] If therefore a man limits his real estates, in strict settlement, and bequeaths the furniture of his mansion-house to go as heir-looms, and be enjoyed by the persons entitled to his real estate *as far as the rules of law and equity will permit;* the furniture vests absolutely in the first tenant in tail of the real estates on his birth, and

[a] Tothill *v.* Pitt, 1 Mad. 488.

[b] Tothill *v.* Pitt, 2 Dick, 431.

[c] E. Chatham *v.* Tothill, 6 Bro. P. C. 450.

[d] Glover *v.* Strothoff, 2 Bro. 33. Robinson *v.* Fitzherbert, id. 127. Jee *v.* Audley, 1 Cox, 324. Chandless *v.* Price, 3 Ves. 99. Elton *v.* Eason, 19 Ves. 73. 1 Mer. 670, N. Donn *v.* Penny, 19 Ves. 545. 1 Mer. 20. Browncker *v.* Beget, 19 Ves. 574. 1 Mer. 271. Britton *v.* Twining, 3 Mer. 176.

[e] 3 P.W. 259. 4 Bro. 543. Fearne, C. R. 478.

[f] 3 Ves. 102. 1 Mad. 478.

[g] 3 Mer. 183.

will go, notwithstanding the latter words, to his administrator upon his death under age.[a] So where Lord V. devised his goods, furniture, &c., after the decease of his son, in trust for such person as should from time to time be Lord V., it being his intention that the same should go with the title so far as the rules of law or equity would permit: this was held to vest an absolute interest in the first Lord V. who was not born in the testator's lifetime, and went to his representatives on his death under twenty-one.[b]

But although the limitation of a personal thing is not allowed after a dying without issue generally, yet if it be confined within the above mentioned limits it will be good; as in the case of a bequest to B. if A. die before twenty-one without issue;[c] or without issue living at his death;[d] or in failure of issue in and on the decease of the testator's wife.[e] A gift over also upon failure of issue will be good, if it be only a substitution in the room of the first, and to take effect if that fail. Thus where there was a bequest among the children of A. payable at twenty-one with benefit of survivorship, but if A. should happen to die without issue, then to B. and C.: this was held not to be a limitation over by way of remainder, but an absolute legacy to the children, if they lived to its vesting in them; if they did not, then to other persons; and was like the limitation of

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[a] Foley *v.* Burnell, 1 Bro. 274. Vaughan *v.* Burslem, 3 Bro. 101. Fordyce *v.* Ford, 2 Ves. J. 536. Carr *v.* Lord Erroll, 14 Ves. 478. Stratford *v.* Powell, 1 B. & B. 1.

[b] Ld. Deerhurst *v.* D. St. Albans, 5 Mad. 233.

[c] Fearne, C. R. 470, 6th ed. Pawlet *v.* Dogget, 2 Ver. 86. Martin *v.* Long, id. 151. Balguy *v.* Hamilton, Mos. 186.

[d] Fearne, C. R. 468, 6th ed. Lyon *v.* Mitchell, 1 Mad. 467. Long *v.* Blackall, 7 T. R. 100; and see Flanders *v.* Clarke, 3 Atk. 509.

[e] Stratford *v.* Powell, 1 B. & B. 1.

two fees simple to start at the same time upon different events.[a] So if a man devises his real estate to A. for life, with remainder to his first and other sons in tail, and in default of such issue to B. in the like manner; and bequeaths part of his personal property to go as heir-looms in the same way as far as they can by law; and A. should die without issue; the bequest to B. takes place.[b]

And courts of justice have uniformly endeavoured to support limitations of this description; taking advantage of any expression, from which the event may be construed, never having had issue; or may be confined to the time of the death. Thus in a bequest over of personal property upon the death of a person without *leaving* heirs, or issue, the settled construction is, that it means without leaving issue at his death.[c] Hence where, after a devise over of real estates to younger children upon the death of S. without leaving issue, the testator gave the residue of his personal estate to S., and directed that if S. should die without issue, the residue should *also* go among the said younger children: this bequest over was held good; for the word "also" had transferred the operative word "leaving" to the residuary clause.[d] So where there was a devise of a leasehold messuage to A. and the heirs of his body, "*but in default of*

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[a] Salkeld *v.* Vernon, 1 Ed. 64; and see Fearne, C. R. 373, 6th ed. Pleydell *v.* Pleydell, 1 P.W. 748. Atkinson *v.* Paice, 1 Bro. 91, Belt's ed. Baldwin *v.* Karver, Cowp. 309. Morse *v.* M. Ormond, 5 Mad. 99.

[b] Gower *v.* Grosvenor, 5 Mad. 337. Barn. C. R. 54; and see Southey *v.* Somerville, 13 Ves. 486.

[c] Fearne, C. R. 473, 6th ed. Forth *v.* Chapman, 1 P.W. 663, the leading case. Taylor *v.* Clarke, 2 Ed. 202. Goodtitle *v.* Pegden, 2 T. R. 720. Crooke *v.* De Vandes, 9 Ves. 197. As to the word "having," see Weakley *v.* Rugg, 7 T. R. 322.

[d] Foley *v.* Irwin, 2 B. & B. 435; and see Sheppard *v.* Lessingham, Ambl. 122.

*such issue, then after his decease*" to B.: the executory devise to B. was held good; for "then" and "when" were adverbs of time, and the words were sufficient to show the intention that the estate should vest, if at all, in B. at the time of the death of A.[a]

Again where personal property was given to L. C. during her life, and after her decease to the heirs of her body, equally between them, share and share alike, and for default of such issue, or in case of the death of L. C. before twenty-one or marriage, then over: L. C. was held to take only a life interest.[b] And where a fund was given to the testator's two illegitimate children J. and S. equally between them, but in the event of the death of either before twenty-one, and without issue, his share to go to the survivor; but in the event of both dying without issue, one of the shares to go to the testator's cousins, and the other to his nephews and nieces: the Lord Chancellor was clear that the testator intended the bequest to his relations to be confined to the event of both the sons dying without issue under twenty-one; and, this having happened, the limitation over took place.[c]

If nothing but a life interest is given over, the failure of issue must necessarily be intended a failure within the compass of that life.[d] Primâ facie also a bequest over to the survivor of two persons, after the death of one without issue, furnishes a strong pre-

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[a] Wilkinson *v.* South, 7 T. R. 555. Pinbury *v.* Elkin, 1 P.W. 563. Fletcher's case, 1 Eq. Ab. 193; and see Evit *v.* Williams, 9 Mod. 209. Rackstraw *v.* Vile, 1 Sim. & St. 604.

[b] Jacobs *v.* Amyatt, 4 Bro. 542.

[c] Kirkpatrick *v.* Kilpatrick, 13 Ves. 476; and see Sheppard *v.* Lessingham, Ambl. 122.

[d] 17 Ves. 482. Fearne, C. R. 488, 6th ed.

sumption that an indefinite failure of issue could not be in the testator's contemplation; for it will be intended that the survivor was meant individually and personally to enjoy the legacy, and not merely to take a vested interest, which might or might not be accompanied by actual possession.[a] But if the bequest is to the survivor, *his executors*, &c., this presumption fails, and the gift over is too remote.[b] And where the property was to be divided, on the death of a previous taker without issue, between four nephews and nieces, the part of C. (one of the nieces) only for life, and her part to be divided between the survivors; the devise over was held too remote; for as the whole property would go over upon failure of issue, whether C. should be then living or dead (the word "survivors" here meaning "others"[c]) the mere circumstance that one taker was confined to a life interest furnished no indication of an intention to make the whole bequest depend upon the existence of that person at the time when the event happened, on which the limitation over was to take effect.[d]

A general gift of the income arising from personal property is equivalent to a general gift of the property itself, unless there is something upon the face of the will to show that such was not the intention. A bequest therefore of the interest of the residue to A. for life, and at his death to B., gives to B. the absolute property subject to A.'s life estate.[e] So the

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[a] 2 Mer. 133. Hughes *v.* Sayer, 1 P.W. 534; and see Keily *v.* Fowler, Fearne, C. R. 482, 6th ed. Wilm. 298. 6 Bro. P. C. 309. Brooks *v.* Taylor, Mos. 188.

[b] Massey *v.* Hudson, 2 Mer. 130. Nicholls *v.* Skinner, id. 135; reported contra, Pr. Ch. 528.

[c] Vid. ante 185.

[d] Barlow *v.* Salter, 17 Ves. 479.

[e] Clough *v.* Wynne, 2 Mad. 188; and see Philips *v.* Chamberlaine, 4

devise of the profits of a term is a devise of the term itself;[a] and an indefinite gift of the interest, or of the dividends, gives the absolute property of stock.[b] Thus a bequest of stock to trustees, in trust to pay the interest and dividends as they shall from time to time arise into the hands of a married woman for her separate use, is an unlimited gift to her of the stock itself.[c]

A bequest to A. "to be disposed of by him by his will as he shall see fit;"[d] or "to be disposed of as he thinks proper to be paid after his death;"[e] has been held to vest the absolute property in the legatee, who may dispose of it as he pleases: he may make a will disposing of it by general terms without a reference to the power;[f] but he is not confined to a disposition by will, and if he dies without making any disposition the property goes to his representatives. It is different when this sort of power is coupled with a limited interest. The distinction is perhaps slight, although established, between a gift for life, with a power of disposition superadded, and a gift to a person indefinitely, with a superadded power to dispose by deed or will. A bequest to A., and to such person as he shall appoint, is absolute property in A. without an appointment: but if it is to him for life, and after his death to such person as he shall appoint by will, he must make an appointment, in order to entitle those claiming under him to

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Ves. 51. Adamson *v.* Armitage, 19 Ves. 416. Coop. 283.

[a] Rayman *v.* Gold, Mo. 635.

[b] Page *v.* Leapingwell, 18 Ves. 463. Stretch *v.* Watkins, 1 Mad. 253.

[c] Haig *v.* Swiney, 1 Sim. & St. 487. Elton *v.* Sheppard, 1 Bro. 532.

[d] Maskelyne *v.* Maskelyne, Ambl. 750. Robinson *v.* Dusgate, 2 Ver. 181. Elton *v.* Sheppard, 1 Bro. 532.

[e] Hixon *v.* Oliver, 13 Ves. 108.

[f] Hales *v.* Margerum, 3 Ves. 299.

any thing.[a] The doctrine that a power of appointment gives the absolute interest seems strongly shown in a late case. There a legacy was given to trustees upon special trust and confidence to place it on government securities, and pay the dividends from time to time to the testatrix's niece for life, and after her decease to pay such principal money to such person as she should appoint by will or otherwise to receive the same; but if she should be desirous at any time to purchase an annuity for her life with the legacy she should be at liberty to do so, provided such annuity should be purchased and secured with the approbation of the trustees, and that she should not have power to resell such annuity. The Court declared their opinion, that the legatee had an absolute power of disposition over the whole fund; that the demand by the bill was a sufficient indication of her intention to take the whole for her own benefit, and the execution of a formal appointment unnecessary.[b]

A legacy, given in trust to purchase an annuity for A. for his life, is an absolute and vested interest in A., who may elect either to take the sum or to have it laid out in an annuity; or if he dies before it is laid out the money will go to his representatives.[c] Hence where 3000*l.* was given to trustees in trust to be by them employed in purchasing in their names upon the life of the testator's brother G.C., who resided abroad, a government annuity of that value

[a] Croft *v.* Slee, 4 Ves. 60. Nannock *v.* Horton, 7 Ves. 391. Bradly *v.* Westcott, 13 Ves. 445.

[b] Irwin *v.* Farrer, 19 Ves. 86; and see Barford *v.* Street, 16 Ves. 135.

[c] Yates *v.* Compton, 2 P.W. 308. Barnes *v.* Rowley, 3 Ves. 305. Bayley *v.* Bishop, 9 Ves. 6.

to be by them received and paid to him every six months during his life; and after the death of the testator his agents abroad paid to G. C. for three successive years the same yearly sum as his brother had been in the habit of allowing him, which payments amounted in all to 1050*l.*; and G. C. then died, but the annuity had not been purchased in consequence of his not having been able to return to England: the Master of the Rolls, on a bill filed by his executor, thought that G. C. must be considered as having elected to take the 3000*l.*; that interest must be computed on the legacy, and the 1050*l.* be considered as so much received by him on account of principal and interest.[a] And here perhaps we may notice a case in which a man, having borrowed 200*l.* of A., granted an annuity of 20*l.* to A., provided that if the borrower at any time repaid the 200*l.* then the annuity to cease; and A. bequeathed the annuity to C., and the heirs of his body subject to the proviso: C. was held entitled to the 200*l.* when it was some years afterwards repaid.[b]

The question what interest a legatee is intended to take in his legacy, must often depend upon the particular wording of each will. Where a man left a legacy to his son, but gave the executors a power at their discretion to restrain it to a life interest, with a bequest over in such case; and the executors renounced; the son was decreed to take the absolute interest.[c] And where a man directed his trustees to advance and pay any money they should think fit, not exceeding in the whole 3000*l.*, for the advance-

[a] Palmer *v.* Craufurd, 2 Wils. C. C. 79. 3 Swanst. 482.

[b] Wyard *v.* Worse, 1 Ch. Rep. 129.

[c] Keates *v.* Burton, 14 Ves. 434.

ment of the plaintiff in any business, art, or profession, or in any civil or military employment; and the trustees laid out 1000*l.* in a commission in the army for the plaintiff, which he afterwards sold: the bequest was construed as a gift of 3000*l.* in all events to the plaintiff, either by advancement or in money.[a] While on the other hand in a case in which a woman gave the residue of her estate in trust for her nephew and his heirs, and that the trustees should pay him yearly the interest during his life, with power for them, if they should see it would be for his benefit, to advance him any part of the principal, with a bequest over if no part should have been advanced: Sir W. Grant observed, the executors might in the exercise of a sound discretion give the property to the nephew; but it was impossible for the Court to say it was an absolute property in him.[b] And where there was a bequest to A. of 200*l.* per annum for the use of herself and children, which annuity to be paid out of the testator's general effects till it was convenient to the executors to invest 5000*l.* in the funds in lieu thereof for her and their use, and to the longest liver of her and her children, subject to an equal division of the interest while more than one of them alive: it was held to be an annuity, and not an absolute legacy.[c]

Where a man bequeathed certain leasehold houses in trust for the separate use of A. during the term independent of her husband; and other houses for the separate use of B. for life, and afterwards to her children, and if no children then to sink into the

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[a] Cope *v.* Wilmot, Ambl. 704.
[b] Robinson *v.* Cleator, 15 Ves. 526; and see Lewis *v.* Lewis, 1 Cox, 162.
[c] Innes *v.* Mitchell, 6 Ves. 464, 9 id. 212.

residue; and then gave the residue of his estate and effects in trust for A. and B. to be paid and applied "*in like manner*" for their use and benefit: they were decreed entitled to the absolute interest of the residue; for the words "in like manner" only meant for their separate use, and not for the same interest.[a] But where a testator gave the residue of his estate in trust to pay the interest to and among his nephews and nieces for their lives, the share of any one dying to go to the children, and if no children the share of the one so dying to go among the survivors "*in manner aforesaid:*" it was held that the share of a nephew, who died without issue, went to the survivors for their lives only.[b]

Where the directions of a will were, that a fund might be lodged with J. B. so as to raise 48*l.* per ann. for the support of A.'s children to be paid them from time to time as their necessities required: the Lord Chancellor said he thought it probable the testator might mean this allowance to take place only during the minority of the children; but that upon the words he had made use of, it was impossible to restrain it to any thing short of a life interest.[c]

In another case in which a man bequeathed the residue of his estate equally among his wife, his son, and his daughters, subject nevertheless as to the shares of his daughters in trust for and during their lives for their separate use, and after their decease the shares to which they were respectively entitled for life as aforesaid to their children; and two of the

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[a] Shanley *v.* Baker, 4 Ves. 732; and see Grassick *v.* Drummond, 1 Sim. & St. 517; "*in the proportions already noticed.*"

[b] Milsom *v.* Awdry, 5 Ves. 465.

[c] Alexander *v.* M'Cullock, 1 Cox, 391.

daughters died without children: it was held they took an absolute interest in their shares; for the purpose of the testator was an equal participation of his estate among his wife and children; his daughters were all married at the date of his will, and two of them had no children; he could therefore hardly be imagined not to have contemplated the chance of their dying without any, and intestacy was not to be imputed to him, if the event was one that could not have escaped his notice, and the words were sufficient to extend to it.[a]

In a devise of a house, and of the goods and furniture in it to the testator's wife for life, and after her decease, to his son R. and his heirs, except the pictures, which the testator gave to his sons J. and E.: it was at first held that the pictures passed to the wife for life; but on a rehearing it was decreed otherwise, and that the exception was an original devise of the pictures to J. and E.[b] But where a man bequeathed all his personal estate to his wife for life, and then went on, "Item, I give A. and B. 1000*l.* apiece if they attain twenty-one, if not then," &c.; "Item, I give to B. after my wife's death all my household goods," &c.; and all the residue of his estate the testator gave, after the death of his wife, to J. S.: it was ultimately decreed, that these legacies of 1000*l.* each were not payable till after the death of the wife.[c]

In a devise from a husband to his wife of the use of all household goods, furniture, plate, &c., the Lord Chancellor said, the wife might use the goods

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[a] Whittell *v.* Dudin, 2 Jac. & W. 279.

[b] Gayre *v.* Gayre, 2 Ver. 538. Raithby's ed.

[c] Young *v.* Burdett, 3 Bro. P. C. 45. 9 Mod. 93. 8 Vin. Ab. 284; and see Harper *v.* Lee, Mos. 3.

in her own or any other person's house, alone, or promiscuously with other goods, or might let them out to hire.[a]

## SECTION V.

### *Of Satisfaction.*

IT has long been an established rule, notwithstanding two early decisions to the contrary,[b] that where a testator at the time of making his will is indebted to another, and bequeaths to his creditor a pecuniary legacy of equal or greater amount than the debt; the legatee shall not claim both; but the bequest shall be considered a satisfaction of the debt; upon the presumption that a man must be intended just before he is bountiful; and that his intent is to pay a debt, and not to give a legacy.[c] Hence a bequest by a husband has been held a satisfaction of arrears of pin-money due to his wife at the time of making his will;[d] or of a bond or covenant that his executors should pay her a sum of money or an annuity after his death;[e] and a legacy by a father a satisfaction of a portion due to a child by settlement,[f] or by the custom of London.[g]

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[a] Marshall *v.* Blew, 2 Atk. 217; and see Fearne C. R. 407.

[b] Cuthbert *v.* Peacock, 2 Ver. 593. 1 Salk. 155. Cranmer's Ca. 2 Salk. 508.

[c] Pr. Ch. 394. Gilb. Eq. R. 89. 2 P.W. 132. 3 id. 354. 3 Atk. 68. Mos. 8. Reech *v.* Kennegal, 1 Ves. 123.

[d] Fowler *v.* Fowler, 3 P.W. 353.

[e] Brown *v.* Dawson, 2 Ver. 498. Pr. Ch. 240. Graham *v.* Graham, 1 Ves. 263. Corus *v.* Farmer, 2 Eq. Ab. 34. Wathen *v.* Smith, 4 Mad. 325.

[f] Bloys *v.* Bloys, 2 Freem. 46. 2 Vent. 347. 2 Ch. Rep. 162. Copley *v.* Copley, 1 P.W. 146. Ackworth *v.* Ackworth, 1 Bro. 307. N. D. Somerset *v.* Duchess of Somerset, 1 Bro. 309. N. Moulson *v.* Moulson, 1 Bro. 82. Hinchcliffe *v.* Hinchcliffe, 3 Ves. 516.

[g] Nicholls *v.* Nicholls, Bac. Ab. Leg. D.

It is obvious however that a legacy can be no satisfaction of a claim that is not due at the making of the will; and if therefore part of a debt is contracted before, and part of it after, the legacy will only be a satisfaction of so much as was due before the date of the will; or if legacies are given both by will and codicil, and a debt is contracted between the making of the will and of the codicil, the legacy given by the latter only will be a satisfaction.[a] Nor will a legacy be a satisfaction of a debt when such an intention cannot reasonably be inferred. Thus where a father, having as executor to another to pay a sum of money to one of his two daughters, by his will bequeathed them 1000*l.* apiece; this was held no satisfaction of the legacy he had to pay as executor; for else one daughter would take more than the other.[b]

The maxim indeed that debitor non presumitur donare has been continually disapproved of, and, were it res integra, would not hold. Every legacy implies a bounty, and it has been said that where there are assets a testator may with equal reason be construed bountiful as well as just. The Court therefore lays hold of any minute circumstance to take cases out of the rule.[c] Thus a direction in the will to pay all debts and legacies has been considered suffi-

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[a] 1 P.W. 299. Cranmer's case, 2 Salk. 508. Thomas *v* Bennet, 2 P.W. 343. Fowler *v.* Fowler, 3 id. 353. Gaynon *v.* Wood, 1 Dick. 331.

[b] Meredith *v.* Wynn, Pr. Ch. 312. Gilb. Eq. R. 70.

[c] See 1 P.W. 410. 2 id. 616. 3 id. 354. 1 Salk. 155. 3 Atk. 68. 97. 2 Ves. 636. 3 Ves. 466. 529. 564. Lord Eldon forcibly remarks, if this rule of presumption was once established, and understood to be the rule, it would have been infinitely better that it should not be destroyed by small observations upon small circumstances, the Court trying to find out a distinction: it would have been better either to have abided by the rule, or to have said boldly, it should exist no longer. 11 Ves. 547; and see 6 Ves. 641, 642.

cient to show the intention that the particular debt and the legacy should both be paid,[a] provided the claim is such as to come within the ordinary meaning of the word "debt." For where a man covenanted on his marriage that his heirs, &c. should pay to his wife 1000*l.*, if she survived him, and by his will gave her 1000*l.* and various specific bequests, and gave all his real and the residue of his personal estate upon trust to sell and pay all his just debts and legacies: the Vice-Chancellor thought that the provision for the wife by the settlement was not a debt within the sense in which the testator must be understood to have used the word "debts" in his will; and that the legacy was therefore a satisfaction of the covenant.[b]

A legacy to the payee of a bill of exchange has been held no satisfaction; for if so it would depend upon the fact whether the original payee had negotiated it or not before the date of the will.[c] And where the debt owing by the testator was upon an open and running account, Lord C. Cowper said, the testator could not intend the legacy to be a satisfaction of a debt which he did not know that he owed, any more than a legacy could be a satisfaction of a debt contracted after the making of the will.[d]

If the bequest is of smaller amount than the debt it will not be considered a satisfaction pro tanto.[e]

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[a] Chancey's case, 1 P.W. 408. Richardson *v.* Greese, 3 Atk. 64. Field *v.* Mostin, 2 Dick. 543. Pilson *v.* Price, cited id. 573; and see Tolson *v.* Collins, 4 Ves. 483. Adams *v.* Lavender, 1 M'Clel. & Y. 41.

[b] Wathen *v.* Smith, 4 Mad. 325.

[c] Carr *v.* Eastabrooke, 3 Ves. 561.

[d] Rawlins *v.* Powel, 1 P.W. 299. 10 Mod. 398; but the case does not seem to have been decided on this ground. See also Wallace *v.* Pomfret, 11 Ves. 542.

[e] 2 P.W. 616. Minuel *v.* Sarazine, Mos. 295; and see Graham *v.* Graham, 1 Ves. 262 Cantle *v.* Morris, 1 Bro. 133. N.

Thus an annuity of 20*l.* per annum given by will out of land and payable half yearly was held no satisfaction of an annuity of 20*l.* per annum secured by bond, payable quarterly, and *free from taxes.*[a] And even if the gift is of ten times greater value than the amount of the claim, yet if it is not as certain as to the duration and commencement of it, it will not be held a satisfaction. A bequest therefore for life only can be no satisfaction of an absolute interest.[b] Or if a legacy is not payable till a future time, as at the age of twenty-five;[c] or even at one month after the testator's death;[d] it will be no satisfaction of a claim that is due at his death. So also if the legacy is given upon a condition or contingency.[e] Thus where T. B. bequeathed to his relations A., B., C., and D., annuities during their lives, to be paid quarterly free from taxes by his wife, whom he made executrix; and the wife by her will gave A. and B. annuities in fee to the same amount payable quarterly *in case they should survive certain persons;* and gave C. and D. also annuities in fee to a like amount payable quarterly; and it was contended that the wife being in the nature of a debtor in respect of these the case was within the general rule: Lord C. King, who thought the doctrine had been already carried too far, held that the two first annuities being given on

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[a] Atkinson *v.* Webb, 2 Ver. 478. Pr. Ch. 236.

[b] Perry *v.* Perry, 2 Ver. 505; and see Forsight *v.* Grant, 1 Ves. J. 298.

[c] See Jeacock *v.* Falkener, 1 Bro. 294. 1 Cox, 37. Lee *v.* Brown, 4 Ves. 362.

[d] Case cited, 2 Ves. 636. Clark *v.* Sewell, 3 Atk. 96; and see Nicholls *v.* Judson, 2 id. 300. Haynes *v.* Mico, 1 Bro. 129. Adams *v.* Lavender, 1 M'Clel. & Y. 41.

[e] 2 Salk. 508. 2 Atk. 493. Pollexfen's case, cited Pr. Ch. 395. Bellasis *v.* Uthwatt, 1 Atk. 426. Pullen *v.* Cresy, 3 Anstr. 830. Mathews *v.* Mathews, 2 Ves. 635. Hanbury *v.* Hanbury, 2 Bro. 352. 529.

contingencies which might never happen there could be no pretence to say they should be a satisfaction of annuities given absolutely; and if that were so, there was no reason to imagine the wife had a different intention as to the others, or that she intended two of them to go in satisfaction of the like annuities given by her husband, and the other two not; and decreed all the legatees entitled to the annuities given by both wills.[a]

Moreover the thing bequeathed must be ejusdem generis with the claim. As money and lands therefore are things of a different nature, the one shall not be taken in satisfaction of the other,[b] except under special circumstances.[c] Hence where a man being indebted to his brother 640*l.* devised to him a mortgage of 693*l.*, (of which he had got a decree of foreclosure, but died before the account was taken, or the mortgagor absolutely foreclosed;) it was held that the lands in mortgage being devised as real estate should be considered as such between the devisor and devisee, and that the legacy therefore, although greater than the debt, should not go in satisfaction of it.[d]

A residuary bequest being uncertain is not to be supposed to have been intended as a satisfaction.[e] Thus where on marriage an estate was settled after

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[a] Crompton *v.* Sale, 2 P.W. 553. Bac. Ab. Leg. D. 1 Eq. Ab. 205. Mr. Preston (Leg. 348) considers this case and that of Lee *v.* Brown, 4 Ves. 362, to have proceeded on the ground of the interests being derived from different persons.

[b] 2 P.W. 615. 2 Salk. 508. Goodfellow *v.* Burchett, 2 Ver. 298; and see Chaplin *v.* Chaplin, 3 P.W. 245. Jaggard *v.* Jaggard, Pr. Ch. 175. Richardson *v.* Elphinstone, 2 Ves. J. 463.

[c] See Gibson *v.* Scudamore, Mos. 7. Barkham *v.* Dorwine, 8 Vin. Ab. 364.

[d] Garret *v.* Evers, Mos. 364.

[e] Barret *v.* Beckford, 1 Ves. 519. Alleyn *v.* Alleyn, 2 id. 37. Devese *v.* Pontet, 1 Cox, 188.

the death of the parents on the first and other sons in tail male, remainder to daughters till 3000*l.* was raised, remainder to the settlor's heirs; and there was one son and two daughters of the marriage, and the father by will gave 600*l.* to one daughter, and 700*l.* to the other; and the son, who was executor of his father, paid the 600*l.*, and by his will devised the estate to D. he paying the 700*l.*, and made his sisters executrixes, and gave them the residue of his personal estate amounting to 7000*l.*: the House of Lords reversed the decree of the Lords Commissioners, who were of opinion that the provision made by the brother's will must be construed and taken in lieu and compensation of the 3000*l.* by the marriage settlement.[a] Yet even a residue under some circumstances may be a satisfaction: as where in a marriage settlement there was a proviso that money or lands given by the father in his lifetime or at his death should be deducted from the portion, unless he should by writing declare to the contrary: here a residuary bequest was held a satisfaction on the ground of the special proviso.[b] So a bequest of the testator's capital share in a trade, and such sum and so much money as being added to the capital at the last settlement should make up in the whole 10,000*l.*, was held a satisfaction of a portion of 2000*l.* due by settlement, the gift not being uncertain; and Sir W. Grant added, he was by no means clear, that if the testator had confined himself to saying he gave so much of his residuary estate as should be of the

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[a] Smith *v.* Duffield. 2 Ver 177. 258.

[b] Rickman *v.* Morgan, 1 Bro: 63. 2 id. 394.

value of 2000*l.*, that would not have been a satisfaction of a portion of the same amount.[a]

A legacy by a father to a child is not in general a satisfaction of a debt due to the child in any other way than a debt due from a stranger would be satisfied by such a legacy.[b] The Court however leans against double portions proceeding from the same person, or tending to bring a greater burden on the heir of a family; and it has been long determined, that where the portions come from the same party, the father or a person in loco parentis, small circumstances of difference where the value is substantially the same to the child shall not prevent satisfaction, which would have that effect in the case of a stranger.[c] Thus a legacy payable three months after the decease of the testator's wife was held a satisfaction of a portion due at her death.[d] So if the gift is not equal in amount to the portion, yet it will nevertheless be a satisfaction pro tanto.[e] And where in a marriage settlement providing portions for children there was a proviso, that if the parents should *in their lifetime* settle, give, or advance to any child any sum, &c. it should be deemed and taken in part of the portion: a legacy by the father was considered as an advancement in his lifetime, and a satisfaction pro tanto.[f]

It was said by Lord Hardwicke that legacies to

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[a] Bengough *v.* Walker, 15 Ves. 507.

[b] Tolson *v.* Collins, 4 Ves. 483.

[c] 9 Ves. 427. 3 Atk. 98. 1 Ves. 520. 1 Bro. 310. 3 Ves. 466. 6 Ves. 319.

[d] Sparkes *v.* Cator, 3 Ves. 530.

[e] 3 P.W. 247. Warren *v.* Warren, 1 Bro. 305. 1 Cox, 41. Byde *v.* Byde, 2 Ed. 19. 1 Cox, 44. 1 Bro. 309. N.

Onslow *v.* Michell, 18 Ves. 490. Goolding *v.* Haverfield, 13 Pri. 593. 1 M'Clel. 345; and see Leake *v.* Leake, 10 Ves. 477.

servants had never been held to be in satisfaction of debts:[a] his Lordship however did not decide the case before him merely on that ground, and in other cases the circumstance of its being a legacy to a servant does not seem to have been taken into consideration.[b]

Evidence it seems, for there has been some contrariety of opinion upon this point,[c] is admissible either to meet or fortify the presumption that a legacy was meant as a satisfaction.[d]

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[a] 3 Atk. 69.

[b] See 2 Ves. 636. Chancey's case, 1 P.W. 408. Wallace *v.* Pomfret, 11 Ves. 542.

[c] See 1 Bro. 131. Copley *v.* Copley, 1 P.W. 148. N. 1. Fowler *v.* Fowler, 3 id. 353.

[d] 4 Dow 89. Pile *v.* Pile, 1 Ch. Rep. 199. Cuthbert *v.* Peacock, 2 Ver. 593. Pole *v.* Lord Somers, 6 Ves. 309. Wallace *v.* Pomfret, 11 Ves. 542.

# CHAPTER V.

## OF REVOCATION.

### SECTION I.

### *Of express Revocations.*

IT has been held that if a husband and wife jointly execute a mutual will, and she after her husband's death takes benefits under it, and then makes a new will; the latter is void so far as it breaks in upon the mutual will, the bequests of which her assets are bound to make good.[a] But except in such a special case no maxim in law is better known than that a will is always revocable, notwithstanding it be made irrevocable in the strongest words.[b] If then a testator by a codicil expressly revokes a particular bequest in his will, there can be little difficulty; but when the revocation is in more general terms a question often arises how far it was intended to include in it any particular legacy. Thus where a woman by her will, reciting that she had a power of appointment over some Long Annuities, gave and appointed them, and all her plate, linen, china, &c., in trust for her residuary legatee thereinafter named; and then gave all her other estate and effects to her son D.; and by a codicil, recited that she had given the residue of her estate to her son D., and legacies to her son W., and to her servants, and then revoked all the above bequests, and gave the residue of her estate and effects to her sons W. and D. equally between them: the codicil was held only to revoke the bequest of the residue, and not to ex-

[a] Dufour *v.* Pereira, 1 Dick, 419. [b] 2 Bl. Com. 502. Off. Ex. 243.

tend to the long annuities and specific articles, to which D. was solely entitled.[a] In the same way where a man devised a freehold estate called Battens to his wife for life, and after her death to A. for life, with remainder to his first and other sons in tail, with remainders over; and, after reciting that he was possessed of a leasehold estate adjoining, directed his trustees and executors to grant the same to some persons in trust that it might go and be enjoyed by the owner or possessor for the time being of his real estate, and not be separated therefrom as long as the term lasted; and then gave his wife the rents, issues, and profits, of all his chattel estates for her life, if she chose to reside at Battens, and also the use during life of the household goods and furniture there; and the testator afterwards suffered a recovery of his real estates, by which the devise of Battens was revoked: the House of Lords reversed the decree of Lord Camden, who had decided that the direction to convey the leasehold estate and the devise to the wife of the chattel estate, and of the household goods, and furniture, were consequentially revoked;[b] and held the wife entitled to the benefit of the bequests, discharged from the condition of living at Battens, which the recovery had put out of her power.[c]

Where a man by his will bequeathed to his sister a legacy of 100*l.*, and by a codicil revoked "the legacy of *fifty pounds* bequeathed to his sister:" Lord Alvanley inclined to think it was only a mis-

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[a] Roach *v.* Haynes, 6 Ves. 153. 8 id. 584; and see Clarke *v.* Butler, 1 Mer. 304.

[b] Darley *v.* Darley, Ambl. 653. 1 Dick. 397; approved of by Lord Erskine, 13 Ves. 492.

[c] Darley *v.* Langworthy, 7 Bro. P. C. 177.

take of the quantum, and a demonstration of intention to revoke the legacy given.[a]

A legacy to an executor, we have seen,[b] is upon condition that he takes upon himself the office, without which he will not be entitled to it. The revocation therefore of the appointment of an executor is a revocation of a legacy given to him.[c]

The mere cancellation of a bequest by the testator's drawing a line through it with a pencil, or striking out the name of the legatee, seems sufficient with respect to personal property.[d] And although a subsequent instrument revoking a devise of freehold must be executed according to the statute of frauds,[e] yet if a man by a codicil, not so executed, revokes a residuary bequest consisting of personal property and of the produce of real estate directed to be sold, the revocation is effectual as to the personalty.[f]

A false reason given for revoking a gift prevents the effect of the revocation. Thus where a man assigned in his codicil, as a reason for revoking two legacies given by his will, that the legatees were dead, which turned out not to be the fact: it was decreed to be no revocation, the cause being false.[g] But where a woman, having given by her will 300*l.* to the children of A., gave, by a codicil, to B. the 300*l.* designed for A.'s children, "as she knew not whether any of them were alive, and *if they were well provided for:*" the revocation was determined to be effectual, as the Court would not inquire whether the legatees were well provided for or not.[h]

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[a] Lord Carrington *v.* Payne, 5 Ves. 404.

[b] Ante 137.

[c] See 8 Ves. 593.

[d] Mence *v.* Mence, 18 Ves. 348.

[e] 29 Car. II. 3. 6.

[f] Gallini *v.* Noble, 3 Mer. 691.

[g] Campbell *v.* French, 3 Ves. 321.

[h] Att. Gen. *v.* Ward, 3 Ves. 327.

If a testator by a codicil revokes a legacy given by his will, and afterwards by a second codicil appoints another executor, and confirms his will in all other respects; this does not set up the legacy again.[a]

Where a man devised his property equally among his children, and afterwards by a codicil revoked the gift as to one of them (the plaintiff), and also excepted his name by an interlineation in the will, giving him only one shilling; and after this, being reconciled to him, cancelled the codicil, but forgot to strike out the interlineation in the will: the will was held to be set up again with regard to the plaintiff, who was consequently entitled equally with the other children.[b] In the case of an erasure of the legatee's name out of a will, the executor, who had submitted that the will should be proved as if no such erasure had been made, was held concluded, and the legatee entitled to his legacy.[c]

The marriage of the testator with his legatee is not of itself a revocation of the legacy.[d] But where a man, having agreed to settle 100*l.* per annum on his intended wife, made his will, on finding himself ill, and left her 100*l.* per annum; but recovering, the marriage was soon afterwards had, and the settlement carried into execution: evidence was admitted to prove these facts, and the wife, after her husband's death, put to her election, which 100*l.* she would choose.[e]

According to Lord Coke if in one will there be

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[a] Crosbie *v.* Mac Doual, 4 Ves. 610; and see Izard *v.* Hurst, post 262.

[b] Utterson *v.* Utterson, 3 Ves. & B. 122. Coop. 60.

[c] Parker *v.* Ash, 1 Ver. 256.

[d] Ewbank *v.* Halliwell, 2 Bro. 220.

[e] Mascal *v.* Mascal, 1 Ves. 323.

divers devises of one thing, the last devise taketh place: but Mr. Hargrave observes that the opinion supported by the greatest number of authorities is, that the two devisees shall take in moieties.[a] In personal bequests also there has been a great contrariety of opinion. In Swinburne it is laid down that the legatees shall divide the legacy between them:[b] while another work of considerable authority[c] adopts the doctrine of Lord Coke. In one case in which a man had bequeathed the same sum in South Sea stock to two different persons, and the testator at the time of making his will and at his death had only that actual sum of South Sea stock; and it was decreed at the Rolls that the legatees should divide it: Lord Hardwicke said, that if the gifts were of the same individual sum the decree was right.[d] Yet in a subsequent case, (where he held that the latter gift revoked the former upon the ground of the apparent intention) his Lordship said, that in the case of a simple legacy, if a man made a will and gave a horse to A. in the first part, and in the latter end of it gave the same horse to B., it was a revocation of the former legacy, and Swinburne therefore was mistaken in point of law.[e] And this seems to be the opinion of later judges.[f] If a partial interest in a thing bequeathed by will is given by a codicil to another, it is a revocation only pro tanto, and such a construction must be made as that both legacies may take place.[g]

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[a] Co. Lit. 112, *b*.
[b] P. 7. S. 21. Godolph. 449.
[c] Touch. 451.
[d] Purse *v.* Snaplin, 1 Atk. 414.
[e] Ulrich *v.* Litchfield, 2 Atk. 372.
[f] See ante 195.
[g] Stone *v.* Evans, 2 Atk. 86.

## SECTION II.

### *Of implied Revocations.*

I. It has long been a settled rule in equity that where a parent, or person *loco parentis*,[a] gives a legacy as a portion to a child, and afterwards on marriage, or any other occasion calling for it, advances an equal or larger sum to that child, the advancement shall be presumed to be in satisfaction of the legacy, which is therefore considered as adeemed, or revoked;[b] and a prohibition will be granted against a legatee suing in the spiritual court for his legacy.[c] If the sum advanced is less than the legacy it will be an ademption *pro tanto*;[d] or even, as it has been held, of the whole bequest.[e] The doctrine appears in an early case where a testator bequeathed to his four daughters 600*l.* apiece, and afterwards gave the eldest daughter on her marriage 700*l.* portion, after which he made a codicil, and gave 100*l.* apiece to his unmarried daughters, and ratified and confirmed his will: it was held that the portion given by the testator in his lifetime should be intended in satisfaction of the legacy to his eldest daughter; and it was agreed to be the constant rule of the Court that where a legacy was given to a child, who after-

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[a] See 2 Atk. 518. Monck *v.* Monck, 1 B. & B. 298.

[b] Hale *v.* Acton, 2 Ch. Rep. 35. 2 Ver. 257, cited. Jenkins *v.* Powell, 2 Ver. 115. Biggleston *v.* Grubb, 2 Atk. 48. Tapper *v.* Chalcroft, ibid. 492, cited.

[c] Scotton *v.* Scotton, 1 Stra. 235.

[d] Hoskins *v.* Hoskins, Pr. Ch. 263; and see Bird *v.* Hooper, Pr. Ch. 298. Roome *v.* Roome, 3 Atk. 181. Shudal *v.* Jekyll, 2 id. 516. Powell *v.* Cleaver, 2 Bro. 499. Ex parte Pye, 18 Ves. 140.

[e] See Clarke *v.* Burgoine, 1 Dick. 353. Hartop *v.* Whitmore, 1 P.W. 681. Pr. Ch. 541. 1 Stra. 407. 1 Bro. 306, N. Belt's ed.; but the last case seems to have been denied to be law. 1 Ves. J. 105.

wards upon marriage or otherwise had the like or a greater sum, it should be intended in satisfaction of the legacy, unless the testator should declare his intent to be otherwise; and it was said the words of ratifying and confirming did not alter the case, though they amounted to a new publication, being only words of form, and declaring nothing of the testator's intent in this matter.[a] The Master of the Rolls indeed, in a subsequent case, thought a codicil, made after the advancement, a strong circumstance to show the intention of a testator that there should not be an ademption.[b] But in a later case it was held according to the doctrine of Izard *v.* Hurst that a codicil ratifying and confirming a will did not set up an adeemed legacy.[c]

This rule (which although it is said to be the law of all other nations[d] Lord Thurlow does not seem to have approved of[e]) proceeds upon the presumption that a man does not mean to pay twice the same debt; and judges in equity have been in the habit of giving the name of a debt to a portion given by a father to a child; and thence a presumption has been raised against the intention of the father to give two portions.[f] Hence the rule does not apply to mere legacies bequeathed by a stranger,[g] or collateral relations,[h] unless perhaps given as a portion or for

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[a] Izard *v.* Hurst, 2 Freem. 224.

[b] Roome *v.* Roome, 3 Atk. 181; and see Bird *v.* Hooper, Pr. Ch. 298. Rider *v.* Wager, 2 P.W. 334.

[c] Monck *v.* Monck, 1 B. & B. 298; and see Drinkwater *v.* Falconer, 2 Ves. 623.

[d] 1 P.W. 682.

[e] See 1 Bro. 427. 2 id. 517. 521. 1 Ves. J. 110.

[f] 19 Ves. 411. Ambl. 326. 1 Dick. 407.

[g] Powel *v.* Cleaver, 2 Bro. 500; and see Spinks *v.* Robins, 2 Atk. 491. Roberts *v.* Bennet, 2 Ver. 136.

[h] Shudal *v.* Jekyll, 2 Atk. 516. Brown *v.* Peck, 1 Ed. 140.

the same purpose as the advancement;[a] nor, it is said, by a grandfather to his grandson;[b] nor even by a father to his illegitimate child, when there is nothing in the will to infer the relationship, nor any thing in the nature or manner of the legacy indicating that it is given as a portion by a father to his child.[c]

The first gift also must be in the nature of a portion, to answer the description of a debt, which is to be satisfied by the subsequent provision;[d] and although where a father gives a legacy generally he will be understood to mean it as a portion,[e] yet if it can be collected from the will that he did not intend it as such, it will not be defeated by a subsequent advancement. Where therefore a testator, having four daughters, gave one by will 1000*l.*, and then bequeathed to all of them 1500*l.* apiece for their portions; and afterwards on the marriage of the first gave her 4000*l.*: it was held that this should be considered a satisfaction of her legacy of 1500*l.*, given as a portion, but not of the 1000*l.* legacy.[f]

If either the legacy or the advancement is uncertain, or upon a contingency, the one will not be considered a satisfaction of the other. There was no case, Lord Hardwicke said, where the devise had been of a residue, that was uncertain, and at the time of the testator's death might be more or less, in which a subsequent portion given had been held to be an ademption: it had always been of weight in

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[a] See 2 Bro. 518. 18 Ves. 153. 154. Roome *v.* Roome, 3 Atk. 181.

[b] 2 Bro. 517; and see Roome *v.* Roome, 3 Atk. 181.

[c] Ex parte Pye, 18 Ves. 140. Weatherby *v.* Dixon, 19 Ves. 407. Coop. 279.

[d] 19 Ves. 412.

[e] 2 Atk. 518. 18 Ves. 151. 153. 1 Ves. J. 107. 1 Dick. 407.

[f] Ward *v.* Lant, Pr. Ch. 182

the construction upon double portions that they were both certain.[a]

Again where a father bequeathed 500*l.* to his son, and afterwards took him into partnership, and brought in the whole capital (3000*l.*) which by the deed of partnership was to be brought in by them equally: this was held not to be a satisfaction of the 500*l.*, not being ejusdem generis.[b] And where a legacy was given in trust for the separate use of the testator's daughter for life, and afterwards to her husband for life, and afterwards to their children; and the testator after the execution of the will advanced a sum of money to the husband: the Vice-Chancellor observed, that primâ facie this advance to the husband was not a satisfaction pro tanto of the legacy, because the nature of the gift was different from the legacy, which was limited.[c] In this respect however the Court overlooks small differences in the circumstances of that, which is proposed to be given, and that, in satisfaction of which it is contended to be given; and does not inquire, whether the portion by the will is entirely and absolutely to the child; or what is afterwards advanced in the form of a settlement on marriage; which not being a performance of a covenant or satisfaction of a debt, yet is a presumed satisfaction of the intended portion.[d]

In a case in which a man bequeathed to his eldest son 400*l.* to enable him to finish building a mansion-

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[a] Farnham *v.* Phillips, 2 Atk. 215. Spinks *v.* Robins, id. 491. Smith *v.* Strong, 4 Bro. 493. Freemantle *v.* Banks, 5 Ves. 79.

[b] Holmes *v.* Holmes, 1 Bro. 555. 1 Cox, 39; and see Grave *v.* E. Salisbury, 1 Bro. 425.

[c] Bell *v.* Coleman, 5 Mad. 22; and see Baugh *v.* Read, 1 Ves. J. 257. 3 Bro. 192. Thellusson *v.* Woodford, 4 Mad 420.

[d] Trimmer *v.* Bayne, 7 Ves. 508; and see Monck *v.* Monck, 1 B. & B. 298. Hartopp *v.* Hartopp, 17 Ves. 184.

house; and the testator afterwards himself expended more than that sum upon the house, and still left it unfinished: the Lord Chancellor is reported to have held the legacy to be satisfied; but it seems by the decree that the money was ordered to be paid to the son.[a] In another case where a man advanced his two sons Peter and William 1500*l.* each, for which they gave receipts, acknowledging it to be on account, and in part of what he had given or should give them by his will; and he afterwards made his will, and thereby, taking notice that he had advanced with his children William, and E. and S. (his daughters) 1500*l.* apiece, gave in like manner to his three other children *Peter*, and M. and A. 1500*l.* apiece: it was decreed that the 1500*l.* advanced to Peter should be a satisfaction of the legacy, and that he should not have another 1500*l.* upon the latter words.[b]

It is clearly established that evidence is admissible to rebut this presumption of an advancement being a satisfaction of a legacy:[c] but the evidence must be clear and satisfactory, otherwise the rule will prevail.[d] Where a man bequeathed to his daughter 1000*l.*, to be paid her on her marriage; and the daughter married, and the testator shortly afterwards advanced her husband 500*l.*; and the evidence was, that the testator had declared that he would give his daughter 500*l.*, as soon as she was married, as she would want furniture: the Master of the Rolls thought that as the testator had made no reference

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[a] Husbands *v.* Husbands, 1 Ver. 95, Raithby's ed.

[b] Upton *v.* Prince, For. 71.

[c] Debeze *v.* Mann, 1 Cox, 346. 2 Bro. 165. 519. Ellison *v.* Cookson, 2 Bro. 307. 1 Ves. J. 100. 3 Bro. 61. 2 Cox, 220. Thellusson *v.* Woodford, 4 Mad. 420.

[d] Trimmer *v.* Bayne, 7 Ves. 508. Dwyer *v.* Lysaght, 2 Ball. & B. 156.

to what he had antecedently engaged to do, the inference was that it was a new gift; for when called to the consideration of the subject, it was natural that he should have expressed his intention, or said something with reference to the engagement under which he was; and if he did not, the Court could only consider the purpose expressed, without reference to any other provision he had made for her.[a]

Sir W. Grant doubted whether strictly it was competent in the first instance to give evidence of declarations of an intention to substitute one provision for the other; but conceived it might be shown by extrinsic evidence, who was the author of a gift, where that did not appear upon the face of the transaction.[b] Yet evidence seems to have been admitted in the first instance in favour of the presumption;[c] even in one case, as between strangers.[d]

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II. We have already seen that the subject matter of a specific legacy must be found to be in existence at the testator's death.[e] If therefore after making his will he disposes of that, which he has specifically bequeathed, it operates as an ademption or revocation of the gift. Thus if an estate is devised to be sold, and the produce bequeathed away, and the testator afterwards himself sells the estate; the gift of the

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[a] Robinson *v.* Whitley, 9 Ves. 577.

[b] 17 Ves. 192.

[c] See Hale *v.* Acton, 2 Ch. Rep. 35. Hoskins *v.* Hoskins, Pr. Ch. 263. Biggleston *v.* Grubb, 2 Atk. 48. Rosewell *v.* Bennett, 3 id. 77. Monck *v.* Monck, 1 B. & B. 298. Brown *v.* Peck, 1 Ed. 140. Thellusson *v.* Woodford, 4 Mad. 420. Bell *v.* Coleman, 5 id. 22.

[d] Chapman *v.* Salt, 2 Ver. 646; and see 18 Ves. 153, 154. Shudall *v.* Jekyll, 2 Atk. 516. Mascal *v.* Mascal, ante 259.

[e] Ante 16, 17.

produce is revoked, and the purchase money becomes part of his general personal estate.[a]

When however the thing bequeathed is not fully alienated, as if it be pledged or pawned, the legacy, it is said, is not thereby extinguished, and the executor is bound to redeem and restore it to the legatee, or pay the price of it, if he suffer it to be forfeited.[b] Nor will a mere alteration be an ademption, provided the thing remain the same in substance. As if a testator bequeaths a house or a ship, and afterwards by piecemeal repairs or renews them, so that there remains little or nothing of the old matter or stuff; his will is not by this presumed to be changed, and it is deemed to be the same house or ship in law.[c] So where a man, entitled to nine twelfths of a partnership concern, bequeathed them by will, and afterwards the articles expired, and he entered into new ones, by which he only reserved to himself seven twelfths: this was held no ademption, but the renewed interest passed under the will.[d] But it is said that if the testator voluntarily pulls down the whole of the house, that he has bequeathed, or it is destroyed by fire or accident, and he rebuilds a new one in the same place, his will is presumed to be changed and the legacy extinguished.[e] If he bequeathed a gold chain, and afterwards converted it into a cup, this was no ademption in the civil law; but this doctrine has not been adopted by us.[f]

If stock is altered by act of Parliament;[g] or is transferred by a cestui que trust from the names of

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[a] Arnald *v.* Arnald, 1 Bro. 401. 2 Dick. 645.
[b] Swinb. P. 7. S. 20.
[c] Ibid. Godolph. 401.
[d] Backwell *v.* Child, Ambl. 260.
[e] Swinb. P. 7. S. 20. Godolph. 401.
[f] 2 Bro. 110. Swinb. P. 7. S. 24.
[g] Partridge *v.* Partridge, For. 226.

trustees into his own;[a] it is no ademption. A specific bequest indeed of stock is adeemed by the testator's selling it;[b] yet if he afterwards buys in again, it has been thought the legacy would remain good.[c]

In the civil law the bequest of a debt due to the testator was extinguished by the subsequent payment or release of it, unless the testator set apart and preserved entire what he so received.[d] In our courts there has been some difference of opinion, and the receiving of the debt held in some cases an ademption,[e] and in others not.[f] A distinction was taken at one time between those instances in which the debtor paid in the debt of his own accord, and uncalled for, and where the testator himself called it in: in the former it was held to be no ademption, on the ground that it must be the testator's own act, and not that of a third person, which revoked his will; whereas by calling in the debt he showed his intention of making it his own, and not of leaving it to the legatee to recover.[g] But this distinction was frequently disapproved of, and soon after exploded:[h] and the modern doctrine seems to be, that where the testator receives the whole or a part of the debt bequeathed,

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[a] Bingwell *v.* Askew, 1 Cox, 427.

[b] Asburner *v.* Macguire, 2 Bro. 108, Humphreys *v.* Humphreys, 2 Cox, 184. Birch *v.* Baker, Mos. 373.

[c] See Drinkwater *v.* Falconer, 2 Ves. 623. Partridge *v.* Partridge, For. 226. This position is denied in a modern work, Prest. Leg. 330.

[d] Godolph. 434. 2 Bro. 110; and see Fryer *v.* Morris, 9 Ves. 360.

[e] 2 Stra. 824. Ambl. 402. Rider *v.* Wager, 2 P.W. 328. Att. Gen. *v.* Pyle, 1 Atk. 435.

[f] Orme *v.* Smith, 1 Eq. Ab. 302. Gilb. Eq. R. 82. 2 Ver. 681. Ford *v.* Fleming, 2 P.W. 469. 1 Eq. Ab. 302. This last case however, according to 2 Stra. 823, was decided on the ground of the legacy being a demonstrative one.

[g] 2 P.W. 165. For. 228. 1 Atk. 508. 3 id. 123. Orme *v.* Smith, ante N. *f*.

[h] 1 P.W. 464. 2 id. 471. 3 id. 385. Ambl. 402. 569. 2 Ves. 624. 2 Bro. 110.

whether he calls it in or it is paid in voluntarily, it is an ademption for so much as is received.[a] Thus if after a debt is bequeathed the debtor becomes bankrupt, and the testator receives a dividend under the commission: this is an ademption for so much as he has received, although the gift remains good with respect to what may be paid after his death out of the bankrupt's estate.[b] Lord Thurlow said he did not think the question in these cases turned on the intention of the testator; that the idea of proceeding on the animus adimendi had introduced a degree of confusion which was inexplicable, and he was satisfied from the consideration he had given the subject, that the only rule to be adhered to was to see whether the subject of the specific bequest remained in specie at the time of the testator's death; for if it did not, then there must be an end of the bequest.[c] In a subsequent case indeed, in which a man bequeathed the interest of a bill of exchange accepted by the East India Company to his wife for life, and after her death to be sold, and the produce divided among his nephews and nieces; and the testator afterwards received the amount of the bill, which formed the bulk of his property, and lent it on personal security: Lord Loughborough held this not to be an ademption, grounding his decision upon the intention of the testator; and seemed to approve of the distinction between a voluntary and compulsory payment.[d] But in a late case where a man effected two policies of insurance upon the life of his wife, and bequeathed

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[a] Stanley *v.* Potter, 2 Cox, 180. Humphreys *v.* Humphreys, id. 184. Fryer *v.* Morris, 9 Ves. 360.

[b] Ashburner *v.* Macguire, 2 Bro. 108.

[c] 2 Cox, 182. 185.

[d] Coleman *v.* Coleman, 2 Ves. J. 639. See the observations on this case, ante 24.

them by will, and afterwards, upon the death of his wife, received the amount; Sir J. Leach followed the doctrine of Lord Thurlow, and considered it an established principle, that in the case of a specific gift, the Court was only to inquire whether the specific thing remained at the death of the testator; and could not enter into the consideration, whether it had or not ceased to exist, by an intention to adeem.[a]

The receipt however of money in respect of a debt may be under such circumstances as to exclude the idea of any intention to adeem: as where a person bequeaths the arrears of interest then due to him on a mortgage, and applies the money he afterwards receives in discharge of the interest that accrued due subsequent to the making of the will; for the arrears still remaining an outstanding debt, the legatee is entitled to them.[b] And of course it is competent for a testator to provide in his will against the circumstance of his receiving the debt in his lifetime.[c] Where therefore a woman bequeathed to her granddaughter two sums of 2000*l.* each due to her on the several bonds of A. and B., but added, that in case all or any part of these sums should be *paid in* before her death, then she gave her grandaughter 4000*l.*, or so much money as the principal money so paid in should amount unto; and the testatrix afterwards released one of the sums without receiving any part of the money: this was held the same as an actual payment, and no ademption.[d]

It is clear that if a testator simply bequeaths a

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[a] Barker *v.* Rayner, 5 Mad. 208.
[b] Graves *v.* Hughes, 4 Mad. 381.
[c] Wetherby *v.* Dixon, 19 Ves. 407.
[d] E. Thomond *v.* E. Suffolk, 1 P. Coop. 279. W. 461.

lease of which he is possessed at the making of his will, and afterwards renews that lease, the legatee is not entitled to the benefit of the new lease; for the new lease is not given to him, but only the old one, which is adeemed and gone. Thus devises of "all my college leases;"[a] of "all my tithes and ecclesiastical dues payable out of W.;"[b] of "the perpetual advowson and disposal of the living or rectory of W. for ever;"[c] of "my leasehold garden and all my estate term and interest therein,"[d] have been held revoked by a renewal.

But a renewed lease will pass under a general devise of "all and singular my leasehold estate, goods, chattels and personal estate whatsoever;"[e] or where the intention of the testator that it should pass, is, under all circumstances, to be collected. Thus where S. C., prebend of T., demised his prebendal lands for twenty-one years to one of his children, who executed a declaration of trust for S. C., and such person as he should appoint by will, &c., and the lease was annually renewed, and a new declaration of trust executed; and S. C. by will devised all the rest of his goods, chattels and estate to his eldest son, who, he willed, should have the disposal of the lease, and should receive to himself all the profits and *advantages* arising and accruing from it; and the lease was several times renewed after the making of the will: Lord Hardwicke considered the words of the will

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[a] Abney *v.* Miller, 2 Atk. 593. The words in the report "*which I now hold of M. College*" are not in the Reg. Book, see 3 Anstr. 824.

[b] Rudstone *v.* Anderson, 2 Ves. 418.

[c] Hone *v.* Medcraft, 1 Bro. 261.

[d] Slatter *v.* Noton, 16 Ves. 197. See also Att. Gen. *v.* Downing, Ambl. 571. Coppin *v.* Fernyhough, 2 Bro. 291. Colegrave *v.* Manby, 6 Mad. 72.

[e] Stirling *v.* Lydiard, 3 Atk. 199; and see Digby *v.* Legard, 2 Dick. 500.

were sufficient to pass not only the trust and beneficial interest then subsisting, but also the renewed lease, and that such must have been the testator's intention.[a]

His Lordship also thought if a testator bequeathed all his estate, right, and interest he should have to come in the lease at the time of his death,[b] or even all the interest he had in the lease,[c] a renewed interest would pass. Where a man bequeathed to his wife during her life all his messuages, lands, and tenements in V., which he held by lease, for all the residue of his term and interest therein; and after her decease gave the same to the plaintiff for all the residue of the term and interest he should have to come therein at his decease: Sir W. Grant dismissed the bill on the ground that the testator's intention was merely to give the residue of the term he then had; that he was thinking not of any future interest he might by possibility acquire in the premises, but of what he actually had. This decision however was reversed by Lord Eldon, who observed, that considering the first clause as an independent, separate, substantive disposition, if that lease, which the testator then had, and which he described as *his* term and interest, had expired, and a new lease had been taken, his wife would have taken nothing. It was equally clear, that if the following part of the clause had stood as a substantive, independent bequest, unexplained by the context, whatever was the term or interest he had at his decease would have passed under that description to

[a] Carte *v.* Carte, 3 Atk. 174. Ambl. 28. Ridgw. C.T. Hard. 210.

[b] 2 Atk. 599.

[c] 3 Atk. 176, in Carte *v.* Carte; but Sir W. Grant considers the report inaccurate in this respect, see 16 Ves. 201; and the words are very different in Ridgway's report of the case.

the plaintiff: if therefore the lease had expired, and a new lease had been taken, that new lease would unquestionably have passed by that clause to the plaintiff after the decease of the testator's wife; who under the residuary clause would have been entitled for her life to that new lease under the description of the term and interest to come at the testator's decease.[a]

With regard to leaseholds for lives it has long been settled that a surrender and renewal operate as a revocation; for the new purchase being a freehold can not pass by a will made before.[b]

When there is a bequest of all goods or of specific articles that shall be in a particular place at the testator's death, the removal of them from that place operates in general as an ademption.[c] There is a strong case in Vernon on this subject. The Earl of S., before he went abroad for his health, made his will, and bequeathed to his wife all the plate and furniture that should be in his house at R. at the time of his death. While he was beyond sea, his steward got the landlord to accept a surrender of the lease of the house at R., and thereupon removed the goods to another house of the testator, and wrote to the Earl, who approved of it. It was held that the goods not having been removed by fraud or practice to disappoint the legacy, nothing passed to the Countess by the words of the will.[d] Yet in another case in which Sir R. B. bequeathed to his wife all his plate, linen,

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[a] James *v.* Dean, 11 Ves. 383. 15 Ves. 236.

[b] Marwood *v.* Turner, 3 P.W. 166. Digby *v.* Legard, 2 Dick. 500.

[c] Ambl. 610. Green *v.* Symonds, 1 Bro. 129. N.

[d] E. Shaftesbury *v.* Countess of Shaftesbury, 2 Ver. 747.

and furniture in his house at S. together with the lease of the said house for the term that should be to come therein at his death; and it appeared that the testator had two houses, one at S. and one at B., and it had been for several years his custom to remove his plate and linen (except sufficient for one week's use without washing) from one house to another, according as the family changed their residence, and that at the time of his death the whole was at B.: the wife was held entitled to all the plate and all the linen except the linen for the week left at B.: for there being only one set of plate and linen, it was like a general devise of all plate and linen.[a] Lady Shaftesbury's case has been doubted in a practical work;[b] yet in a late case, in which a man bequeathed to his wife all his household goods, plate, &c., that should be in or about his dwelling-house in Doctors' Commons at the time of his decease; and after the making of the will the testator took a house in Bedford Square, and removed to it the greater part of the furniture from his house in Doctors' Commons: the Vice-Chancellor observed, that probably, if the testator had been asked, whether he meant to give his wife the furniture in Bedford Square, he would have answered in the affirmative; but a gift of such furniture as should be in his house at Doctors' Commons at the time of his decease could not pass furniture, which at the time of his decease was in his house in Bedford Square.[c]

If the goods are only removed for a necessary purpose, as on account of fire, it will not be an

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[a] Land *v.* Devaynes, 4 Bro. 537.

[b] 1 Rop. Leg. 34; and see Mr. Raithby's note to the case.

[c] Heseltine *v.* Heseltine, 3 Mad. 276.

ademption.[a] And where the captain of a ship bequeathed to his wife all his goods and chattels on board the W., and afterwards removed to another ship: Lord Hardwicke thought there was a difference between this, and goods in a house; and that the removal of them out of the ship, it being a description so precarious, did not infer an intention to revoke, or at least an intention in the creation of the legacy, that if the goods should not be there at his death, they should not pass.[b]

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[a] 1 Ves. 273. 1 Bro. 129. [b] Chapman *v.* Hart, 1 Ves. 271.

# CHAPTER VI.

## OF PAYMENT.

### SECTION I.

*Of the Persons to whom Legacies are to be paid, and herein of the Equity of married Women to a Provision.*

THERE seems formerly to have been a difference of opinion how far in the case of a legacy given to an infant the executor could with safety pay it to him, or to his father for him.[a] This point is not now of much importance, for by the legacy act[b] he is empowered to pay it into the Court of Chancery without suit, and when the legatee attains twenty-one he may petition for it: since which if a bill be filed for securing the legacy the costs will not be given out of the testator's estate.[c] But of course a payment to the parent if authorized by the will is valid;[d] and a legacy to A., an adult, "to be equally divided between himself and his family," or "for him, and his children's use," may be paid to A., notwithstanding the infancy of the children.[e] Trinkets also, specifically given to infants, have been ordered to be delivered by the executors to the father of the legatees.[f]

Where a legatee was abroad, but had left a gene-

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[a] See Holloway *v.* Collins, 1 Ch. Ca. 245. Bilson *v.* Saunders, Bunb. 240. Doyley *v.* Tollferry, 1 Eq. Ab. 300. 1 P.W. 285. Gilb. Eq. R. 100. Philips *v.* Paget, 2 Atk. 80. Willoughby *v.* E. Rutland, Nels. 38.

[b] 36 Geo. III. 52. 32. Appendix.

[c] Whopham *v.* Wingfield, 4 Ves. 630.

[d] Fane *v.* Fane, 1 Ver. 30.

[e] Cooper *v.* Thornton, 3 Bro. 96. 186. Robinson *v.* Tickell, 8 Ves. 142.

[f] Hill *v.* Chapman, 2 Bro. 612.

ral authority to A. to receive all sums due to him, the legacy was ordered to be paid to A.[a] The case of a legatee abroad is now provided for by the legacy act in the same way as for an infant.[b]

A bequest "to his Majesty's government in exoneration of the national debt" was ordered to be transferred to such person as the king, under his sign manual, should appoint.[c]

A legacy to the parish of C. was construed a gift to the poor of the parish;[d] but a gift to the parish church of H. was held to belong to the churchwardens for the reparations of the church; for as on the one hand the parson of the church is a corporation for the taking of land for the use and benefit of the church, and not capable of taking goods, or any personalty on that behalf; so, on the contrary, the churchwardens are a corporation to take money, or goods, or other personal things for the use of the church, but are not enabled to take lands.[e]

Money given for placing out poor apprentices is to be paid to the corporation of the town, or to the parson of every town or parish not incorporate.[f]

A legacy to a married woman, if not given to her separate use, and if no suit has been instituted,[g] may be paid to her husband;[h] or may be set off against a debt due by the husband to the testator.[i] A pay-

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[a] Carr *v.* Eastabrooke, 2 Cox, 390; and see Hill *v.* Chapman, 11 Ves. 239.

[b] 36 Geo. III. 52. 32.

[c] Newland *v.* Att. Gen. 3 Mer. 684, on the ground, according to a modern work (Prest. Leg. 189) of its being a void bequest.

[d] West *v.* Knight, 1 Ch. Ca. 134.

[e] Att. Gen. *v.* Ruper, 2 P.W. 125.

[f] 7 Jac. I. 3. Att. Gen. *v.* Lord Newport, Rep. T. Finch, 187.

[g] See 4 Ves. 18. 10 Ves. 90. 1 Glyn & Jam. 68.

[h] 10 Ves. 90. 9 Pri. 36. Doswell *v.* Earle, 12 Ves. 473; and see Adams *v.* Peirce, 3 P.W. 11.

[i] Ranking *v.* Barnard, 5 Mad. 32. Ex parte O'Ferrall, 1 Glyn & Jam. 347.

ment to her will not be valid;[a] for as the husband is chargeable for her devastavit,[b] and liable for her conversion of goods of which she is only devisee for life, notwithstanding a separation has taken place between them;[c] so on the other hand in equity, as at law, a gift to the wife is a gift to the husband, who may release or assign a legacy bequeathed to her, notwithstanding a divorce a mensâ et thoro;[d] and if he and his wife give a letter of attorney to A. to receive it, and A. receives it accordingly, but the husband dies before it is paid over to him; it is considered as having vested in his possession, and will go to his executors.[e]

It has long, however, been the practice in equity, when a husband is obliged to apply to the Court for a personal demand in right of his wife, and there has been no settlement or agreement upon the marriage, not to allow him to obtain it without making a provision for her.[f] Lord Hardwicke observes, this is an equity grounded upon natural justice, and is that kind of parental care which the Court exercises for the benefit of orphans.[g] Yet other judges have wondered how the rule came to be established, and thought it difficult to discover the ground of the wife's equity.[h]

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[a] Palmer *v.* Trevor, 1 Ver. 261; and see 5 Ves. 521.

[b] Com. Dig. Baron & Fem. N. Powell *v.* Bell, Pr. Ch. 255. Kings *v.* Hilton, Cro. Car. 603.

[c] Lord Paget *v.* Read, 1 Ver. 143.

[d] Stephens *v.* Totty, Cro. Eliz. 908. Mo. 665. 1 Roll. Ab. 343. 2 id. 301. Wats *v.* Conisby, Hob. 247. Atkins *v.* Dawbury, Gilb. Eq. R. 88; and see 2 Roll. Rep. 134. 1 Salk. 115. 326. Com. 70.

[e] Huntley *v.* Griffiths, Mo. 452. 1 Roll. Ab. 342.

[f] 2 Atk. 419, 420. 1 Mad. 373. See the doctrine and cases on this subject, 1 Mad. Ch. 480. Brid. Eq. Dig. Bar. & Fem. S. 9.

[g] 2 Atk. 419.

[h] See 2 P.W. 642. 3 id. 205. 1 Mad. 458.

Whenever therefore a married woman is entitled to a legacy, and there has been no settlement, the legacy will not be decreed to the husband without his making a provision for her;[a] and an injunction will be granted if he sues for it in the ecclesiastical court.[b] And even if there has been a settlement, yet if the provision by it is inadequate to the wife's fortune,[c] or is only slender or precarious, as a mere covenant by the husband that the wife shall have such share of his property as would belong to the widow of a freeman of London;[d] or consists of part of the wife's own property, that has been settled to her separate use, and there afterwards comes a considerable accession of fortune to her; the Court will oblige the husband to make a further provision for her:[e] and she may herself institute a suit against him to enforce this equity.[f] If the husband has received a great part of his wife's fortune, and refuses to make a settlement, the Court will not only stop the payment of the residue, but will even prevent his receiving the interest of that residue, that it may accumulate for the benefit of the wife,[g] or be applied for her maintenance in case he has turned her out of doors or by ill treatment obliged her to leave his

[a] Brown *v.* Elton, 3 P.W. 202. Underwood *v.* Morris, 2 Atk. 184. Harrison *v.* Buckle, 1 Stra. 238.

[b] Pr. Ch. 548. 1 Atk. 491. 2 id. 419. Meals *v.* Meals, 1 Dick. 373. 5 Ves. 517. N. Gardener *v.* Walker, 1 Stra. 503. Harrison *v.* Buckle, id. 238.

[c] Lady Elibank *v.* Montolieu, 5 Ves. 737; and see 3 Ves. 98. Carr *v.* Taylor, 10 Ves. 574.

[d] March *v.* Head, 3 Atk. 720; but see Adams *v.* Peirce, 3 P.W. 11.

[e] Burdon *v.* Dean, 2 Ves. J. 607; and see Tomkyns *v.* Ladbroke, 2 Ves. 591.

[f] Lady Elibank *v.* Montolieu, 5 Ves. 737. Oxenden *v.* Oxenden, 2 Ver. 493. Gilb. E. R. 1. Williams *v.* Callow, 2 Ver. 752. Watkyns *v.* Watkyns, 2 Atk. 96. Roberts *v.* Roberts, 2 Cox, 422. Duncan *v.* Duncan, 19 Ves. 394. Coop. 254. Elliott *v.* Cordell, 5 Mad. 149.

[g] 3 Atk. 21.

house,[a] or has gone abroad leaving her unprovided for.[b] But except in such cases, or where the wife has been a ward of court,[c] the husband will be entitled to the interest of her fortune.[d]

This right of the wife extends not only to the husband but to all those claiming under him, whether by voluntary assignment, or by act of law; as in the case of trustees under a general assignment in trust for creditors;[e] or the assignees in bankruptcy,[f] or under an insolvent act;[g] for these stand exactly in the place of the husband, and are subject to precisely the same equity in respect to the wife. And it may now perhaps be laid down, notwithstanding some doubts on this point,[h] that if the husband assigns his wife's interest to another for a valuable consideration such assignee is in the same situation;[i] for although an injunction has been granted to prevent the husband making any such assignment, this was only to hinder his incumbering the case with new parties.[k] It seems, however, that where an equitable interest is given to the wife for her life only, the Court permits the husband to enjoy it without her consent, and

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[a] 19 Ves. 397. 5 Mad. 156. Oxenden *v.* Oxenden, 2 Ver. 493. Williams *v* Callow, id. 752.

[b] Watkyns *v.* Watkyns, 2 Atk. 96. Wright *v.* Morley, 11 Ves. 12. Guy *v.* Pearkes, 18 Ves. 196.

[c] See 3 Ves. 511.

[d] 4 Ves. 20. 1 P.W. 383. 2 Ves. 562. Bullock *v.* Menzies, 4 Ves. 798. Duncan *v.* Duncan, 19 Ves. 394. Coop. 254.

[e] Pryor *v.* Hill, 4 Bro. 139.

[f] 9 Ves. 100. 11 id. 17. Jacobson *v.* Williams, 1 P.W. 382. Watson *v.* Mascal, id. 459. N. Freeman *v.* Parsley, 3 Ves. 421. Burdon *v.* Dean, 2 Ves. J. 607. Oswell *v.* Probert, id. 680. Brown *v.* Clark, 3 id. 166. Lumb *v.* Milnes, 5 id. 517.

[g] Worrall *v.* Marlar, 1 Cox, 153. 1 P.W. 459. N. 2 Dick. 647.

[h] See 1 Cox, 158. 9 Ves. 100. 11 id. 17. 20. 1 Mad. 373. 5 id. 156. Povey *v.* Amhurst, Gilb. Eq. R. 80.

[i] 4 Bro. 326. 4 Ves. 19. 530. 2 Mad. 20. E. Salisbury *v.* Newton, 1 Ed. 370. 4 Ves. 529. Jewson *v.* Moulson, 2 Atk. 417. Like *v.* Beresford, 3 Ves. 506. Johnson *v.* Johnson, 1 Jac. & W. 472.

[k] Roberts *v.* Roberts, 2 Cox, 422. Ellis *v.* Ellis, 1 Sup. to Vin. Ab. 475.

without making any provision for her; and if, while living with and maintaining her, he sells this interest for a valuable consideration, she has no equity against such assignee.[a]

A wife may wave this right to a provision, and if she appears personally in court, or before commissioners, and consents upon examination that the property shall be paid to her husband, he will be entitled to it even after an order of the Court for a settlement has been pronounced.[b] In some instances indeed this seems not to have allowed;[c] but in a case where the husband was insolvent, the Master of the Rolls decreed the whole to be paid to him, and refused to refer it to a Master to consider of a scheme for settling some provision for the wife, which he said was never done unless there appeared circumstances of fraud or compulsion on the part of the husband; and that a wife might as well dispose of personal estate, over which she had an absolute control, as of real estate by joining in a fine with her husband.[d] And in later cases it seems to have been thought that if the wife persisted the Court could not refuse.[e] Hence where a man gave his daughter a legacy to be laid out by trustees in the purchase of a well secured annuity for her life, her receipts from time to time to be a sufficient discharge, &c.: the legacy was ordered on the petition of the daughter and her husband to be paid to him.[f] In a case however in which a sum

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[a] Elliott *v.* Cordell, 5 Mad. 149.

[b] 10 Ves. 88. 90. 1 Mad. 458. 1 Glyn & Jam. 67.

[c] Blackwood *v.* Norris, For. 43, cited. Ex parte Higham, 2 Ves. 579. Ex parte Gardner, id. 671.

[d] Willats *v.* Cay, 2 Atk. 67.

[e] 2 Ves. J. 677. 2 Atk. 454. Dymock *v.* Atkinson, 3 Bro. 195. Belt's ed. Frederick *v.* Hartwell, 1 Cox, 193.

[f] Gullan *v.* Trimbey, 2 Jac. & W. 457.

of money was settled on marriage in trust to pay the dividends as the wife should from time to time by writing appoint, but not so as to deprive herself of the intended use or benefit thereof by sale, mortgage, charge, or otherwise in the way of anticipation; and after her decease in trust for her husband, if he survived her, but if not, then for the wife, her executors, &c.: the Court refused to decree the money to the husband, as that would be anticipating it; and the Lord C. Baron observed, he was not sure that he should have followed the example of the Master of the Rolls in the last mentioned case.[a] Lord Loughborough also refused to let the husband have the whole where the marriage was a contempt of court, and he had been released from prison on his undertaking to make a settlement.[b] Nor will the Court receive the consent of a married woman that money should be paid to her husband until her share is ascertained.[c] And where therefore a wife's portion of the residuum could not be ascertained, as there were some demands on the estate which if allowed would diminish her share, and it was proposed that her consent should be taken for the whole which it would amount to without any deductions: the Court refused the application, as this would be depriving her of the power of changing her mind in the interim.[d] Yet the consent of the wife to the sale of a reversionary life interest has been taken de bene esse,[e] and the purchase money allowed to be

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[a] Ritchie v. Broadbent, 2 Jac. & W. 456.

[b] Stackpole v. Beaumont, 3 Ves. 89.

[c] Jernegan v. Baxter, 6 Mad. 32.

[d] Edmonds v. Townshend, 1 Anstr. 93; and see 8 Ves. 178.

[e] Woollands v. Crowcher, 12 Ves. 174.

paid to the husband:[a] although it was held in a subsequent case that a wife can not by her consent in court dispose of her reversionary interest in personalty in favour of her husband; and the Vice-Chancellor said, that if the wife by her consent could pass a remainder or reversion in personal property to the husband, she would not only part with a future possible equity, but with her chance of possessing the whole property by surviving her husband; and to give this effect to her consent, would make it analogous to a fine at law, with respect to real estate; a principle always disclaimed in a court of equity, which interferes to protect the property of the wife against the legal rights of the husband; and will never lend itself as an instrument to enable the husband to acquire a right in the wife's personal property, which he can by no means acquire at law.[b]

The Court, before it orders the money to be paid to the husband, requires an affidavit from the husband and wife that there is no settlement affecting the property in question; but it does not seem necessary to refer it to a Master for this purpose,[c] as has sometimes been done.[d]

Where the parties were abroad at Breda it was ordered that the wife should appear before a magistrate there and be examined.[e] And where a commission issued from the government of Virginia, under which the wife consented to a power of attorney to

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[a] Howard *v.* Damiani, 2 Jac. & W. 458.

[b] Pickard *v.* Roberts, 3 Mad. 384.

[c] See Minet *v.* Hyde, 2 Bro. 663. Binford *v.* Bawden, 2 Ves. J. 38.

[d] See Hough *v.* Ryley, 2 Cox, 157. Hardwick *v.* Mynd, 1 Anstr. 274.

[e] Minet *v.* Hyde, 2 Bro. 663. The examination was to be in writing and attested by notaries, &c. See the particulars of the order in Mr. Belt's N. See also Parsons *v.* Dunne, 2 Ves. 60.

receive a legacy, executed by her husband: the Lord Chancellor ordered a transfer to the Accountant General with liberty to the legatees to apply upon such documents for payment.[a] But where the husband and wife were both inhabitants of Prussia, the money was ordered to be paid to the husband without examination, as by the law of that country the whole personalty of the husband and wife is at the absolute disposal of the husband.[b] Payment of a legacy amounting to 167*l.* to the agent of the husband without a commission to take the consent of the wife, has been refused, although the parties lived at Tortola, and it was urged that the expense would run away with a great part of the legacy.[c] Now however legacies to married women under 200*l.*, or 10*l.* in annual payments, may be paid by the Accountant General to them or their husbands upon an affidavit by them that there is no settlement or agreement affecting or relating to such legacy or annuity.[d]

When a settlement is decreed it is for the wife, and the children. Sir W. Grant remarked, he was not aware that the wife had in any case been permitted to say, she claimed a settlement for herself, but not for her children.[e] If the wife die after an order directing the Master to approve of a proper settlement, the children are entitled to the benefit of that order:[f] although if there were no children it would not prevent the right of the husband by survivorship.[g]

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[a] Campbell *v.* French, 3 Ves. 321.

[b] Sawer *v.* Shute, 1 Anstr. 63, cited 3 Ves. 323.

[c] Bourdillon *v.* Allaire, 3 Bro. 237.

[d] Bea, Ord. Ch. 464. Elworthy *v.* Wickstead, 1 Jac. & W. 69.

[e] 13 Ves. 6; and see 1 Mad. 457. Johnson *v.* Johnson, 1 Jac. & W. 472.

[f] Murray *v.* Lord Elibank, 10 Ves. 84. 13 id. 1. Rowe *v.* Jackson, 2 Dick. 604. Wiseman *v.* Wiseman, 1 Dick. 343, cited; and see 1 Glyn & Jam. 67.

[g] 10 Ves. 90, 91.

Hence where a legacy was left to a married woman, whose husband became a bankrupt, and the executors of the will filed a bill to carry the trusts of it into execution; and the wife died before answer put in, leaving children: Sir J. Leach was of opinion, that upon the bill being filed, the equity of the wife attached upon the property, and that her subsequent death pending the suit, without waving her equity, gave to the children an immediate title to the provision that the wife could have acquired, if living.[a] And where a legacy was left to the wife of a bankrupt, and the assignees agreed with the executor to settle part on the wife and her children; and the wife afterwards died before any settlement was made, leaving a daughter: it was held that her death could not disappoint the claim of the child.[b] How far the children have any substantive and independent right to claim after the death of their mother, if a settlement was not directed during her life, was at one time much doubted.[c] But in a late case where this point came under consideration, Sir T. Plumer said, that though the cases as printed were contradictory, yet on consulting the registrar's books they were all found reconcileable, and all concurred in showing that the children had no right independent of contract or a decree.[d]

The wife will not in general have the whole of the property decreed to her.[e] The Court, in determining the question how much she shall have, has exercised a

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[a] Steinmetz *v.* Halthin, 1 Glyn & Jam. 64.

[b] Lloyd *v.* Williams, 1 Mad. 450.

[c] See 13 Ves. 7.

[d] Lloyd *v.* Williams, 1 Mad. 450; and see 1 Glyn & Jam. 66.

[e] Pryor *v.* Hill, 4 Belt's Bro. 139. Beresford *v.* Hobson, 1 Mad. 362. Goose *v.* Davis, Cooke, B. L. 298, marginal note, 8th ed.

discretion, and has not tied itself down to any precise rule. Any settlement of other property made by the husband upon the wife is to be taken into consideration; and regard must also be had to any other property possessed by the husband in right of his wife.[a] The most usual course seems to be to give her one half.[b] In one case however where the wife was a ward of court, the whole of the property was decreed to be settled upon her and her children, notwithstanding the husband had assigned her interest to secure the repayment of money borrowed for the support of himself and his wife.[c] The bad conduct of the husband may perhaps give the wife a special equity to have a larger part of the fund settled on her; but if a divorce from ill-treatment takes place only after the bankruptcy of the husband, it makes no difference, as the right to the legacy has become vested in the assignees.[d]

## Section II.

### *Of the Time and Rate of Payment.*

By the civil law executors have a year's time from the death of the testator to get in the estate, and to pay legacies; and, in conformity to this, the same rule, where no earlier time is mentioned in the will, has been taken up, and is now followed in the Court of Chancery.[e] Where therefore a testator

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[a] Green *v.* Otte, 1 Sim. & St. 250.

[b] See 1 Mad. 375. 377. Goose *v.* Davis, ante 285. Ex parte Newham, 1 Glyn & Jam. 40. Ex parte O'Ferrall, id. 347.

[c] Like *v.* Beresford, 3 Ves. 506.

[d] Green *v.* Otte, 1 Sim. & St. 250. Beresford *v.* Hobson, 1 Mad. 362.

[e] Bac. Ab. Leg. K. 2 1 Ves. 310. 2 Salk. 415.

willed that his executors should within three months after his death transfer 1000*l.* stock to each of his relations, naming them; and in another part of his will gave legacies of stock "*as aforesaid:*" it was held there was not sufficient to take the latter legacies out of the general rule, and that the value of the stock must be taken at the end of a year, the usual time.[a] The legacy however vests on the death of the testator, so that if a residuary legatee dies before the debts are satisfied, or it appears how much the surplus will amount to, his representatives will nevertheless be entitled to it when ascertained.[b]

If it can be collected that the testator had any other intention in this respect, it will of course be followed as near as possible. Thus where a man gave legacies to his grandchildren to be paid at twenty-one or marriage, and by a subsequent clause in his will appointed *all the legacies thereby devised* to be paid within one year after his death: this last clause was construed only to relate to the other legacies given by the will, so as not to contradict the time specially appointed for the payment of the legacies to the grandchildren.[c] Where also a man by a codicil postponed for a particular reason the time he had appointed for payment of his legacies, and that reason became inapplicable by the events that happened: the legacies were declared to be payable at the original time appointed by the will.[d]

When a legatee, whose legacy is to be paid him at the age of twenty-one, dies under that age, his

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[a] Sibley *v.* Perry, 7 Ves. 522.

[b] Carth. 52; and see Wilson *v.* Spencer, 3 P.W. 172. So if a child dies after his portion is payable but before the estate is sold. Bartholomew *v.* Meredith, 1 Ver. 276.

[c] Adams *v.* Clerke, 9 Mod. 154.

[d] Wordsworth *v.* Younger, 3 Ves. 73.

representatives must wait till such time as he would, if living, have attained twenty-one; unless the legacy be given with interest; for then they will be entitled immediately on his death.[a] Although if maintenance or an annual sum only, and not the interest itself, be given to the legatee, his representatives must wait till such time as he would himself have been entitled.[b]

If a legacy be given to J. S. payable at twenty-one, and if he die before, to go over to A.; and J. S. die under twenty-one; the legacy is due to A. immediately; for the devise over to him is a new substantive bequest.[c] But this does not seem to be the case in gifts payable out of land: for where certain premises were charged by will with portions for daughters at their respective ages of twenty-two or marriage, and if any died before her portion became payable the share of the one so dying to go to the survivors; and one of the daughters attained twenty-two, and another died under that age; it was held that the portion of the latter should not be raised before such time as she would have attained twenty-two if she had lived.[d]

When the bequest is not payable till a future time, as at the age of twenty-one; or at the end of ten years from the death of the testator; or after the determination of a previous life interest; the legatee is entitled to have the amount of his legacy appro-

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[a] 1 Ves. 307. 1 Stra. 239. 1 Bro. 105. 3 Ves. 13. Cloberry *v.* Lampen, 2 Freem. 24. Anon. id. 64. Sanders *v.* Earle, 2 Ch. Rep. 188, cited 2 Ver. 199. Fonnereau *v.* Fonnereau, 1 Ves. 118. 3 Atk. 645.

[b] Chester *v.* Painter, 2 P.W. 335. Roden *v.* Smith, Ambl. 588. Harrison *v.* Buckle, 1 Stra. 238.

[c] 1 And. 83. Pl. 82. Papworth *v.* Moore, 2 Ver. 283. Lamdy *v.* Williams, 2 P.W. 478, 1 Eq. Ab. 299; and see 1 Atk. 556.

[d] Feltham *v.* Feltham, 2 P.W. 271.

priated and secured for his benefit out of the testator's assets.[a] So the legatee of an annuity for life out of the personal estate has a right to have a sufficient portion of it appropriated to answer the annuity.[b] This is done to secure the interest of every party of course as a common equity, without expecting any suggestion of insolvency of the executor, or of wasting the assets, which seems to have been thought necessary in the earlier cases.[c] Lord Hardwicke is reported to have held, where the legacy was given over to another in case of the death of the legatee before the time of payment, that he was not entitled to have it secured, on the ground that nothing vested in him.[d] Yet his Lordship in a subsequent case, after noticing the general rule, said, there was not any more useful part of the jurisdiction of the Court in the administration of assets; and it was therefore admitted to be done in the case of a legacy always, although contingent.[e] Lord Thurlow also doubted the correctness of the report of Palmer *v.* Mason,[f] and observed he saw no distinction as to the gift being contingent or merely future; whether it was payable at a fixed or a contingent future day the effect was the same.[g] Thus where a man bequeathed certain parts of his personal estate to A., the son of his daughter M. H., but if A. died under twenty-one, then to such other children as M. H. should have;

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[a] 2 Atk. 58. Johnson *v.* Mills, 1 Ves. 282. 1 Bro. 105, cited. Ferrard *v.* Prentice, Ambl. 273. 2 Dick. 568. Green *v.* Pigot, 1 Bro. 103. 2 Dick. 585. Walker *v.* Cooke, Pierce *v.* Taylor, id. cited. Heath *v.* Perry, 3 Atk. 105; N. 1. Contra Starkie *v.* Smith, 2 Dick. 520.

[b] Slanning *v.* Style, 3 P.W. 334.

[c] See Duncumban *v.* Stint, 1 Ch. Ca. 121. Rous *v.* Noble, 2 Ver. 249. Batten *v.* Earnley, 2 P.W. 163.

[d] Palmer *v.* Mason, 1 Atk. 505. 1 Dick. 70.

[e] 1 Ves. 283.

[f] 1 Dick. 70, marginal note.

[g] 1 Bro. 105; and see Carey *v.* Askew, 2 Bro. 58. 1 Cox, 241.

and in case M. H. should die without any other children then to W. S.; and A. died under twenty-one, and M. H. being forty years of age, and having no children, W. S. claimed to have the property secured for his benefit in case of the contingency happening: Lord Talbot thought, there being a possibility at least of a right coming to this contingent devisee, it was reasonable that all rights such as they were, whether vested or contingent, should be preserved.[a] But a legatee, whose legacy is payable out of the real estate, has no right to have it raised or secured till the time of payment; for real estate can not, like personal, be spent and gone; and though an equity might possibly arise to a purchaser without notice of such a charge, yet this is not an event to which the Court will look forward.[b]

The practice in these cases is to order a sum equal to the legacy to be laid out in stock, which appropriation binds all parties; and the legatee must abide by the rise and fall in the value of the funds;[c] as he must also if the executor lay it out without the intervention of the Court in the same manner as would have been ordered if there had been a suit. Thus where a legacy, given to an infant, was laid out by the executors in 3 per cents., and the stocks afterwards fell: the infant was held to be bound, and the trustee justified, because the Court, if applied to, would have made the same appropriation.[d] But where a legacy of 4000*l.* was given, payable on mar-

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[a] Studholme *v.* Hodgson, 3 P.W. 300.

[b] Gawler *v.* Standerwick, 2 Cox, 15.

[c] Webb *v.* Webb, 2 Dick. 746. Burgess *v.* Robinson, 3 Mer. 7. Contra Alcock *v.* Eames, 2 Dick. 578.

[d] Ex parte Champion, cited 3 Bro. 147; and see 7 Ves. 150. Hutcheson *v.* Hammond, 3 Bro. 128.

riage, and till then interest at 3 per cent.; and the executrix invested the amount of the legacy in the purchase of 4487*l.* stock, and conveyed it to trustees upon trust to pay the legatee the amount of the legacy with interest at 3 per cent., and to pay the surplus interest to the executrix: Lord Thurlow held that the executrix could not take the surplus interest; that if a legatee had his legacy anticipated he must stand or fall by it, but then he must have the whole fund: and it is said in the marginal note, that the stock having sunk in value the executrix's estate should make it good.[a]

Under some circumstances however a legatee will not be bound. Thus where the executors in pursuance of an order paid the balance due from them into Court, and it was laid out in the 3 per cents., and some of the legatees being infants, a reference was made to the Master to compute how much stock it would be necessary to set apart to answer their claims; and before any order made upon his report one of the legatees came of age: he was held entitled to his full legacy, notwithstanding the fall of stock; but if an order had been made upon the Master's report to set apart the stock during the infancy, it would have concluded the amount of the legacy.[b] And where an annuity of 200*l.* a year was bequeathed to a wife out of the personal estate, and the executors under the direction of the Court set apart a sum of 4000*l.* Navy 5 per cent. Annuities to answer the claim, which stock was afterwards by the late act of parliament[c] converted into 4200*l.* new

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[a] Cooper *v.* Douglas, 2 Bro. 232. and see Borrett *v.* Deady, 3 Mad. 449.

[b] Rock *v.* Hardman, 4 Mad. 253;

[c] 3 Geo. IV. 9.

4 per cents.; the deficiency was decreed to be made up out of other funds in Court, as the annuity was a charge upon the whole of the residue.[a] And again where legacies, charged on land, were given to adults and infants, payable to the latter at twenty-one; the amount of their legacies, on a sale of the estate, was ordered to be invested, but without prejudice to their right to go against the estate if the fund should prove deficient.[b]

The fund which the Court adopts for investment of monies is the 3 per cent. Consolidated Annuities,[c] and it will not inquire whether it would be for the benefit of infants that money in the executor's hands should be laid out on real security.[d] But this rule will be departed from under special circumstances. Thus where a residue was given in trust to pay the interest, &c. to A. for life in equal portions, "on the two most usual feasts or days of payment in the year, that is to say, Lady-day and Michaelmas-day:" the funds were ordered to be laid out in the 3 per cents. Reduced, the dividends of which are payable at those times.[e]

In a late case where a legacy was given to the testator's daughter on her marriage, the Vice-Chancellor held, that the legatee being entitled to receive a certain sum in money when the event of her marriage happened, her legacy was not capable of being secured by the present appropriation of any sum of stock; and directed, that the residuary legatee should be allowed to receive the whole fund in Court, upon

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[a] Davies *v.* Wattier, 1 Sim. & St. 463.

[b] Dickinson *v.* Dickinson, 3 Bro. 19.

[c] 2 Dick. 499. N.

[d] Norbury *v.* Norbury, 4 Mad. 191.

[e] Caldecott *v.* Caldecott, 4 Mad. 189.

giving security to the satisfaction of the Master for the payment of the legacy if the event happened.[a]

In a bequest of all the testator's money in the funds in trust to pay his wife an annuity for life; the remainder of the stock, after leaving what appeared sufficient to answer the annuity, was decreed to be paid to the residuary legatee.[b] But where 3000*l.* Bank stock was given to A. for life, and after his death different sums, amounting to 2300*l.* were given to others, and the residue to A.; and he applied to have the stock sold, and the surplus, after investing 2300*l.* in the funds, paid to him: the Master of the Rolls thought this differed from the last case, and that the same thing had never been done, when it was to secure gross sums: it would be to take away part of the security, as the stocks might fall, and not be sufficient at the death of A. to pay the sums charged.[c]

When specific articles were bequeathed to a person for life only, the old rule of the Court was, that such person should give security that they should not be embezzled:[d] but the practice now is for an inventory only to be signed by the devisee for life, and deposited with the Master for the benefit of all parties;[e] for there ought to be danger, it is said, to require security.[f]

Legacies are in general to be paid in the currency

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[a] Webber *v.* Webber, 1 Sim. & St. 311.

[b] Drinkwater *v.* Whipham, 3 Bro. 259; but see Breton *v.* Ld. Clifden, 1 Sim. & St. 363.

[c] Soundy *v.* Binyon, 3 Bro. 258.

[d] See Bracken *v.* Bently, 1 Ch. Rep. 110. Bill *v.* Kinaston, 2 Atk. 82.

[e] Slanning *v.* Style, 3 P. W. 334. Leeke *v.* Bennett, 1 Atk. 470. Bill *v.* Kinaston, 2 id. 82. Anon. Mos. 15. Hunt *v.* Berkley, id. 49.

[f] 1 Bro. 279.

of the country in which the testator resides, and the will is made; and a legatee therefore of a will made in England, whose legacy is payable out of lands in Ireland, will be entitled to have his legacy paid in English money without any charge of remittance.[a] So if a man in Jamaica gives some legacies to be paid in sterling money, and then one to A. generally, and afterwards several more to be paid in sterling money; the legacy to A. is of Jamaica money;[b] and will be directed here to be computed according to the nominal current value, not the actual value, of the currency of that country.[c]

A gift by a person in Antigua of a certain weight of sugar, to be paid in ten years after the testator's death, was decreed to be computed according to what was the medium rate of sugars in Antigua at the end of the ten years.[d]

In paying or retaining a legacy the executor is made answerable for certain duties imposed by the last stamp act,[e] proportionably to the degree of relationship of the legatee to the testator. The payment of these however may be expressly provided for by the testator. Thus where the will directed the executors "to make payment of all the legacies without any deduction," it was held they must be paid without deduction of the duty.[f] If the legacy is given

[a] Phipps *v.* E. Anglesea, 1 P.W. 696. Wallis *v.* Brightwell, 2 P.W. 88. The currency however of the two countries is now assimilated, 6 Geo. IV. 79.

[b] Saunders *v.* Drake, 2 Atk. 465. Pierson *v.* Garnet, 2 Bro. 38. Malcolm *v.* Martin, 3 Bro. 50.

[c] Cockerell *v.* Barber, 16 Ves. 461.

[d] Symes *v.* Vernon, 2 Ver. 553.

[e] 55 Geo. III. 184. See Appendix.

[f] Barksdale *v.* Gilliat, 1 Swanst. 562. If the will directs the payment of the duty, no duty is chargeable on the money applicable to that purpose. 36 Geo. III. 52. 21. Appendix.

free of duty, it is an increase of the legacy itself; and if that therefore is payable out of the real estate, the duty is also to be paid out of the same fund.[a]

## SECTION III.

### *Of Interest and Maintenance.*

IT is a general principle, that a legacy payable at a given time, whether vested or not, does not carry interest till that time; for interest is given for delay of payment. A bequest therefore to A. to be paid at twenty-one, does not carry interest during his minority, unless there is something on the face of the instrument, from whence it can be inferred that the testator considered interest as incident to the gift.[b] Thus, where legacies were bequeathed contingently upon the legatees attaining twenty-one, and the testator gave his executors power during the minority of the legatees to lay out the money on securities for the purposes and on the trusts of his will, and to call it in, &c.: the legatees were held not entitled to interest; and Lord Hardwicke said, there could be no doubt unless for the last clause; but he did not take that to be a direction to lay out the money for the benefit of the particular legatees, but equally for the benefit of the residuary ones.[c] So where a woman devised certain estates to A. for life, remainder to his first and other sons in tail, &c.; and, failing such issue, willed that the estates should stand charged

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[a] Noel *v.* L. Henley, 7 Pri. 241.

[b] 2 Atk. 329. 1 Ves. 307. 3 Ves. 16. 1 Sch. & Lef. 5. Att. Gen. *v.* Thompson, Pr. Ch. 337. 1 Eq. Ab. 301. Lloyd *v.* Williams, 2 Atk. 108. Descrambes *v.* Tomkins, 4 Bro. 149. N. 1 Cox, 133. Tyrrell *v.* Tyrrell, 4 Ves. 1. Birmingham *v.* Kiswan, 2 Sch. & Lef. 455.

[c] Heath *v.* Perry, 3 Atk. 102.

with the payment of certain legacies, which should be raised and paid within six months after the death of A. without issue, and subject thereto to B. for life, &c.; provided that it should be lawful for A. to make any settlement of all or any part of the estates in jointure, &c.; and A. married, and settled the whole estate on his wife for her jointure, and died without issue: the legacies were decreed only to be paid with interest from the death of the jointress.[a] A posthumous child also will only be entitled to interest from the time of his birth, although the testator has given interest on his legacies *to be computed from the day of his death*.[b]

From the time however that a legacy becomes payable interest begins to run upon it, if not paid.[c] Hence where 500*l.* was given without any interest to J. B., but in case it should not be claimed within five years, then the testator bequeathed the same sum of 500*l.* *without interest as aforesaid* to R. C.; and no claim was made by J. B.: the Master of the Rolls held that the words "without interest as aforesaid," were only intended so as to give no retrospective interest for the period of the five years, which were given to J. B.; and that interest was payable from the expiration of those five years, when the legacy became due.[d] If no time of payment is mentioned in the will interest begins to accrue from the end of a year after the testator's death,[e] notwithstanding there is a gift over in the event of the legatee dying under

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[a] Reynolds *v.* Meyrick, 1 Ed. 48.

[b] Rawlins *v.* Rawlins, 2 Cox, 425.

[c] Palmer *v.* Trevor, 1 Ver. 261. Symes *v.* Vernon, 2 id. 553. Contra Knapp *v.* Powell, Pr. Ch. 11.

[d] Careless *v.* Careless, 1 Mer. 384. 19 Ves. 601.

[e] 2 Salk. 415. 2 Atk. 109. 1 Ves. 211. 1 Cox, 244. Maxwell *v.* Wettenhall, 2 P.W. 26. Bilson *v.* Saunders, Bunb. 240. Webster *v.* Hale, 8 Ves. 410.

age.[a] For by a rule, that has been adopted for the sake of general convenience, the Court holds the personal estate to be reduced into possession within a year after the death of the testator, and to be making interest: actual payment may in many instances be impracticable within that time; yet in legal contemplation the right to payment exists, and carries with it the right to interest until actual payment.[b] Thus where a fund did not come to be disposable for the payment of legacies till near forty years after the death of the testator, the legacies were held to bear interest from the year after his death.[c] Hence also where a legacy was given to be paid out of money due on mortgage "*when the same shall be recovered;*" and the money was not received until more than three years after the death of the testator: these words were held not sufficient to postpone the right to interest until the money had been recovered.[d]

A legacy charged on land only will carry interest from the death of the testator;[e] and it is the same if it is given out of a reversionary interest; for a reversion is as capable of being sold or mortgaged as any other estate.[f]

It has been said also that if a legacy be given out

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[a] Taylor *v.* Johnson, 2 P.W. 504. Mos. 98. S. C. somewhat differently reported.

[b] 13 Ves. 333. 10 id. 333; but the executor may if he chooses pay legacies, or hand over the residue, within the year. 1 Sch. & Lef. 12. 1 Turn. 241.

[c] Greening *v.* Barker, cited 1 Sch. & Lef. 12.

[d] Wood *v.* Penoyre, 13 Ves. 325.

[e] Maxwell *v.* Wettenhall, 2 P.W. 26. Bilson *v.* Saunders, Bunb. 240. Spurway *v.* Glynn, 9 Ves. 483. Shirt *v.* Westby, 16 Ves. 393; and see 1 Sch. & Lef. 11. But a modern work (Prest. Leg. 283) considers this doctrine overruled, and cites Gibson *v.* Bott, 7 Ves. 97.

[f] Davies *v.* Davies, 1 Dan. 84; and see 2 Atk. 110. Contra Maxwell *v.* Wettenhall, 2 P.W. 26. See also Bacon *v.* Clerk, 1 P.W. 478. Hall *v.* Carter, 2 Atk. 354.

of personal estate, consisting of mortgages carrying interest, or of stocks yielding profits, the legacy shall carry interest from the death of the testator:[a] but Lord Redesdale held, that the yielding profits made no difference; and that if the fund was productive within the twelve months, all the intermediate profits belonged to the residuary legatee;[b] and Lord Eldon observes, the old doctrine is exploded now by every day's practice.[c]

The interest of a contingent legacy until the event, upon which it is made payable, happens, is undisposed of, and falls into the residue.[d] Hence when the residue itself is given on a contingency the interest must accumulate for the benefit of the person who ultimately becomes entitled to that residue.[e] But where it is bequeathed in words that confer a vested interest, and is liable only to be devested and given over to another upon a contingency, the intermediate profits as they accrue will belong to the first legatee.[f] Thus where a man devised all the residue of his personal estate to his daughter F., to be paid to her at the age of twenty-one, and if she died under twenty-one, to such son of his daughter E. as should first attain the age of twenty-one; but if E. should have no such son, then over; and F. died an infant within half a year after the death of the

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[a] Maxwell v. Wettenhall, 2 P. W. 26.

[b] Pearson v. Pearson, 1 Sch. & Lef. 10.

[c] 7 Ves. 97.

[d] Haughton v. Harrison, 2 Atk. 329. Heath v. Perry, 3 Atk. 101. Wyndham v. Wyndham, 3 Bro. 58. Shawe v. Cunliffe, 4 Bro. 144.

[e] Butler v. Butler, 3 Atk. 58. Trevanion v. Vivian, 2 Ves. 430. Bullock v. Stones, id. 521. Glanvill v. Glanvill, 2 Mer. 38; and see Hawkins v. Combe, 1 Bro. 335.

[f] Tissen v. Tissen, 1 P.W. 500. Nicholls v. Osborn, 2 id. 419. Shepherd v. Ingram, Ambl. 448. Chaworth v. Hooper, 1 Bro. 82; and see Sisson v. Shaw, 9 Ves. 285. Montgomerie v. Woodley, 5 Ves. 522.

testator, and E. had an infant son (the plaintiff:) Lord Hardwicke held that during the life of F. the profits vested in her, because the residue did so; and decreed them to her representatives; but as to the profits, which would accrue till the devise to the plaintiff vested, they must be considered as part of the residue, and accumulate; and in case the plaintiff should die under twenty-one the surplus, together with the interest and profits, ought to go and belong to such persons as should be entitled thereto according to the contingencies in the will.[a]

The legatee of a specific legacy that produces profit, as of East India Bonds for example, or stock, will be entitled to interest from the death of the testator.[b] And it is said that where the Court decrees a legacy to be a satisfaction of a debt, it gives interest always from the death.[c]

Interest will not be given upon the arrears of an annuity bequeathed by will;[d] nor on arrears of maintenance reported due.[e] If a legacy has been erroneously paid to a legatee who has no farther property in the estate, in recalling that payment the rule of the Court is not to charge interest; but if the legatee is entitled to another fund making interest in the hands of the Court, justice must be done out of his share.[f]

When subsequent interest is directed to be computed, it is the course of the Court, in the case of a

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[a] Green *v.* Ekins, 2 Atk. 473. Studholme *v.* Hodgson, 3 P.W. 300.

[b] 2 Ves. 563. Mos. 99. 4 Ves. 751. 5 Ves. 205. 8 Ves. 413. 1 Swanst. 557. Barrington *v.* Tristam, 6 Ves. 345. Gibson *v.* Bott, post 304. Fontaine *v.* Tyler, 9 Pri. 94. But see Morley *v.* Bird, 3 Ves. 632.

[c] 3 Atk. 99.

[d] Anderson *v.* Dwyer, 1 Sch. & Lef. 301. Bignal *v.* Brereton, 1 Dick. 278; but see Litton *v.* Litton, 1 P.W. 541. Batten *v.* Earnley, 2 id. 163.

[e] Mellish *v.* Mellish, 14 Ves. 516.

[f] Gittins *v.* Steele, 1 Swanst. 199.

mortgage, to compute such interest on the principal and interest reported due; but in cases of bonds or legacies, to compute it on the principal only.[a]

In a legacy for life, with remainder over, no interest is due till the end of two years; for till the legacy is payable there is no fund to produce interest.[b] Yet if an annuity be given, the first payment is paid at the end of the year from the death of the testator, and an annuitant is no more than a tenant for life of part of the capital.[c] If indeed an annuity is given to be purchased by the executor, with a direction, until purchased, to pay the annuitant a less sum per annum: he will be only entitled to the smaller sum for the first year.[d] Sir J. Leach, in a case in which the residue was given for life, with remainder over, thought it would be strange if a residuary legatee should have a prior title to a pecuniary one; and that it seemed the plainer rule to hold, that what was ascertained at the end of the year to be residue, should be the capital, to the interest of which the tenant for life of the residue would be entitled.[e] And when annuities are given out of a residue, and there is no time of payment mentioned in the will, it might be questioned, his Honour said, whether the principle must not be the same, as if there were one tenant for life of the residue, and the annuities be payable only from the end of one year after the testator's death.[f]

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[a] Perkyns *v.* Baynton, 1 Bro. 574.

[b] 7 Ves. 96. Stent *v.* Robinson, 12 Ves. 461. Lowndes *v.* Lowndes, 15 Ves. 301. Raven *v.* Waite, 1 Swanst. 553. 1 Wils. C. C. 204. Benson *v.* Maude, 6 Mad. 15; but see 9 Ves. 553.

[c] 7 Ves. 96. 9 id. 553. Houghton *v.* Franklin, 1 Sim. & St. 390.

[d] Browne *v.* Spooner, 1 Ves. J. 291.

[e] Stott *v.* Hollingworth, 3 Mad. 161; and see 1 Jac. & W. 314. L. Eldon says he should not have decided this case without hearing a most elaborate argument on both sides; see 1 Turn. 239.

[f] Storer *v.* Prestage, 3 Mad. 167.

Yet in a later case in which a man bequeathed the residue of his estate and effects in trust to invest in the funds, and pay the interest, &c. from time to time to A. for life, and afterwards for the benefit of his widow and children: Lord Eldon held the tenant for life entitled to the interest and dividends accrued due in the first year upon the stocks or funds, in which the testator's property was invested at the time of his death.[a] And in another case in which a man bequeathed to his wife "the interest of one half of his property during her life;" and a part of his property consisted of capital in a partnership, and was by the articles to remain a certain number of months after his death in the concern, and then his share was to be ascertained, and a moiety of it to be paid at the end of one year, and the other at the end of two years after that time to his representatives: Lord Eldon thought the wife ought to have from the death to the termination of the partnership interest at a given rate, and not the profit; and then at the end of the partnership was entitled to interest upon the capital with reference to the circumstance, that one half was not to be collected till the end of one year, the other not till the end of two years; calculating what was then the value of the sums respectively.[b]

Where a man devised to trustees till his son should arrive at twenty-one, and then to the son, he paying to the father of the testator 10*l.* per quarter; and if the son should die under twenty-one, then to the father for life: the father's annuity was held not to commence till the son came into possession.[c]

The devisee for life of the produce of real estates,

[a] Hewitt *v.* Morris, 1 Turn. 241. [b] Fearns *v.* Young, 9 Ves. 549.
[c] Turner *v.* Probyn, 1 Anstr. 66.

directed to be sold with all convenient speed after the testator's death, is entitled, it has been held, to the rents and profits of the estates only from the end of the year after the death.[a] So where land was devised in strict settlement, and the residue of the personal estate directed to be laid out in the purchase of land to be settled to the same uses; and it was contended that the enjoyment of the personal estate was intended to be co-extensive and to commence at the same time with that of the land: Sir T. Plumer thought there was not sufficient to warrant a departure from the general rule, which he considered to have been laid down in a case before Lord Eldon,[b] that one year ought to be considered, in the absence of particular circumstances, a reasonable period to collect the testator's estate, and to invest it in a purchase; and therefore held the tenant for life not entitled to the interest of the residue accrued during the first year.[c] In a subsequent case however where there was also a proviso, that until the residue should be laid out in a purchase the trustees should invest it in the funds, the dividends to be paid to such persons and for such uses and in such manner as the rents of the premises to be purchased would go if the purchase were actually made: Lord Eldon held the tenant for life entitled to the interest of the personalty from the death of the testator;[d] and denied having laid down any such general rule as warranted the decision of the Master of the Rolls. In the case

[a] Noel *v.* L. Henley, 7 Pri. 241; but see Casamajor *v.* Strode, 19 Ves. 390. N. Fitzgerald *v.* Jervoise, 5 Mad. 25.

[b] Sitwell *v.* Barnard, post 303.

[c] Taylor *v.* Hibbert, 1 Jac. & W. 308; and see Benson *v.* Maude, 6 Mad. 15.

[d] Angerstein *v.* Martin, 1 Turn. 232. Hewitt *v.* Morris, id. 241.

alluded to* the residue of the personal estate was to be laid out in land and settled, with a direction that the interest of such residue should accumulate and be laid out in lands to be settled in like manner as the testator had directed the residue; and his Lordship observed, he had merely decided, that though there was a direction for accumulation, the tenant for life should not be kept out of the interest beyond the year; that the direction should only operate for one year, and that although the personalty remained as personalty, it should at the end of the year be considered as converted.

Where the residue was to be converted into money as soon as conveniently might be after the testator's decease, and to be placed out at interest for the benefit of two daughters, with remainders in their respective moieties to their children; and the testator's property consisted chiefly of leaseholds, part of which could not be sold on account of defects in the title, but another part, consisting of a farm held by him, was sold about five months after his decease, and had produced considerable profit during that time, which was claimed by the daughters: Lord Eldon thought it was within the common rule, and that the best decree would be to declare that the property to be converted had been converted in a reasonable time; that the persons entitled for life should have the interest from that conversion; and as to the other leasehold premises, that it being for the interest of all parties that they should not be sold, a value should be set upon them; and the per-

* Sitwell *v.* Barnard, 6 Ves. 520; and see Entwistle *v.* Markland, Stuart *v.* Bruere, id. notes.

sons entitled for life should have interest at 4 per cent. upon that value from the death of the testator.[a]

As between the tenant for life and the remainderman, the rule, at least as to funds that are not permanent, is, that what is not specifically given is to be converted into money, if the property and the parties entitled are not abroad.[b] Thus Long Annuities, and other stocks, will be sold, and the produce invested in the 3 per cents., to the dividends of which the tenant for life will be entitled.[c] But where the bequest is specific, there is no equity between the parties, who must take the funds as found at the testator's death, and enjoy the property as given. Hence where a man bequeathed all the stock standing in his name to his executors in trust for his wife for life, and after her death to his nephew, with the usual power for the executors to alter and vary the stock; and the nephew claimed to have some Long Annuities sold, and invested in the 3 per cents.: Sir J. Leach thought it would be too much to intend, that the testator meant to authorize the trustees, at their pleasure, to diminish the gift he had before made to his wife; and that the power was given to the trustees with a view to the security of the property, and not to vary or affect the relative rights of the legatees.[d]

When Bank stock is given for life, the tenant for life is entitled to the dividends at whatever rate they may be declared:[e] but a bonus given upon that

[a] Gibson v. Bott, 7 Ves. 89.

[b] See Holland v. Hughes, 16 Ves. 111.

[c] 9 Ves. 552. Howe v. E. Dartmouth, 7 Ves. 137, and cases in the notes.

[d] Lord v. Godfrey, 4 Mad. 455.

[e] Barclay v. Wainewright, 14 Ves. 66.

stock, or "a participation of 5*l.* per cent. out of the interest and profits of the corporation over and above the half-yearly dividends," has been held an accretion of the capital, and the tenant for life entitled only to the interest upon it.[a] The distinction is, that whenever the addition is made clearly and distinctly as a dividend only, the tenant for life is to have it; but whenever it is not clearly given as a dividend, it is considered as an accretion of capital. Yet the Bank have it in their power to give the bonus to the tenant for life or not.[b] A specific bequest of a certain sum in Bank stock, being all that stock the testator possesses, will not pass a bonus given upon it between the date of the will and the death of the testator.[c]

There is no apportionment in general as between the tenant for life, and those in remainder, of an annuity, or dividends.[d] Thus where a man devised his real and personal estate in trust to sell, and invest the produce in the funds; and, after payment of certain annuities, to pay the surplus of the yearly income to his daughter for life, *by equal half-yearly payments; the first payment to be made on the second quarter-day which should happen next after his decease;* and the testator died on the 19th of November, 1756, and the daughter on the 19th of January, 1803; and her representative claimed the dividends due on the 5th of January, 1803: it was held that there could be no apportionment in this case, and that the daugh-

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[a] Brander *v.* Brander, 4 Ves. 800. Paris *v.* Paris, Clayton *v.* Gresham, 10 Ves. 185. 290. Witts *v* Steere, 13 Ves. 363. Hooper *v.* Rossiter, 1 M'Clel. 527.

[b] 10 Ves. 190.

[c] Norris *v.* Harrison, 2 Mad. 268.

[d] Wilson *v.* Harman, 2 Ves. 672. Pearly *v.* Smith, 3 Atk. 260. Rashleigh *v.* Master, 3 Bro. 99.

ter was only entitled up to Michaelmas, being the day of the last half-yearly payment previous to her death.[a] In provisions for maintenance of children it seems different; for where a woman willed that her daughter A. should pay her daughter B. the sum of 30*l.* yearly, while she remained unmarried, by 15*l.* each May-day, and All Saints-day; and B. married: an apportionment up to the time of her marriage was allowed.[b]

Bequests to children form an exception to the general rule, that interest does not begin till the end of a year after the testator's death; for in these, whether vested or not, or even if there be a devise over on the death of the legatee before the time of payment, the Court, if the children have no other provision, will give the interest of the legacy by way of maintenance from the testator's death; for it considers the parent to be under an obligation to provide not only a future but a present maintenance for his offspring, and will not presume the father inofficious, or so unnatural as to leave a child destitute.[c] Thus where a man, after giving a legacy to A., gave the residue of his estate to his infant child, upon his attaining twenty-one, and the interest to accumulate, saying nothing as to maintenance; and if he died before, gave it over to another: the Master of the Rolls thought the infant upon the general rule enti-

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[a] Franks *v.* Noble, 12 Ves. 484.

[b] Reynish *v.* Martin, 3 Atk. 330; and see Hay *v.* Palmer, 2 P.W. 501.

[c] 1 Atk. 507. 3 id. 102. 1 Cox, 244. 434. 3 Ves. 16. Glide *v.* Wright, 1 Ch. Rep. 265. Greenhill *v.* Waldoe, Gilb. Eq. R. 31. Pr. Ch. 367. Att. Gen. *v.* Thompson, id. 337. 1 Eq. Ab. 301. Conway *v.* Longville, 1 Eq. Ab. 301. Harvey *v.* Harvey, 2 P.W. 21. Incledon *v.* Northcote, 3 Atk. 430. Long *v.* Long, 3 Ves. 286. N.

tled to maintenance from his father's death.[a] So where the intention of the testator to put himself in loco parentis can be inferred,[b] as where he gives directions as to the maintenance and education of the legatees, or appoints guardians to them,[c] the Court will give the interest, or maintenance out of it,[d] from the death of the testator. Hence where a grandfather having taken the children of his son, who had ruined himself, educated them entirely, and by his will gave the son a provision by way of annuity, provided he did not interfere with the children, and then gave legacies to them: Lord Bathurst thought this sufficient to raise the implication, and interest was decreed.[e] But unless such an intention can be collected, the exception is confined to children; and neither nieces,[f] nor even grandchildren,[g] can claim interest on their legacies before the time they are payable.

Lord Hardwicke observed the Court had not extended the exception to a natural child for two reasons: first from the rule of law considering a natural child as no relation; having indeed no civil blood: secondly, that it was not fit for a court of justice to give the same countenance to such children as in the case of legitimate children.[h] Lord Alvanley indeed was of opinion that both a natural child and a wife

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[a] Mole *v.* Mole, 1 Dick. 310. Contra Leech *v.* Leech, 1 Ch. Ca. 249.

[b] Acherley *v.* Vernon, 1 P.W. 783. This is said to have been the ground of the decision, see 3 Ves. 16. 1 Sch. & Lef. 5.

[c] 1 Sch. & Lef. 6. Pett *v.* Fellows, 1 Swanst. 561. Beckford *v.* Tobin, 1 Ves. 308. Hill *v.* Hill, 3 Ves. & B. 183.

[d] See De Mazaar *v.* Pybus, 4 Ves. 644.

[e] Case cited, 1 Sch. & Lef. 5.

[f] Crickett *v.* Dolby, 3 Ves. 10.

[g] 6 Ves. 547. Atkinson *v.* Turner, 2 Atk. 41. Haughton *v.* Harrison, id. 329. Butler *v.* Butler, 3 id. 58. Elton *v.* Elton, id. 507. Ellis *v.* Ellis, 1 Sch. & Lef. 1. Coleman *v.* Seymour, 1 Ves. 209; and see Palmer *v.* Mason, 1 Atk. 505.

[h] 1 Ves. 310.

would come under the exception;[a] but Lord Eldon seems to have thought there must be something more on the will in the case of a natural child to show that the testator put himself in loco parentis;[b] and it has since been held that the exception does not extend to a wife,[c] nor to a natural child,[d] nor even to legitimate offspring, if adult.[e] And although Lord Hardwicke is reported to have said that where a legacy is given to a charity, interest should be paid from the death of the testator, it appears by the decree in the case that interest was only given from the end of the year after the death.[f]

If a partial maintenance is given, as if an annual sum less than the interest is bequeathed for maintenance, the child can have no more: for the implication that the testator intended his child should be supported by the interest is ousted, if he provides any maintenance for the child, however small the maintenance, and however large the legacy;[g] except where the legacies are vested and there is no gift over of them to strangers.[h]

Yet in some cases of infant grandchildren and others unprovided for, the Court has directed a maintenance with the consent of those to whom the legacies were given over in the event of the death of the legatees before the time of payment.[i] The cases,

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[a] 3 Ves. 12. 16.

[b] 6 Ves. 547.

[c] Stent *v.* Robinson, 12 Ves. 461. Lowndes *v.* Lowndes, 15 Ves. 301.

[d] Lowndes *v.* Lowndes, ante N. *c.*

[e] Ibid.; and see Raven *v.* Waite, 1 Swanst. 553. 1 Wils. C. C. 204.

[f] Att. Gen. *v.* Hayes, 1 Sand. Atk. Rep. 356.

[g] 3 Ves. 17. 1 Sch. & Lef. 5. Hearle *v.* Greenbank, 3 Atk. 716. Long *v.* Long, 3 Ves. 286. N. Wynch *v.* Wynch, 1 Cox, 433; and see Mitchell *v.* Bower, 3 Ves. 283; but see Bourne *v.* Tynte, 1 P.W. 786, cited. 2 Vent. 346. 2 Freem. 45.

[h] See Aynsworth *v.* Pratchett, 13 Ves. 321. Stretch *v.* Watkins, 1 Mad. 253.

[i] See Greenwell *v.* Greenwell, 5

says Lord Eldon, after great struggle go this length, that where there are equal legacies to a class of children, even with a direction for accumulation, the principal with the accumulation to be paid at twenty-one, with survivorship in case of the death of any under that age to the others, the chance of all taking or the survivor being equal, the Court takes the fund, which belongs to all, and must go to all or some of them, and maintains them all out of the interest But the principle can not be applied, if there is a gift over, or the legacy is contingent. Where therefore maintenance was sought on behalf of five infants, to whom a residue was bequeathed, with survivorship among them in case of the death of any under the age of twenty-one; and in case all of them should die under that age, the whole was given to their sister, who took no interest directly in that residue; but a legacy was given to her by the same will; and in case of her death under the age of twenty-one, that legacy was given over to the other five children: the application was refused; for the five children would be maintained at the sister's expense, as she had no interest in common with them, and stood as a stranger.[a]

Where the daughter of the testator was residuary devisee and legatee for life, and had received part of the personal estate since his death, maintenance was refused, as she was an accounting party, and the

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Ves. 194. Cavendish *v.* Mercer, Fendall *v.* Nash, id. notes; and Lord Eldon's observations on these cases in Errat *v.* Barlow, 14 Ves. 202. Collis *v.* Blackburn, 9 Ves. 470. Haley *v.* Bannister, 4 Mad. 275.

[a] Ex parte Kebble, 11 Ves. 604, observing upon Fairman *v.* Green, 10 Ves. 45. Buckworth *v.* Buckworth, 1 Cox, 80. Lomax *v.* Lomax, 11 Ves. 48. Errington *v.* Chapman, 12 Ves. 20. Marshall *v.* Holloway, 2 Swanst. 436.

balance might turn against her:[a] but Lord Erskine said he very willingly acceded to the practice which began in the case cited,[b] and was very just on account of the delay in taking the accounts, that when the Court can see clearly, that there will be a clear fund, the residuary legatee shall have an allowance for maintenance in the mean time.

If an intention can be inferred from the will that maintenance should be allowed, it will sometimes be done. Thus where a man gave to his daughter for her life only an annuity "for and towards the maintenance of herself and the education and maintenance of her children;" and after her decease gave a legacy to all and every the children of her body when and as they should respectively attain twenty-one, with benefit of survivorship; and if none should attain twenty-one, the legacy to cease: the Master of the Rolls thought it extremely improbable that the testator intended the children should be without any provision in case the mother died leaving them under age, and therefore there was a fair inference, that the testator's intention was to give maintenance.[c] So from the clear language of the will a second son was held entitled to a double allowance for maintenance: the one as devisee of the real estate; the other as a legatee of the personal.[d] But where lands were devised in trust that the trustees should within

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[a] Warter *v.* ——, 13 Ves. 92.

[b] Wear *v.* Wilkinson, cited id. 93.

[c] Lambert *v.* Parker, Coop. 143; and see Chambers *v.* Goldwin, 11 Ves. 1.

[d] Clive *v.* Walsh, 1 Bro. 146. See also Harris *v.* Finch, 1 M'Clel. 141, interest given on a contingent legacy. Where there are two funds absolutely given by different persons for the maintenance of an infant, the interest of the infant must determine which of the two funds is to be applied. Foljambe *v.* Willoughby, 2 Sim. & St. 165.

six years after the testator's decease raise and pay 1500*l.* apiece to his two youngest daughters, and also out of the rents and profits pay interest, at the rate of 4*l.* per cent. per annum, for the said 1500*l.* apiece until the same should be paid, for and towards their maintenance and education; and one of the daughters married, and died within the six years: it was held that her husband and administrator, though entitled to the principal, could not recover interest from her death, that being designed for the maintenance of the wife.[a]

In a case in which a legacy was left to be divided among a man's children, interest was directed to be paid to their mother, and applied for maintenance upon her affidavit, that her husband was abroad and in very embarrassed circumstances; the share of each child not exceeding 300*l.*:[b] and where a legacy was given to A. the better to enable him to provide for his younger children, and he consented to secure the capital, he was held entitled to the interest.[c]

Where a testator left his wife 400*l.* per annum, "in consideration of the expense and care she will incur in the maintenance of our children;" this was held only to apply to their maintenance while at her house, and that she was not to be charged with maintenance or education while at school.[d]

Maintenance will not in general be given beyond the interest of the legacy.[e] In small legacies the principal has sometimes been broken in upon, and sums for maintenance given out of it:[f] and an ap-

[a] Cowper *v.* Scott, 3 P.W. 119.
[b] Walker *v.* Shore, 15 Ves. 122.
[c] Brown *v.* Casamajor, 4 Ves. 498.
[d] Collier *v.* Collier, 3 Ves. 33.
[e] 2 Sch. & Lef. 35. Anon. Mos. 41; and see Parker *v.* Parker, 2 Freem. 58. Ex parte M'Key, 1 B. & B. 405.
[f] Barlow *v.* Grant, 1 Ver. 255. Ex parte Green, 1 Jac. & W. 253;

prentice fee in such cases has been allowed,[a] even where the legacy was given over upon the event of the legatee dying under twenty-one.[b] Yet, where 100*l.* was given in trust to invest and apply the interest for the maintenance and education of A. till twenty-one, and then to pay the principal to him, with a limitation over on his death before the time of payment: Lord Alvanley observed, that there was no power in the trustees to apply more than the interest of the legacy for the maintenance of the legatee; and they were not at liberty, under the trust reposed in them, to advance any part of the capital, though it would have been ever so much for his benefit,[c]. And Sir W. Grant refused to allow sums for maintenance and advancement, saying that the rule had been never to permit trustees of their own authority to break in upon the capital; and that it had rarely occurred, that the Court itself had broke in upon the capital for the mere purpose of maintenance; though frequently for the purpose of putting the child out in life.[d] It is of course competent for the infant by any act after he comes of age, upon full consideration of all that has been done for him during his minority, to affirm such payments.[e]

Lord Thurlow observed that it was a constant and very proper rule of the Court, that it would never make a father any allowance with retrospect to what he had paid without the authority of the Court,

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and see 2 P.W. 23. Contra Swinnock *v.* Crisp, 2 Freem. 78.

[a] Swinnock *v.* Crisp, 2 Freem. 78. 2 Vent. 353. Disallowed to a mother, Smee *v.* Martin, Bunb. 186.

[b] Franklin *v.* Green, 2 Ver. 137. Sed qu?

[c] Lee *v.* Brown, 4 Ves. 362.

[d] Walker *v.* Wetherell, 6 Ves. 473; and see Davies *v.* Austen, 3 Bro. 178. 1 Ves. J. 247. Lee *v.* Brown, 4 Ves. 362. Lord Alvanley, in the last cited case, seems not to admit the distinction noticed by Sir W Grant.

[e] 4 Ves. 366. 368.

and refused it accordingly in the case before him, notwithstanding the will had expressly given the produce of the legacies for maintenance;[a] neither would he allow maintenance for the future, although directed by the will, if the father was of ability to maintain his children.[b] But his Lordship is said to have afterwards changed his opinion,[c] and it seems now settled, that maintenance will be allowed for the time past;[d] and even, if given by the will, without an inquiry as to the father's ability.[e] Hence maintenance has been allowed where the father's income was 3000*l.* a year.[f] The Court will look at each case with a view to make such order, as the rule prescribed by the testator justifies, and the conduct of the parties allows.[g] In legacies to grandchildren, with directions to apply so much as might be necessary for their maintenance and education, provisions left them by their father have been taken into consideration.[h] Upon the report in a late case of the father's inability independent of the estate of his wife; the Vice-Chancellor thought that the wife, during the life of the husband, not being under a legal obligation to maintain the children, the Court could not take into consideration her separate estate.[i]

It does not seem clear whether a legacy must be

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[a] Andrews *v.* Partington, 2 Cox, 223. 3 Bro. 60. Hill *v.* Chapman, 2 Bro. 231.

[b] Hughes *v.* Hughes, 1 Bro. 387; and see Pulsford *v.* Hunter, 3 id. 416.

[c] 3 Ves. 733.

[d] Ex parte Penleaze, 1 Bro. 387 N. Belt's ed. Heysham *v.* Heysham, 1 Cox, 179. Reeves *v.* Brymer, 6 Ves. 425. Sherwood *v.* Smith, id. 454. Sisson *v.* Shaw, 9 id. 285. Ex parte Darlington, 1 B. & B. 240. Chambers *v.* Goldwin, 11 Ves. 1.

[e] Heste *v.* Pratt, 3 Ves. 730.

[f] Jerveise *v.* Silk, Coop. 52.

[g] Mabarly *v.* Turton, 14 Ves. 499.

[h] Rawlins *v.* Goldfrap, 5 Ves. 440.

[i] Haley *v.* Bannister, 4 Mad. 275.

demanded to entitle the legatee to interest. It has been laid down that a legacy is not due till demand, and the executor shall pay interest only from that time; or, if no demand be proved, from the time of the bill exhibited.[a] A distinction was however taken between a legacy that was to be paid at twenty-one, or marriage, or any other particular time, when it would carry interest from that time; and one given generally, without any time mentioned; for then interest would be due only from demand;[b] except in a gift to an infant, to whom no laches could be imputed.[c] And although in a subsequent case where a legacy was devised to J. S. to be paid at a certain time, it was held by the Lord Keeper that it should not carry interest, but from the time of a demand made;[d] yet Lord Cowper afterwards adopted the above distinction, holding that generally interest is only due from demand; but that where a legacy is left payable at a day certain it must be paid with interest from that day.[e] And so in a still later case, in which a man gave a legacy payable a year after his death to his niece, who married some years afterwards, and the husband demanded the legacy, which after two years was paid him, and he gave a receipt for the principal and amount of two years interest; and then after seven years acquiescence brought his bill for the arrears of interest from the end of a year after the testator's death till the marriage, insisting that by mistake he only thought the legacy was payable on marriage: the Court said it was plain interest

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[a] 2 Freem. 1. Fringe v. Lewes, 1 Leo. 17; and see Poph. 104.

[b] Anon. 2 Freem. 207.

[c] 2 Salk. 415; and see Churchill v. Lady Speake, 1 Ver. 251. Contra Bullen v. Allen, Rep. T. Finch. 264.

[d] Joliff v. Crew, 1 Eq. Ab. 286. Pr. Ch. 161.

[e] 2 Salk. 415.

for the legacy was due, there being a certain time appointed by the will which gave it; and the executor was accordingly decreed to pay the arrears with costs.[a] It is said also in a late practical work, that the doctrine of a legacy, given generally, not carrying interest till demand, has been overruled.[b]

When any particular rate of interest is directed by the will, that will be given: but when there is no such direction, it has long been the practice (with some few instances to the contrary[c]) to allow only four per cent.,[d] the usual interest of the Court.[e] A distinction was once taken between legacies charged on the personal and on the real estate: in the latter case, the security being good, the rule was to give one per cent. less than legal interest, which was allowed in the former;[f] but this has long been altered.[g]

In bequests by testators residing in other countries the rate of interest of those countries has been sometimes given.[h] Lord Alvanley however thought there was no reason in these cases for giving more

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[a] East *v.* Thornbury, 3 P.W. 126.

[b] Prest. Leg. 282.

[c] 2 Salk. 415. Bird *v.* Lockey, 2 Ver. 745. Incledon *v.* Northcote, 3 Atk. 439.

[d] Underwood *v.* Merris, 2 Atk. 184. Guillam *v.* Holland, id. 343. Shudal *v.* Jekyll, id. 519. Hodgson *v.* Rawson, 1 Ves. 48. Reynolds *v.* Meyrick, 1 Ed. 48. Green *v.* Pigot, 1 Bro. 105. Davies *v.* Austen, 1 Ves. J. 247. Lee *v.* Brown, 4 Ves. 369. Kirby *v.* Potter, id. 752. Spurway *v.* Glynn, 9 Ves. 486. Wood *v.* Penoyre, 13 Ves. 337. Shirt *v.* Westby, 16 Ves. 396. Careless *v.* Careless, 19 Ves. 607. Davies *v.* Davies, 1 Dan. 84.

[e] 1 Bro. 386.

[f] Moore *v.* Moore, 3 Atk. 402. Swynfen *v.* Seawen, 1 Ves. 99. 1 Dick. 117. Bryant *v.* Speke, 1 Ves. 171. Lord Trimlestown *v.* Colt, id. 277; and see id. 311. Denton *v.* Shellard, 2 id. 239.

[g] 6 Ves. 544.

[h] Saunders *v.* Drake, 2 Atk. 465. Raymond *v.* Brodbelt, 5 Ves. 199. Symes *v.* Vernon, 2 Ver. 553.

A gift of a legacy may be so framed as to be a release of a demand: but to have this effect the intention must be clear; and if therefore a testator merely bequeaths a legacy to his debtor, the debt must be set off against the legacy.[a] Yet papers of the testator have been admitted in evidence to show his intention that a debt should not be put in demand by his executors, and the legatee in consequence held entitled to his clear legacy.[b]

A legacy to a wife, we have seen,[c] may be set off against a debt due by the husband to the testator: but in a suit by the assignee of a legacy it has been held that the executor can not set off a debt due to himself from the legatee.[d]

Where a man had made several presents to a woman, to whom he was to be married, and left her also a legacy by his will, and died on the day fixed for his marriage; and the executors claimed to deduct out of the legacy the value of the presents: the Master of the Rolls observed, that if the executors had a right to these presents, either in law or equity, they should not be obliged to bring an action, or a bill for the recovery of them; but might deduct the value of them out of the legacy; but he thought they had no right to the presents, no condition being expressed; and that it became a court of equity to declare presents made by an intended husband, absolute gifts.[e]

Whenever there are no debts, or the debts are all paid, and no purpose for which the estate is to be left

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[a] Wilmot *v.* Woodhouse, 4 Bro. 227. Jeffs *v.* Wood, 2 P.W. 128.

[b] Eden *v.* Smyth, 5 Ves. 341; and see Reeves *v.* Brymer, 6 Ves. 516.

[c] Ante 277.

[d] Whitaker *v.* Rush, Ambl. 407.

[e] Lockyer *v.* Simpson, Mos. 298.

outstanding, the legatees are entitled, according to the modern practice, to have the testator's property lodged in court.[a] The old law was different; nor will it now be done where the executor does not admit having in his hands a clear balance, and there is no allegation and affidavit of his insolvency.[b]

It has been held that if an executor pay debts not carrying interest before those that do, it is not a devastavit, for which he can be called upon to answer by legatees.[c]

Where an executor was constituted trustee as to a particular legacy, which was to be invested in the funds, and he, after accounting for the residuary estate, retained the legacy, without investing it: he was held liable to make good the loss arising by the non-investment, the stocks having risen in the meantime; but generally, it was said, the Court does not enter into the consideration whether the executor could, or not, at an earlier period, have invested a stock legacy.[d]

It is a principle early established, that if an executor or trustee procures to himself the renewal of a lease that belonged to the testator, the renewed interest shall be subject to the trusts of the will.[e] Hence where the wife of a testator, being the devisee for life of a term, and executrix, applied for a renewal,

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[a] Blake *v.* Blake, 2 Sch. & Lef. 26. Curgenven *v.* Peters, 3 Anstr. 751. Mortlock *v.* Leathes, 2 Mer. 491. Vigrass *v.* Binfield, 3 Mad. 62.

[b] Rutherford *v.* Dawson, 2 B. & B. 17.

[c] Turner *v.* Turner, 1 J. & W. 39.

[d] Byrchall *v.* Bradford, 6 Mad. 13.

[e] Holt *v.* Holt, 1 Ch. Ca. 190. Anon. 2 id. 207. Walley *v.* Walley, 1 Ver. 484. Keech *v.* Sandford, Sel. Ca. Ch. 61. Rawe *v.* Chichester, Ambl. 715. 2 Dick. 481. 1 Bro. 198. N. James *v.* Dean, 11 Ves. 383. 15 id. 236. Mulvany *v.* Dillon, 1 B. & B. 409.

and another person also did the same, and agreed to give the wife 3000*l.* to give up her application; this money was held to be subject to the same trusts as the lease.[a] So where a testator gave to his brothers annuities for their respective lives payable out of certain lands, provided his interest therein should so long continue; but in case the annuitants should die before the expiration of the lease of the said lands the annuities of such of them so dying to go to A. during the testator's interest in the said lease; the annuities were held to be a charge upon the renewed interest of the premises obtained by the executors.[b]

These cases proceed upon the ground that the renewed lease is merely an extension or continuation of the old one. Every person having a lease has an interest in the renewal, and though the lessors are not bound to renew, yet when done, it is a continuation of the old lease.[c] The same doctrine therefore has not been applied where the devisee for life of a term purchased the reversion in fee; this being a totally different subject, which the testator had it not in his contemplation to dispose of.[d]

Where an executor and residuary legatee received all the assets, and bought land with the money, as well as the equity of redemption of an estate, upon which the testator had a mortgage; and then died: both the land and the equity of redemption were held liable to the claims of the legatees.[e]

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[a] Owen *v.* Williams, Ambl. 734. 1 Bro. 199. N.

[b] Stubbs *v.* Roth, 2 B. & B. 548. Winslow *v.* Tighe, id. 195. Maxwell *v.* Ashe, cited 7 Ves. 184. Query, where a lease is devised charged with an annuity, whether the annuitant must contribute to the renewal fines? see the first cited case.

[c] Ambl. 719. 3 Mer. 197. 1 B. & B. 47.

[d] Randall *v.* Russell, 3 Mer. 190. Hardman *v.* Johnson, id. 347.

[e] Ryall *v.* Ryall, 1 Atk. 59.

The general rule however of law and equity is clear, that an executor may dispose of the assets, and they can not be followed by the creditors of the testator.[a] If an executor therefore sell a term specifically devised, the devisee has no remedy but against the executor.[b] So where a man bequeathed a leasehold house to A., and appointed him executor; and A. became a bankrupt, and his assignees sold the house: the Master of the Rolls thought this specific bequest could not be applied to satisfy the devastavit; that the assignees were entitled to the produce, and the residuary legatees must prove under the commission.[c]

It is a different case if the buyer is in any way accessory to a devastavit; common honesty requires that if there is either express or implied fraud, the parties shall not avail themselves of it; and in such case the assets may sometimes be followed even by legatees. Thus where a man bequeathed away some navigation bonds, which were in a box at his banker's for safe custody; and three years after the testator's death his executrix caused the bonds to be taken out, and deposited with the bankers as a security for a private debt from her to them, as well as for future advances to be made to her in her private trade: Lord Thurlow, on a bill by the legatee, held that the bankers must deliver up the bonds, and account for the interest received upon them, saying, that if one concerts with an executor, or legatees, by obtaining the testator's effects at a nominal price, or at a

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[a] 4 T. R. 625. N. 1 Cox, 147. 4 Mad. 357; and see Brent *v.* Best, 1 Ver. 69.

[b] Ewer *v.* Corbet, 2 P.W. 148. Elliot *v.* Merryman, Barn. C. R. 78. See the doctrine on this subject stated, Sug. V. & P. C. 11. S. 2.

[c] Geary *v.* Beaumont, 3 Mer. 431.

fraudulent under-value, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the executor, or in any other manner, contrary to the duty of the office of executor, such concert will involve the seeming purchaser, or his pawnee, and make him liable for the full value.[a]

And even a mere pecuniary legatee may claim this relief. Thus where shortly after the death of the executrix of a testator, her executor transferred some stock into the names of his bankers as a security for such sums as he then owed or might afterwards owe them; and the bankers knew that the stock had belonged to the testator, but trusted to the representations of the executor that he was himself absolutely entitled to it: Sir W. Grant held that the stock was liable to the claims of pecuniary legatees, it being gross negligence in the bankers not to look at the will.[b] Under an administration bond also, given according to the statute of distribution,[c] a legatee may follow the real assets of the administrator; while a creditor has no such right.[d]

It seems material to inquire in these cases, whether the assignment was made in consideration of an antecedent debt, or as a pledge for money about to be borrowed. In the former case the assignment or pledge will be considered as made with a view, and for a purpose, not connected with the administration of assets: but money advanced at the time may be, and is, primâ facie, to be considered as advanced for

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[a] Scott v. Tyler, 2 Dick. 712. 2 Bro. 431.

[b] Hill v. Simpson, 7 Ves. 152; and see Keane v. Robarts, 4 Mad. 332. Watkins v. Cheek, 2 Sim. & St. 199.

[c] 22 & 23 Car. II. 10. 2.

[d] Ashley v. Baillie, 2 Ves. 368.

the purpose of paying the debts: and if the transaction is no more than a sale of part of the assets for money advanced at the time, the vendee can never be affected by proof of the executor's intention at the time to misapply the produce.[a]

The claim of a legatee in this respect, we must observe, will be barred by his laches. For where a man bequeathed to his wife the profits of some leasehold premises for life, and she took out administration with the will annexed, and sold them; and the purchaser, after twenty years possession, again sold them by auction to the defendant, and the devisees in remainder first gave notice of their title at this sale, and some years afterwards, on the death of the wife, filed their bill against the purchaser: Lord Alvanley said, if it had been a recent application, and the matter quarrelled with immediately, the circumstances were so suspicious that the purchase might have been set aside; but the parties interested having lain by so long it would be doing a very violent thing to relieve.[b]

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II. Nothing is a more known rule than that a legacy of money given generally is payable only out of the personal estate,[c] which in the ecclesiastical court is the sole fund for that purpose. In law or equity, however, land may be charged by will with legacies as well as debts: or a testator may if he

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[a] See M'Leod *v.* Drummond, 14 Ves. 353. 17 id. 152. Keane *v.* Robarts, 4 Mad. 332.

[b] Andrew *v.* Wrigley, 4 Bro. 125. Bonney *v.* Ridgard, 1 Cox, 145. 17 Ves. 98, cited.

[c] 2 Freem. 265.

chooses give a preference to some legacies over others, and render the real estate, as well as the personal, liable only for the payment of the former. Thus if he devises his lands subject to what he shall afterwards charge upon it, and then gives some legacies generally, and others with a power to enter on the land; the latter only are charged upon it.[a]

Whether the expressions in a will are sufficient or not to charge the real estate with debts and legacies is often a question of difficulty. In a doubtful case the Court inclines to the construction in favour of creditors rather than against them.[b] It has been held there is a distinction in this respect between debts and legacies: for in a case in which it was contended that the words were sufficient to charge the debts, and that there was no difference between simple contract debts and legacies: Lord Alvanley said, there was no doubt as to debts, but as to the legacies there must be a clear manifest intention that the devisee should take subject to the legacies; and he did not think the words authorized him to declare, that the legacies should be raised out of the real estate to the loss and disappointment of the specific devisees.[c] And although Lord Loughborough, taking notice of this opinion, observed he did not know how to state a difference between debts and legacies,[d] yet on two subsequent occasions Lord Alvanley said he remained of the same opinion,

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[a] Gwillim v. Holland, 4 Bro. 402. N. Belt's ed.; and see Hone v. Medcraft, 1 Bro. 261.

[b] 1 Ves. J. 440. Noel v. Weston, 2 Ves. & B. 269.

[c] Kightley v. Kightley, 2 Ves. J. 328; and see Davis v. Gardiner, 2 P.W. 187.

[d] 3 Ves. 551; and see Quintine v. Yard, 1 Eq. Ab. 74.

and that he could not agree that where there was a specific devise there was no difference between debts and legacies.[a]

If a testator directs his trustees to possess themselves of all his estate and substance to pay debts, it is a direct charge.[b] Or if a man devises his lands to J. S., the said J. S. paying his debts;[c] or if, "after payment of debts,"[d] or, "my debts and legacies being first deducted,"[e] he goes on to devise his real and personal estate, the real is charged. And where a man professes in the beginning of his will to dispose of his temporal or worldly estate, and then directs his debts to be paid, and afterwards devises his real estate, it is a sufficient charge; the first disposition running over the whole, and the words "worldly estate" taking in every thing as well real as personal.[f] So where a testator began, "as to all my worldly estate, I give," &c.; and then bequeathed several legacies to be paid by his executor, and devised the rest and residue of his goods and chattels, and estate to A., his heir at law, and made him executor; the lands were held to be charged.[g]

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[a] 3 Ves. 739. 5 id. 362.

[b] Foster v. Cook, 3 Bro. 347.

[c] 2 Freem. 192; and see Miles v. Leigh, 1 Atk. 573.

[d] 1 Ves. J. 440. Tompkins v. Tompkins, Pr. Ch. 397. Gilb. Eq. R. 90. King v. King, 3 P.W. 358. Hannis v. Packer, Ambl. 556. Brudenell v. Boughton, 2 Atk. 268. Astley v. Powis, 1 Ves. 495. Shallcross v. Finden, 3 Ves. 738; and see Austen v. Halsey, 6 Ves. 475.

[e] Newman v. Johnson, 1 Ver. 45; and see Harris v. Ingledew, 3 P.W. 91.

[f] Bowdler v. Smith, Pr. Ch. 264. Beachcroft v. Beachcroft, 2 Ver. 690. Davis v. Gardiner, 2 P.W. 187. Hatton v. Nichol, For. 110. E. Godolphin v. Penneck, 2 Ves. 271. Legh v. E. Warrington, 4 Bro. P. C. 90. Sup. to Ves. 341. Lord Inchiquin v. Ld. O'Brien, 1 Wils. 82. Coombes v. Gibson, 1 Bro. 273. Contra Barton v. Wilcocks, 4 Vin. Ab. 463. 8 id. 439.

[g] Awbrey v. Middleton, 4 Vin. Ab. 460; and see Hassel v. Hassel, 2 Dick. 527. Bench v. Biles, 4 Mad. 187.

With regard to a mere direction to pay debts and legacies there seems to be some difference of opinion. In an early case where a man willed and *devised* that his debts and legacies should be paid in the first place, the estate was held charged, upon the ground that "in the first place" imported before any devise by the will should take place; and that the word "devise" must mean some benefit; for the plaintiffs (the creditors) could have no "devise" should not their debts be charged on the real estate.[a] A mere "willing in the first place" that all debts should be paid has been held sufficient;[b] and Lord Alvanley said he was very clearly of opinion, that wherever a testator says he wills that his debts shall be paid, that will ride over every disposition, either as against his heir at law or devisee.[c] In some of the early cases, which seem more in favour of charging than the later ones, the devisee of the land has also been appointed the executor, and this has been considered material, as he has by that the means of paying the debts out of the real estate. Thus where a man devised all his lands to P., and the heirs of his body, and, after reciting that he owed P. money on account, devised therefore to him all his personal estate, and made him executor, willing him to pay his debts: the Court decreed both the real and personal estate to be sold for payment of the testator's debts.[d] So

[a] Trott *v.* Vernon, 2 Ver. 708. Pr. Ch. 430. Gilb. Eq. R. 111. But as to this word "devise," see Powell *v.* Robins, post 328.

[b] Stanger *v.* Tryon, 2 Raithby's Ver. 709. N. Kightley *v.* Kightley, 2 Ves. J. 328.

[c] 3 Ves. 739; and see Wareham *v.* Brown, 2 Ver. 153.

[d] Clowdsley *v.* Pelham, 1 Ver. 411; affirmed in the Lords, 2 id. 229; and see Tibbots *v.* Hurst, 1 Ch. Rep. 202. Elliot *v.* Hancock, 2 Ver. 143. Trott *v.* Vernon, ante N. *a.* Brudenell *v.* Boughton, 2 Atk. 268. Denn *v.* Mellor, 5 T. R. 558. Finch *v.* Hattersley, 7 Ves. 210, cited.

where a testator devised his real estate to his brother in fee, and after giving some legacies, appointed his brother sole executor of his will, desiring him to perform the same: the Court was clear the lands were liable to the legacies; for the testator needed not have devised the lands to his brother, who was his heir, unless he intended him to take subject to the legacies;[a] but he was devisee and executor, and was desired to see the will performed, and therefore a much stronger case than Clowdsley *v.* Pelham.[b]

On the other hand it has been held, where the testator in the beginning of his will desired all his just debts to be paid, and afterwards gave several legacies and devised lands, that the devisee was not charged with the payment of the debts; for if that should be so, the debts of every testator would be charged upon his land, as there were few wills but had some such expression, whereby the testator desired his debts to be paid.[c] So where the will began, "Imprimis I will and direct, that all my just debts and funeral expenses be paid and discharged as soon as conveniently may be after my decease by my executrix and executors:" Lord Alvanley was clear there was no charge of the debts upon the real estate, but a mere direction to the executors to pay the debts, without giving them any other fund than the personal estate, out of which they could fulfil that duty.[d] And where again a man first devised, that all his just debts and funeral expenses might be

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[a] See also Davis *v.* Gardiner, 2 P.W. 187.

[b] Alcock *v.* Sparhawk, 2 Ver. 228; affirmed in the Lords. Lypet *v.* Carter, 1 Ves. 499.

[c] Anon. 2 Freem. 192; and see Eyles *v.* Cary, 1 Ver. 457.

[d] Keeling *v.* Brown, 5 Ves. 359; and see Williams *v.* Chitty, 3 Ves. 545. Brydges *v.* Landen, id. 550, cited.

satisfied and paid by his executors, and then devised his real estate to his only son, and his heirs, with a devise over in case of his death under age, and gave his personal estate to A. and B. in trust, and appointed them executors: Sir W. Grant, who seems not to have assented to the full extent of Lord Alvanley's above mentioned doctrine,[a] thought the principal case determined by those last cited,[b] upon the supposition, that no real estate passed to the executors.[c] Yet in a late case Sir J. Leach appears to have held, that a direction in the beginning of a will to pay debts in the first place was sufficient, as importing a general and primary purpose that the payment of the testator's debts should precede the subsequent dispositions which he had made of his property.[d]

It is clear however that the effect of a general direction for payment of debts may be restrained by subsequent expressions, and confined to the means afterwards pointed out.[e] Thus where a man, after stating that he made his will for the purpose of disposing of his real and personal estate, directed his debts and funeral charges to be paid immediately after his death, and devised certain premises, excepting H. and R., to be sold for payment of debts, funeral expenses and legacies; and then went on to say, that H. and R. should be in the first place for payment of legacies: it was held that H. and R. were not liable for debts.[f] Although if a testator charges all his real estate with his debts, and by a subsequent clause devises a particular part to be sold for that purpose; it does not imply that no more

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[a] Ante 326.
[b] Ante 327. N. *d.*
[c] Powell *v.* Robins, 7 Ves. 209.
[d] Clifford *v.* Lewis, 6 Mad. 33.
[e] 2 Ves. & B. 272.
[f] Thomas *v.* Britnell, 2 Ves. 313.

shall be sold, but only an intention that that part shall be first applied.[a]

A substantive and independent intention to turn the real estate at all events into personal will let in debts. Thus where a man by his will devised certain estates to trustees (who were also executors) in trust to sell, and out of the produce to discharge incumbrances upon them, and to invest the overplus of the money in trust for such persons, in such proportions, &c., as he had thereinafter directed concerning the residue of his personal estate, it being his intent that such overplus money should go with and be considered as part of the residue and surplus of his personal estate; and then after bequeathing some legacies gave all the rest, residue, and surplus of his personal estate, after payment of his debts, in trust, &c.: Lord Thurlow decreed the overplus of the monies arising by the sale to be subject to the debts.[b] But an expressed intention to make a complete disposition of real and personal estate, followed by a devise of the real estates in trust to sell, and out of the produce to raise a certain sum, with a bequest of that sum, and of the overplus to certain persons, is not sufficient; there being only a specific purpose, and no conversion, except to answer that purpose.[c]

Where a man devised his estate to trustees in trust for his wife for life, with power for her to charge it with a sum of money, remainder to a brother for life, remainder to another brother for life, *charged and chargeable as aforesaid;* and immediately from and after the determination of those estates to his nephew in fee, *charged and chargeable with cer-*

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[a] Ellison *v.* Airey, 2 Ves. 568. J. 436. 2 id. 267.

[b] Kidney *v.* Coussmaker, 1 Ves.

[c] Gibbs *v.* Ougier, 12 Ves. 413.

*tain legacies to be paid within twelve months after his death:* Lord Hardwicke thought these legacies were charged on the whole estate, and not confined to the reversion in fee.[a]

When the real estate is thus charged with the payment of debts and legacies, the Court will in general decree a sale if necessary. Thus where the devise was, "as for my lands, tenements, goods, and chattels, I give and bequeath, as follows: after my debts paid to my five daughters 100*l.* apiece: also I give to my wife, whom I make my executrix, all the rest of my lands and tenements, goods and chattels;" and the personal estate was not sufficient to pay the debts, nor could the executrix out of the profits of the premises raise money to pay the debts and portions: the Court conceived it was intended by the will, that the executrix should raise money to pay the debts and legacies, and decreed her to sell accordingly.[b] So a legacy "*to be paid on the land*" authorizes a sale.[c] It has been established also in a series of authorities, that if the devise is for payment of debts and legacies out of the rents and profits, or of the profits merely, the lands may be sold: for as a devise of the rents and profits will at law pass the lands,[d] the Court has by a liberal construction of these words taken them to amount to a direction to

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[a] Carter *v.* Carter, 1 Ves. 168.

[b] Hughs *v.* Collis, 1 Ch. Ca. 179; and see Lumley *v.* May, Prec.Ch. 37. Berry *v.* Askham, 2 Ver. 26. Jackson *v.* Farrand, id. 424. Brudenell *v.* Boughton, 2 Atk. 267. Wilson *v.* Spencer, 3 P.W. 172. Jones *v.* Selby, Pr. Ch. 288. Nor can the parol demur, Mould *v.* Williamson, 2 Cox, 386. Anon. 3 Cox, P.W. 389. N. Blatch *v.* Wilder, 1 Atk. 420; and see 1 Ves. 28.

[c] Davies *v.* Davies, 1 Dan. 84.

[d] 2 Ves. & B. 76. 1 Ves. 171. 2 id. 46. 2 Atk. 272; and see Paramour *v.* Yardley, Plow. 539.

sell; not so much upon the meaning of the parties, (for it has with great truth been observed there is not one case in ten that it has been agreeable to the testator's intention) as from the necessity of effectuating the purpose by some means more prompt than the gradual accumulation of annual rents.[a] Where therefore a man devised an estate to his wife for life, remainder to his son in fee, and the reversion, expectant on the death of A., of another estate also to his son in fee, upon condition to pay the testator's daughter a legacy within a year after the death of H., and in default of payment that the daughter should enter and receive the rents and profits till the legacy was paid; and H. died, during the life of the wife, and of A.: the legacy was decreed to be paid by a sale of the reversions.[b]

But the natural and primary interpretation of the words, *out of the rents, issues, and profits*, is out of the rents, issues, and profits as they arise, and not by way of anticipation; and if this appears by other expressions in the will to have been the meaning of the testator, a legatee must be content with that method of payment. In a devise therefore to pay debts and legacies out of the annual rents and profits,[c] or out of the rents only,[d] the lands shall not be sold. So where a man devised his lands to trustees for paying debts and legacies, and gave some legacies to

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[a] Anon. 1 Ver. 104. Cary *v.* Appleton, 1 Ch. Ca. 240. Lingon *v.* Foley, 2 id. 205. Foster *v.* Foster, Prec. Ch. 122. Talbott *v.* D. Shrewsbury, id. 394. Gilb. Eq. R. 89. Allan *v.* Backhouse, 2 Ves. & B. 65; and see 2 Ves. J. 461. N. Sand. on Uses, 253, 3d ed. 1 Mad. Ch. 600.

[b] Bacon *v.* Clerk, Prec. Ch. 500. 1 P.W. 478.

[c] Anon. 1 Ver. 104. Cary *v.* Appleton, 1 Ch. Ca. 240. Lingard *v.* E. Derby, 1 Bro. 311.

[d] Talbott *v.* D. Shrewsbury, Prec. Ch. 394. Gilb. Eq. R. 89.

be paid after the debts with all convenience, *as the profits of the estate should advance the money:* the word "advance," it was held, in the last clause, amounted to a direction that the legacies should be paid out of the annual profits as they should arise.[a]

The devisee for life of an estate charged with a legacy has been decreed to pay one-third of it, and the remainder-man the other two-thirds;[b] but it seems probable, according to the modern doctrine, that the tenant for life would have to contribute only according to the benefit he is likely to derive from the enjoyment of the estate.[c] Where legacies were made payable out of the reversion only, the remainder-man was allowed to cut timber for the payment of them during the life of the tenant for life.[d]

A mother, devisee of lands during the minority of her son, having paid legacies charged by the will on the lands, was allowed the payment, although it turned out that the will had been revoked.[e]

Nothing is better established in equity than this principle, that money directed to be employed in the purchase of land, and land directed to be sold, and turned into money, are to be considered as that species of property into which they are directed to be converted. A devisor may give to his devisee either land, or the price of land, at his pleasure; and the devisee must receive it in the quality in which it is

[a] Baines *v.* Dixon, 1 Ves. 41; and see Ivy *v.* Gilbert, Prec. Ch. 583. 2 P.W. 13. Ridout *v.* E. Plymouth, 2 Atk. 104.

[b] Peachy *v.* Colt, Rep. T. Finch, 304.

[c] See Nightingale *v.* Lawson, 1 Bro. 440. 1 Cox, 181. Stone *v.* Theed, 2 Bro. 243. White *v.* White, 4 Ves. 24, 9 Ves. 554. Allan *v.* Backhouse, 2 Ves. & B. 65.

[d] Claxton *v.* Claxton, 2 Ver. 152.

[e] Hele *v.* Stowell, 1 Ch. Ca. 126.

given. Hence if personal estate is bequeathed for the purchase of land to be settled on A., who dies before it is so laid out; it will not go to his personal representatives, but will descend to his heir, as the lands would have done, if purchased.[a] And on the other hand if a man devises land to be sold, and disposes of the produce as money, the legatees or their personal representatives are entitled to the rents and profits till the sale.[b] The rule also is clear, that where real estate is directed to be converted into personal, for a purpose expressed, which purpose fails, either wholly or partially, in the former case, though the estate has been converted, the whole produce of that conversion will still be real estate; and in the latter, as far as the purpose fails, so far the money is to be considered realty, and not personalty: the principle being, that where a testator means with regard to a particular purpose to convert his real estate into personal, if that purpose can not be served, the Court will not infer an intention to convert the estate for any other purpose not expressed.[c] If a man therefore devises his real estate in trust to sell, and convert into money, and makes no disposition, or only a partial one, of the produce;[d] or gives

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[a] Scudamore *v.* Scudamore, Prec. Ch. 543. Carr *v.* Ellison, 2 Dick. 796. Biddulph *v.* Biddulph, 12 Ves. 161.

[b] Yates *v.* Compton, 2 P.W. 308. Ashby *v.* Palmer, 1 Mer. 296. Fletcher *v.* Ashburner, 1 Bro. 497.

[c] 1 Ves. & B. 174.

[d] Randall *v.* Bookey, Pr. Ch. 162. 2 Ver. 425. City of London *v.* Garway, 2 Ver. 571. Starkey *v.* Brooks, 1 P.W. 390. Stonehouse *v.* Evelyn, 3 P.W. 251. Buggins *v.* Yates, 9 Mod. 122. Gale *v.* Crofts, 4 Vin. Ab. 468. Robinson *v.* Taylor, 2 Bro. 589. 1 Ves. J. 44. Chitty *v.* Parker, 4 Bro. 411. 2 Ves. J. 271. Halliday *v.* Hudson, 3 Ves. 210. Brown *v.* Bigg, 7 Ves. 279. Berry *v.* Usher, 11 Ves. 87. Wilson *v.* Major, id. 205. Hill *v.* Cock, 1 Ves. & B. 173. Maugham *v.* Mason, id. 410. Kellett *v.* Kellett, 1 B. & B. 533.

legacies out of it to charitable uses;[a] or to persons who die in his lifetime,[b] or before the period at which their legacies vest;[c] the heir at law becomes entitled to so much as is not disposed of, or of which the disposition fails from any of the above mentioned causes. Thus in a leading case, in which a testator gave all his real and personal estate to trustees in trust to sell, and convert such real and personal estate into money, and thereout to pay debts, legacies, &c.; and if after all such payments there should remain any overplus, the same to be paid to certain of his legatees, two of whom died in his lifetime; it was held that their shares in the overplus should be divided between the next of kin and the heir; that is, so much of those shares as was constituted of the personal estate, to the next of kin; and so much as was made up of the produce of the real estate to the heir.[d] And where a man devised real estates in trust to sell, declaring that the monies arising by the sale should be considered as part of his personal estate, and thereout, and out of his personal estate gave some legacies, and then gave to his executor the sum of 1000*l.* to be disposed of according to any instructions he might leave in writing; and bequeathed away the rest and residue of his goods and chattels, personal estate, and effects; and died without leaving any instructions: this 1000*l.* was decreed to the heir at law, and not to the residuary legatee.[e]

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[a] Gravenor *v.* Hallum, Ambl. 643. Jones *v.* Mitchell, 1 Sim. & St. 290.

[b] Digby *v.* Legard, 2 Dick. 500. Cox's N. to 3 P.W. 22. Hutcheson *v.* Hammond, 3 Bro. 128. Att. Gen. *v.* Ward, 3 Ves. 327. Williams *v.* Coade, 10 Ves. 500.

[c] Cruse *v.* Barley, 3 P. W. 20. Spink *v.* Lewis, 3 Bro. 355.

[d] Ackroyd *v.* Smithson, 1 Bro. 503. 2 Dick. 566.

[e] Collins *v.* Wakeman, 2 Ves. J. 683; and see Hooper *v.* Goodwin, 18 Ves. 156.

But if there appears upon the will an intention to convert the property out and out, as it is termed, the failure of a legacy given out of the produce of land will not entitle the heir. Thus where an estate was devised in trust to sell, and out of the monies arising therefrom to pay certain legacies; and the residue of the purchase-money arising from the sale, and all the rest, residue, and remainder of the personal estate were given to A.; and one of the legacies was decreed to be void: it was held that this was the case of an estate to all intents and purposes turned into money, and therefore the legacy belonged to the residuary legatee.[a] Upon this ground also it is said that some few cases[b] proceed, which seem difficult to reconcile with the doctrine before stated. In a late case Sir J. Leach observed, he had anxiously considered the authorities upon this subject, and had endeavoured to extract from them certain general principles which might admit of clear application. In that case the devisor gave all his personal and certain parts of his real estate to A. and B. in trust to sell and dispose of his said real and personal estate, and out of the money to arise to pay debts and certain legacies, which he thereby gave, and, subject thereto, upon trust to pay the ultimate residue, or surplus, to his wife, her executors, &c.: he then gave certain other freehold estates to the same trustees in trust for his wife for life, and after her death for his son Thomas, and after his death upon

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[a] Kennell *v.* Abbott, 4 Ves. 802.

[b] Mallabar *v.* Mallabar, For. 78. Durour *v.* Motteux, 1 Ves. 320; stated from Reg. Lib. 1 Ves. & B. 413. 1 Sim. & St. 292. See on this case 1 Ves. & B. 417. 1 Sim. & St. 294. Ogle *v.* Cook, 1 Bro. 501, cited; on which see 2 Ves. J. 686. North *v.* Crompton, 1 Ch. Ca. 196; doubted by Lord C. Manners, 1 B. & B. 543.

trust to sell the same, and to apply the money arising by the sale equally amongst Robert, the son of his said son Thomas, and all the other children of his said son Thomas; but if all such his grandchildren should die under twenty-one, unmarried, and without issue, then the money to arise by the sale of the said last mentioned premises should be in trust for his sons Joseph and Robert in equal shares, their executors, &c. He then gave some other freehold and leasehold estates to the same trustees upon trust, to pay an annuity to his son Thomas during the life of his wife, and subject thereto to pay the rents and profits to his son Robert for life, and after his death to sell the same, and apply the produce for the benefit of the children of Robert; and if there should be no children of Robert, then for his (the testator's) sons Thomas and Joseph, equally, their executors, &c. The testator's wife, his son Robert, and his grandson Robert, all died in his lifetime, and his personal estate proved sufficient for payment of all the debts and legacies. On the subsequent death of Thomas, the eldest son, the question arose whether the interests that became vested in him were personal or real property. His Honour observed that the true inquiry in these cases is, whether the devisor has expressed a purpose that, in the events which have happened, the land shall be converted into money. Where a devisor directs his land to be sold, and the produce divided between A. and B. the obvious purpose of the testator is, that there shall be a sale for the convenience of division; and A. and B. take their several interests as money, and not land. So, if A. dies in the lifetime of the devisor, and the heir stands in his place, the purpose of the devisor, that there shall

be a sale for the convenience of division, still applies to the case; and the heir will take the share of A. as A. would have taken it, as money, and not land.* But in the case put, let it be supposed that A. and B. both die in the lifetime of the devisor, and the whole interest in the land descends to the heir; the question would then be, whether the devisor can be considered as having expressed any purpose of sale applicable to that event, so as to give the interest of the heir the quality of money. The obvious purpose of the devisor being, that there should be a sale for the convenience of division between his devisees, that purpose could have no application to a case in which the devisees wholly failed, and the heir would therefore take the whole interest as land. That he apprehended these principles to be the true result of all the authorities, and applying them to the case before him, he held, that under the first devise the devisor's purpose of sale, being plainly for a distribution, had no application to the events which had happened, but the whole interest by the death of the wife resulted to Thomas, the heir at law, who took the estate as land, and it descended in that character to his heir. That under the second devise, there was an obvious purpose of sale for the convenience of division; and that by the death of the only child of Thomas, and the testator's son Robert, Thomas the heir became entitled to the moiety intended for Robert, but the purpose of sale for convenience of division still applied, and this moiety was not land, but personal estate of Thomas the heir. That under the third devise there was the same obvious purpose of sale; first, for a division between the children of

* See also Wright v. Wright, 16 Ves. 188.

Robert; and, failing them, between Thomas, the heir, and Joseph. There were no children of Robert, but the purpose of sale remained, and this moiety also was not land, but personal estate of Thomas the heir.[a]

If an estate is devised away charged only with legacies, which fail, no matter how;[b] or money is given to be laid out in land for the benefit of A., charged with an annual sum for a charitable use,[c] the devisee, out of whose estate the charge arises, is entitled to the benefit of the failure. "If I give to A. and his heirs," says Lord Eldon, "all my real estate, charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more; and the effect of those two modes admits just this difference. The former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest, subject to a particular purpose: the latter is a devise for a particular purpose, with no intention to give him any beneficial interest. Where therefore the whole legal interest is given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir: but, where the whole legal interest is given for a particular purpose, with an intention to give to the devisee of the legal estate the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the devisee: as it is intended to

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[a] Smith *v.* Claxton, 4 Mad. 484. Poor *v.* Mial, 6 Mad. 32.

[b] 4 Ves. 811. Jackson *v.* Hurlock, 2 Ed. 263. Ambl. 487; and see

[c] Barrington *v.* Hereford, cited 1 Bro. 61.

be given to him."[a] Yet it seems to have been held that in a devise of land on condition to pay a sum of money to a charity, the heir at law is entitled to the legacy, as part of the produce of the land undisposed of.[b]

The right of the heir, it is to be observed, to a legacy that is void, is subject to that of the other legatees; for the whole fund being liable to every legacy, those that are void must go towards making up any deficiency for the payment of the rest.[c] Lord Eldon here again states a distinction, that if a man devises his real estate in trust to pay several persons 1000*l.* each, and any of those persons die in his life, in case of a deficiency, the others must abate; but if the devise is in trust to pay his debts and legacies, and he gives several legacies, and one of the legatees dies, the fund is a trust for the benefit of all the other legatees, if necessary.[d]

When a person having an equitable charge upon an estate afterwards becomes entitled to the fee simple of the estate itself, the general rule is, that the charge shall merge, and be extinguished.[e] Thus where a man charged his lands with a legacy to his daughter, and the lands on his death descended on the daughter as heir, who then died: the Court dismissed a bill by her mother, as her administrator, to have the money raised.[f] But this is a question of circumstances, and of intention, actual or presumed, of the person in whom the interests are united; and

[a] 1 Ves. & B. 272; and see Noel *v.* Ld. Henley, 7 Pri. 241.

[b] Bland *v.* Wilkins, 1 Bro. 61. N. Arnold *v.* Chapman, 1 Ves. 108.

[c] Currie *v.* Pye, 17 Ves. 462.

[d] See 1 Sand. Uses, 241. 3d. ed. Donisthorpe *v.* Porter, 2 Ed. 162. Ambl. 600. Chester *v.* Willes, Ambl. 246. Wyndham *v.* E. Egremont, id. 753. Price *v.* Gibson, 2 Ed. 115. Ld. Compton *v.* Oxenden, 2 Ves. J. 261.

[e] Norfolk *v.* Gifford, 2 Ver. 208.

in which a court of equity is not guided by the rules of law. A court of law cannot look into rights, or beneficial interests; it merges estates lying in the same person, but cannot where they lie in different persons: equity does not regard that, but looks into the beneficial interests, and views of parties, whether the estates are strictly in the same or different persons.[a] Hence in the case of infants, where it is more beneficial for them that the charge should be kept on foot, there will be no merger; for where no intention is expressed, or the party is incapable of expressing any, the Court considers what is most advantageous to him; and it has been observed, that in all the cases, in which charges have been held to merge, there was nothing which showed that it was not perfectly indifferent to the party, in whom the interests had united, whether the charge should or should not subsist.[b] The cases also of creditors,[c] and where the person entitled to the charge does not take a fee simple in the estate[d] are said to be exceptions to the rule.

If lands are charged with the payment of debts and legacies, the estate remains charged in whosesoever hands it comes.[e] Where therefore a man devised an estate charged with a legacy, and the devisee sold the estate; the legacy was decreed with interest and costs, as against the purchaser, out of the estate; and the Master of the Rolls observed, if the seller had

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[a] 2 Ed. 164. Ambl. 601. 18 Ves. 390.

[b] 2 Ves. J. 264. 18 id. 393, 394. Powell *v.* Morgan, 2 Ver. 90. Thomas *v.* Kemeys, id. 348. 2 Freem. 207; and see Ld. Teviot *v.* Lady Spencer, Pr. Ch. 5.

[c] 2 Ed. 164. Ambl. 601. 2 Ves. J. 262.

[d] 2 P.W. 604. Ambl. 246. 755.

[e] Mos. 96. Newell *v.* Ward, Nels. 38. Smith *v.* Alterly, 2 Freem. 136. 3 Ch. Rep. 93.

given notice, and the legacy had been deducted out of the purchase money, the vendees only would be liable.[a] Where also an estate was devised to A. for life, remainder to R. in fee, charged with a legacy to be paid in a twelvemonth's time after R. should come to enjoy the premises; and if R. should die before A., then that H., coming to the possession of the premises, and surviving A., should pay the legacy; and R. and H. both died before A., but R. left a son, who became entitled to the estate: Lord Hardwicke thought there was a plain intent of the testator that the person who possessed the estate should pay the legacy, and that it did not depend on the contingency of R.'s personally enjoying the premises.[b] But when the land has once borne its burden it is discharged; so that if an estate is devised to trustees for payment of debts and legacies, and they raise the money, and misapply it; the legatees have no remedy but against the trustees.[c] So where money due on mortgage was given to infant children, but for the more sure payment in case the executor should not pay the same, lands were devised for that purpose; and the mortgagee paid in the money, which was invested with the approbation of the Master in securities that failed; it was held that there having been an effectual payment of the legacies, the lands were discharged.[d]

A will charging legacies on land is within the

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[a] Newman *v.* Kent, 1 Mer. 240; and see Shackleton *v.* Shackleton, 2 Sim. & St. 242.

[b] Miles *v.* Leigh, 1 Atk. 573. 4 Vin. Ab. Charge. C. Pl. 21; and see Tollett *v.* Tollett, Ambl. 177. 194.

[c] Anon. 1 Salk. 153. 5 Ves. 736, cited. Juxon *v.* Brian, Pr. Ch. 143; but see Harrison *v.* Cage, 2 Ver. 85, and Mr. Raithby's note.

[d] Oldfield *v.* Oldfield, 1 Ver. 336.

statute of frauds,[a] and must be executed in the manner required by it. Hence in a case in which a man by will duly attested devised his real estates in trust to sell, and pay the produce to such person as he should appoint by a private letter or paper of instructions, which he intended to leave with A.; and after his death two papers of instructions, giving some legacies, and dated previous to his will, were found in the bureau of his room in the house of A. and in the same envelope with the will, which envelope was sealed up and endorsed in the hand of the testator as his will; Lord Eldon thought the will had not by its contents sufficiently identified these papers to enable him to say, they were necessarily incorporated; that the rule of law was, that an instrument properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper was, which was meant to be incorporated, in such a way, that the Court could be under no mistake; if the papers were not incorporated, they were not attested by three witnesses, and he could not therefore give the parties their legacies.[b]

It has however been decided that when the land is once charged generally with the payment of legacies by a will duly executed, legacies may be given, altered, or revoked, by a subsequent unattested will or codicil.[c] The ground of this doctrine is the analogy to the case of debts, constituting a fluctuating charge. It is impossible previously to ascertain what

[a] 29 Car. II. 3. 5.

[b] Smart *v.* Prujean, 6 Ves. 560.

[c] 1 P. W. 423. 1 Burr. 423. 2 Ves. J. 213. 665. 3 Ves. 331. 8 Ves. 495. 12 Ves. 37. Brudenell *v.* Boughton, 2 Atk. 268. Lord Inchiquin *v.* French, Ambl. 33. Hannis *v.* Packer, id. 556.

debts a man may owe at the time of his death, and it is difficult to ascertain, when he is making his formal and regular will, what legacies he may think fit, or his fortune will enable him to give: the Court has therefore said, that when he has by a will, duly executed, charged debts and legacies, it is only necessary to show that there is a debt, or that there is a legacy, in order to constitute a charge: that character being given to the demand, the charge immediately attaches by virtue of the executed will.[a]

But a man can not by an attested will reserve to himself a power to dispose of real estate by an unattested instrument; nor of an interest in money to be constituted by the surplus of the produce of estates converted by the will.[b] Where therefore a testator by his will, duly executed, devised to trustees his lands in G., in trust to discharge debts and incumbrances, and also to pay off and discharge all such annuities, legacies or bequests, *as he should give or bequeath to be paid out of and from, or charge and make chargeable upon* his real or personal estate in G. by his will, codicil, or any writing signed by him, whether witnessed or not; and then charged his estates in G. with an annuity for his wife; and by a codicil, not attested, gave her an additional annuity from his estates in G. on the same terms as the former: it was held that this additional annuity was no charge upon the estates.[c]

If the charge is not general it will sometimes of

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[a] 2 Ves. J. 237. 12 id. 37. The distinction that the legacies in the unattested will must be to the same legatees (see 2 Atk. 274. Hyde *v.* Hyde, 1 Eq. Ab. 409. 3 Ch, Rep. 155,) does not seem to have been attended to.

[b] Habergham *v.* Vincent, 2 Ves. J. 204. 4 Bro. 353. Sheddon *v.* Goodrich, 8 Ves. 481; and see Hooper *v.* Goodwin, 18 Ves. 156.

[c] Rose *v.* Cunynghame, 12 Ves. 29.

necessity be confined to the legacies in the will only. Thus if a man by a duly executed will gives legacies, and then charges his estate with the payment of his *legacies abovementioned:* the estate will not be chargeable with legacies given by a subsequent unattested codicil.[a] So where a man by his will, duly executed, gave legacies to his daughters, and then devised his real estates to trustees for a term in trust to pay to his daughters the several legacies thereby bequeathed to them, and also the several other legacies thereinafter bequeathed, and then gave a few other small legacies; and by an unattested codicil, recited, that upon more attentive consideration it appeared to him that the legacies to his daughters were not adequate provisions to support them in that state of life, to which from his possessions they were entitled, and he therefore thereby gave them the sum of 800*l.* in addition to the said legacies given them by his will: the Lord Chancellor thought the construction he was obliged to adopt was very unfortunate; but he could not make the declaration prayed by the bill, that the legacies, bequeathed by the unattested codicil, were charged upon the real estate.[b] Yet where G. J. by will, duly attested, gave several legacies, and then devised all his real and personal estate, subject to and charged with his debts and funeral expenses, and also the said "*hereinbefore mentioned legacies,*" to trustees, in trust to apply the interest, &c. subject nevertheless to his debts, funeral charges, and legacies, for his nephew A.; and afterwards by an unattested instrument in his own hand writing, but without

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[a] Masters *v.* Masters, 1 P.W. 421. and see Wright *v.* Lord Cadogan, 2 Ed. 239.

[b] Bonner *v.* Bonner, 13 Ves. 379;

date or signature, which he declared to be his last will and testament, repeated, with some increase, certain pecuniary and specific bequests to his wife, and devised all his real and personal estate in trust to pay debts, funeral expenses, and legacies therein-before given to his wife, and then to convey to his nephew A., subject to such legacies as were there-after given; and then gave the same legacies to some of the legatees in his will as before, smaller ones to others, and omitted altogether the names of the rest: Mr. J. Buller thought it was clear that the testator meant to make a general charge of legacies on the land, and that though he had made use of the words "*herein-before mentioned*," they were in truth all the legacies he had given, for there were not any given after those words; and at the end of the will he spoke of legacies generally. He held therefore that the legacies arose on the second instrument, but came in under the charge made on the land by the first, in favour of legatees in general.[a]

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III. A testator can not as against creditors alto-gether exempt his personal estate; and notwith-standing he devises any part of it specifically, such part, if the rest falls short, must be applied to pay-ment of debts upon simple contract.[b] And where a man has a power to charge an estate with a sum of money, and he by will executes the power, and de-vises away the money, it will be considered as part of his personal estate, and subject to his debts.[c]

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[a] Jackson *v.* Jackson, 2 Cox, 35. 1 Cox's P.W. 423. N.

[b] Clarke *v.* Clarke, Bunb. 90.

[c] Bainton *v.* Ward, 2 Atk. 172. 7

But as against his heir or devisee a testator may substitute his real in the room of his personal property, and charge his debts and legacies on a fund, which is not in its nature primarily liable. If therefore a man devises his lands to be sold for payment of debts and legacies, and wills that his personal estate shall not stand to be charged or liable thereto;[a] or bequeaths it to go to the legatee clear,[b] the legatee of the personal estate will be entitled to have the real first applied in payment of those charges. Thus where a man by his will gave some of his real estates in trust to sell and pay certain specialty debts, and settled his other real estates on his wife and child, and gave all his personal estate to his wife "fully and clearly exonerated from all his debts," &c.; and the estates devised in trust were not sufficient for the payment of the debts: it was held the settled estates, and not the personalty, must make up the deficiency.[c]

The intention of a testator to exonerate his personal estate must clearly appear by his will; for evidence to prove such an intention is not admissible;[d] and it is now settled, contrary to the old decisions,[e] that whatever may be the amount of the personal estate, unless it appears upon the face of the will, it makes no difference.[f] It is clear also that there

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Ves. 503. N. Ashfield *v.* Ashfield, 2 Ver. 287. Hinton *v.* Toye, 1 Atk. 465. Troughton *v.* Troughton, 3 Atk. 656; and see Lassells *v.* Lord Cornwallis, 2 Ver. 465. Pr. Ch. 232. Thompson *v.* Towne, 2 Ver. 319. Pr. Ch. 52. Pack *v.* Bathurst, 3 Atk. 269. See a case where legatees were preferred to creditors, Killet *v.* Ford, post. S. 7.

[a] Gilb. Eq. R. 73.

[b] Lady March *v.* Fowke, Rep. T. Finch, 414.

[c] Morrow *v.* Bush, 1 Cox, 185.

[d] Gale *v.* Croft, 1 Dick. 23. 2 Eq. Ab. 415. Stephenson *v.* Heathcote, 1 Ed. 38; and see 1 B. & B. 315.

[e] Bamfield *v.* Wyndham, Pr. Ch. 101; and see For. 208.

[f] 19 Ves. 518. 1 Mer. 220. 1 Ed. 43. 3 Ves. 113. E. Inchiquin *v* French, 1 Cox, 1. Ambl. 33.

must appear an intention not only to charge the real, but to exempt the personal estate. The distinction once taken[a] between a direction to sell real estate out and out, and merely charging it, has long been exploded.[b] It is not enough that the real estate is charged with or devoted in any form to the payment of debts: the construction must be one that aims at finding, not that the real estate is charged, but that the personal estate is discharged.[c] Thus in a case, which in modern times has been looked up to as establishing the doctrine as to the exoneration of the personal estate, where a man by will created a term, and subject thereto devised his estate to his brother for life, with remainders over, and declared the trusts of the term to be, that the trustees should out of the rents and profits, or by mortgage, &c., raise so much money as would be sufficient to pay and satisfy all his debts, funeral charges, and legacies; and gave all his personal estate to his said brother; provided that if he (the testator) left issue then the devise to his brother and also the devise of the residue of his personal estate should be void, and the real estate descend, and the residue of his personal go as if he had died intestate; and appointed the trustees of the term executors, and directed them to satisfy all his debts and legacies by such ways and means as they should think meet, with a power to deduct and

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[a] See Wainwright *v.* Bendlowes, 2 Ver. 718. Ambl. 581. Pr. Ch. 451. Adams *v.* Meyrick, 1 Eq. Ab. 271. Heath *v.* Heath, 2 P.W. 366.

[b] 1 Cox, 5. Ambl. 38. 3 Ves. 111. 2 Sch. & Lef. 545. 2 B. & B. 527. 7 Pri. 264.

[c] 19 Ves. 518. 1 Mer. 220. 2 Atk. 625. 3 id. 201, 202. Lord Grey *v.* Lady Grey, 1 Ch. Ca. 296. Mead *v.* Hide, 2 Ver. 120. Pr. Ch. 2. Noke *v.* Darby, 3 Bro. P. C. 290. Fereyes *v.* Robertson, Bunb. 301. Samwell *v.* Wake, 1 Bro. 144. 2 Dick. 597. Holford *v.* Wood, 4 Ves. 76. Watson *v.* Brickwood, 9 Ves. 447. Tower *v.* Lord Rous, 18 Ves. 132. Maugham *v.* Mason, 1 Ves. & B. 410.

satisfy themselves out of his personal estate or out of the money to be raised out of the term all their expenses; and the Lords Commissioners held that the legatee of the personal estate was entitled to it exempt from payment of debts: Lord Thurlow, on a rehearing, reversed the decree, saying, he took the rule imprimis to be, that neither the charge of the debts upon the real estate, nor the gift of the personal, was sufficient, of itself, to exempt it: and, after commenting upon the clauses of the will, his Lordship added, the true ground upon which he proceeded was not any of those criticisms, but simply upon the rule of law, the testator not having declared by express words, or any other declaration, which would tend in law to the purpose of preserving the personal estate for any given purpose whatever.* So where a woman devised her lands to trustees, whom she made executors, in trust to sell, and apply the produce in manner thereinafter mentioned; and then desired in the first place that her funeral expenses and debts might be paid out of such purchase-money; and secondly, certain legacies to different persons, who were creditors of her late husband, to be paid them by her trustees and executors; and then gave some pecuniary legacies to be paid by her trustees and executors out of the money arising by the sale of her said lands, which she ordered to be sold with all convenient speed after her death; and disposed of such of the purchase-money as should remain after payment of the legacies, which she directed to be paid by her executors as soon as they could sell the lands, but made no disposition of her personal estate: Lord Redesdale said he could not

* D. Ancaster *v.* Mayer, 1 Bro. 454.

find words on which to found a presumption that it was intended by the testatrix to raise a charge on the real estate for the benefit of the next of kin; and the personal estate must therefore be a fund in the hands of the executors, applicable to the payment of the funeral expenses, debts, and legacies.[a]

The old law was that the personal estate could not be exempted from the payment of debts and legacies without express words; but this is now admitted not to be necessary, and it is sufficient if there appears upon the will an "evident demonstration," a "plain intention," or a "necessary implication."[b] As to what constitutes this plain intention, different judges have held different opinions. Lord Thurlow thought it was a point so slender and fine that he could not collect any certainty upon the question;[c] and Lord Eldon observes, it is scarcely possible to find any two cases, in which the Court altogether agrees with itself; there being hardly a single circumstance, regarded in one as a ground of inference in favour of the intention, suggested as belonging to that particular will, that is not in some others treated as a ground against that intention.[d]

It seems however that if a testator devises his real estate in trust to sell, and pay debts, and gives away his personal estate in the nature of a specific bequest, the legatee will be entitled to have the real estate first applied in payment of the debts.[e] In

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[a] M'Cleland v. Shaw, 2 Sch. & Lef. 538; and see Gray v. Minnethorpe, 3 Ves. 103. Stapleton v. Stapleton, 2 B. & B. 523.

[b] 1 Swanst. 28. 9 Ves. 453. 19 id. 517. 1 Mer. 219.

[c] 1 Bro. 462.

[d] See Bootle v. Blundell, 19 Ves. 509. 1 Mer. 193; in which his Lordship enters at large into the doctrine, and observes upon many of the most material cases.

[e] Michell v. Michell, 5 Mad. 69; and see Heath v. Heath, 2 P.W. 366.

some cases in which the legatee of the personal estate was also executor, it has been held that he must take it as such, subject to the claims upon him in that character; for that the natural construction of a will, where the testator gives all his personal estate to one whom he makes his executor, is, that it must go to the creditors, and the gift be intended after debts paid.[a] Yet in others this does not appear to have made any difference. Thus where a man devised particular lands to trustees, in trust to sell, and pay his debts, legacies, and funeral expenses, and gave his wife all his personal estate whatsoever, and constituted her sole executrix: Lord Bathurst determined the personal estate to be exempt.[b] So where a testator gave to his wife all his ready money, securities for money, goods, chattels, and other personal estate and effects whatsoever, for her own sole and absolute use; and devised his real estate, subject to the payment of his debts, in trust with all convenient speed to sell, and out of the produce to pay and satisfy all debts, &c., and after payment thereof to invest the residue in the funds, and pay the interest to his wife for life, and after her death to his children; and appointed his wife, and his trustees,

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Gaskill *v.* Hough, 3 Ves. 110, cited. O'Neal *v.* Mead, 1 P.W. 693. Miles *v.* Leigh, 1 Atk. 573. But see Aldridge *v.* Lord Wallscourt, 1 B. & B. 312.

[a] 19 Ves. 520. 522. 1 Mer. 226. Harewood *v.* Child, cited, For. 204. 1 Cox, 7. Bromhall *v.* Wilbraham, For. 274. Hall *v.* Brooker, Gilb. Eq. R. 72. Brummel *v.* Prothero, 3 Ves. 111; and see Cutler *v.* Coxeter, 2 Ver. 302. French *v.* Chichester, id. 568. Stephenson *v.* Heathcote, 1 Ed. 38; on which see 19 Ves. 526. Lucy *v.* Bromley, Bunb. 260.

[b] Kinaston *v.* Kinaston, 2 Dick. 506. 1 Bro. 457. N.; and see Bamfield *v.* Wyndham, Pr.Ch.101. Wainwright *v.* Bendlowes, Ambl. 581. 2 Ver. 718. Pr. Ch. 451. Gilb. E. R. 125. Adams *v.* Meyrick, 1 Eq. Ab. 271. Walker *v.* Jackson, post 355. Feltham *v.* Executors of Harlston, 1 Lev. 203.

his executors: Sir J. Leach held that the wife should take the personal estate exempt from the debts.[a]

This general gift of the personal estate must be in the nature of a specific bequest. For although a bequest of all ready money, securities for money, stocks, &c., and "all other personal estate of what nature or kind soever, not before disposed of," has been held to entitle the legatee to have the real estate first applied;[b] yet the mere bequest of the *residue* of personal estate not before disposed of is not sufficient; for the Court will not say, that because a testator devises a residue, he necessarily means that something should pass by that residue.[c] In one case indeed in which a woman bequeathed all the rest and residue of her personal estate and effects whatsoever, not before specifically disposed of, to J. W., in trust to dispose of as she should appoint, and in default of appointment for his own use and benefit, and appointed him executor, Lord Alvanley said, he could not read the will without giving to the words "rest and residue" a meaning totally distinct from residue after payment of debts; for those words coupled with the words "not specifically bequeathed," meant only such parts of the personal estate as were not specifically given; and he thought he was perfectly warranted in saying, there was demonstration plain, that the testatrix did

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[a] Greene *v.* Greene, 4 Mad. 148.

[b] Williams *v.* Bishop of Llandaff, 1 Cox, 254.

[c] E. Inchiquin *v.* French, 1 Cox, 1. Ambl. 33. 1 Wils. 82. Ridg. C. T. Hard. 230. Samwell *v.* Wake, 1 Bro. 144, though in 2 Dick. 597. the bequest is of "all the personal estate." Fereyes *v.* Robertson, Bunb. 301. D. Ancaster *v.* Mayer, ante 348. Philips *v.* Philips, 2 Bro. 273. Anon. 2 Vent. 349. Noke *v.* Darby, 3 Bro. P. C. 290. Tait *v.* Lord Northwick, 4 Ves. 816. Hartley *v.* Hurle, 5 id. 540. Brydges *v.* Phillips, 6 id. 567. Tower *v.* Lord Rous, 18 id. 132.

not mean to give the personal estate to J. W. as executor, but specifically for his own use and benefit, and exempt from the payment of debts.[a] The propriety of this decision however has been doubted.[b]

But notwithstanding that a devise to sell for payment of all debts will not, in general, exonerate the personal estate, yet the real estate may be so appropriated to the payment of a particular debt or legacy, in contradistinction to others, as to show a clear intention, that it shall not be a burthen upon any other fund, though an intention to exonerate the personal estate is not in any other way expressed. Thus where a man, having given his estate generally after payment of debts and funeral, without mentioning legacies, afterwards gave four legacies to each of his four sisters, adding, "all which legacies I mean shall be paid out of my freehold estate in N.," and gave a power to mortgage and charge the estate for payment of that money: Lord Hardwicke said, this was not within the common rule, not being a common charge on the real estate in aid of the personal, but an express incumbrance on that estate; an express gift of the legacy out of the real estate, which whenever done, the real must bear that burthen, and the personal was not applicable in aid.[c] And where a man by will created a term in trust to raise certain sums as portions for his children, and

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[a] Burton *v.* Knowlton, 3 Ves. 107; and see Sear *v.* Ashwell, 3 Swanst. 411, N.

[b] See 4 Ves. 823. 5 Ves. 545. 1 B. & B. 317.

[c] Amesbury *v.* Brown, 1 Ves. 482; and see Anon. 2 Freem. 22. Ward *v.* Lant, Pr. Ch. 182. Whaley *v.* Cox, 2 Eq. Ab. 549. Ward *v.* Lord Dudley, 2 Bro. 316. 1 Cox, 438. Walker *v.* Pink, cited 1 Cox, 5. Hale *v.* Cox, 3 Bro. 322. Spurway *v.* Glynn, 9 Ves. 483. Gittins *v.* Steele, 1 Swanst. 24. Noel *v.* Lord Henley, 7 Pri. 241.

gave the residue of his personal estate, his debts, legacies, and funeral expenses being first paid and discharged, to his executors, in trust for his grandson, to accumulate till twenty-one: it was held that the portions, not being classed among the debts and legacies, must be raised out of the real estate.[a] So also where W. H. devised his lands in trust to sell and apply the money in the first place to discharge a sum due on mortgage, and in the next place to raise 2000*l.* which he gave to his two daughters; and as to the residue of the estates as should be left unsold to his wife for life, remainder to his daughters; and then bequeathed all the rest and residue of his personal estate, after payment of all his just debts, legacies, and funeral expenses, to his wife: Sir W. Grant said, that as to the legacy of 2000*l.* he could not consider it as a general legacy, nor conceive the personal estate in any degree charged with it: for it was given only as a part of the produce of the real estate; and that as to the mortgage debt the will upon the whole showed an intention that it should be a burthen upon the real estate, and not a debt as to the personal.[b] But the personalty has been held liable to make up the deficiency of the real estate so appropriated.[c]

Lord Alvanley observed that the circumstance, that the trustees of the real estate were not the executors, afforded a strong inference as to the real intention; and was always favourable to the exemption of the personal estate;[d] and so on the contrary it has been considered, generally speaking, that where the trustees were the executors, that circumstance

[a] Reade *v.* Litchfield, 3 Ves. 475. Hancox *v.* Abbey, 11 Ves. 179.
[c] Strode *v.* Ellis, Nels. 203.
[d] 3 Ves. 106.

afforded an argument against the intention to exempt it.[a] Again, some judges have considered a direction that the funeral expenses should be paid out of the real estate a strong circumstance to exonerate the personal; for that it was not reasonable to suppose the testator could have meant to exempt it from that, which is the primary charge upon it, and yet leave it subject, in all other respects, to the natural course of law; while others have professed not to see much in that argument, and that the circumstance goes no further in meaning than it does in words, to create a fund for one particular class of expenditure.[b] The legatee of the personal estate being devisee for life of the real, has in many cases been urged against the exemption of the personal estate, from the inference it affords of an intention to preserve the real estate.[c] Thus where a man bequeathed all his personal estate to his daughter, then an infant, making her executrix; and devised all his lands in trust to pay his debts and legacies; and gave the surplus of his lands, after payment of his debts, to his daughter in tail: the Lord Chancellor held that the personal estate should first be applied, saying, what he chiefly grounded his opinion upon was, that the same person was devisee of the personal, and also devisee of the surplus of the real estate in tail; and he could not think it was the intention of the testator to exempt his personal estate from his debts, for no other reason, but that his daughter might dispose thereof by her will under her age of twenty-one, on purpose to leave the real estate of the testator, and

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[a] 19 Ves. 527. 1 Mer. 232.

[b] 1 Mer. 217; and see 3 Ves. 108. 6 id. 570.

[c] 19 Ves. 532.

which was settled on herself in tail, the more incumbered.[a]

In a case in which a man devised his estates to be sold by his executrixes for the payment of his debts and legacies, and afterwards re-executed his will, and added a bequest to his executrixes of all his personal estate not before devised: Lord Hardwicke thought that if the bequest had been originally inserted it would have been a strong case for exemption, but that the re-execution made it insurmountable; for unless it was construed to be the testator's intention to exempt his personal estate in favor of his executrixes, the words were fruitless and vain, and did no more in their favour than the will, as it originally stood, would have done before; and therefore the words could have no other signification than to exempt his personal estate.[b] Lord Thurlow, it must be added, did not approve of this reasoning of Lord Hardwicke.[c]

Some few cases may be here noticed that have been decided upon their own circumstances. Where a man devised his lands to trustees to be sold for payment of his debts and legacies, and devised all the residue of his personal estate to his wife, and gave her also 600*l.* out of the money to be raised by sale of the trust estate, and made her executrix: Lord Harcourt said, that as the testator had given his wife 600*l.* out of the real estate, he did not think the residue of the personal sufficient for her, and there was the strongest presumption imaginable of

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[a] Haslewood *v.* Pope, 3 P.W. 322; and see Dolman *v.* Smith, 2 Ver. 740. Pr. Ch. 456. 1 Dick. 26. Gilb. Eq. R. 128.

[b] Walker *v.* Jackson, 2 Atk. 624. 1 Wils. 24.

[c] See 19 Ves. 520.

his intent, that she should have that residue.[a] And where a man by his will devised his lands to trustees in trust to sell, and apply the produce in the first place in discharge of his debts and legacies, and after payment thereof, then as to the residue, one moiety to his daughter A., and the other for the benefit of the children of another daughter; but if the children should die under twenty-four, then such moiety to *sink into and be deemed part of the residue of his personal estate*, and be paid and applied in such manner as that was thereinafter given; and directed that the rents till such sale should be applied to the use of his daughter A.: Lord Kenyon thought the direction that the residue of the purchase money was to be added to the testator's other personal estate was incompatible with the idea that the personal estate should be applied in the first instance, and amply sufficient to show it was not so intended.[b]

Again where a man devised his lands to his wife for life, chargeable with the payment of two annuities, and with a legacy of 1000*l.*, and gave her a power to raise, by mortgage or sale of any part of the inheritance, such a sum as would be sufficient to discharge his debts; and then, reciting the desire he had to perpetuate his name and estate, devised all his real estate (after his wife's death) to A. for life, &c.; and gave his wife all his personal estate, and made her sole executrix: it was decreed that the charge of the debts should be entirely on the real estate, and

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[a] Waise *v.* Whitfield, 8 Vin. Ab. 437; and see Waring *v.* Ward, 5 Ves. 670.

[b] Webb *v.* Jones, 1 Cox, 245. 2 Bro. 60. Belt's ed. Lord Redesdale however seems to consider this case as anomalous; see M'Cleland *v.* Shaw, 2 Sch. & Lef. 538.

the wife have the personal to her own use.[a] And where J. P. gave one third of all his estate whatsoever to his wife, and devised to his son and his heirs two thirds of all his real and personal estate, upon condition to pay his debts: the judges were unanimous in opinion, that the wife should have her third of the personal estate not liable to the debts.[b]

Such then being the contradictory nature of the decisions and opinions on this subject, we may adopt the words of a late writer,[c] that it is difficult to say what will amount to an exemption of the personal estate, unless a case resemble any of those already decided, or unless the personal estate is expressly exempted by the testator. It may be added however in conclusion, that where a man has exempted his personal estate for the benefit of the particular legatee, and not for the benefit of the estate generally, if that bequest fails by the death of the legatee, the benefit of the exemption fails also: and can not be set up by any one else against the persons, to whom the real estate would come subject to the disposition in favour of that legatee, if he had lived.[d]

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IV. It has been a constant rule in equity (and Lord Hardwicke thought there was not a more useful power in the Court) that a claimant, having two funds to resort to for his demand, shall not by his election

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[a] Stapleton *v.* Colvile, For. 202. 2 Eq. Ab. 372. Neither has this case been approved of, see 3 Ves. 110. Lord Thurlow said there never was a stronger case against charging the real estate; 1 Bro. 466.

[b] Chester *v.* Painter, 2 P. W. 335.

[c] Prest. Leg. 45.

[d] Waring *v.* Ward, 5 Ves. 670. Hale *v.* Cox, 3 Bro. 322. Noel *v.* Ld. Henley, 7 Pri. 241.

disappoint a party having only one; but equity, to satisfy both, will throw him, who has two funds, upon that which can be affected by him only; to the intent that the only fund, to which the other has access, may remain clear to him.[a] Thus in an early reporter it is said to be a common case among creditors, that where there are not sufficient assets, such creditors as have real securities shall have their debts out of the real estate, or otherwise the creditors by simple contract shall have the benefit of their securities, pro tanto, to come upon the land.[b]

The bounty of the testator enables a legatee, as well as a creditor, to call for this species of marshalling; that if the creditors, having a right to go to the real estate descended, will go to the personal estate, their choice shall not determine, whether the legatees shall be paid or not.[c] Hence a legatee, whether specific or pecuniary, where the real estate is liable to pay debts, is entitled, on the creditors exhausting the personal assets, to stand in their place, and be paid out of the land the amount of the personal estate so exhausted.[d] Or if some of the legatees have their legacies charged on the real and personal estate, and others on the personal only, the former must take their satisfaction out of the real estate, and shall not come upon the personal.[e]

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[a] 8 Ves. 395. 2 Atk. 436. 446. Povye's Case, 2 Freem. 51. Sagitary v. Hyde, 1 Ver. 455. Wilson v. Fielding, 2 id. 763.

[b] 2 Freem. 265.

[c] 8 Ves. 396.

[d] Anon. 2 Ch. Ca. 4. Culpepper v. Aston, id. 115. Knight v. Gay, cited 2 Ver. 182. Tipping v. Tipping, 1 P. W. 729. Burton v. Pierpoint, 2 id. 78. Haslewood v. Pope, 3 id. 322. Lutkins v. Leigh, For. 53. Hanby v. Roberts, Ambl. 127. Bowaman v. Reeve, Prec. Ch. 577. Fenhoulhet v. Passavant, 1 Dick. 253. Norris v. Norris, 2 id. 542. Lowthian v. Hassel, id. 737. Lucy v. Gardener, Bunb. 137.

[e] Colchester v. Ld. Stamford, 2 Freem. 124. Grise v. Goodwin, id.

When however the real estate is devised away, the right of a legatee differs from that of a creditor. The devisee has an equal claim as an object of the testator's bounty to have his estate, as the legatee to have his legacy; and there can be no reason for favouring the latter at the expense of the former. If therefore a man devises his real estate, and gives general pecuniary legacies not charged on that real estate, and dies leaving specialty debts, and the specialty creditors exhaust the personal estate; the legatees shall not stand in their place, and come upon realty.[a] But if, though specifically devised, the land is made subject to all debts, that distinguishes the case; for there is a double fund; and the creditor shall not disappoint the legatee.[b] It is the same also, where, instead of the case of a mere specialty creditor, the land specifically devised is subject to a mortgage by the testator: there he shall not disappoint the legatee.[c]

A wife in regard to her paraphernalia is entitled to stand in the place of a specialty creditor against assets descended.[d] Bona paraphernalia, it has been held, are not devisable by the husband from the wife,[e] who as to these has been looked upon in the nature

264. Masters *v.* Masters, 1 P.W. 421. Bligh *v.* E. Darnley, 2 id. 620. Hanby *v.* Roberts, Ambl. 127. 1 Dick. 104. Norman *v.* Morrell, 4 Ves. 769.

[a] Ambl. 129. 1 Dick. 105. Herne *v.* Meyrick, 1 P.W. 201. 2 Salk. 416. Clifton *v.* Burt, 1 P.W. 678. Pr. Ch. 540. Haslewood *v.* Pope, 3 P.W. 322. Keeling *v.* Brown, 5 Ves. 359.

[b] 8 Ves. 397. Foster *v.* Cook, 3 Bro. 347. Bradford *v.* Foley, and Webster *v.* Alsop, id. 351. N.

[c] 8 Ves. 397. Lutkins *v.* Leigh, For. 53. Forrester *v.* Ld. Leigh, Ambl. 171.

[d] Tipping *v.* Tipping, 1 P.W. 729. Probert *v.* Clifford, 2 id. 544. N. 1 Atk. 440. Ambl. 6. Snelson *v.* Corbet, 3 Atk. 369.

[e] Northey *v.* Northey, 2 Atk. 77. Seymore *v.* Tresilian, 3 id. 358. But query as to jewels, see Com. Dig. Bar. and Fem. F. 3. 1 Atk. 441. Nels. 179.

of a creditor,[a] and as having a right to be reimbursed to their value out of the real estate, if charged with debts.[b]

If the real estate is devised to the heir in tail, the assets will not be marshalled for legatees:[c] nor will they, it has been thought, if the estate be devised to him in fee; for though he takes by descent, yet the devise is sufficient to manifest the intention of the testator that the heir should have the land as much as the legatees their legacies.[d]

It has been doubted whether the lien, which equity gives the vendor of an estate for his purchase money, is such a charge as to entitle third persons to call for a marshalling of the assets; so that if the vendee die, and the purchase money is afterwards paid out of his personal estate, his legatees can stand in the place of the vendor against the estate. Lord Hardwicke is reported to have said that this equity would not extend to a third person; that it was confined to vendor and vendee; and if the vendor should exhaust the personal assets of the purchaser, a legatee would not be entitled to stand in the vendor's place, and to come upon the purchased estate.[e] But Lord Eldon observed, that the lien of the vendor was in equity very like a charge; and the cases of marshalling seemed to have gone this length; that where there was a charge upon an estate descended, a

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[a] 1 P.W. 730. 2 Atk. 78. 3 id. 369. 395.

[b] Probert *v.* Clifford, ante 359. Incledon *v.* Northcote, 3 Atk. 430. Boynton *v.* Parkhurst, 1 Bro. 576. 1 Cox, 106.

[c] Herne *v.* Meyrick, 1 P.W. 201. 2 Salk. 416.

[d] 3 P.W. 367. N.A. Scott *v.* Scott, 1 Ed. 458. Ambl. 383; on which see the note to Doe *v.* Timins, 1 B. and A. 542.

[e] Pollexfen *v.* Moore, 3 Atk. 272; and see Coppin *v.* Coppin, 2 P.W. 291; and Mr. Sugden's observations on these cases. Vend. and Purch. Chap. 12. 2.

legatee should stand in the place of the person having that charge, resorting to the personal estate.[a] Sir W. Grant also held that creditors were entitled to avail themselves of this charge upon the general principle of marshalling;[b] and Lord Eldon subsequently again observed, alluding to the case before Lord Hardwicke, that if the meaning was, that he (Lord Hardwicke) would follow the case of Coppin *v.* Coppin,[c] and that if the vendor exhausted the personal assets, the legatee of the purchaser should not come upon the estate, there was great difficulty in applying the principle; as it would then be in the power of the vendor to administer the assets as he pleased; having a lien upon the real estate to exhaust the personal assets, and disappoint all the creditors; who, if he had resorted to his lien, would have been satisfied; and in that respect, with reference to the principle, the case was anomalous.[d] Where also a man, after reciting by his will that he had contracted for the purchase of an estate, directed his executors to pay the purchase-money, and devised the estate to his natural son, and gave several legacies; and the personal estate was about sufficient to pay either the purchase-money, or the legacies, but not both: the Master of the Rolls held it to be a case for a rateable contribution between the devisee and the legatees.[e]

When the real estate is charged in aid of the personal for the payment of legacies, and a legacy is given payable at a future time, the Court will not marshal the assets so as to turn such legacy upon

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[a] 6 Ves. 483, 484.
[b] Trimmer *v.* Bayne, 9 Ves. 209.
[c] Ante 360, N. *e*.
[d] 15 Ves. 345.
[e] Headley *v.* Readhead, Coop. 50.

the personal estate, in which case it would be vested and transmissible;[a] while, as against the real estate, it would sink by the death of the legatee before the time of payment.[b] Lord Hardwicke in one case appears to have thought differently;[c] but Lord Loughborough said the point was of little moment in that case, and he would not follow it to introduce a new rule as to marshalling, and charge the real estate indirectly.[d]

It seems also now to be settled, notwithstanding several former opinions to the contrary,[e] that assets will not be marshalled or arranged in favour of a charity. If a legacy to a charity is charged upon land it has been justly said, that to marshal the assets would be to support a legacy contrary to law, and to evade the statute of mortmain:[f] or where the charity is only residuary legatee, there can be no reason for the Court doing for it what it would not do for any one else.[g] But that in the case of a mere personal bequest a charity shall not be entitled to the same equity as any other legatee, seems to be going a great way. Accordingly where Lord M. by his will charged his real estate with the payment of his debts and

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[a] Vid. ante 172.

[b] Prowse *v.* Abingdon, 1 Atk. 482. Ord *v.* Ord, 2 Dick. 439.

[c] Reynish *v.* Martin, 3 Atk. 330. 1 Wils. 130; and see Keily *v.* Monck, 3 Ridg. P. C. 251.

[d] Pearce *v.* Loman, 3 Ves. 135.

[e] See Att. Gen. *v.* Ld. Weymouth, Ambl. 25. Att. Gen. *v.* Graves, id. 158. 1 Coll. Jur. 451. Att. Gen. *v.* Tomkins, Ambl. 216. Dalton *v.* James, cited 2 Dick. 476. Att. Gen. *v.* Caldwell, Ambl. 635. Negus *v.* Coulter, 1 Dick. 326. Att. Gen. *v.* Martin, cited 3 Bro. 377. High. on Mortmain, 95.

[f] See Mogg *v.* Hodges, 2 Ves. 52. 1 Coll. Jur. 442. Walker *v.* Childs, Ambl. 524. Foster *v.* Bladgen, id. 704. Hillyard *v.* Taylor, id. 713. 2 Dick. 475. Foy *v.* Foy, 1 Cox, 163. Makeham *v.* Hooper, 4 Bro. 152.

[g] See Arnold *v.* Chapman, 1 Ves. 108. Att. Gen. *v.* Tyndall, 2 Ed. 207. Att. Gen. *v.* E. Winchelsea, 3 Bro. 374. Att. Gen. *v.* Martin, id. 377, cited. Att. Gen. *v.* Hurst, 2 Cox, 364.

legacies, except three legacies given for charitable purposes, which three legacies he directed to be paid out of his personal estate: Lord Northington decreed the charity legacies to stand in the place of the specialty creditors, for what they should exhaust of the personal estate.[a] However in a case before Lord Kenyon, in which the question was, whether the Court would marshal or make any arrangement of assets, so as to assist charitable legacies: his Lordship said, that whatever difference of opinion there might have formerly been upon the subject, he considered it to have been the established law of the Court from Lord Northington's time, not to marshal or arrange assets in favour of a charity.[b]

## SECTION V.

### *Of the Executor's Assent.*

ALL the personal estate of a testator devolves upon the executor as a trustee: he alone has a title in law to every thing bequeathed, and nothing passes to a legatee without his assent.[c] If a legatee take possession of the thing devised without such assent, the executor may have an action against him;[d] or if he enters into a term he may be considered as a disseisor.[e] Neither can he retain possession of a chattel bequeathed to him, which happens to be in his possession at the testator's death, notwithstanding the

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[a] Att. Gen. *v.* Lord Mountmorris, 1 Dick. 379.

[b] Ridges *v.* Morrison, 1 Cox, 180.

[c] Co. Lit. 111. *a.* Touch. 455. 459 1 P.W. 554. Bac. Ab. Leg. L.

[d] Plow. 281. Countess of Rutland *v.* Countess of Rutland, Cro. Eliz. 377. Contra Keilw. 128, as to things that can be identified.

[e] Owen, 56.

testator himself has appointed that he may take it without assent.[a] And if a testator by will release a debt due to him, it is said to be the better opinion, that the assent of the executor is necessary to give effect to the bequest.[b] Hence also if stock is specifically bequeathed, and the executors bring an action against the Bank for refusing to transfer it to them, an injunction will not be granted; for they have the legal title, beyond which the Bank can not look.[c]

This matter of assent is only a perfecting act for the security of the executor; for it is the will of the testator which gives the interest to the legatee; and that interest is such as that in case of his death before assent it will go to his representatives;[d] or in case of his outlawry will be subject to forfeiture.[e] The law therefore does not require any exact form in which the executor's assent is to be made, and any expression which shows his concurrence or agreement to the thing will suffice. It is like the attornment of a tenant to the grant of a reversion, and therefore a small matter will amount to an assent. Thus if an executor says to the legatee, I wish you joy of the thing devised to you; or I am content, or intend that you have it according to the will; or if one offers the executor money, or seems willing to purchase the thing bequeathed, and the executor directs him to the legatee; or if the executor himself

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[a] Com. Dig. Admon. C. 5.

[b] Toll. Ex. 308.

[c] Bank of England *v.* Moffat, 3 Bro. 260. Bank of England *v.* Parsons, 5 Ves. 665. Bank of England *v.* Lunn, 15 Ves. 569. Lord Thurlow thought that the executor's assent was not necessary to a specific bequest of stock. Pearson *v.* Bank of England, 2 Cox, 175. But he seems afterwards to have altered his opinion; see 5 Ves. 668. N.

[d] Off. Ex. 28.

[e] Toll. Ex. 308, citing Off. Ex. 29; but in which the point is introduced with a query.

offers the legatee money for it, or requests him to dispose of it, or takes a grant or lease from him, or offers to deliver up possession to the legatee; or makes a lease reserving rent to himself in trust for the legatee; these and the like acts amount to an assent.[a]

When any chattel, real or personal, is given to an executor by the will, he has an election to have and take it in the one right or the other; as executor or as legatee; and it is said he shall take it as executor till his election to have it as legatee.[b] It seems clear however that if the executor is devisee for life of a term, and enters generally, he shall have it as executor, which is his first and general authority, and not as legatee without claim or demonstration of his election, although the testator were not indebted to any.[c] But if he says he will take the thing bequeathed according to the will, or that the remainder-man is to have the estate after him, it will be a sufficient assent, and election to take as legatee.[d] So if an executor devisee of a term, reciting he has it by devise, grants it over; or if he take the profits of it to his own use; or exclude a co-executor from a joint occupancy with him; or if he repair the tenements devised at his own expense;[e] or if he perform a condition annexed to the devise to him, as to pay

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[a] Swinb. P. 1. S. 7. Off. Ex. 226. Touch. 456. Com. Dig. Adm. C. 6. Bac. Ab. Leg. L. Doe *v.* Guy, 3 East, 120. Noel *v.* Robinson, 1 Ver. 90. 453. 460. 2 Ch. Ca. 145. 2 Ch. Rep. 248. 2 Vent. 358.

[b] Off. Ex. 27. 224. Godolph. 461. Plow. 543. Touch. 454. Com. Dig. Admon. C. 5. Swinb. P. 2. S. 9. Bac. Ab. Leg. L. Portman *v.* Willis, Cro. Eliz. 386; but see 2 P.W. 531. Mo. 352.

[c] 10 Rep. 47. 2 P.W. 531. 1 Lev. 25. 7 Taunt. 221. Young *v.* Holmes, 1 Stra. 70.

[d] Garrett *v.* Lister, 1 Lev. 25.

[e] Com. Dig. Admon. C. 6.

a sum of money,[a] or to educate the testator's son;[b] these acts indicate an assent to the bequest.

But if an executor enter into a term devised to him, and do not prove the will; or if he only say that the testator left all to him;[c] or if one of several executors enter and grant a lease in his own name,[d] it will not amount to an assent.

An assent to the first devisee enures to those in remainder;[e] and an assent to an estate in remainder is an assent to a present estate.[f] So an assent to a devise of a chattel lease is an assent to the devise of a rent out of it, or to a condition or contingency annexed; and an assent to take part as a residuary legatee an assent to take the whole residue as such.[g] But an assent to a rent out of a term seems not an assent to a bequest of the term itself.[h]

If there are several executors an assent by one is sufficient; and if a legacy therefore be given to all the executors generally, any one may take his own share by his own assent.[i]

A married woman can not assent to a legacy, but the assent of her husband is sufficient; and he may elect for her to take as legatee.[k] Probates are not now to be granted to infants;[l] and an executor during minority can not assent to any legacy or dis-

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[a] Com. Dig. Admon. C. 6. Plow. 544. Young *v.* Holmes, 1 Stra. 70.

[b] Paramour *v.* Yardley, Plow. 539.

[c] Com. Dig. Admon. C. 7; but see Off. Ex. 226.

[d] Doe *v.* Sturges, 7 Taunt. 217.

[e] 10 Rep. 47. Touch. 456, 457. Com. Dig. Admon. C. 6. Bac. Ab. Leg. L. 3 P.W. 12. Paramour *v.* Yardley, Plow. 539. Weleden *v.* Elkington, id. 516.

[f] Com. Dig. Admon. C. 6.

[g] Ibid.

[h] 3 Bulstr. 122.

[i] Off. Ex. 225. Touch. 455. Com. Dig. Admon. C. 8. Townson *v.* Tickell, 3 B. & A. 40.

[k] Com. Dig. Admon. C. 8. Off. Ex. 225.

[l] 38 Geo. III. 87. 6.

pose of a term devised unless there be assets to pay debts.[a]

An executor may assent before probate,[b] and if he die the assent continues good.[c] The assent, it has been thought, when given, relates back to the death of the testator, and that the previous grant therefore of the legatee is confirmed by it.[d]

As an assent is but a perfecting act it can not, after it is once given, be revoked;[e] and if given upon a condition subsequent, the condition is void.[f] It has indeed been said that it can not be given on a condition, or on any limitation or restriction whatsoever; for that after the assent the legatee is in by the devise.[g] Yet it has also been laid down that an assent may be upon condition precedent; as where the executor assents to the devise of a term, if the devisee will pay the rent in arrear at the testator's death; in which case, if the consideration be not performed, there is no assent.[h]

If an executor refuse his assent without cause, he may be compelled to it in equity or in the ecclesiastical court.[i]

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[a] Prince's case, 5 Rep. 30. 2 And. 132. Doubted Cro. Eliz. 719.

[b] Bac. Ab. Leg. L. Com. Dig. Admon. B. 9. C. 8. 1 Salk. 301. 1 T. R. 480.

[c] Anon. 2 Freem. 23.

[d] Off. Ex. 249; and see Plow. 280, 281.

[e] Swinb. P. 1. S. 7. Off. Ex. 227. Com. Dig. Admon. C. 8 1 Ver. 460.

[f] Com Dig. Admon. C. 8.

[g] Bac. Ab. Leg. L., citing March, 136. Cro. Jac. 614, 615. 2 Vent. 360; and see 4 Rep. 28.

[h] Off. Ex. 238. Toll. Ex. 310. Swinb. P. 1. S. 7.

[i] Com. Dig. Admon. C. 8. Bac. Ab. Leg. L. Touch. 459. 1 P.W. 287. 2 id. 531. 2 Ves. 18. Off. Ex. 29.

## SECTION VI.

### *Of presumptive Payment.*

AFTER great length of time, as thirty years for example, without demand, a legacy will be presumed to have been paid:[a] for although it is not barred by the statute of limitations,[b] and has therefore been decreed after a lapse of forty years,[c] yet this was where length of time only, and not satisfaction, was insisted on by the executor. Sir T. Clarke took a distinction between a bequest of a mere legacy and an annuity; and held that though the doctrine had prevailed that the statute would not run as to the former, yet it would not hold as to the latter:[d] but Lord Loughborough thought the statute could not be pleaded to an annuity.[e]

Legacies also will be presumed to have been satisfied under circumstances. Thus where a father had as executor to pay a legacy to his daughter, and he advanced a larger sum on her marriage, and the legacy was not demanded during his life: it was held to be satisfied, Lord Hardwicke observing, there are few cases where a father will not be presumed to have paid the debt he owes to a daughter, when in his lifetime he gives her in marriage a greater sum than he owed her.[f] But the presumption of a legacy

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[a] Lewis *v.* Lord Teynham, cited 2 Ves. J. 13. Fotherby *v.* Hartridge, 2 Ver. 21. Jones *v.* Turberville, 2 Ves. J. 11. 4 Bro. 115.

[b] Anon. 2 Freem. 22.

[c] Parker *v.* Ash, 1 Ver. 256.

[d] Smallman *v.* Lord Hamilton, 2 Atk. 71.

[e] Higgins *v.* Crawfurd, 2 Ves. J. 571.

[f] Wood *v.* Briant, 2 Atk. 521. Mackdowell *v.* Halfpenny, 2 Ver. 484. Seed *v.* Bradford, 1 Ves. 501. Chave *v.* Farrant, 18 Ves. 8; overruling Chidley *v.* Lee, Pr. Ch. 228.

being satisfied by the gift of a larger sum to the legatee seems confined to the case of parent and child: for where 100*l.* was bequeathed to the executor in trust for A., and the executor (his great uncle) expended more than the interest of the legacy in maintaining and educating the legatee, and paid one hundred guineas with him as an apprentice fee, and left him also by his will 200*l.*; and the legatee upon his coming of age gave a power to B. to receive all legacies left to him, under which B. received the legacy of 200*l.*; and ten years afterwards A. claimed the legacy of 100*l.*: it was with great reluctance decreed to him by the Court.[a]

Legatees are not to be excluded, like creditors, by not claiming within the time limited by the advertisements published under a decree.[b] It may be added also that a legatee has been held not to be barred by his having been subscribing witness to a receipt given on the payment of the legacy to another person.[c]

## Section VII.

### *Of Abatement and Refunding.*

I. It was once held, that if land was devised to trustees to be sold for payment of debts and legacies, that they should be paid pari passu, and the debts have no preference,[d] unless the trustees were

[a] Lee *v.* Brown, 4 Ves. 362; and see Davison *v.* Goddard, Gilb. Eq. R. 65.

[b] Anon. 9 Pri. 210.

[c] Holmes *v.* Custance, 12 Ves. 279.

[d] Wolestoncroft *v.* Long, 1 Ch. Ca. 32. 3 Ch. Rep. 12. Gosling *v.* Dorney, 1 Ver. 482. Anon. 2 id. 133. Herbert *v.* Herbert, 2 Freem. 270. Powell's Ca. Nels. 202.

also executors.[a] But this doctrine, which it was said would be making a man sin in his grave, has been since exploded; and it is now the constant determination that creditors shall be preferred before legatees, when there is not sufficient for both.[b]

Yet a man may charge his legacies in such a way as to give them a preference over debts. Thus where a testator by his will directed his devisee to pay out of the premises devised the sum of 1000*l.* to trustees, to be by them applied as the residue of his personal estate was thereinafter directed, and gave them also a legacy in trust for A. payable out of the premises, and bequeathed the residue of his personal estate, after his debts, legacies, and funeral expenses were paid, to trustees in trust for his relations: the Lord Chancellor was of opinion that the 1000*l.*, and the legacy to A. must be applied according to the respective bequests without being liable to the claim of the creditors.[c]

We have already seen that specific legatees are entitled to the things bequeathed them, notwithstanding there are no funds left for payment of the pecuniary legacies.[d] Demonstrative legacies[e] may also, it seems, have a similar priority. For where a man bequeathed as a portion to his daughter 12,000*l.*, and to his niece 4000*l.*, directing that the latter should be paid out of the money in his banker's hands; and left more than 4000*l.* in the banker's

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[a] Whitton *v.* Lloyd, 1 Ch. Ca. 275. Foly's Ca. 2 Freem. 49. Hixon *v.* Wytham, 1 Ch. Ca. 248. 1 Freem. 305. Rep. T. Finch, 195. Anon. 2 Ver. 405. Greaves *v.* Powell, 2 Ver. 248. Walker *v.* Meager, 2 P.W. 550. Mos. 204.

[b] 2 Atk. 111. 12 Ves. 154. Maytin *v.* Hoper, Ridg. C. T. Hard. 206. Bradgate *v.* Ridlington, Mos. 56.

[c] Killet *v.* Ford, 1 Cox, 442.

[d] Ante 16.

[e] Vid. ante 21.

hands, but the whole amount of his personal property was not sufficient to discharge both the legacies: that to the niece was decreed to be paid in full.[a]

But in general, if after payment of debts and satisfaction of specific bequests the estate is not sufficient to pay the pecuniary legacies, they must abate proportionably among themselves; nor can an executor, as in the case of a creditor, pay a legatee who uses the greatest diligence, and gets a decree; for there is no priority in legacies.[b] Hence where a man had compounded with his creditors for ten shillings in the pound, and afterwards acquired a considerable fortune, and by will bequeathed several legacies, and gave the residue of his personal property to his brother, who was thereout to pay what he owed to his creditors, who had been so kind as to compound with him: it was held that the creditors having once released their debts, which were thereby extinct, they could claim no preference over other legatees.[c]

If a testator says, "in the first place I give to A., then to B.," &c.; or "I give to A. payable at one month after my decease, to B. at six months," &c.; or bequeaths several legacies and directs one of them to be paid in the first place,[d] or to be paid immediately after his decease out of the first money belonging to him that should be got in after his death,[e] these legacies must nevertheless abate in proportion with others: for it must be presumed that a testator considers he has property sufficient to answer all his

[a] Acton *v.* Acton, 1 Mer. 178. Smallbone *v.* Brace, Rep. T. Finch, 303; and see 2 Ves. J. 640. 9 Ves. 152. Humphreys *v.* Humphreys, post. 378.

[b] Ashley *v.* Pocock, 3 Atk. 208. Contra, Touch. 476. Plow. 545.

[c] Coppin *v.* Coppin, 2 P.W. 291.

[d] Vintner *v.* Pix, 1 Ch. Rep. 133. Brown *v.* Allen, 1 Ver. 31. Beeston *v.* Booth, 4 Mad. 161.

[e] Blower *v.* Morret, 2 Ves. 420.

legacies, and that he has an intention that all should be equally paid; which presumption of equality is not to be repelled by ambiguous expressions, but must prevail, unless there be clear intent to the contrary.

It was once laid down that an executor legatee might retain for his legacy, as he might for a debt, although there was nothing left to discharge the legacies given to others.[a] But it has been since held that an executor must abate in proportion with the rest.[b] In the civil law an exception was made in favour of legacies to charities:[c] yet neither has this been adopted by our courts, which hold that charitable gifts must abate equally with others.[d] Bequests to servants also are equally within the general rule.[e]

Annuities seem at first to have been considered specific legacies, and not liable to abate;[f] but in a case where a testator gave A. 140*l.* out of his personal estate, to purchase her an annuity of 20*l.* a year for her life: Sir J. Jekyll held it a pecuniary legacy, which must abate in proportion.[g] Afterwards the Court considered, that the distinction was extremely nice between such a direction in the will, and a gift in the will of that annuity out of the personal estate; that in sense and reason it amounted to the same thing; and they held, therefore, that an annuity by will out of personal estate by way of

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[a] Touch. 480.

[b] Butler *v.* Coot, Nels. 142. 2 Freem. 134. 3 Ch. Rep. 54. Fretwell *v.* Stacy, 2 Ver. 434. Att. Gen. *v.* Robins, 2 P.W. 23. Heron *v.* Heron, 2 Atk. 171.

[c] Fielding *v.* Bound, 1 Ver. 230; but see Swinb. P. 3. S. 17.

[d] Masters *v.* Masters, 1 P.W. 421. Att. Gen. *v.* Hudson, id. 675. Att. Gen. *v.* Robins, 2 id. 23; and see id. 296.

[e] Att. Gen. *v.* Robins, 2 P.W. 25.

[f] Maytin *v.* Hoper, Ridg. C. T. Hard. 206.

[g] Halton *v.* Medlicot, 3 Atk. 694, cited.

direct devise or legacy should abate in proportion with pecuniary legacies.[a]

Some legacies however may have a preference over others where the circumstances are such as to show clearly the intention of a testator in this respect. Thus where a man bequeathed several legacies, and at the latter end of his will added, that he apprehended there would be a considerable surplus of his personal estate beyond what he had given in legacies, for which reason he gave several further legacies; and afterwards gave several more legacies by a codicil; and there happened to be a great deficiency of the assets by the fall in value of South Sea Stock: it was decreed that the former legacies should have the preference, and the legacies given at the latter end of the will, and in the codicil, should be lost.[b] And where a testator gave 2000*l.* apiece to his two sons, and 2000*l.* to his daughter, with a proviso, that if his assets should fall short for the payment of these, still the daughter should be paid her full legacy, and that the abatement should be borne proportionably out of the sons' legacies only; and the testator left sufficient assets, but they were wasted by the executor: it was ultimately held, contrary to the decree made at the Rolls, that the daughter should have her full portion, and the abatement be made only out of the sons' legacies.[c]

So some legacies may have a preference over others in consequence of the testator having directed a certain part of his property to be applied in payment of his debts before the rest. As where a woman,

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[a] 2 Ves. 417. Hume *v.* Edwards, 3 Atk. 693. Rogers *v.* Millicent, 2 Dick. 570.

[b] Att. Gen. *v.* Robins, 2 P.W. 23.

[c] Marsh *v.* Evans, 1 P.W. 668.

after bequeathing different sums of stock, and various other legacies, gave the rest residue and remainder of her funded property, after payment of her debts, legacies, &c. to A.; and the rest residue and remainder of her real and personal estate and effects to others: it was held that the stock must be first applied in payment of debts and legacies, notwithstanding there might in consequence be nothing left for A.[a]

A bequest to a wife in lieu or satisfaction of dower or thirds is considered a purchase, and therefore not liable to abate, provided there is any thing to purchase; for if the wife has a jointure, and is not entitled to dower or thirds, the words would amount to nothing.[b] It is said also to have been held that if legacies were given to children and strangers, and there was a defect of assets, that the children should not abate in proportion, but the loss should fall upon the strangers;[c] for children unprovided for may be considered in some respects as creditors.[d] In a case where a testator gave an annuity of 120*l.* to his wife for life, and directed his executors to purchase it if they could in government securities, or if they could not, then to purchase land of 200*l.* a year value to be settled, so as that the said annuity should be to his wife free from taxes, with remainders over; and directed that if he left any child living at his death, his executors should out of the profits of the

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[a] Ghost *v.* Yeats, 1 Jac. & W. 102. Browne *v.* Groombridge, 4 Mad. 495.

[b] Burridge *v.* Bradyl, 1 P.W. 126. Blower *v.* Morret, 2 Ves. 420. Davenhill *v.* Fletcher, Ambl. 244.

[c] 2 Freem. 45; and see Swinb. P. 3. S. 17.

[d] 1 Ed. 461. 2 Ves. 258. 2 P.W. 152. See Bells *v.* Bells, Finch. Ch. Ca. 88. Trust for portions, maintenance of children, and payment of debts; maintenance decreed to be first paid.

residue of his estate pay to his wife 30*l.* per annum for the maintenance of such child; and after giving some other legacies, gave the residue among his children equally: Lord Hardwicke thought it was natural that the wife and children should have the annuities out of his estate before the gift to strangers, and it appeared to him that the testator had expressed that intent; for otherwise he must presume that the testator intended the whole maintenance for his children should depend upon the contingency, whether there would be any surplus after the purchase of the wife's annuity, and after all the pecuniary and merely voluntary legacies to collateral relations; and he accordingly decreed that the wife was entitled to the annuity, and sums for maintenance in preference to the other legatees. His Lordship added, he should have doubted the determination in Brown *v.* Allen,[a] had it been a provision for a wife, and should have inclined to think it was a declaration of the testator's intent that the provision for his wife should come out of the personal estate, and be paid in the first place; because there was ground for that from the preference to a wife and children unprovided for.[b]

A legacy given for a monument to the testatrix's mother, from whom she had received the greatest part of her estate, was decreed to be paid in full, it being a debt of piety:[c] and gifts of 3*l.* apiece to the poor of three several parishes were looked upon as doles at the funeral, and it was therefore held that no abatement ought to made out of them.[d] But a bequest of 200*l.*

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[a] Ante 371.

[b] Lewin *v.* Lewin, 2 Ves. 414; and see Blower *v.* Morret, id. 420.

[c] Masters *v.* Masters, 1 P.W. 421.

[d] Att. Gen. *v.* Robins, 2 P.W. 23.

to R. to keep a monument in repair the surplus to be his property, was decreed to abate.[a]

Residuary legatees have, under special circumstances, been put upon the same footing as others in respect of abatement. Thus where a man having three sons gave 3000*l.* apiece to his two younger sons, and devised an estate to his wife to encourage a further provision which he designed she should make for his younger children, his eldest son being sufficiently otherwise provided for by his said will, and being made residuary legatee thereof: Lord Cowper was of opinion, that the testator must, at the making of the will, have known what his surplus would amount to after his debts and legacies paid; that he meant this surplus as a legacy to his eldest son; and that all the three sons therefore were to receive pari passu in respect of the value of the surplus given to the eldest, and in regard to the legacies of 3000*l.* each to the two younger sons.[b] Lord Thurlow however said, he could not agree to the law of this case, as unmixed with the question of the executor having wasted the assets of the testator;[c] that as it stood it was not a direct authority any further than that the residuary legatee should not suffer by a devastavit, more than in proportion with the other legatees; and his Lordship added, he should find great difficulty in deciding that a residuary legatee should be suffered to abate with the other legatees; for though the Court might be lucky enough occasionally to hit the testator's intention, it was in point of precedent a very dangerous sort of refinement, and would in nine

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[a] Blackshaw *v.* Rogers, cited 4 Bro. 349.

[b] Dyose *v.* Dyose, 1 P.W. 305.

[c] 1 Bro. 478.

cases out of ten lead to great confusion and embarrassment.[a]

In another case also in which a man devised certain estates to be sold, with a direction that they should not be sold for less than 10,000*l.*, and out of the produce gave legacies amounting to near 7200*l.*, after payment of which, he gave the overplus of the monies arising by the sale to A. and B.; and after the testator's death the estates being sold under a decree of the Court produced less than 7000*l.*: Sir W. Grant thought the same construction did not apply to this disposition of 10,000*l.* as would be applicable to a general residuary clause; and that the testator meant, not an indefinite surplus, but a precise legacy to a certain extent, with a chance of something more; and decreed therefore that the legacies payable out of the monies to arise by the sale, and the sum of 2200*l.*, being the residue of the said sum of 10,000*l.*, bequeathed to A. and B. ought to abate proportionably.[b]

Specific legacies, although not liable to abate with pecuniary ones, must abate proportionably among themselves, if any of the things specifically bequeathed are wanted for the payment of debts.[c] So if a certain amount of stock is given specifically among several persons, and the testator at his death is not possessed of so much of that stock, the loss must be borne in average by the several persons entitled, according to the proportions designed for them.[d]

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[a] 2 Cox, 186. 1 Cox's P.W. 306. N. 2; and see Ex parte Chadwin, 3 Swanst. 380.

[b] Page *v.* Leapingwell, 18 Ves. 463.

[c] Ld. Castleton *v.* Ld. Fanshaw, 1 Eq. Ab. 298. D. Devon *v.* Atkins 2 P.W. 381.

[d] Sleech *v.* Thorington, 2 Ves. 560. Page *v.* Leapingwell, ante N. b.

And there may be cases in which a specific legacy will be chargeable with the payment of a pecuniary one. As if a man bequeaths his personal estate at A. to one person, and his personal estate at B. to another; and then gives a legacy payable out of his personal estate, and leaves no other personal estate than at those two places: the legacy must come out of the personal estate at large in both places.[a] And where there was a bequest to A. and B. of "all the stock which I have in the 3 per cents. being about 5000*l.*, except 500*l.*, which I give to C.;" and the testator after making his will sold a part of the stock: C. was held entitled to his legacy entire, while the gift to A. and B. failed as to so much as was sold out.[b]

General legacies of stock must abate according to their value at the end of one year after the testator's death, unless he directs the interest of the stock to be paid from the time of his death, in which case the abatement must be according to the value of the stock at that time.[c]

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II. As there is no priority then among legatees, whenever an executor pays one legacy, or the interest of it for any length of time,[d] the presumption is, he has sufficient for all; and the Court will oblige him, if solvent, to pay the rest, and not permit him to bring a bill to compel the legatee, whom he voluntarily paid, to refund:[e] unless debts should after-

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[a] Prec. Ch. 393. Gilb. Eq. R. 87.

[b] Humphreys *v.* Humphreys, 2 Cox, 184.

[c] Simmons *v.* Vallance, 4 Bro. 345. Blackshaw *v.* Rogers, id. cited.

[d] Corporation of Clergymen's Sons *v.* Swainson, 1 Ves. 75; and see 2 id. 85.

[e] 2 Atk. 8. Orr *v.* Kaines, 2 Ves. 194. Vintner *v.* Pix, 1 Ch. Rep. 133.

wards appear of which he had at first no notice.[a] If the executor prove insolvent, there seems to be a distinction in regard to the claim of an unsatisfied legatee in this respect, whether there was originally a deficiency of assets, or whether the executor has wasted them. In the former case, a legatee, who has been paid more than his proportion, must refund to the others; while in the latter, even a residuary legatee is not liable, having received no more than he was entitled to; and a legatee is to refund only in cases where the payment at the time of making it would amount to a devastavit.[b] A legatee having his legacy only secured by a statute and mortgage, and not actually paid, has been decreed to abate.[c]

An executor is not bound to pay a legacy without security to refund, in case the estate prove not sufficient to pay debts and legacies.[d] And formerly, if the ecclesiastical court proceeded to compel an executor to pay a legacy without such a security, a prohibition was granted:[e] though this is now out of use, as equity will decree a legatee to refund if the payment was not voluntary but by decree.[f] The executor also may retain sufficient out of the assets to answer a contingent debt, as in the case of an outstanding unbroken covenant entered into by his tes-

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Hodges *v.* Waddington, 2 Ch. Ca. 9. 2 Vent. 360. Newman *v.* Barton, 2 Ver. 205. Noell *v.* Robinson, 2 Vent. 358. 1 Ver. 94. Keylinge's case, 1 Eq. Ab. 239. Coppin *v.* Coppin, 2 P. W. 291. Contra 2 P. W. 447. Davis *v.* Davis, 8 Vin. Ab. 423. 1 Dick. 32. That an action will not lie, see 3 Bos. & P. 169.

[a] 1 Ch. Ca. 136. German *v.* Colston, 2 Ch. Rep. 137.

[b] Walcott *v.* Hall, 2 Bro. 305, Belt's ed. 1 Cox's P.W. 495; and see Partridge *v.* Gopp, Ambl. 596.

[c] Grove *v.* Ranson, 1 Ch. Ca. 148.

[d] 3 Ch. Rep. 65. 1 Ch. Ca. 137. 2 Freem. 134. 137. 141. 3 Salk. 223. Com. Dig. Admon. C. 3.

[e] Bac. Ab. Leg. H. 1 Ver. 93.

[f] 2 Vent. 358. 2 Ver. 205. 1 P. W. 495. Ambl. 161. Anon. 1 Atk. 491.

tator: but the residuary legatee will be entitled to this on giving a sufficient indemnity;[a] or he may have it paid into court for its better security.[b]

Creditors may compel legatees to refund notwithstanding the assets were originally sufficient.[c] Thus where a man devised some of his estates to his executors in trust for payment of his debts, and the executors renounced the executorship, and conveyed the estates, subject to the trust, to the heir; who also got possession of the personal property, paid some legacies, and after eleven years became bankrupt: the Court decreed, that the creditors should be paid out of the legacies received by the legatees, on failure of the other funds.[d] So where legacies were given to the four daughters of an executor, and he, after a decree against him to account, advanced 500*l.* to each of them, two of which sums were voluntary gifts, and the other two marriage portions: the gifts to the unmarried daughters were held fraudulent and void, as within the statute;[e] but they being legatees under the will, the sums were to be considered as paid to them in part of their legacies, and so much only to be refunded (the decree having directed a general abatement) as they had received beyond their proportion.[f] Specific legacies also will be held assets for creditors, notwithstanding the assent of the executor.[g]

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[a] Simmons *v.* Bolland, 3 Mer. 547; and see Hawkins *v.* Day, Ambl. 160. 3 Mer. 555. Necton *v.* Sharpe, 1 Roll. Ab. 928. Cro. Eliz. 466.

[b] See Yare *v.* Harrison, 2 Cox, 377.

[c] 1 Ver. 94. 2 Vent. 358. Anon. 2 Freem. 137. Anon. 1 Ver. 162. 2 Vent. 360. S. C.

[d] Hardwick *v.* Mynd, 1 Anstr. 109.

[e] 13 Eliz. C. 5.

[f] Partridge *v.* Gopp, 1 Ed. 163. Ambl. 596.

[g] Touch. 454. 1 Ver. 455. Chamberlaine *v.* Chamberlaine, 2 Freem. 141. 1 Ch. Ca. 256.

When a legatee has been abroad, and not heard of for a long time, he has been presumed to be dead, and payment ordered to those entitled to the legacy in that event, on security to refund in case the legatee should ever return.[a] And where an executor appealed to the House of Lords from a decree for payment of a legacy, the legatee was allowed to have the money paid out of court to him, on giving security to refund, in case the decree should be reversed.[b] And in another case a receiver has been ordered, on motion before a report of debts, to pay the executrix the arrears due on an annuity bequeathed to her, upon her stating by her answer, that all debts which had come to her knowledge had been satisfied, and undertaking to refund, if necessary.[c]

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[a] Norris *v.* Norris, Rep. T. Finch, 419. Dixon *v.* Dixon, 3 Bro. 510. Bailey *v.* Hammond, 7 Ves. 590.

[b] Way *v.* Foy, 18 Ves. 452.

[c] Skinner *v.* Sweet, Coop. 54. Such motions however are said to be disapproved of. 2 Mad. Ch. 494. 2d ed.

# CHAPTER VII.

## OF SUITS FOR LEGACIES.

### SECTION I.

### *Of the Jurisdiction of different Courts.*

THE cognizance of a legacy is said formerly to have belonged exclusively to the ecclesiastical courts, as having jurisdiction over all testamentary matters.[a] And this seems the case now in some respects. Thus where a bill was filed by an executor, who had proved the will in the ecclesiastical court, to be relieved against a legacy supposed to have been interlined by the legatee; the bill was dismissed with costs, the remedy being in the latter court;[b] for equity has no power to decide on the validity of a will either of real or personal estate.[c] So where a man made his will and appointed T. S. his executor, and afterwards by a codicil declared that R. (the plaintiff) should have the bond he owed the testator; and the executor proved the will, but not the codicil: it was adjudged that no relief could be had in equity till the codicil was proved, and that must be in the spiritual court.[d]

The jurisdiction of the ecclesiastical court is confined to gifts of goods and chattels: and if a man,

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[a] Bac. Ab. Leg. M. Swinb. P. 1. S. 6. 3 Salk. 223. Het. 87. 5 T. R. 692.

[b] Plume *v.* Beale, 1 P.W. 388.

[c] 1 Ves. 287. 3 Mer. 171.

[d] Took *v.* Fitz-John, Hard. 96. Yet it sometimes happens to the temporal courts to have to decide whether an instrument is testamentary or not. See Att. Gen. *v.* Jones, Appendix.

therefore, devises his lands to be sold for payment of his legacies, the legatee can not sue in the spiritual court; for these legacies issuing out of land are not within its jurisdiction.[a] But it is said that for a legacy devised out of a term of years the executor may be sued in the spiritual court, as it issues out of a chattel, which is testamentary.[b] Where an executor gave a bond for payment of a legacy, and the legatee sued him in the spiritual court, it was held that a prohibition ought to go; for the executor by entering into a bond had extinguished the legacy, and made it a mere debt at common law.[c] Dodderidge J. held indeed that the legatee might sue either in the ecclesiastical or temporal courts:[d] but his decision was afterwards denied to be law.[e]

It is said also that if a man covenant with J. S. to pay him 20*l.*, and afterwards by will devises to him 20*l.* in discharge of the covenant, this is not a legacy suable in the spiritual court, but remains still a debt recoverable at common law. But if A. covenants with J. S. that he will pay 20*l.* apiece to B. C. and D. and afterwards devises 20*l.* apiece to them in discharge of the covenant, these are good legacies, and recoverable in the spiritual court, the covenant being in this case with a stranger.[f]

If in a matter merely spiritual the ecclesiastical

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[a] Jenk. 5 Cent. Ca. 56. 2 Roll. Ab. 285. Paschall v. Keterich, Dyer, 151. Edwards v. Graves, Hob. 265; and see 2 Freem. 244. 3 Salk. 223. Palm. 120. Benl. 60. Contra Dyer, 264, *b.* 1 Bulstr. 153.

[b] 1 Brownl. & Gold. 34. Prowe's Ca. 2 Roll. Ab. 285. Ramsey v. Ross, 1 Sid. 279; and see 1 Bulstr. 153. Love v. Naplesden, Cro. Jac. 279. Rosse v. Rosse, 1 Lev. 180. 2 Keb. 8. Bastard v. Stockwell, 2 Show. 50.

[c] 2 Brownl. and Golds. 11. Goodwyn v. Goodwyn, Yelv. 38. Champue's Ca. Het. 166.

[d] Gardner's Ca. 2 Roll. Rep. 160.

[e] Cuband v. Dewsbury, 8 Mod. 327.

[f] Davies & Percie's Ca. 2 Leo. 119.

courts proceed in their own manner, though that is different from the common law, no prohibition lies: but if in the course of a cause an incident happens which is of temporal cognizance, or triable by the common law, they may try the incident, but must try it as the common law would.[a] Thus if payment be pleaded to a suit for a legacy, they shall try the matter of payment or no; but then they must admit such proof as the common law will, and if there be only one witness, and they reject the evidence, as their law requires two, they shall be prohibited.[b] But it is not sufficient ground for a prohibition to suggest that the plaintiff had only one witness to prove the fact, unless he allege that he offered such proof, and it was refused for insufficiency.[c]

Suits for legacies are now very rarely brought in the ecclesiastical courts;[d] for legatees, finding their authority inadequate to enforce a full discovery of assets, were frequently driven for that purpose into equity, which to save a circuity of suit exercised complete jurisdiction in the matter by enforcing the discovery, and decreeing payment of the legacy.[e] Hence after a bill filed for administration of assets an injunction has issued to stay a legatee from proceeding in the ecclesiastical courts for his legacy.[f] Injunctions also have been granted upon the ground that those courts were using their jurisdiction contrary to equity and conscience; as in the case of a

[a] Cro. Eliz. 666. 2 Roll. Ab. 285. 1 Vent. 291. Hob. 188. 12 Co. 65. 1 Ld. Raym. 74; and see 2 Roll. Ab. 298, 299. 1 Roll. Rep. 12. 2 Inst. 608.

[b] Shetter *v.* Friend, 1 Show. 172. Carth. 142. 2 Salk. 547. 3 Mod. 283. Cited Lord Raym. 220, 221. Wats *v.* Conisby, Hob. 247. Richardson *v.* Desborow, cited 3 Mod. 286. Eaton's Ca. cited Mo. 413. Warner *v.* Barret, Het. 87.

[c] Carth. 144. Bagnall *v.* Stokes, Cro. Eliz. 88.

[d] See 5 Mad. 357.

[e] 3 Ridg. P. C. 243. Cowp. 287.

[f] Smith *v.* Kempson, 2 Dick. 709.

trustee of a legacy suing for payment into his own hands;[a] or a husband for a legacy given to his wife.[b] So a prohibition was granted where there was no residuary bequest, and they were decreeing the executors to make a distribution of the surplus; for the spiritual court can only compel a distribution when the party dies intestate.[c]

And notwithstanding the rule in equity is not to allow a suit against an executor before probate, yet on proof of spoliation or suppression of a will by the executor, a legatee may file his bill, and have an immediate decree for payment of his legacy.[d] Or if there is a suit depending in the ecclesiastical court, either in regard to the granting probate or administration, or to the recalling them, when granted, equity will interfere by appointing a receiver to protect the property in the meantime.[e] And after probate a receiver will be granted in the case of misconduct, waste, or improper disposition of the assets;[f] or the bankruptcy or insolvency of the executor;[g] or where the husband of a sole executrix is out of the kingdom.[h] But it will not be done merely because the executor is in mean circumstances; for to induce the Court to interfere against an executor, especially before answer, a strong special ground must be made.[i]

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[a] 1 Atk. 516; and see Nicholas v. Nicholas, Pr. Ch. 546.

[b] 1 Atk. 516. Ante 279.

[c] 2 Ves. 29. Petit v. Smith, 1 P. W. 7. 5 Mod. 247. Ld. Raym. 86. Comb. 378. Com. 3. Hatton v. Hatton, 2 Stra. 865. See ante, 37, N. k, that the appointment of an executor prevents intestacy.

[d] Tucker v. Phipps, 3 Atk. 359.

[e] Atkinson v. Henshaw, 2 Ves. & B. 85. Ball v. Oliver, id. 96, reviewing all the former cases. Rutherford v. Douglas, 1 Sim. and St. 111. N.

[f] 12 Ves. 5.

[g] Gladdon v. Stoneman, 1 Mad. 143. N. Middleton v. Dodswell, 13 Ves. 266.

[h] Taylor v. Allen, 2 Atk. 213.

[i] Hathornthwaite v. Russel, 2 Atk. 126. Anon. 12 Ves. 4. Howard v. Papera, 1 Mad. 142.

But as the two courts have a concurrent jurisdiction, the cestui que trust, it is said, of a personal estate, may sue in chancery to have an account against the executor or administrator, and at the same time sue in the prerogative court to enforce the executor or administrator, to bring in an inventory.[a] Whether the court of chancery will enjoin a legatee from proceeding in another court of equity seems doubtful.[b]

If money is devised out of land an action of debt, or on the case, will lie for it.[c] So an action will lie against the representatives of an executor for the arrears of an annuity bequeathed out of a term of years:[d] and if there be a power to distrain, the validity of the annuity may be decided in an action of replevin.[e] The validity also of a donatio mortis causâ may be tried in an action of trover, and if the executor libels the donee for taking the subject of the gift, a prohibition will be granted.[f] But an action on the case will not lie for a mere legacy:[g] nor will assumpsit lie for a legacy upon an implied promise in consideration of assets; on the ground that no terms can be imposed on the party entitled to recover; and that if a legacy, therefore, were given to a wife (as in the principal case) the husband would recover at law, and no provision could be made for her, or her family. Lord Kenyon observed, the only case he knew of where it was said that this action might be maintained happened in the time of the Commonwealth; but the

[a] Digby *v.* Cornwallis, 3 Ch. Rep. 72.

[b] See Jackson *v.* Leaf, 1 Jac. and W. 229.

[c] 2 Salk. 415. 3 id. 223. 6 Mod. 27. 11 id. 91. Holt. 419. Ld. Raym. 937.

[d] Duppa *v.* Mayo, 1 Saund. 278.

[e] James *v.* Semmens, 2 H. B. 213.

[f] Thomson *v.* Batty, 2 Stra. 777.

[g] Nicholson *v.* Shearman, Sir T. Raym. 23. Sid. 45.

reason there given was to prevent a failure of justice, the ecclesiastical courts being at that time abolished, and the court of Chancery not having then, nor indeed until the time of Lord Nottingham, entertained any jurisdiction over the question of legacies.[a] It has been held however that assumpsit will lie upon an *express promise* by an executor to pay a pecuniary legacy in consideration of assets;[b] or on a promise in consideration of forbearance, in which case, it was said not to be material whether the executor had assets or not, being charged upon his own promise.[c]

The interest in a specific legacy vests in the legatee upon the assent of the executor, and trover therefore, after such assent, will lie for things specifically bequeathed,[d] and ejectment for a leasehold.[e]

The court of Chancery, it has been held, has no jurisdiction in regard to the distribution of money given to a charity in Scotland.[f]

The courts of some manors, as those of Mansfield, and of Cowley and Caversham in Oxfordshire, are said to have jurisdiction in testamentary matters.[g] It has been determined that the court of the Marches of Wales at Ludlow has no power to hold pleas of legacies.[h]

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[a] Deeks v. Strutt, 5 T. R. 690. Farish v. Wilson, Peake N. P. 73.

[b] Trewinian v. Howell, Cro. Eliz. 91. Atkins v. Hill, Cowp. 284. Hawkes v. Saunders, id. 289. Lewis v. Lewis, 1 H. B. 111. N. But in a modern work (Toll. Ex. 465) these cases are considered as overruled by Deeks v. Strutt.

[c] Davis v. Reyner, 2 Lev. 3. 1 Vent. 120; and see Smith v. Johns Cro. Jac. 257.

[d] Williams v. Lee, 3 Atk. 223.

[e] Doe v. Guy, 3 East. 120.

[f] Provost of Edinburgh v. Aubery, Ambl. 236.

[g] Off. Ex. 44. 2 Inst. 231. 9 Co. 37. Gilb. Eq. Rep. 207.

[h] Ellis v. Winne, Sir T. Raym. 191.

## Section II.

### *Of Parties to Suits.*

A LEGATEE can in general only sue the executor, as being the representative of the testator; and a bill therefore by a residuary legatee against the executor, and a debtor to the testator, suggesting no collusion or insolvency, was dismissed as against the latter:[a] and even where collusion was stated a ne exeat regno against the debtor was refused.[b] But where A. bequeathed a legacy, and made a husband and wife his executors, and the husband made his wife and his son executors of his will, and the legatee of A. exhibited his bill against the wife and her son, charging that the estate of A. had come to the hands of them both: the demurrer of the son was over-ruled; the Court declaring that the estate of A. in whosesoever hands ought to be liable to his legacies.[c]

If an executor dies intestate a legatee can not sue his administrator in the spiritual court, unless administration de bonis non has also been granted; for there is no privity between the testator and such administrator.[d] But if there are two executors, and the surviving one only dies intestate, the executor of the other may be sued there; and it is no objection that all vested in law in the survivor.[e] Whe-

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[a] Beckley *v.* Dorrington, cited 6 Ves. 749. Lord Redesd. Pl. 129.

[b] Graves *v.* Griffith, 1 Jac. & W. 646.

[c] Nicholson *v.* Sherman, 1 Ch. Ca. 57. 2 Freem. 181.

[d] Tucker *v.* Towell, Lee's Ca. T. Hard. 185; and see Amend *v.* Fotherbie, 2 Roll. Ab. 298.

[e] Suppl. to Off. Ex. 213, citing Guillan *v.* Gill, 1 Lev. 164.

ther an executor de son tort can be sued for legacies has been doubted.[a]

Where a man bequeathed legacies to his infant children, and made his wife (their mother) executrix, who married the defendant, and died: it was held, that the infants had no claim to an account of their father's personal estate, because they did not call upon their father-in-law to account during the life of their mother.[b]

It has been laid down generally that all executors must sue and be sued:[c] but there are necessarily some exceptions to this; as where, for instance, some of them are out of the jurisdiction of the Court.[d] So where a plaintiff in his bill against one executor alleged that he knew not who was the other, and prayed that the defendant might discover who he was; a demurrer for want of parties was overruled.[e] It seems also that in Chancery, according to the practice at law, a plaintiff need only sue the executors who have administered; and that if he makes an executor a defendant, who says he has not proved, nor intermeddled, the bill will be dismissed as against him with costs, as being an unnecessary party.[f] In the Exchequer it has been held differently in the case of an infant plaintiff.[g]

A legatee may sue on behalf of himself and other legatees; or he may sue for his own legacy only, and need not make the other legatees parties;[h] unless

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[a] See 1 Roll. Ab. 919. Swinb. P. 4. S. 23, citing Noy 13.

[b] Gratwick *v.* Freeman, Rep. T. Finch, 95; and see Smith *v.* Johns, Cro. Jac. 257.

[c] 3 Ch. Rep. 92.

[d] Cowslad *v.* Cely, Pr. Ch. 83. 2 Eq. Ab. 165.

[e] Bowyer *v.* Covert, 1 Ver. 95.

[f] Willis *v.* Walker, 1 Raithby's Ver. 90, N. 2. Brown *v.* Pittman, Gilb. Eq. R. 75.

[g] Price *v.* Vaughan, 2 Anstr. 524.

[h] Haycock *v.* Haycock, 2 Ch. Ca.

the legacies are charged on land.[a] Payment to a legatee has been ordered on motion with the consent of all parties, the assets being admitted to be ample:[b] but in a suit by a single legatee for his own legacy, unless the personal representative of the testator, by admitting assets for payment of the legacy, warrants an immediate personal decree against himself, by which he alone will be bound, the Court will direct a general account of all the legacies of the same testator, and payment of the legacy claimed rateably only with the other legacies.[c]

A residuary legatee must bring before the Court all persons interested in the residue, except where it is not necessary or convenient that all should be before the Court.[d] Thus to a bill for the moiety of a residue, the other moiety being given to A. (one of the defendants) for life, and upon her decease, to such persons as she should appoint, and, in default of appointment, to certain other persons; the Court thought these persons must be made parties, although the interest was upon such a remote contingency.[e] But it seems not necessary that a residuary legatee should be a party to a bill for a specific legacy.[f] And if one of two joint executors and residuary legatees assign his share, the assignee may sue for his moiety without making the assignor or his representative a party, unless the validity of the assignment is denied,

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124. Att. Gen. *v.* Ryder, id. 178. Dunstall *v.* Rabett, Rep. T. Finch, 243. Morse *v.* Sadler, 1 Cox, 352.

[a] Morse *v.* Sadler, 1 Cox, 352. Faithful *v.* Hunt, 3 Anstr. 751.

[b] Pearce *v.* Baron, 12 Ves. 459.

[c] Redesd. Tr. Pl. 137; and see 1 Turn. 100.

[d] 16 Ves. 328. Dunstall *v.* Rabett, Rep. T. Finch, 243. Parsons *v.* Neville, 3 Bro. 365.

[e] Sherrit *v.* Birch, 3 Bro. 229.

[f] Wainwright *v.* Waterman, 1 Ves. J. 311; and see Anon. 1 Ver. 261.

or there appears to the Court any doubt upon that head.[a]

The appointees under the will of a married woman must in general be made parties;[b] but this rule was dispensed with where they were very numerous, and the plaintiffs sued on behalf of themselves, and the other appointees.[c]

The assignee of the legatee of a term, it was held, must make the executor a party to a suit for it, although an assent to the legacy is alleged.[d]

The Attorney General must be a party to a bill for a legacy given to a charity, except where it is given to the treasurer, or other officer, of some established charitable institution, to become a part of the general funds of that institution.[e]

A husband can not sue alone for a legacy bequeathed to his wife:[f] nor can the wife, if they are divorced a mensâ et thoro, sue for it without making her husband a party.[g] In the spiritual court, it has been said, a wife may sue alone.[h] And if the husband dies before the time at which a legacy, left to his wife, is payable, she may bring a bill for it without making his representative a party; for although the husband might possibly have released it, yet that shall not be presumed.[i]

A legatee has no claim against an executor after a distribution of assets under a decree; for where the Court has taken the management of assets from

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[a] Blake *v.* Jones, 3 Anstr. 651.

[b] Court *v.* Jeffery, 1 Sim. & St. 105.

[c] Manning *v.* Thesiger, ibid. 106.

[d] Moor *v.* Blagrave, 1 Ch. Ca. 277.

[e] Wellbeloved *v.* Jones, 1 Sim. & St. 40; but see Chitty *v.* Parker, 4 Bro. 38.

[f] Clark *v.* Ld. Anglesey, Nels. 78. 2 Freem. 160. 1 Ch. Ca. 41.

[g] Anon. 2 Freem. 22.

[h] 10 Mod. 64.

[i] Brotherow *v.* Hood, Com. 725.

the executor into its own hands, it will not permit him to be charged for what has been done in pursuance of its directions.[a]

## SECTION III.

### *Of Costs.*

THE general rule in equity as to costs is, that wherever a testator has expressed himself so ambiguously as to make it necessary to come into Court, his general assets must bear the costs.[b] Thus where certain specific bequests, as well as the residue of the real and personal estate, were given over to S. on the death of A. without children; and S. filed a bill to have the property secured: the Lord Chancellor thought the costs ought clearly to be paid out of the assets of the testator, who by his will had occasioned the difficulties.[c] So where a legacy was given to such person of the name of M. who should prove that he was of the eldest line, and nearest relation of the testator; a legatee, who established his claim, was held entitled to his costs out of the general estate, except the costs of making out his pedigree.[d] And notwithstanding the offer of the executors to a legatee to inspect the accounts of the testator's estate, he will, if he files his bill for an account, be

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[a] Farrell *v.* Smith, 2 B. & B. 337.

[b] Jolliffe *v.* East, 3 Bro. 25. Att. Gen. *v.* E. Winchelsea, id. 374. 2 Cox, 364. Baugh *v.* Read, 1 Ves. J. 257. Nourse *v.* Finch, 1 Ves. J. 344. Kidney *v.* Coussmaker, 1 Ves. J. 436. Howse *v.* Chapman, 4 Ves. 542. Barton *v.* Cooke, 5 Ves. 461. Barrington *v.* Tristam, 6 Ves. 345. Wilson *v.* Brownsmith, 9 Ves. 180. Pearson *v.* Pearson, 1 Sch. & Lef. 10. Stubbs *v.* Roth, 2 B. & B. 555.

[c] Studholme *v.* Hodgson, 3 P.W. 300.

[d] Wallis *v.* Williams, Beam. on Costs, 341.

entitled to his costs; for he has a right to have an account taken with the sanction of oaths, and all the other guards against deception, which a court of equity can supply.[a]

In the same way a specific legatee,[b] or a plaintiff establishing his claim to a bond as a donatio mortis causâ,[c] or to a legacy not inserted in the will in consequence of the promise of the executor to pay it,[d] is entitled to his costs out of the general estate.

Where the devisee of land charged with a legacy mortgaged it, and the purchase-money of the estate, after a sale before the Master, turned out not sufficient to pay the legacy in full: the Vice-Chancellor refused to give the mortgagee, who was a necessary party to the suit, his costs out of the price; stating that the legatee was not to be put to expense by the improper conduct of the devisee, or the folly of his mortgagee.[e]

When however the question is not between the individual legatee and the person taking the bulk of the estate, but arises as to the interest in property clearly severed from the bulk, the expenses of questions touching that fund are to be thrown upon the fund itself.[f] Thus where a man bequeathed the residue of his estate in trust to invest in the funds, and to pay the dividends between his two daughters A. and B., for their respective lives; and in case of the death of either of them, without leaving issue, in

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[a] Sharples *v.* Sharples, 1 M'Clel. 506; but see Chapman *v.* Knell, ib. cited.

[b] Bagshaw *v.* Newton, 9 Mod. 283. Nisbett *v.* Murray, 5 Ves. 149. Barton *v.* Cooke, id. 461.

[c] Gardner *v.* Parker, 3 Mad. 184.

[d] Barrow *v.* Greenough, 3 Ves. 152.

[e] Shackleton *v.* Shackleton, 2 Sim. & St. 242.

[f] Jenour *v.* Jenour, 10 Ves. 573; and see D. Manchester *v.* Bonham, 3 Ves. 61. Irwin *v.* Farrer, 19 Ves 86.

trust to pay 500*l.*, part of the moiety of the one so dying, to his daughter C.; the residue for the survivor of his said two daughters for her life; and in case of the death of the survivor of his said two daughters A. and B. without leaving issue, then one moiety of the residue of the trust-monies to his son S., and the other to his daughter C.; and the testator afterwards erased the name of his daughter C. out of his will, and B. died without issue, after whose death, on a bill filed by the representatives of S. claiming the 500*l.*, a question arose whether the costs should be defrayed from the general residue or from the 500*l.*: it was ordered that the Master should ascertain how much of the costs related to the question arising on the will of the testator respecting the 500*l*, and how much to the residue of B.'s moiety; so much of the 500*l.* as would raise such part of the costs as the Master should apportion in respect of the 500*l.* to be sold.[a] So the costs of the Bank, who are made parties for the security of a legacy;[b] or the costs of an order requiring security for the performance of a condition annexed to a legacy,[c] are to be paid out of the legacy, and not out of the general estate. And where the question was as to a void bequest of 800*l.* to a charity, given with other legacies out of the residue of real estate devised to be sold, whether it belonged to the heir, or fell into the residue of the produce of the real estate: the Vice-Chancellor observed, the justice of the case required that the costs of the suit should be borne propor-

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[a] Skrymsher *v.* Northcote, 1 Swanst. 571.
[b] Hammond *v.* Neame, 1 Swanst 38.
[c] Colston *v.* Morris, Bea. on Costs, 390. 6 Mad. 89.

tionably by the 800*l.*, and the surplus produce of the real estates after paying the 800*l.*[a]

Nor is the general estate to bear the additional costs caused by the conduct of any of the parties. Thus where pending a suit by one of two residuary legatees against the other, the plaintiff assigned his interest, and took the benefit of the insolvent act, which caused two supplemental suits: it was held that as the costs of these had been occasioned by the acts of the plaintiff they ought to be borne by his share of the residue.[b] So where after a bill filed for establishing a will, and carrying the trusts into execution, the heir also filed a bill to have some of the legacies declared void under the statute of mortmain: the Lord Chancellor thought it just that the costs of the personal estate should come out of the personal; those of the real out of the real; and then the costs of the unnecessary bill by the heir at law would fall upon the latter.[c]

It is said to have been decided, that if a bill for the payment of a legacy be dismissed, the plaintiff will not be entitled to have his costs paid out of the testator's estate, notwithstanding there is ambiguity in the will.[d] Yet in an information for a legacy given to a charity, which was decided to be void, it was ordered that all parties should be paid their costs of the suit out of the testator's estate.[e]

A legatee, it has been held, coming in before the

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[a] Jones *v.* Mitchell, 1 Sim. & St. 290.

[b] Brace *v.* Ormond, 2 Jac. & W. 435.

[c] Leacroft *v.* Maynard, 1 Ves. J. 279.

[d] Newl. Ch. Pr. 397, citing Lister *v.* Sherringham, in the Exch. H. T. 1816; and see 1 Mad. 394. Burgess *v.* Robinson, 3 Mer. 7.

[e] Att. Gen. *v.* Hinxman, 2 Jac. & Walk. 270.

master, and not party to the cause, shall have his costs; for it was in his power to have brought a bill for his legacy, which would have put the estate to further charge.[a] And where upon a bill by a residuary legatee in Chancery, and a decree for administration of assets, legatees, who had previously filed their bill in the Exchequer, were restrained from any further proceedings in that court, they were allowed the costs of their suit up to the time of their having notice of the decree.[b] A legatee also establishing a paper in the ecclesiastical court is entitled to have his expenses paid out of the estate.[c]

The Court refused costs against a legatee found illegitimate by verdict, and claiming a legacy as a legitimate child, as he had always borne the name of the family, and been received in it.[d] And where again a plaintiff claimed a legacy, which was decided to have been adeemed by advancement in the testator's lifetime, the bill was dismissed without costs, Lord Manners saying, it was a family cause, and a proper point to come before the Court, and was raised by the testator himself.[e]

In charity cases costs have sometimes been given as between solicitor and client.[f] But it has been held that in a bill by one residuary legatee against another, costs, as between solicitor and client, can not be given out of the estate without consent.[g] In the Exchequer an order to pay costs as between

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[a] Maxwell v. Wettenhall, 2 P.W. 26.

[b] Jackson v. Leaf, 1 Jac. and W. 229; and see Clarke v. E. Ormonde, 1 Jac. 122.

[c] Sutton v. Drax, 2 Phill. 323.

[d] Forbes v. Taylor, 1 Ves. J. 99.

[e] Monck v. Lord Monck, 1 B. and B. 298.

[f] Moggridge v. Thackwell, 1 Ves. J. 475. 7 id. 88. Att. Gen. v. Carte, Bea. on costs, 343. 1 Dick. 113; and see Bea. on costs, 214.

[g] Fenner v. Taylor, 5 Mad. 470. 6 id. 3.

attorney and client is never made under any circumstances.[a]

Costs are not included in "*testamentary expenses*," which must be confined to the usual charges of probate, &c.[b]

Under a decree for administration of assets, the master to make "*all just allowances;*" these words were held (contrary to the opinion of the Master of the Rolls) to include the payment of legacies, as the plaintiffs (the residuary legatees) would be entitled to nothing until the legacies were paid.[c]

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[a] Bea. on costs, 216. Fontaine v. Tyler, 9 Pri. 105.

[b] Browne v. Groombridge, 4 Mad. 502.

[c] Nightingale v. Lawson, 1 Cox, 23.

# APPENDIX.

## 36 Geo. III. 52.

**An Act for repealing certain Duties on Legacies and Shares of Personal Estates, and for granting other Duties thereon, in certain Cases.**[a] [26th April, 1796.]

The first and second sections repeal the duties imposed by 20 Geo. III. 28, 23 Geo. III. 58, and 29 Geo. III. 51, and grant new ones in lieu: these were added to by 45 Geo. III. 28. Those given

[a] Two or three cases have occurred as to these duties attaching on wills of testator's residing abroad. Where a man in India made his will there, giving all his real and personal estate in trust for his natural children to be paid them on attaining the age of twenty-one; and died in that country, and one of the executors proved the will there, possessed himself of the property, and came over to England, and died before any of the legatees were of age; and the co-executor then proved the will in England, and the property was thereupon paid over to him, and the legatees were also all resident here: it was held that the duty attached.[a] So where one of the residuary legatees of a testator in the East Indies took out administration here, and executed a power to A. and B. to settle all accounts, and receive all monies due to him *as such administrator*, and the balance was remitted from India to A. and B. accordingly; it was held that this money was subject to the duty.[b] In a late case a testator in India bequeathed the residue of his estate and effects to his brother A. and his sister B. in Scotland, but in case his sister should die before him leaving children, her children to have the share she would have been entitled to; and the testator's sister died before him, and after his death the executor remitted to his agents in England part of the estate with directions to pay one moiety of it to A., and the other to B. or her children; and the children instituted a suit against the agents for their moiety, which was accordingly paid into court. Sir J. Leach observed, that if a testator died in India, and his personal estate was wholly in India, and his executor was resident there, and the will was proved there, and the executor remitted to a legatee in England, or to some other person in England, for the specific use of the legatee, the amount of his legacy, he was of opinion that the legacy duty was not payable upon such remittance, inasmuch as the whole estate was administered in India, and the remittance was in respect of a demand which was to be considered as established there. But if a part of the assets of the testator was found in England, in the hands of the agent of such executor, without any specific appropriation, and a legatee in England instituted a suit here for the payment of his legacy out of such unappropriated assets, then such assets were to be considered as administered in England, and the legacy duty was payable in respect of them. That in the principal case the sum in question was remitted by the executor in India to the defendants for

[a] Att. Gen. v. Cockerell, 1 Pri. 165. [b] Att. Gen. v. Beatson, 7 Pri. 560.

by the last act were repealed by 48 Geo. III. 149, and new duties substituted, which were again altered by 55 Geo. III. 184, and for which see post.

Duties to be under the management of the commissioners for stamps.

III. And be it further enacted, That the said Duties shall be under the care, management, and direction, of the commissioners for the time being appointed to manage the duties on stamped vellum, parchment, and paper; who, or the major part of them, are hereby empowered and required to employ the necessary officers under them for that purpose, and to cause four new stamps to be provided to denote the several rates of duty hereby imposed; that is to say, one stamp to denote the rate of two pounds per centum, one other stamp to denote the rate of three pounds per centum, one other stamp to denote the rate of four pounds per centum, and one other stamp to denote the rate of six pounds per centum, and the same to alter or renew whenever it shall be requisite, and to do all things necessary for carrying this act into execution, according to the rules, methods, and directions, herein contained, in as full and ample a manner, as they, or the major part of them, are authorized and empowered to put in execution any law concerning stamped vellum, parchment, or paper.

Commissioners to appoint receivers of the duties, and to keep accounts, shewing the personal estates in respect of which the duties have been paid.

IV. And be it further enacted, That the said commissioners shall, by writing under their hands and seals, or the hands and seals of the major part of them, appoint proper persons in the several counties, shires, stewartries, ridings, and divisions, in Great Britain, as occasion shall require, to collect and receive the duties hereby imposed, and to keep proper accounts thereof, to be transmitted to the head office of the said commissioners; and upon payment of any such duty, if paid at the head office of the said commissioners, the said commissioners shall cause the same to be duly entered in their books, and to be set down therein to the account of the personal estate in respect whereof the said duty shall be paid, and shall make like entries in their books, upon transmission of the proper accounts for that purpose from the several officers to be appointed by the said commissioners in the different counties, shires, stewartries, ridings, and divisions, aforesaid, to whom they shall from time to time give proper orders for such purpose; and the accounts of such payments shall be kept, with

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the purpose of being paid to B., the residuary legatee; and if B. had been the residuary legatee, and the payment had been made to her accordingly, the legacy duty would not have been payable here. But B. had died in the lifetime of the testator, and the gift of the residue to her had lapsed, and her children, the plaintiffs, were the residuary legatees; and their bill was filed, not upon the ground of a specific appropriation of this sum to them by the executor, for no such appropriation had been made, but upon the ground of their title under the will as residuary legatees, and because the sum in question was admitted to be part of the testator's residuary estate. This sum, therefore, was estate of the testator administered here, and the legacy duty was, for that reason, payable. Logan v. Fairlie, 2 Sim. & St. 284.

proper references, in alphabetical order, according to the surname of the testator, testatrix, or intestate, in respect of whose personal estate such payments shall have been made respectively, so that it may at all times appear upon the books of the said commissioners, what payments have been made in respect of the personal estate of any testator, testatrix, or intestate.

Commissioners may provide printed receipts, which may be used, or others of the like forms.

V. And, in order that all persons may be enabled to take receipts and discharges on the payment or satisfaction of any legacy, or residue of any personal estate, or any part thereof, according to the directions prescribed by this act: be it further enacted, That it shall be lawful for the said commissioners of stamp duties, from time to time, to provide sufficient quantities of paper adapted for such receipts or discharges as aforesaid, and to cause to be printed thereon the form of words in the schedule hereunto annexed; and it shall also be lawful for any of his Majesty's subjects, requiring such receipts or discharges, to cause the same to be duly filled up with sums, names, and date, according to the provisions before-mentioned, and also upon any vellum or parchment, or upon any other paper not provided by the said commissioners, to use the like form whenever there shall be occasion.

Duties to be paid by executors or administrators on retaining or paying legacies.

VI. And be it further enacted, That the duties hereby imposed shall, in all cases in which it is not hereby otherwise provided, be accounted for, answered, and paid, by the person or persons having or taking the burthen of the execution of the will or other testamentary instrument, or the administration of the personal estate of any person deceased, upon retainer for his, her, or their own benefit, or for the benefit of any other person or persons, of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue, which he, she, or they shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons; and also upon delivery, payment, or other satisfaction or discharge whatsoever, of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue, to which any other person or persons shall be entitled; and in case any person or persons having or taking the burthen of such execution or administration as aforesaid, shall retain for his, her, or their own benefit, or for the benefit of any other person or persons, any legacy, or any part of any legacy, or the residue of any personal estate, or any part of such residue, which such person or persons shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons, and upon which any duty shall be chargeable by virtue of this act, not having first paid such duty, or shall deliver, pay, or otherwise howsoever satisfy or discharge any legacy, or any part of any legacy, or the

If duty be not paid before legacies are retained by executors, or discharged, they having deducted it, the amount to be a debt from them to his Majesty; and if they pay legacies without deducting the

duty, it shall be a debt from both parties.

residue of any personal estate, or any part thereof, to which any other person or persons shall be entitled, and upon which any duty shall be chargeable by virtue of this act, having received or deducted the duty so chargeable, then and in every of such cases, the duty which shall be due and payable upon every such legacy, and part of legacy and residue, and part of residue respectively, and which shall not have been duly paid and satisfied to his Majesty, his heirs and successors, according to the provisions of this act, shall be a debt of such person or persons having or taking the burthen of such execution or administration as aforesaid, to his Majesty, his heirs and successors; and in case any such person or persons so having or taking the burthen of such execution or administration as aforesaid, shall deliver, pay, or otherwise howsoever satisfy or discharge any such legacy or residue, or any part of any such legacy or residue, to or for the benefit of any person or persons entitled thereto, without having received or deducted the duty chargeable thereon, (such duty not having been first duly paid to his Majesty, his heirs or successors, according to the provisions herein contained), then and in every such case such duty shall be a debt to his Majesty, his heirs and successors, both of the person or persons who shall make such delivery, payment, satisfaction, or discharge, and of the person or persons to whom the same shall be made.

What shall be deemed legacies within the intent of this act.—See also 45 Geo. III. 28. 4.

VII. And be it further enacted, That any gift by any will or *testamentary instrument*[a] of any person dying after the passing of this act, which shall, by virtue of such will or testamentary instrument, have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and

[a] An important case in respect of the possibility of evading the legacy duty has been decided in the Exchequer. By indenture, dated the 25th of March, 1813, W. F. in consideration of 10*s.* bargained, sold, &c. to A. & B. a leasehold house, a sum of 7500*l.* in the funds, and all other the personal estate which should belong to him at the time of his decease, in trust for himself for life, and after his decease to apply the produce for the maintenance and education of H. F. until twenty-one or marriage, and then in trust for H. F., her executors, &c., with a proviso for W. F. by deed or will to revoke or alter all or any of the trusts. Afterwards W. F. made his will, by which he confirmed the deed, except where it was altered by his will, and after giving some legacies appointed A. and B. his executors. At the death of W. F. the house remained in his possession; the stock was standing in his name, never having been transferred to the trustees; and he retained the entire possession of all the other property mentioned in the deed, as well as the custody of the deed itself. It was held (dissentiente Wood B.) that the deed itself was to be considered as a testamentary instrument, or that, in all events, the deed and the will together were testamentary; and that the duty therefore attached upon the property that H. F. took under them. Att. Gen. v. Jones, 3 Pri. 368.

taken to be a legacy within the intent and meaning of this act, whether the same shall be given by way of annuity or in any other form, and whether the same shall be charged only on such personal estate, or charged also on real estate of the testator or testatrix who shall give the same; except so far as the same shall be paid or satisfied out of such real estate, in a due execution of the will or testamentary instrument by which the same shall be given; and every gift which shall have effect as a donation mortis causa, shall also be deemed a legacy within the intent and meaning of this act.

VIII. And be it further enacted, That the value of any legacy given by way of annuity, whether payable annually or otherwise, for any life or lives, or for years determinable on any life or lives, or for years or other period of time, shall be calculated, and the duty chargeable thereon shall be charged, according to the tables in the schedule hereunto annexed; and the duty chargeable on such annuity shall be paid by four equal payments, the first of which payments of duty shall be made before or on completing the payment of the first year's annuity, and the three others of such payments of duty shall be made in like manner successively, before or on completing the respective payments of the three succeeding years' annuity respectively; and the value of any such annuity, if determinable upon any contingency besides the death of any person or persons, shall be calculated without regard to such contingency: provided always, that if any such annuity shall determine by the death of any person, before four years payment of such annuity shall become due and payable, then and in such case the duty shall be payable in proportion only to so many of the payments of the said annuity as actually accrued and became due and payable; and in case any such annuity shall at any time determine upon any other contingency than the death of any person or persons, then and in such case, not only all payments of duty which would otherwise become due after the happening of such contingency, if any such would become due, shall cease; but it shall be lawful for the person or persons who shall have paid any duties which shall have previously become due, to apply for and obtain a return of so much of the duty so paid, as will reduce the same to the like duty as would have been payable by such person or persons for such annuity, calculated according to the term for which the same shall have endured; which abatement the said commissioners for management of the stamp duties shall settle and determine according to the tables in the schedule hereunto annexed, and shall cause the amount of such abatement to be paid to the person or persons entitled to the same, out of any monies in their hands arising from the duties imposed by this act.

The value of annuities, and the duty, to be calculated according to the annexed tables, and the duty paid by instalments, &c.

IX. And be it further enacted, That the value of any legacy given

The value of annuities

payable out of legacies, and the duty, to be calculated according to the annexed tables, and the duty to be charged on the value of such legacies after deducting such annuities, &c.

by way of annuity for any life or lives, or for years determinable on any life or lives, or for years or other period of time, and charged on and made payable out of any other legacy or legacies, shall be calculated, and the duty shall be charged thereon, in the same manner as hereinbefore directed with respect to other annuities; and the duty on the legacy charged with such annuity, if any duty shall be payable for such legacy, shall be calculated on the value of such legacy, after deducting the value of such annuity; and the duty for such annuity shall be paid by the person or persons entitled to the legacy or legacies charged with such annuity, by four equal payments, in the same manner as the same would be payable according to the provisions hereinbefore contained, if such annuity had been a direct gift to the annuitant, and subject to the like proviso in case such annuity shall determine before four years payment shall become due; and the payment which shall be made for such duty, shall be retained by the person or persons paying the same, out of the first four years' payments of such annuity, if so many shall become due, or out of so many of such payments as shall become due by equal portions.

Duty on legacies given to purchase annuities to be calculated on the sums necessary to purchase them.

X. And be it further enacted, That the duty payable upon any legacy given by direction to purchase with any personal estate of the testator or testatrix, or any part thereof, an annuity of a certain amount for the life or lives of any person or persons, or any other term, shall be calculated upon the sum necessary to purchase such annuity according to the tables beforementioned, and shall be deducted from such sum, and paid as in the case of other pecuniary legacies; and the person or persons paying or satisfying such legacy, and the person or persons for whose benefit the same shall be paid or satisfied, shall be discharged, by payment of such duty so calculated as aforesaid, from all other demands in respect of the duty payable on such legacy; and the annuity to be purchased for the benefit of the person or persons entitled to the benefit of such legacy, shall be reduced in proportion to the amount of the duty payable thereon as aforesaid, such reduction to be calculated in the same manner as the duty so payable is hereinbefore directed to be calculated; and the purchase of such reduced annuity, together with the payment of such duty, shall satisfy and discharge such legacy as fully as if an annuity had been purchased equal in amount to the annuity so directed to be purchased.

Duty on legacies whose value can only be ascertained by application of the allotted fund, to be charged on the money as applied.

XI. And be it further enacted, That if any benefit shall be given by any will or testamentary instrument, in such terms that the amount or value of such benefit can only be ascertained from time to time, by the actual application for that purpose of the fund allotted for such purpose, or made chargeable therewith; or if the amount or value of any benefit given by any will or testamentary instrument, cannot, by reason of the form and manner of the gift, be so ascertained that the

duty can be charged thereon under any other of the directions herein contained; then and in every such case, such duty shall be charged upon the several sums of money or effects which shall be applied from time to time for the purposes directed by such will or testamentary instrument, as separate and distinct legacies or bequests, and shall be paid out of the fund applicable for such purposes, or charged with answering the same.

How duty on legacies enjoyed by persons in succession, or having partial interests therein, shall be charged,

XII. And be it further enacted, That the duty payable on a legacy or residue, or part of residue, of any personal estate, given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, who shall be chargeable with the duties hereby imposed at one and the same rate, shall be charged upon and paid out of the legacy or residue, or part of residue, so given, as in the case of a legacy to one person; and where any legacy or residue, or part of residue, shall be given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, some or one of whom shall be chargeable with no duty, or some of whom shall be chargeable with different rates of duty, so that one rate of duty can not be immediately charged thereon, all persons who, under or in consequence of any such bequest, shall be entitled for life only, or any other temporary interest, shall be chargeable with the duty in respect of such bequest, in the same manner as if the annual produce thereof had been given by way of annuity; and such persons respectively shall be so chargeable with such duty, and the same shall be payable when they shall respectively become entitled to and begin to receive such produce, and shall be paid by equal portions during the aforesaid term of four years, if they shall so long continue to receive such produce; and where any other partial interest shall be given, or shall arise out of such property so to be enjoyed in succession, the duty on such partial interest shall be charged and paid in the same manner as the duty is hereinbefore directed to be charged and paid in like cases of partial interests, charged on any property given, otherwise than to different persons in succession; and all and every person and persons who shall become absolutely entitled to any such legacy or residue, or part of residue, so to be enjoyed in succession, shall, when and as such person or persons respectively shall receive the same, or begin to enjoy the benefit thereof, be chargeable with and pay the duty for the same, or such part thereof as shall be so received, or of which the benefit shall be so enjoyed, in the same manner as if the same had come to such person or persons immediately on the death of the person by whom such property shall have been given to be enjoyed, or in such manner that the same shall be enjoyed in succession.

and by whom payable.

XIII. And be it further enacted, That the duty payable on any legacy or residue, or part of residue, so given to, or so to be enjoyed

by different persons in succession, upon whom the duty shall be chargeable at one and the same rate, shall be deducted and paid by the person or persons having or taking the burthen of the execution of the will or testamentary instrument under which the title thereto shall arise, upon payment or other satisfaction or discharge of every or any part of such legacy or residue, or part of residue, to any trustee or trustees, or other person or persons to whom the same shall be payable or paid in trust or for the benefit of the persons so entitled thereto in succession; and if the same shall not be so paid or satisfied to any such trustee or trustees, then such duty shall be deducted and paid out of the capital of the property so given, upon receipt, by any of the persons so entitled in succession, of any produce of such capital, or any part thereof, according to the amount of the capital of which such produce shall be so received; and where the duty chargeable upon any such bequest for the benefit of or to be enjoyed by different persons in succession, shall be chargeable at different rates, so that the same cannot be paid at one and the same time, but must be paid in succession as aforesaid, then and in such case, all and every the person and persons having or taking the burthen of the execution of the will or testamentary instrument in which such bequest shall be contained, shall be chargeable with such duties in succession, in the same manner as such persons would be chargeable with the like duties in case of immediate bequest; unless the property bequeathed shall have been paid or otherwise satisfied to or vested in any trustees or trustee as aforesaid, in which case such trustees or trustee, or his, her, or their representatives, shall be chargeable with the duties for and in respect of such property so vested in him, her, or them respectively, in such and the same manner as if he, she, or they, had had or taken the burthen of the execution of the will or testamentary instrument, by which such bequest shall have been made; and in like manner, where any partial interest shall be given, or shall arise out of any such property so to be enjoyed in succession, and such partial interest shall be satisfied or paid by the person or persons so enjoying such property, such person or persons shall be chargeable with the duties for and in respect of such partial interest, and shall retain and pay the same accordingly, in such and the same manner as if he, she, or they had had or taken the burthen of the execution of the will or testamentary instrument, by which such partial interest shall have been created; and in all such cases the person or persons so chargeable with duty, shall be debtors to the King's Majesty, his heirs and successors, in like manner, and shall be subject to the like penalties, as the person or persons having or taking the burthen of the execution of such will or testamentary instrument, are hereby made chargeable and subject to.

XIV. Provided always, and be it further enacted, That no duty shall be paid on any articles of plate, furniture, or other things, not yielding any income, and given to or for the benefit of, or so as that the same be enjoyed by, different persons in succession, whilst the same shall be so enjoyed in kind only by any person or persons not having any power of selling or disposing thereof, so as to convert the same into money or other property yielding an income; but if the same shall be actually sold or disposed of, or shall come to any person or persons having power to sell or dispose thereof, or having an absolute interest therein, then, and in each and every such case, the same duty shall be chargeable and paid thereon as if the same had been originally given absolutely, and with full power to sell or dispose thereof, and shall be chargeable upon and paid by the person or persons for whose benefit the same shall be sold, or who shall have power to sell or dispose thereof, or an absolute interest therein, and shall become the debt of such person or persons; but shall not be a charge on any person or persons by reason of his, her, or their having assented to such bequest, as the person or persons having or taking the burthen of the execution of the will or testamentary instrument by which such bequest shall have been made.

Plate, &c. while enjoyed in kind, not liable to duty till in possession of persons having power to dispose thereof.

XV. Provided always, and be it further enacted, That where any legacy, or any residue or part of residue, shall be so given by any will or testamentary instrument, that different persons shall become entitled thereto in succession, the duty shall be charged thereon as given to be enjoyed in succession, whether the person or persons entitled thereto shall take the same under or by virtue of such will or testamentary instrument, and the dispositions therein contained, or in default of such dispositions, and as entitled by intestacy.

Duty on legacies enjoyed in succession to be charged as such, whether taken under wills or by intestacy.

XVI. And be it further enacted, That where any legacy, or residue or part of residue, shall be given to or for the benefit of any person or persons in joint tenancy, some or one of whom shall be chargeable with any duty hereby imposed, and some or one of whom shall not be so chargeable, the person or persons chargeable with duty shall pay such duty in proportion to the interest of such person or persons respectively in such bequest; and if any person or persons chargeable with duty, and entitled in joint tenancy as aforesaid, shall become entitled by survivorship, or by severance of the joint tenancy, to any larger interest in the property bequeathed, than that in respect of which such duty shall have been paid, then, and in such case, all and every such person or persons so becoming entitled by survivorship, or by severance, shall be charged with the same duty as if the property to which such joint tenant or joint tenants shall so become entitled

Duty on legacies in joint tenancy to be paid in proportion to the interest of the parties.

had been originally given to or for the benefit of such person or persons only.

Duty on legacies subject to contingencies, to be charged as for absolute bequests, &c.

XVII. And be it further enacted, That when any legacy, or any residue or part of residue, shall be given, subject to any contingency which may defeat such gift, and whereupon the same may go to some other persons or person, such bequest (unless chargeable as an annuity under the provisions herein contained) shall be charged with duty as an absolute bequest, to the person or persons who shall take the same subject to such contingency, and such duty shall be paid out of the capital of such legacy, or residue or part of residue, notwithstanding the same may, upon such contingency, go to some person not chargeable with the same duty, or with any duty; and if such contingency shall afterwards happen, and the property so bequeathed shall thereupon go in such manner that the same, if taken immediately after the death of the testator or testatrix, under the same title would have been chargeable with a higher rate of duty than the duty so paid, the person or persons becoming entitled thereto, shall be charged with and shall pay the difference between the duty so paid, and such higher rate of duty.

How duty on legacies subjected to power of appointment shall be charged;

XVIII. And be it further enacted, That where any legacy, or the residue or any part of the residue, of any personal estate, shall be subjected to any power of appointment to or for the benefit of any person or persons specially named or described as objects of such power, such property shall be charged with duty as property given to different persons in succession; and in so charging such duty, not only the person and persons who shall take previous or subject to such power of appointment, but also any person and persons who shall take under or in default of any such appointment, when and as they shall so take respectively, shall, in respect of their several interests, whether previous, or subject to, or under, or in default of such appointment, be charged with the same duty, and in the same manner, as if the same interests had been given to him, her, or them respectively, in and by the will or testamentary disposition containing such power, in the same order and course of succession as shall take place under and by virtue of such power of appointment, or in default of execution thereof, as the case may happen to be; and where any property shall be given for any limited interest, and a general and absolute power of appointment shall also be given to any person or persons to whom the property would not belong in default of such appointment, such property, upon the execution of such power, shall be charged with the same duty, and in the same manner, as if the same property had been immediately given to the person or persons having and executing such power, after allowing any duty before paid in respect thereof; and

where any property shall be given with any such general power of appointment, which property in default of appointment will belong to the person or persons to whom such power shall also be given, such property shall be charged with, and shall pay the duty by this act imposed, in the same manner as if such property had been given to such person or persons absolutely in the first instance, without such power of appointment.

and how on personal estates directed to be applied in purchase of real estates.

XIX. And be it further enacted, That any sum of money or personal estate, directed to be applied in the purchase of real estate, shall be charged with and pay duty as personal estate; unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession, shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued; but no duty shall accrue in respect thereof, after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so applied: provided nevertheless, that in case before the same or some part thereof shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase.

Estates pur auter vie applicable as personal estates, to be charged as such.

XX. And be it further enacted, That estates pur auter vie, applicable by law in the same manner as personal estate, shall be charged with the duties hereby imposed as personal estate.

Money left to pay duty not chargeable as a legacy.

XXI. Provided always, and be it further enacted, That if any direction shall be given, by any will or testamentary instrument, for payment of the duty chargeable upon any legacy or bequest out of some other fund, so that such legacy or bequest may pass to the person or persons to whom or for whose benefit the same shall be given, free of duty, no duty shall be chargeable upon the money to be applied for the payment of such duty, notwithstanding the same may be deemed a legacy, to or for the benefit of the person or persons who would otherwise pay such duty.

Mode of ascertaining duty on property not reduced into money.

XXII. And be it further enacted, That in cases of specific legacies, and where the residue of any personal estate shall consist of property which shall not be reduced into money, it shall be lawful for the person or persons having or taking the burthen of the administration of such effects, or the person or persons by whom the duty thereon ought

to be paid, to set a value thereon, and offer to pay the duty according to such value; or to require the commissioners for management of the stamp duties, to appoint a person to set such value, at the expense of the person or persons by whom such duty ought to be paid; and it shall be lawful for the commissioners to accept the duty offered to be paid, upon the value set by the person or persons having or taking the administration of such effects, or by whom the duty for the same shall be payable, without such appraisement, if the said commissioners shall think fit so to do; but if the said commissioners shall not be satisfied with the value so set, on which the duty shall be so offered, it shall be lawful for the said commissioners, notwithstanding such offer, to appoint a person to appraise such effects, and to set the value thereon, on which value so set the said commissioners shall assess the duty payable in respect thereof, and require the same to be paid; but if the person or persons by whom such duty shall be payable, shall not be satisfied with the valuation made under the authority of the said commissioners, and pay the duty accordingly, it shall be lawful for such person or persons to cause the valuation so made under the authority of the said commissioners, to be reviewed by the commissioners of the land tax for the time being, of the district or place where such effects shall be, at their next meeting, after the said commissioners for management of the stamp duties shall have assessed and required payment of such duty as aforesaid, if fourteen days shall have elapsed between such time and the meeting of the said commissioners of land tax, and if not, then at the next succeeding meeting of the said commissioners, of which appeal six days notice shall be given to the said commissioners of stamp duties; and the said commissioners of the land tax shall and may (if they think fit) appoint a person to appraise such effects, and set a value thereon, and shall and may hear and determine such appeal, in the same manner as in any other cases of appeal to them, and with the like authorities, and their judgment shall be final; and if the valuation made under the authority of the said commissioners of the stamp duties in the case last-mentioned, shall not be duly appealed from within the time aforesaid, or shall be affirmed upon appeal, the duty shall be paid according to such valuation; and if any variation shall be made on such appeal, the duty shall be paid according to such variation; and if the duty assessed in manner aforesaid, shall exceed the duty offered to and refused by the said commissioners of stamp duties, the expense of such appraisement and other proceedings in assessing such duty, shall be borne by the person or persons by whom such duty shall be payable; and if any dispute shall arise between any person or persons entitled to any such legacy, or residue or part of residue, and any person or persons having or taking the burthen of the administration of such effects,

with respect to the value thereof, or with respect to the duty to be paid thereon, the duty shall be assessed by the said commissioners of stamp duties on reference to them by either party for that purpose; and if the value of any property on which such duty ought to be paid shall be in dispute, the said commissioners of the stamp duties shall cause an appraisement to be made thereof, at the expense of the person or persons by whom such duty ought to be paid, in the manner herein-before directed in other cases, and assess the duty thereon accordingly; and if such person or persons by whom such duty ought to be paid, shall be dissatisfied with such valuation, or with the assessment of duty made upon such valuation by the said commissioners of the stamp duties, the same shall be reviewed and finally determined by the said commissioners of the land tax, upon appeal to them within the time, and under the restrictions, and in the manner herein-before directed in other cases; but if such valuation or assessment shall not be duly appealed from within the time limited for that purpose, or shall be affirmed upon appeal, the duty shall be paid according thereto; and if any variation shall be made therein on such appeal, the duty shall be paid according to such variation; and in case the effects whereon any such duty shall be payable shall be at the distance of ten miles from London, then, and in such case, it shall be lawful to make the like application to such person as shall be deputed for that purpose by the said commissioners to act in their stead, in such cases, within the county or district in which such effects shall be; and such person so deputed shall act in such cases, in all respects, in the same manner as the said commissioners are hereby authorized to act, subject nevertheless to the instructions and controul of the said commissioners.

Duty on legacies not satisfied in money, &c. to be paid according to the value of the satisfaction.

XXIII. And be it further enacted, That where any legacy, or part of any legacy, or residue, or part of residue, whereon any duty shall be chargeable by this act, shall be satisfied otherwise than by payment of money or application of specific effects for that purpose, or shall be released for consideration, or compounded for less than the amount or value thereof, then, and in such case, the duty shall be charged and paid in respect of such legacy, or part of legacy, or residue, or part of residue, according to the amount or value of the property taken in satisfaction thereof, or as the consideration for release thereof, or composition for the same: provided always, that if any legacy or bequest shall be made in satisfaction of any other legacy, or bequest, or title to any residue, or part of residue, of any personal estate remaining unpaid, the duty shall not be paid on both subjects, although both may be chargeable with duty, but shall be paid on the subject yielding the largest duty.

If legatees refuse to accept

XXIV. And be it further enacted, That if any person or persons

legacies, duty deducted, the court, in case of suit, may order them to pay costs;

having or taking the burthen of the execution of the will or other testamentary instrument, or the administration of the personal estate of any person deceased, or any other person or persons hereby made chargeable with duty, shall declare himself, herself, or themselves ready and willing, and shall accordingly offer to pay any pecuniary legacy, or residue, or part of residue, deducting the duty payable thereon, or shall in like manner offer to deliver or otherwise dispose of any specific legacy, or any specific property, part of any residue of any personal estate, to or for the benefit of the person or persons entitled thereto, or to any trustee or trustees for such person or persons, upon payment of the duty payable in respect thereof, and the person or persons entitled to such legacy, or residue, or part of residue, or the trustee or trustees for such person or persons, shall refuse to accept such offer, and to give a proper release and discharge for such legacy or residue, or so much thereof as shall be offered to be paid, delivered, or otherwise disposed of as aforesaid, then, and in such case, although no actual tender shall be made, if any suit shall be afterwards instituted for such legacy or effects, respecting which such offer shall have been made, it shall be lawful for the court in which such suit shall be instituted, to order all costs, charges, and expenses attending the same, to be paid by the person or persons who shall have refused to accept such offer, and to give or join in such release or discharge, or to order such costs, charges, and expenses, to be deducted and retained out of such legacy or effects, together with the duty payable thereon, as the said court shall see fit; and in case any suit shall be instituted for payment of any legacy, or residue, or part of residue, of any personal estate, and the person or persons sued for the same shall be desirous of staying proceedings in such suit, on payment of the money due, or delivering, or otherwise disposing of the specific effects demanded, after deducting or receiving the duty payable thereon, it shall be lawful for the court in which such suit shall be instituted, if it shall see fit, on application in a summary way, to make such order for payment of such legacy, or residue, or part of residue, or for delivering or otherwise disposing of such effects, and for payment of the duty payable thereon, and all such costs, charges, and expenses, attending such suit as shall be just.

and in suits where the party sued may wish to stop proceedings on payment of bequests, deducting duty, the court may make order therein.

If suit be instituted concerning administration, the court to provide for payment of the duty.

XXV. And be it further enacted, That if any suit shall be instituted concerning the administration of the personal estate of any person dying testate or intestate, or any part of such estate in which any direction shall be given touching the payment of any legacies or legacy of such person, or the residue of his or her personal estate, or any part thereof, the court wherein such suit shall be instituted shall, in giving directions concerning the same, provide for the due payment of the duties hereby imposed; and in taking any account of any personal

estate, or otherwise acting concerning the same, such court shall take care that no allowance shall be made in respect of any legacy, or part of legacy, or of any residue, or part of residue, in any manner whatsoever, without due proof of the payment of the duties hereby imposed.

Executors may discharge legacies on payment of the duty accrued.

XXVI. Provided always, and be it further enacted, That any person or persons having or taking the burthen of the execution of any will or other testamentary instrument, or the administration of the personal estate of any person deceased, may from time to time pay, deliver, or otherwise dispose of any legacy, or any part of any legacy, or make distribution of any part of the residue of any personal estate, on payment, from time to time, of such proportions of the duty hereby imposed, as shall accrue in respect of such part of such personal estate as shall be so administered.

No legacy, liable to duty, to be paid without a receipt, containing certain particulars;

XXVII. And be it further enacted, That no person or persons having or taking the burthen of the execution of any will or testamentary instrument, or the administration of the personal estate of any person deceased, nor any trustee or trustees, or other person or persons hereby directed and required to account for any duty, shall, from and after the passing of this act, pay, deliver, or otherwise dispose of, or in any manner satisfy, discharge, or compound for, any legacy whatsoever, or any part thereof, or the residue of any personal estate, or any part thereof, in respect whereof any duty is hereby imposed, without taking a receipt or discharge in writing for the same, expressing the date of such receipt or discharge, and the names of the testator, testatrix, or intestate, under whose will or testamentary disposition, or upon whose intestacy the title to such legacy or part of legacy, or to such residue, or part of residue, shall accrue, and of the person or persons to whom such receipt or discharge shall be given, and of the person or persons to whom such legacy or residue, or part of residue, shall have been given, or shall have belonged in consequence of intestacy, and the amount or value of the legacy or part of legacy, or residue or part of residue, for which such receipt or discharge shall be given, and also the amount and rate of the duty payable and allowed thereon; and that no written receipt or discharge for any legacy or part of any legacy, or for the residue of any personal estate, or any part of such residue, in respect whereof any duty is hereby imposed, shall be received in evidence, or be available in any manner whatever, unless the same shall be stamped, as required by this act; and no evidence whatsoever shall be given of any payment, satisfaction, or discharge whatsover, or of any release or composition of such legacy, or any part thereof, or of such residue, or any part thereof, without producing such receipt or discharge, duly stamped as aforesaid, unless the actual payment of the duty hereby imposed shall first be given in

no receipt available unless duly stampt, &c.

Copy of entry at Stamp-office of payment of duty, evidence. Stampt receipts for annuities not required but on completing payments for each of the first four years.

evidence: provided always, that a copy of the entry, in the books of the commissioners of the stamps, of the payment of such duty, shall be admitted as evidence thereof: provided also, that payment of any annuity shall not be deemed a payment for which such stamped receipt shall be required, under the directions of this act, except the several payments which shall complete the payments for each of the first four years during which such annuity shall be payable: and in like manner any payment in respect of any legacy or bequest, hereby directed to be charged with the duty in the same manner as annuities are hereby made chargeable with duty, shall not be deemed a payment for which such stamped receipt shall be required, except the several payments which shall complete the payments for each of the first four years, in respect of which such legacy or bequest shall be chargeable with duty as an annuity.[a]

Penalty of 10*l.* per cent. for paying or receiving legacies without stampt receipts.

XXVIII. And be it further enacted, That any person having or taking the burthen of the execution of any will or testamentary instrument, or the administration of the personal estate of any person deceased, and any trustee or trustees, or other person or persons, hereby directed and required to account for any duty, who shall pay, deliver, or otherwise dispose of, or in any manner satisfy or discharge, or compound for any legacy given by such will or testamentary instrument, or the residue, or any part of the residue, of such personal estate, to or for the benefit of any person or persons entitled to such legacy, or any part thereof, or to such residue, or any part thereof, without taking such receipt or discharge in writing as aforesaid, and causing the same to be stamped within the time hereby allowed for stamping the same, shall forfeit and lose the sum of ten pounds per centum on the sum of money, or the value of the property if not money, for which such receipt or discharge ought to have been given in pursuance of this act; and all and every person and persons receiving or taking the benefit of any such money, or other property, without giving a written receipt or discharge for the same, in which the duty payable in respect thereof shall be expressed to have been allowed or paid to the person or persons to whom such receipt or discharge shall be given, and which shall bear date on the day of signing the same, shall forfeit and lose the sum of ten pounds per centum on the sum of money, or on the value of the property, so received or taken.

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[a] It was held previous to this act that a receipt *stamped as for a legacy* was not required on paying the *annual produce* to a tenant for life. Green v. Croft, 2 H. B. 30. Mr. J. Heath observed, that it was a great error in the legacy acts, that legacies themselves were not chargeable, but only the receipts for them. The present statute was afterwards passed, expressly to remedy the defect then complained of. See 2 Mer. 53.

XXIX. And be it further enacted, That every such receipt or discharge shall be brought within the space of twenty-one days after the date thereof, to the said head office of the said commissioners, or to some other office to be appointed by the said commissioners for such purpose, to be stamped, paying the duty for the same, and upon such payment either at the said head office, or at any other office to be appointed as aforesaid, the receiver general or other proper officer to be appointed for that purpose by the said commissioners, as the case shall require, shall write upon such receipt or discharge an acknowledgment of the payment of the duty so paid in words at length, and bearing date the day on which such payment shall be made, and shall subscribe his name thereto, and enter an account thereof in a book or books to be provided for that purpose, to the intent that he may be thereby charged with the sum so paid; and in case the duty shall be so paid at the said head office, then the receipt or discharge so brought to be stamped, shall be forthwith stamped with one of the said four stamps as the case shall require; and in case the duty shall be so paid at any other office to be appointed by the said commissioners as aforesaid, the receipt or discharge whereon such acknowledgment of the payment of duty shall be so written and subscribed, shall be transmitted within the space of twenty-one days from the day of payment of such duty, to the said head office to be stamped, and the same shall be stamped accordingly with one of the said four stamps as the case shall require; and in case the person or persons paying such duty at any such office to be appointed as aforesaid, shall be desirous that the same should be transmitted to the said head office, by the officer to whom such duty shall be paid, and shall leave the same with such officer for such purpose, such officer shall thereupon sign and deliver an acknowledgment, that such receipt or discharge has been left with him for such purpose, and shall transmit such receipt or discharge to such head office to be stamped as aforesaid, and the same shall be sent again to such officer as soon as conveniently may be after the stamping thereof; and such officer shall deliver back the same to the person or persons entitled thereto, upon re-delivery to him of the acknowledgment which he shall have given for the same: provided always, that if any such receipt or discharge shall not be so brought to any such office as aforesaid, within such space of twenty-one days as aforesaid, it shall nevertheless be lawful to carry such receipt or discharge to the said head office to be stamped in like manner, within three calendar months after the date thereof, paying the duty for the same, and also the further sum of ten pounds per centum on such duty, by way of penalty for not having before paid such duty, on payment of which duty and penalty, the said commissioners are hereby authorized and required to stamp such receipt or discharge, in the same manner as if the same

Receipts to be stamped within twenty-one days after date, on which an acknowledgment of payment of the duty shall be written, &c.

Receipts may be stamped within three months after date, on payment of duty, and 10*l.* per cent. penalty;

[See also 48 Geo. III. 149. 44.]

had been brought to the said office within the space of twenty-one days from the date thereof; but the said commissioners, or any of their officers, shall not on any pretence whatever, except as hereinafter directed, stamp any vellum, parchment, or paper, upon which any receipt or discharge for any legacy or part of legacy, or any residue of any personal estate, or any part thereof, shall be written or signed with the said new stamps, or any of them, unless the duty for the same shall be paid, and such receipt or discharge shall be produced to be so stamped in manner aforesaid, within the times and in the manner herein-before respectively limited and appointed.

but none to be stamped unless the duty be paid, and they are brought to be stamped within the limited time.

Mistakes in paying duty may be rectified, if no suit be instituted, on payment of the difference within three months, and 10*l.* per cent

XXX. And be it further enacted, That if it shall appear to the satisfaction of the said commissioners of stamp duties, upon oath or affirmation, to be administered by a justice of the peace, or master or masters extraordinary in chancery, which oath or affirmation such persons are hereby empowered to administer, that less duty has been paid for any legacy, or residue, or part of residue, than ought to have been paid for the same, by mistake, without any intention to defraud; and if application shall be made to the said commissioners to rectify such mistake, and accept the duty really due before any suit shall be instituted concerning the same, and within three calendar months after payment of the money actually paid instead of the just duty, it shall be lawful for the said commissioners to accept the difference between the money paid and the just duty, together with the sum of ten pounds per centum on such difference, by way of penalty, in full for the just duty, and which shall be in discharge of all penalties incurred by non-payment of such duty, and to cause an acknowledgment of the payment of the just duty to be written on the receipt or discharge given for such legacy or residue, or part of residue, and to be subscribed by the proper officer, and also to cause such receipt or discharge to be properly stamped, if necessary, in the same manner as would have been done if the just duty had been originally paid.

Persons paying or receiving money contrary to this act, indemnified on discovering the other offender.

XXXI. Provided always, and be it further enacted, That the party or parties paying or satisfying any legacy, or any residue of any personal estate, or any part of such residue, or receiving the same, contrary to the provisions of this act, who shall, within the space of twelve calendar months after the offence committed, discover the other party or parties offending therein, so that such party or parties so discovered be thereupon convicted, such person so discovering shall be indemnified and discharged from all penalties incurred for any offence against this act.

If by infancy or absence legacies can not be paid, the money may be paid into the Bank,

XXXII. Provided always, and be it further enacted, That where, by reason of the infancy, or absence beyond the seas, of any person entitled to any legacy, or to the residue of any personal estate, or any part thereof, chargeable with duty by virtue of this act, the person or

persons having or taking the burthen of any will or testamentary instrument, or the administration of such personal estate, cannot pay such legacy or some part thereof, although he, she, or they may have effects for that purpose, or cannot pay such residue, or some part thereof, although he, she, or they may have the same, or some part thereof, in his, her, or their hands, it shall be lawful for such person or persons to pay such legacy, or residue, or any parts or part thereof respectively, or any sum or sums of money on account thereof, after deducting the duty chargeable thereon, into the Bank of England, with the privity of the accountant general of the court of Chancery, to be placed to the account of the person or persons for whose benefit the same shall be so paid; for payment of which money the said accountant general shall give his certificate as usual in such cases, on production of the certificate of the commissioners of stamps, that the duty thereon has been duly paid; and such payment into the Bank shall be a sufficient discharge for the money so paid in, provided the duty be also paid thereon as aforesaid; and such money when paid in shall be laid out by the said accountant general, without any formal request for that purpose, in the purchase of three pounds per centum Consolidated Annuities,* which, with the dividends thereon, shall be transferred and paid to the person or persons entitled thereto, or otherwise applied for his or their benefit, on application to the court of Chancery, by petition or motion, in a summary way: provided always, that if it shall afterwards appear that such money, or any part thereof, has been improperly paid into the Bank as aforesaid, it shall also be lawful for the said court of Chancery, upon petition, in a summary way to dispose thereof, and of the annuities purchased therewith, and the dividends received thereon, in such manner as justice shall require: provided also, that if it shall appear that the duty paid in respect of any such sum of money was more than ought to have been paid, it shall be lawful for the person or persons who shall have paid such duty, to apply to the said commissioners for management of the stamp duties, to repay such excess of duty; and the said commissioners are hereby authorized, upon such application, to repay such excess of duty to the person or persons who shall appear to them entitled to receive the same, or to pay such excess of duty into the Bank, with the privity of the said accountant general, for the benefit of the person or persons entitled, there to be placed to the same account, and to be applied in the same manner as the same would have been applicable, if paid together with the remainder of the legacy, or sum of money, in respect of which the same shall have been paid; and the said commissioners

and laid out in the 3*l.* per cents.

If such money be improperly paid in, the Chancery may dispose thereof:

If more than the proper duty has been paid, the Commissioners for Stamps may return the excess;

* The register or his deputies authorized to enter and sign any draft of the Accountant-General for the purpose of laying out the money, in the same manner as drafts drawn in pursuance of any order of the Court. 37 Geo. III. 135.

are hereby authorized to make such payments respectively out of the monies in their hands, arising from duties imposed by this act; and if the duty paid to the said commissioners shall appear to be less than the duty which ought to have been paid, it shall be lawful for the person or persons who paid such money into the Bank as aforesaid, upon payment of the full duty to the said commissioners, in such manner as the same ought to be paid, with such penalties, if any, as ought to be paid in respect thereof, to apply to the court of Chancery, in a summary way, for the repayment of the further sum paid to the said commissioners for such duty, out of the money in the Bank so paid in by such person or persons, or the produce thereof, which payment the said court is hereby authorized to order.

and if less, on payment of the full duty, the Chancery may order re-payment to the party.

XXXIII. And be it further enacted, That if at the end of two years after the death of any person deceased, it shall appear, to the satisfaction of the said commissioners of stamp duties, that it will require time to collect the debts or effects of such person then outstanding, or that from circumstances it will be difficult to ascertain or adjust the amount of the clear residue of the personal estate of such person liable to duty, and the parties interested therein shall be desirous of compounding for the duty thereon, it shall be lawful for such parties respectively, with the consent of the commissioners of stamp duties, to make application to the court of Exchequer at Westminster, if the deceased person resided in England or elsewhere, except in Scotland, and to the court of Exchequer in Scotland, if the deceased resided in Scotland, for leave to compound such duty, stating upon oath the particulars of the personal estate for which such composition shall be proposed to be made, by affidavit to be filed in the said court, and declaring at the same time upon oath, whether any other property of the deceased then outstanding besides the property for which such composition shall be proposed to be made, hath come to the knowledge of the said parties, or any of them, and the nature thereof, and the circumstances attending the same; and in such case it shall be lawful for the said court of Exchequer in England or Scotland, as the case may be, to appoint a proper person to set a value on the personal estate, or such part thereof, for which no duty shall have been charged, and which shall be specified in such affidavit as the property for which such composition shall be desired, and to adjust and settle the duty which, justly and equitably under all circumstances, ought to be paid in respect of such personal estate so specified, and thereupon it shall be lawful for the said commissioners, and they are hereby required, if the said court of Exchequer to which such application shall be made, shall confirm the said adjustment and settlement, and order the duty to be accepted accordingly, and by authority of such order to accept payment of the sum so adjusted and settled, in full discharge of the

If it shall appear to the commissioners for stamps, at the end of two years after the death of any person, that it will require time to collect the effects, or be difficult to ascertain the residue of the personal estate, the duty may be compounded for.

duty on so much of such personal estate as shall be so specified, and according to such order, and to enter the same in their books accordingly, and to grant certificates thereof, expressing the receipt of such duty by way of composition under such order; and every such person to whom such certificate shall be granted, and every future representative of the same estate, and all persons entitled to the benefit of the property for which such composition shall be so paid, shall be discharged from any further payment of duty on the same; and in all future payments of such property, it shall be lawful for the persons having or taking the burthen of the execution of any will or testamentary instrument disposing such property, or the administration thereof, to pay, apply, and dispose of the same, and for all persons entitled to the benefit thereof to receive the same, without having the receipts and discharges in writing, hereby required to be given and taken for the same, stamped as herein-before directed; provided such receipts or discharges shall express the same to be given under the authority of such composition as aforesaid, and not liable to duty: provided always nevertheless, that the duty shall be charged and paid upon all and every part of the personal estate of such person deceased, other than that which shall be specified in such affidavit as aforesaid, and included in the valuation in which such composition shall have been made as aforesaid, and for which the said court of Exchequer shall allow and order such composition to be taken as aforesaid, in the same manner as if no such composition had been made; and all and every person and persons shall be liable to all the like penalties and forfeitures for not duly paying the duty for such personal estate not compounded for, and subject to the like rules, methods, and directions, for charging such duty, as such person and persons respectively would be liable to if such composition had not been made.

Duty to be paid on any part of personal estates not included in the composition.

XXXIV. And be it further enacted, That if at any time after payment of duty on any legacy, or residue, or part of residue, of the personal estate of any person deceased, any debt shall be recovered against the estate of such deceased person, or any loss shall happen, by reason whereof, or for any other just cause, any legatee or other person, by whom any legacy or part of legacy, or any residue of any personal estate hath been received or retained, shall be obliged to refund the same, or any part thereof, then in every such case it shall be lawful for the said commissioners of stamp duties, and they are hereby required, on due proof made on oath as aforesaid, to their satisfaction, of the amount of such sums refunded, and that by reason thereof there hath been an over-payment of duty, to settle and adjust the amount of such over-payment, and to repay the same out of the money in their hands, arising from the duties by this act imposed,

If any legacy be refunded, the duty to be repaid.

or to allow the same in future payments, as the case may permit or require.

Executors previous to retaining their legacies to transmit the particulars, with the duty offered, to the commissioners of stamps, who shall charge the same agreeable to this act.

XXXV. And be it further enacted, That whenever any person or persons having or taking the burthen of the execution of any will or testamentary instrument, or the administration of any personal estate as aforesaid, shall be entitled to any legacy, or the residue, or any part of the residue, of the personal estate of any testator, testatrix, or intestate, such person shall be chargeable with the duty, whenever he, she, or they shall be entitled, in the due course of administration, to retain to his, her, or their own use, any part of the said estate, in satisfaction of such legacy, or residue, or any part thereof; and every such person, before any such retainer, shall transmit to the said commissioners of stamp duties, or their officers, a note containing the particulars of such legacy, residue, or part of residue, intended to be retained, and the amount or value thereof, and the duty which such person or persons shall offer to pay thereon; and the said commissioners shall charge and assess the duty thereon, in such manner as the duty shall be chargeable thereon by virtue of the provisions in this act contained, and such duty shall be paid accordingly; and on payment of the said duty, the said receiver general of the said duty, or officer appointed to receive the same, shall, at the foot of a duplicate of the said assessment duly stamped, in such manner as the said commissioners shall direct for such purpose, give a receipt for such duty in such form of words as the said commissioners shall direct, which receipt shall be a discharge for the duty expressed therein; and in case any such person or persons shall neglect to pay such duty as aforesaid, within fourteen days after the same ought to have been paid as aforesaid, every such person and persons shall forfeit and pay treble the value of the duty which ought to have been paid.[a]

Penalty for neglect of payment of duty for fourteen days.

Receipts for legacies, except those by wills, respecting which the duties imposed by acts mentioned in the preamble, are repealed, to be deemed receipts within the meaning of those acts;

XXXVI. And whereas doubts have arisen upon the construction of the said acts of the twentieth, twenty-third, and twenty-ninth years of his Majesty's reign, whether the duties thereby imposed were intended to be imposed on all legacies, bequests, and dispositions by will or testamentary instrument whatsoever: be it enacted and declared, That all receipts and discharges whatsoever for legacies specific and pecuniary, and of any nature or kind whatsoever, and for all personal estate whatsoever, in any manner given or disposed of by will or testamentary instrument, whether by way of annuity or other particular bequest, or by way of residue, or share of residue, or otherwise howsoever, as well as on personal estate, distributable upon

[a] The duty on the residue retained by the executor and residuary legatee is to be upon the amount of the residue at the time of delivering into the stamp office the note of what he intends to retain, and taking in therefore the interest accrued since the testator's death. Att. Gen. v. Lord Cavendish, Wight, 82.

intestacy, except such dispositions as shall be made by any will or testamentary instrument, with respect to which the duties imposed by the said former acts are hereby repealed, shall be deemed and taken to be receipts and discharges for legacies, within the intent and meaning of the said former acts respectively; and all and every person and persons to whom any such legacy, or any part of any such legacy, shall be due and payable at the time of passing this act, or who at the time of passing this act shall be entitled to any residue, or any share or part of any residue, of any personal estate, under any such will or testamentary instrument, or upon intestacy, and also all and every person and persons who shall become entitled to any legacy, or residue, or part of residue, of any such personal estate, after the passing of this act, upon which no duty is imposed by this act, and upon which the duties imposed by the said former act remain in force and unrepealed, shall, upon receipt or other satisfaction or discharge, of any such legacy, or part of such legacy, or residue, or part of such residue, sign and give a receipt or discharge in writing, duly stamped as required by the said former acts respectively; and the person or persons having or taking the burthen of the execution of any will or other testamentary instrument, or the administration of any personal estate, shall have the like powers to require such receipt or discharge in writing, and to retain the duty payable in respect thereof, and the person and persons paying, or otherwise satisfying or discharging, and the person or persons receiving, or being otherwise satisfied for such legacy, or residue, or part of residue, shall be in like manner debtors for the duty imposed on such receipt or discharge in case of non-payment of such duty, and to the like penalties for enforcing due payment thereof, as by this act are provided with respect to the duties hereby imposed on legacies, and residue of personal estate of persons dying after the passing of this act.

and such receipts to be given for legacies due at passing this act, and for legacies becoming due afterwards on which no duty is hereby imposed.

XXXVII. And be it further enacted, That if the authority under or by colour of which any person shall have administered the estate or effects of any person deceased, or any part thereof, shall be void, or be repealed, or declared void, and such person shall, before the avoidance, repeal, or declaration of avoidance, have paid any duty hereby imposed, or any duty imposed by any of the said former acts, which shall not be allowed to such person out of the estate or effects of such deceased person, by reason that the same duty was not really due or payable, the money paid for such duty shall, on proof thereof to the satisfaction of the said commissioners of stamp duties, be repaid to the person or persons who shall have paid the same, or his, her, or their representatives, by the said commissioners, out of any monies in their hands arising from the duties imposed by this act, or the said former acts; but in case such duty ought to have been paid by the rightful executor

If administration be made void, and any duty shall have been improperly paid, it shall be repaid; but if it ought to have been paid, it shall be allowed in account with the rightful executor.

or executors, administrator or administrators, of such deceased person, then and in such case the payment of such duty shall be valid and effectual notwithstanding such avoidance, repeal, or declaration of avoidance as aforesaid; and no such person shall, by reason of the avoidance, repeal, or declaration of avoidance of such authority, be sued, molested, or troubled for or in respect of such payment; but all such payments, in respect of the said duty, shall be allowed in account with such rightful executor or executors, administrator or administrators, and the same shall be deemed payments in the due course of administration, as fully and effectually as if such payments had been made by rightful executors or administrators; any law, usage, or custom, to the contrary notwithstanding.

Persons swearing falsely, guilty of perjury.

XXXVIII. And be it further enacted, That if any person or persons, upon any oath or affirmation before the said commissioners of stamp duties, or commissioners of land tax, or any person or persons authorized by this act to administer any such oath or affirmation, shall wilfully and corruptly swear, affirm, or alledge any matter or thing which shall be false or untrue, with intent to defraud his Majesty of any of the said duties hereby imposed, or with intent to charge any person or persons with any greater or other duty than such person or persons ought to be charged with, every such person or persons so offending, and being thereof duly convicted, shall be, and is and are hereby declared to be subject and liable to such pains and penalties as by any law now in being, any person convicted of wilful and corrupt perjury is subject and liable to.

Penalty of 500*l.* for altering receipts.

XXXIX. And be it further enacted, That if any person shall alter any word, letter, figure, or number, in any assessment or receipt to be made or given in pursuance of this act, for any of the said duties, after the same shall have been signed by the officer appointed to sign the same, according to the directions of this act, or shall utter or publish as true any such altered assessment or receipt, with intent to defraud his majesty, his heirs or successors, or any other person or persons, then and in such case, every person so altering, uttering, or publishing as aforesaid, shall forfeit and pay the sum of five hundred pounds.

Persons forging stamps, &c. to suffer death.

XL. And be it further enacted by the authority aforesaid, That if any person shall counterfeit or forge, or procure to be counterfeited or forged, any stamp directed or allowed to be used or provided, made or used, in pursuance of this act, or shall counterfeit or resemble the impression of the same upon any vellum, parchment, or paper, with intention to defraud his Majesty, his heirs or successors, or shall utter, vend, sell or expose to sale, any vellum, parchment, or paper, liable to the said duty, with such counterfeit impression thereupon, knowing the same to be counterfeited, or shall privately or fraudulently use any

stamp directed or allowed to be used by this act, with intent to defraud his Majesty, his heirs or successors, of the said duty, every person so offending, and being thereof lawfully convicted, shall be adjudged a felon, and shall suffer death as in case of felony without benefit of clergy.

Receipts duly stampt, free from all other duties.

XLI. Provided always, and be it further enacted, That every receipt or discharge for any legacy, or any part of any legacy, or for any residue, or part of residue, of any personal estate, which shall be duly stamped as required by this act, shall be free and discharged from all stamp duties imposed by the said recited acts, or by any other act of parliament upon receipts or discharges for money; and that every such receipt or discharge which shall be duly stamped as required by the said recited acts, and upon which no new duty is imposed by this act, shall be also free and discharged from any stamp duty imposed by any other act upon receipts or discharges for money.

Powers of former acts relating to stamps, to extend to this act.

XLII. And be it further enacted by the authority aforesaid, That all powers, provisoes, articles, clauses, allowances, and all matters and things prescribed or appointed by any former act or acts of parliament, relating to the stamp duties on vellum, parchment, and paper, and not hereby altered, shall be of full force and effect with relation to the duties hereby imposed, and shall be applied and put in execution for the raising, levying, collecting, and securing, the said duties hereby imposed, according to the true intent and meaning of this act, as fully and effectually, to all intents and purposes, as if the same had severally and respectively been hereby re-enacted, with relation to the said duties hereby imposed.

Recovery and application of penalties sued for within three months.

XLIII. And be it further enacted, That one moiety of all pecuniary penalties and forfeitures hereby imposed, where no other mode of prosecution is specially prescribed by this act, shall, if sued for within the space of three calendar months from the time of any such penalty or forfeiture being incurred, be to his Majesty, his heirs and successors; and the other moiety thereof, with full costs of suit, to the person or persons who shall inform or sue for the same within the time aforesaid, and which shall and may be sued for in his Majesty's Court of Exchequer at Westminster, for offences committed in England, or in his Majesty's Court of Exchequer in Scotland, for offences committed in Scotland, by action of debt, bill, plaint, or information, wherein no essoin, privilege, wager of law, or more than one imparlance shall be allowed; but nevertheless it shall be lawful for his Majesty's attorney general in England, or his Majesty's advocate in Scotland, in case it shall appear to his satisfaction that such penalty was incurred without any intention of fraud, to stop all further proceedings, by entering a noli prosequi, or otherwise, with respect as well to the share of such penalty claimed by such informer or informers, as to the share thereof belonging to his Majesty.

Suits for penalty incurred without intention of fraud, may be stopt.

Recovery and application of penalties not sued for within three months.

XLIV. Provided always, and be it further enacted, That in default of prosecution within the time herein-before limited, no such penalty or forfeiture shall be afterwards recoverable, except in the name of his Majesty's attorney general in England, and of his Majesty's advocate in Scotland, by information in the Court of Exchequer in England or Scotland respectively, in which case the whole of such penalty or forfeiture shall belong to his Majesty, his heirs and successors; and that all penalties and forfeitures, and shares of Penalties and forfeitures, incurred as aforesaid, belonging to his Majesty, his heirs or successors, shall be paid into the hands of the receiver general of his Majesty's stamp duties for the time being, any law, usage, or custom, to the contrary notwithstanding; and that in all cases where the whole of such pecuniary penalties or forfeitures shall be recovered to the use of his Majesty, his heirs or successors, it shall be lawful for the said commissioners to cause such reward as they shall think fit, not exceeding one moiety of such penalty or forfeiture so recovered, after deducting all charges and expenses incurred in recovering the same, to be paid thereout to or amongst any person or persons who shall appear to them entitled thereto as informers, in respect of such penalties or forfeitures so recovered; any thing herein contained to the contrary notwithstanding.

Commissioners of stamps may reward informers.

Duties to be paid to the receiver general of stamp duties, and by him paid into the Exchequer.

XLV. And be it further enacted by the authority aforesaid, That all the monies arising from the said duties herein-before granted, and also the duties arising from the said former acts of the twentieth, twenty-third, and twenty-ninth years aforesaid, not hereby repealed, and all arrears of the said rates and duties hereby repealed, shall, from and after the passing of this act, be paid from time to time into the hands of the receiver general for the time being of the duties on stamped vellum, parchment, and paper, who shall pay the same, the necessary charges of raising and accounting for the same being deducted, into his Majesty's receipt of exchequer at Westminster, at such time and in such manner as other duties on stamped vellum, parchment, and paper, are directed to be paid, and the same shall be carried to and made part of the consolidated fund.

Exchequer to set apart a proportion of the duties for ten years, and the remainder to be applied in defraying any increased charge occasioned by any loan of this session, and kept with other duties granted for the same

XLVI. And be it further enacted, That, from and after the passing of this act, out of the monies that shall be paid into the said receipt of the said duties hereby imposed, and of the said former duties not hereby repealed, and arrears of duties hereby repealed, the sum of ten thousand two hundred and sixty-nine pounds fifteen shillings, being one fourth part of the sum of forty-one thousand and seventy-nine pounds, the annual average produce for three years, ending the first day of August one thousand seven hundred and ninety-five, of the whole of the said former duties, shall quarterly, on the fifth day of July, the tenth day of October, the fifth day of January, and the fifth day of

April, in every year during the period of ten years, be set apart from the remainder of the said monies; and that after the setting apart at the said receipt of exchequer at the end of each such quarter, the sum of ten thousand two hundred and sixty-nine pounds fifteen shillings, the said remainder of the said monies arising or to arise of the said several duties, and of arrears as aforesaid, or so much thereof as shall be sufficient, shall be deemed an addition made to the revenue, for the purpose of defraying the increased charge occasioned by any loan made by virtue of any act or acts to be passed in this session of parliament; and that the said remainder of the said monies shall, during the space of ten years next ensuing, be paid into the said receipt distinctly and apart from all other branches of the public revenue; and that there shall be provided and kept at the office of the auditor of the said receipt, during the said period of ten years, a book or books in which the said remainder of the monies arising from the said duties, and paid into the said receipt, shall, together with the monies arising from any other rates or duties, granted in this session of parliament for the purpose of defraying such increased charges as aforesaid, be entered separate and apart from all other monies paid or payable to his Majesty, his heirs or successors, on any account whatever.

purpose separate from other monies.

XLVII. And be it further enacted, That if any action or suit shall be brought or commenced against any person or persons for any thing done in pursuance of this act, then, and in every such case, the said action or suit shall be commenced within six calendar months after the fact committed, and not afterwards, and shall be brought in the county or place where the cause of action shall arise, and not elsewhere; and the defendant or defendants in such action or suit to be brought, may plead the general issue, and give this act, and the special matter in evidence, at any trial to be had thereupon, and that the same was done in pursuance and by the authority of this act; and if it shall appear to be so done, or if any such action or suit shall be brought after the time before limited for bringing the same, or shall be brought in any other county, city, or place, than as aforesaid, then, and in every such case, the jury shall find for the defendant or defendants; and if upon such verdict, or if the plaintiff or plaintiffs shall become nonsuit, or discontinue his, her, or their action, or if a verdict shall pass against the plaintiff or plaintiffs, or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall and may recover treble costs, and have the like remedy for the same as any defendant or defendants hath or have for costs of suit in other cases by law.*

Limitation of actions.

General issue.

Treble costs.

* The tables, which then follow, for calculating the value of annuities being very long, it has not been thought advisable to swell this work by inserting them.

## 39 Geo. III. 73.

An Act for exempting certain specific Legacies which shall be given to Bodies Corporate, or other public Bodies, from the payment of Duty; and also the Legacy of Books and other Articles given by the will of the late Reverend *Clayton Mordaunt Cracherode* to the Trustees of the *British* Museum. [12th July, 1799.]

Whereas it is expedient that certain specific legacies given to bodies corporate, and other public bodies and societies, should be exempted from the duties imposed on legacies; be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That, from and after the passing of this act, no legacy, consisting of books, prints, pictures, statues, gems, coins, medals, specimens of natural history, or other specific articles, which shall be given or bequeathed to or in trust for any body corporate, whether aggregate or sole, or to the society of *Serjeants' Inn*, or any of the Inns of Court or Chancery, or any endowed school, in order to be kept and preserved by such body corporate, society, or school, and not for the purposes of sale, shall be liable to any duty imposed on legacies by any law now in force.

The scond section exempts from duty the bequest of books, &c. given by the Rev. Clayton Mordaunt Cracherode to the British Museum.

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## 45 Geo. III. 28.

An Act for granting to his Majesty additional Stamp Duties in *Great Britain* on certain Legacies. [5th April, 1805.]

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Duties not payable for legacies passing to the husband or wife of the deceased, or to the Royal Family.

III. Provided always, and be it further enacted, That nothing herein contained shall extend to charge with any of the duties hereby granted any legacy or residue, or part or share of residue, which shall be given or pass to or for the benefit of the husband or wife of the deceased, or to or for the benefit of any of the Royal Family.

What shall be deemed a legacy under this act

IV. And be it further enacted, That every gift by any will or testamentary instrument of any person dying after the passing of this act, which, by virtue of any such will or testamentary instrument, shall have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of, as he or she shall think fit, or which shall have been charged upon or made payable out of any real estate, or be directed to be satisfied out of any monies to arise by the sale of any

real estate, of the person so dying, or which such person may have the power to dispose of, whether the same shall be given by way of annuity, or in any other form shall be deemed and taken to be a legacy within the true intent and meaning of this act: provided always, That nothing herein contained shall be construed to extend to the charging with the duties by this act granted, any specific sum or sums of money, or any share or proportion thereof charged by any marriage settlement, or deed or deeds upon any real estate, in any case in which any such specific sum or sums, or share or proportion thereof, shall be appointed or apportioned by any will or testamentary instrument under any power given for that purpose by any such marriage settlement, or deed, or deeds.

V. And be it further enacted, That the duties hereby granted upon legacies, or charged upon or made payable out of any real estate, or out of any monies to arise by the sale of any real estate, or upon residues, or parts or shares of residues of any such monies, shall be accounted for, answered, and paid by the trustee or trustees to whom the real estate shall be devised, out of which the legacy or legacies, or share or shares, of any money arising out of the sale or mortgage, or other disposition of such real estate, shall be to be paid or satisfied, or if there shall be no trustees, then by the person or persons entitled to such real estate, subject to any such legacy, or by the person or persons empowered or required to pay or satisfy any such legacy; and the said duties shall be retained by the person paying or satisfying any such legacy or share of money, in like manner, and according to such rules and regulations, and under and subject to such penalties, as far as the same can be made applicable, as are contained in an act passed in the thirty-sixth year of the reign of his present Majesty, intituled, *An Act for repealing certain Duties on Legacies and Shares of Personal Estates, and for granting other Duties thereon in certain Cases.* 36 Geo. III. 52.

Duties on legacies charged on real estate to be paid by the trustees, or the persons entitled to such estate.

VI. Duties to be under the management of the commissioners for stamps.

VII. Duties to be levied according to the provisions of 36 Geo. III. 52.

VIII. Persons counterfeiting stamps, &c. guilty of felony.

IX. Powers of former acts extended to this act.

X. Application of the duties.

XI. Accounts to be kept distinct.

XII. Actions or suits to be brought within six calendar months, and the general issue allowed to be pleaded.

55 Geo. III. 184.

An Act for repealing the Stamp Duties on Deeds, Law Proceedings, and other written or printed Instruments, and the Duties on Fire Insurances, and on Legacies and Successions to Personal Estate upon Intestacies, now payable in *Great Britain*; and for granting other Duties in lieu thereof. [11th July, 1815.]

The first and second sections enact, that all the duties granted by 48 Geo. III. 149, shall cease and determine, and that in future there shall be raised, levied, and paid for and in respect of the several instruments, matters, and things mentioned and described in the schedule hereunto annexed (except those standing under the head of Exemptions) the several duties or sums of money set down in figures against the same respectively, or otherwise specified and set forth in the same schedule.

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Powers, &c. of former acts extended to this act.

VIII. And be it further enacted, That all the powers, provisions, clauses, regulations and directions, fines, forfeitures, pains and penalties, contained in and imposed by the several acts of parliament relating to the duties hereby repealed, and the several acts of parliament relating to any prior duties of the same kind or description, shall be of full force and effect with respect to the duties hereby granted, and to the vellum, parchment and paper, instruments, matter and things, charged or chargeable therewith, as far as the same are or shall be applicable, in all cases not hereby expressly provided for, and shall be observed, applied, enforced, and put in execution for the raising, levying, collecting, and securing of the said duties hereby granted and otherwise relating thereto, so far as the same shall not be superseded by, and shall be consistent with the express provisions of this act, as fully and effectually to all intents and purposes, as if the same had been herein repeated and specially enacted with reference to the said duties hereby granted.

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SCHEDULE;—PART THE THIRD.

| LEGACIES AND SUCCESSIONS TO PERSONAL OR MOVEABLE ESTATE UPON INTESTACY. | Duty. £. s. d. |
|---|---|
| I. *Where the Testator, Testatrix, or Intestate died before or upon the 5th Day of April* 1805. | |
| For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or *testamentary instrument*[a] of any persons who died before or upon the | |

[a] See ante 402 as to what is a testamentary instrument.

| LEGACIES and SUCCESSIONS—*continued.* | Duty. |
|---|---|
| 5th day of April, 1805, out of his or her personal or moveable estate, and which shall be paid, delivered, retained, satisfied or discharged, after the 31st day of August 1815: [a] | £ s. d. |
| Also for the clear residue (when devolving to one person) and for every share of the clear residue (when devolving to two or more persons) of the personal or moveable estate of any person who died before or upon the 5th day of April 1805 (after deducting debts, funeral expenses, legacies, and other charges first payable thereout,) whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy; where such residue, or share of residue, shall be of the amount or value of 20*l.* or upwards, and where the same shall be paid, delivered, retained, satisfied or discharged, after the thirty-first day of August 1815: | |
| Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of the deceased, or any descendant of a brother or sister of the deceased;* a duty at and after the rate of two pounds and ten shillings *per centum*, on the amount or value thereof..... | *per cent.* 2 10 0 |
| Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased;* a duty at and after the rate of four pounds *per centum* on the amount or value thereof..... | *per cent.* 4 0 0 |
| Where any such legacy, or residue, or share of such | |

[a] In 48 Geo. III. 149, the words were, *paid, delivered, retained, satisfied, or discharged, after the 10th day of October*, 1808. Where a legacy was given in trust to invest in the funds, and pay the dividends to A. for life, and after his death one moiety to be paid to his eldest son, and the other to his younger children, and the executor invested the legacy in the funds accordingly; and the legatee for life died in 1812: it was held that this was a legacy *retained* after the 10th of October 1808, and subject to the duty. Att. Gen. *v.* Lady Manners, 1 Pri. 411. But where the money was in 1779 paid into Court under a decree, and invested in stock in trust in the cause, and the tenant for life died in 1807: it was held that there having been an appropriation of the legacy in 1779, this amounted to a paying, satisfying, or discharging, and that the legatee over was entitled free from the payment of any duty. Hill *v.* Atkinson, 2 Mer. 45. 3 Pri. 399.

| LEGACIES and SUCCESSIONS—*continued.* | Duty. £. s. d. |
|---|---|
| residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased*; a duty at and after the rate of five pounds *per centum* on the amount or value thereof | *per cent.* 5 0 0 |
| And where any such legacy, or residue or share of such residue, shall have been given, or have devolved, to or for the benefit of any person *in any other degree of collateral consanguinity to the deceased* than is above described, or to or for the benefit of *any stranger in blood to the deceased*; a duty at and after the rate of eight pounds *per centum* on the amount or value thereof | *per cent.* 8 0 0 |

II. *Where the Testator, Testatrix, or Intestate shall have died after the 5th Day of April* 1805.

For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards given by any will or testamentary instrument, of any person, who shall have died after the 5th day of April 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied or discharged after the 31st day of August 1815:

Also, for the clear residue (when devolving to one person) and for every share of the clear residue (when devolving to two or more persons) of the personal or moveable estate, of any person, who shall have died after the 5th day of April 1805, (after deducting debts, funeral expenses, legacies and other charges first payable thereout,) whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy; where such residue, or share of residue, shall be of the amount or value of 20*l.* or upwards, and where the same shall be paid, delivered, retained, satisfied or discharged after the 31st day of August 1815:

| LEGACIES and SUCCESSIONS—*continued.* | Duty. |
|---|---|
| And also for the clear residue (when given to one person) and for every share of the clear residue (when given to two or more persons) of the monies to arise from the sale, mortgage, or other disposition of any real or heritable estate, directed to be sold,[a] mortgaged, or otherwise disposed of, by any will or testamentary instrument, of any person, who shall have died after the 5th day of April 1805 (after deducting debts, funeral expenses, legacies, and other charges first made payable thereout, if any) where such residue, or share of residue, shall amount to 20*l.* or upwards, and where the same shall be paid, retained or discharged after the 31st day of August 1815: | £ s. d. |
| Where any such legacy or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a child of the deceased, or any descendant of a child of the deceased,* or to or for the benefit of *the father or mother, or any lineal ancestor of the deceased;* a duty at and after the rate of one pound *per centum* on the amount or value thereof..... | *per cent.* 1 0 0 |
| Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of the deceased, or any descendant of a brother or sister of the deceased;* a duty at and after the rate of three pounds *per centum* on the amount or value thereof..... | *per cent.* 3 0 0 |
| Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of the father or mother of the deceased, or any descend-* | |

[a] Where a man by will devised some real property to A. and B. upon trust to sell as soon as possible after his decease; and willed that the produce should be deemed part of the residue of his estate therein after disposed of, or go in aid, if necessary, of the rest of his property, in discharge of his pecuniary legacies; and then, after giving various legacies, gave all the residue of his estate and effects to A.; and the personal estate was sufficient to satisfy the testator's debts and legacies without having recourse to a sale of the real property: it was held that it must nevertheless be considered as having been actually sold by the executors, and that the money arising from the sale had been by them paid over to the devisee, and the duty therefore attached. Att. Gen. *v.* Holford, 1 Pri. 426. See ante 332, as to its being considered in equity as personalty.

| LEGACIES and SUCCESSIONS—*continued.* | Duty. £ s. d. |
|---|---|
| *ant of a brother or sister of the father or mother of the deceased*; a duty at and after the rate of five pounds *per centum* on the amount or value thereof. | *per cent.* 5 0 0 |
| Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased*; a duty at and after the rate of six pounds *per centum* on the amount or value thereof..... | *per cent.* 6 0 0 |
| And where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of any person, *in any other degree of collateral consanguinity to the deceased* than is above described, or to or for the benefit of *any stranger in blood to the deceased*;[a] a duty at and after the rate of ten pounds *per centum* on the amount or value thereof..... | *per cent.* 10 0 0 |
| And all gifts of annuities, or by way of annuity, or of any other partial benefit or interest, out of any such estate or effects as aforesaid, shall be deemed legacies within the intent and meaning of this schedule. | |
| And where any legatee shall take two or more distinct legacies or benefits under any will or testamentary instrument, which shall together be of the amount or value of 20*l.* each shall be charged with duty, though each or either may be separately under that amount or value. | |
| *Exemptions.* | |
| *Legacies, and residues, or shares of residue, of any such estate or effects as aforesaid, given or devolving to or for the benefit of the husband or wife of the deceased, or to or for the benefit of any of the Royal Family. And all legacies which were exempted from duty by the act passed in the 39th year of his Majesty's reign, c. 73,*[b] *for exempting certain specific legacies given to bodies corporate, or other public bodies, from the payment of duty.* | |

[a] In a gift "*to my son-in-law A. and my daughter B. his wife*;" it was held that one moiety was subject to one per cent., and the other to ten per cent. duty. Att. Gen. v. Bacchus, 9 Pri. 30.

[b] Ante 426.

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[a] Since the first part of these sheets went to the press a report of a case has been published, in which it was held, that a decree for *an account*, on a suit by a husband and wife for a legacy given to her, does not disappoint her right by survivorship; and the Lord Chief Baron seemed to think, that even a decree for *payment* would not have that effect. Adams *v.* Lavender, 1 M'Cle. & Y. 41.

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THE END.

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