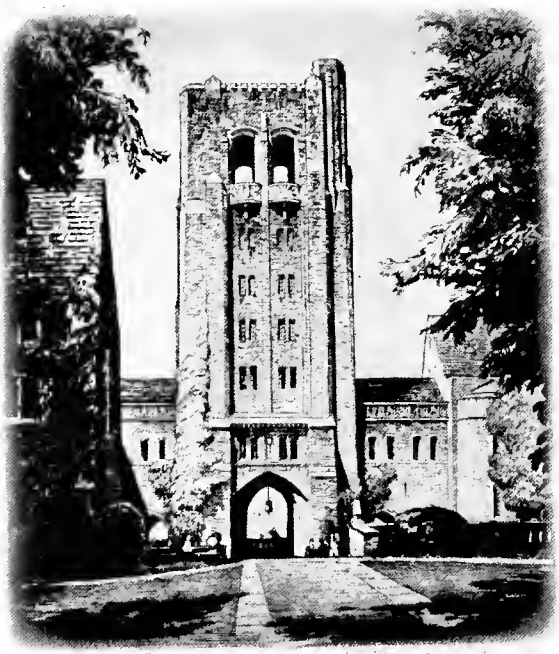

CASES

ON THE

LAW OF SUCCESSION

TO PROPERTY AFTER THE DEATH OF THE OWNER

The following cases have been printed at the request of Professor Mechem, of the Law Department of the University of Michigan, for use in connection with his lectures in that law school. They have been chiefly selected from Reeves' Cases on Wills and Abbott's Cases on Descent, Wills, and Administration.

ST. PAUL
WEST PUBLISHING CO.
1895

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CASES

ON THE

LAW OF SUCCESSION

TO PROPERTY AFTER THE DEATH OF THE OWNER.

MERCHANT v. MERCHANT.

(2 Bradf. Sur. 432.)

Surrogate's Court New York. Nov., 1853.

Thos. W. Higgins, for W. H. Merchant. Horace Holden and Robert Dodge, for legatees.

THE SURROGATE. On the final accounting of the executor William H. Merchant, the legatees seek to charge him with three thousand dollars, the amount of three Erie Railroad income bonds, which they allege were the property of the deceased.

To prove this, the claimants produced the inventory; but, the entry thereon showing that the executor claimed the bonds as a gift from the testator, the proof was insufficient. Mr. Dodge then testified that the executor, after the testator's death, called at his office and stated that he had taken the bonds in question out of the box containing the securities of the estate, on the morning after the decease of his father—the executor alleging as a reason, that he claimed them as his own, as a gift from his parent.

It was then proved on the part of the executor, by the evidence of his co-executor, Mr. Reading, that two of the legatees had stated that the testator gave to his son, William, the bonds in question, some short time previous to the making of his last will—within a month before; that it was a full and free gift, and William had handed the bonds to his mother; that subsequently and after the testator made his last will, his wife took the bonds, conversed with him about the will as it then stood, and, holding the bonds in her hand, said, "Now, that the will gives each child alike, shall I hand over to each child a thousand-dollar bond?" The testator said, "No, put them back in my tin box." It also appears that, the day before the testator's death, he directed one of his daughters to bring the box, open it, and see if the bonds were there. She opened it and shewed him the bonds; and he said it was all right, and told her to put them back in the box, keep the key, and at his decease deliver it to Mr. Reading, one of his executors —that she kept the key till after her father's death, when she gave the key, at her mother's request, to her brother William, the other executor.

It is certain that the bonds in question once belonged to the testator, and they were entered by him on a schedule of his assets. The testator having made a will by which his son had not been placed on an equal footing with his daughters, and having subsequently become reconciled to his son, made the gift of these bonds, when his will remained in that condition. He afterwards revoked that will and executed another, in which his children were treated alike, except that the daughters were given the use of his dwelling-house and furniture in common with their mother. After the new will had been made, Mrs. Merchant brought the bonds to the testator, and the conversations and circumstances occurred which I have before stated.

1. Was the gift to the son a donation inter vivos or mortis causa? It is proved, that the testator was at the time in his last sickness, and that during the whole course of his illness, he did not expect to recover. In such a case, the presumption of law is that the gift was intended as a donatio mortis causa. 1 Rop. Leg. 22.

2. It having been shown, that after the gift the testator resumed possession, it is urged on one side, that the gift was revoked; and on the other, that possession having been obtained by the donor without the consent or privity of the donee, the gift was not legally revoked. The last point involves the proposition that the donor cannot revoke the gift without the consent of the donee.

I would remark, in the first place, that if this be so, it is a solitary exception to dispositions of property made in view of death, by the voluntary bounty of the donor.

It is true that a will does not revoke a donatio mortis causa; but the reason is that the will does not speak till the testator's death—till the very moment the donation by its terms has become absolute—when of course it is too late to revoke it. On the donor's death, the donee's title becomes absolute, and therefore irrevocable by a will, which from its nature is inoperative during the donor's lifetime, the only period during which the donation could be revoked.

It is insisted, however, that, inasmuch as the entire dominion of the donor over the property is transferred to the donee, no right of revocation exists. But this rule, as I understand it, does not mean that the donor reserves no right of revocation—but only that he parts with the control and possession of the property (Williams, Ex'rs, 654)—that there is not a partial but absolute delivery and change of possession. If such an absolute delivery is inconsistent with a power of revocation by simple reclamation, it is just as inconsistent with a revocation in case of the donor's recovery. Such an argument would destroy the peculiar character of this class of donations, and transform them into pure irrevocable gifts inter vivos.

The truth is, that the whole of this doctrine of revocation is a rule of law. The law declares that a donation mortis causa, is revocable in case the donor recover—and that, too, notwithstanding the gift was in express terms absolute, and the delivery was absolute. I do not see in any case that the power of revocation is inconsistent with absolute dominion in the donee, existing under a condition annexed by the law to the gift, that the donor may resume the property. An attorney in fact, for the time being has full authority and absolute dominion within the

scope of his power; and yet the power may be revoked at any instant. In the sense contended for by the counsel of the executor, a donee has not absolute dominion over the subject of the gift: though his possession for the time is absolute, his title does not become perfect till the donor's death. Before that period, he cannot dispose of the property. If that event should not happen, the donor may resume his gift.

It is conceded on all hands, that if the donor recover the gift will be defeated. This is a condition the law implies; and if the law likewise implies that the gift may be reclaimed at the pleasure of the donor—the latter condition is no more incongruous with the possession and dominion of the donee than the former.

It is admitted that the gift may be revoked in the donor's lifetime, by resumption of possession; but if that means, that the subject of the gift must come back into the possession of the donor by the consent of the donee, it amounts only to the simple truism, that both parties can by mutual agreement annul the transaction. But if by resumption of possession, a reclamation of possession is intended, then the gift can be revoked at the option of the donor. This seems to be the view taken in Bunn v. Markham, 7 Taunt. 224, where Gibbs, C. J., says: "It is in the power of the donor at any time to revoke the donation before his death." In Ward v. Turner, 2 Ves. Sr. 433, Lord Hardwicke does not declare that an actual resumption of possession is necessary to constitute a valid revocation; but on the contrary he cites the Commentary of Vinius to the effect, that the donor where the gift was defeated by "recovery or revocation," had his action against the donee. Id. 439.

Suppose the donee dies before the donor, does the gift stand? In the case of a will, the prior decease of the legatee causes the legacy to lapse. This was the rule of the civil law in respect to donations mortis causa; and in the same breath this was declared, the power of the donor to revoke was likewise expressed. The terms or conditions on which the donor can recover the subject of the gift are thus stated in the Institutes: "Sin autem supervixisset is qui donavit, reciperet; vel si eum donationis poenituisset, aut prior decesserit is cui donatum sit." Inst. lib. 2, tit. 7, § 1. Again, in the Digest it is laid down: "Mortis causa donatio, etiam dum pendet an convalescere possit donator, revocari potest." Dig. l. 39, tit. 6, § 16, item § 30.

The three conditions annexed to the gift by the civil law, which on happening defeat the donation, are: 1st, The recovery of the donor; 2d, His repentance of the gift; 3d, The death of the donee before the donor's decease. These are separate and independent conditions. Ayliffe says, the gift "may be revoked by the donor's repenting thereof." Parergon, 331; Bracton, lib. 2, cap. 26, § 1. In Jones v. Selby, Finch Prec. 300, the chancellor said: "You agree that a donatio causa mortis is a gift in presenti, to take effect in futuro after the party's death, as a will; and that it is revocable during his life, as a will is." Chancellor Kent speaks of these gifts as "conditional and revocable and of a testamentary character." 2 Comm. 445. In Wells v. Tucker, 3 Bin. 370, Justice Tilghman says: "It is contended on the part of the plaintiff, that a gift of this kind passes the property immediately, and is not subject to revocation by the donor. Without absolutely committing myself, I incline to the opinion, that in this as in several other particulars, it partakes of the nature of a legacy, and is revocable." In the same case, Justice Yeates describes the donation as "subject to countermand and revocation." In Nicholas v. Adams, 2 Whart. 22, Justice Gibson states accurately the three modes of defeasance acknowledged by the civil law. His language is, that it is "defeasible by reclamation—the contingency of survivorship—or deliverance from the peril."

I find nothing against this doctrine—unless it be the language of the vice chancellor, in Reddel v. Dobree, 10 Sim. 244, who, speaking of an alleged donation, characterized it as a gift which "was always liable during the lifetime of the testator to be recalled by him;" and "therefore the very essence of a donatio mortis causa," was wanting. The gift in that case, was of money that might happen to be in a certain box at the testator's death, and on condition that up to the time of his death, he should retain "the complete dominion over whatever might be placed in the box." The opinion of the vice chancellor is, substantially, that the reservation of this dominion is inconsistent with the essence of a donatio mortis causa. If no more than that was intended, the doctrine is but another form of stating that there must be a complete delivery. If it was designed to declare that when there had been a complete delivery, the donor could not revoke the gift, such an opinion was not called for by the case in hand, and is not agreeable with the authorities. There are several cases besides that of Reddel v. Dobree, which might be supposed to imply that the donor had no right to revoke, (4 Dru. & War. 159, 285; 2 Colly. 356; 8 Mees. & W. 401;) but I think they proceed on the ground that there must be an absolute delivery, a change of possession and dominion, so as to vest the full possessory title in the donee, subject only to such rules as the law applies to this class of gifts. That a donatio mortis causa cannot be revoked at the will of the donor, I find no where decided, or distinctly asserted; while the rule of the civil law, that it could be revoked if the donor repented, even while it was uncertain whether or not he would recover, is clearly

laid down in the Digest, and has been admitted to be the rule at common law, by a number of distinguished judges, although I am not aware the point has expressly arisen as the subject of distinct decision.

Applying this rule to the facts in evidence, I am of opinion that the testator conceived this gift to be revoked. After making the donation, he made a change in his will, and substantial alterations as to the disposition of his property, in favor of the donee. When that act was accomplished, his wife brought these bonds to him, and asked whether she should distribute them among his children. He said, "No," and directed them to be placed in the depository where he kept his valuable papers. That direction was not only a resumption of the possession, but an indication of a change in his views in respect to the disposition of the property. His subsequent conduct, in calling for the box, inquiring whether the bonds were there, and directing his daughter to lock the box, and give the key not to his son, but to the other executor, after his death, confirms the idea of revocation, and shows he intended the bonds to come into the possession of his executor, after his decease, as a part of his estate. I think, therefore, that the revocation has been sustained.

The jurisdiction of the surrogate to try this question, has been questioned by the counsel of the donee. The surrogate has jurisdiction to try every question necessary to the settlement of the accounts of the executor. It is competent for the legatees, on the accounting of the executor, to produce evidence to charge him with more assets than he acknowledges in his accounts to have received. They may prove the testator had assets which the executor should have collected, or which he has received and not brought into his accounts. In the present case, the legatees assumed the last position. They sought to charge the executor with the amount of these bonds, and shewed the bonds had belonged to the testator in his lifetime, and that the executor had admitted they were in the possession of the testator at the time of his death. Had the case stopped there, it would have been my duty to have charged the executor with the amount of the bonds. But he sets up a gift by the testator; and in order to decide whether he is liable or not for the bonds, the question of gift must be determined. The executor himself raised this point, to exonerate himself from liability; and it is necessary to decide it in order to settle his accounts, and make a final decree for the distribution of the estate. If an executor can retain assets on the plea of a gift causa mortis, and then successfully impeach the surrogate's jurisdiction to inquire into the validity of this plea, the power of this court in respect to the settlement of accounts and the adjustment of estates is at an end.

I am very clear that this objection is not tenable—and must therefore decree distribution, in accordance with the conclusion to which I have arrived, respecting the revocation of the donation by the testator before his decease.

NOTE. See Jones v. Selby, Finch Prec. 300; Jayne v. Murphy, 31 Ill. App. 28.

RIDDEN v. THRALL et al.

(26 N. E. 627, 125 N. Y. 572.)

Court of Appeals of New York. Feb. 24, 1891.

Appeal from supreme court, general term, second department.

Action by James N. Ridden against James H. Thrall, as administrator, etc., of Charles H. Edwards, deceased, and another, to determine the validity of an alleged gift *causa mortis* made to plaintiff by defendant's decedent. From a judgment affirming a judgment in plaintiff's favor, defendant appeals.

Carlisle Norwood, Jr., for appellants. *John H. Corwin* and *Wm. D. Veeder*, for respondent.

EARL, J. On the 1st day of October, 1888, Charles H. Edwards had money on deposit in savings banks, and kept the savings banks books in a tin box, and on that day he delivered the tin box to the plaintiff, informing him that he was about to go to St. Luke's hospital in the city of New York to have an operation performed for hernia, and that he was apprehensive he might die from the results of the operation, and said to him that if he did not return he gave him the box and its contents. He went to the hospital on the next day, and on the 5th day of October an operation was there performed for inguinal hernia. The operation was not dangerous, and was apparently successful. But on the 16th day of October he suddenly died from heart disease, with which he was afflicted when he went to the hospital. He had not returned from the hospital, and had not recovered from the disease for which the operation was performed, nor from the results of the operation. The defendants claim that the circumstances were such that a valid gift was not made, mainly because Edwards did not die from the disease on account of which he went to the hospital, and from which he apprehended death might ensue. The case is novel in some of its features, and interesting. I have carefully considered the able argument submitted on behalf of the appellants, and am satisfied that the judgments of the courts below upholding the gift are right.

The gift was sufficiently proved. The facts which took place at the time of the gift on the 1st day of October were testified to by the plaintiff's wife. There were 16 bank-books, and they represented about $40,000 of deposits. Such a gift should be proved by very plain and satisfactory evidence, and, if the case depended upon the evidence of the wife alone, any court might well hesitate to uphold the gift. But on the previous day (September 30th) Edwards wrote the following letter addressed to the plaintiff: "Friend Jim: Should I not survive from the effects of the operation about to be performed on me at St. Luke's Hospital, this is my last will and request, that you will take charge of my body, and have it placed in my family plot in Greenwood Cemetery; and also that you will take full charge of all my personal effects of every kind, and to have and hold the same unto yourself, your heirs and assigns, forever. You will find my papers and all my accounts in the box. C. H. EDWARDS." This was inclosed in an unsealed envelope, addressed to the plaintiff, and placed by Edwards in the bureau in the room occupied by him in plaintiff's house, where it was found about a week after his burial by plaintiff's wife and his aunt, both of whom proved the handwriting to be that of the donor. The genuineness of this letter was not disputed upon the trial. While, standing alone, it would not have been sufficient to establish the gift, it furnishes strong confirmation of the evidence of plaintiff's wife as to the gift, and leaves no reason to doubt that it was made as she testified. It was competent as corroborating evidence, just as the oral or written declarations of the donor previously made would have been, showing the intention to give, and thus corroborating the evidence as to the actual gift subsequently made. I have found no authority condemning such evidence. In all cases where probate of a will is contested on the ground of undue influence, fraud, incompetency, or forgery, the previous declarations or statements, in any form, of the testator, showing an intention in harmony with the instrument offered for probate, have always been held competent, not as sufficient, standing alone, but as corroborating the other evidence offered by the proponent.

The gift was consummated by the delivery of the books, and no other formality was needed to constitute the actual delivery of the bank deposits needful to vest the possession and title in the donee. In savings banks in this state such deposit books are issued as evidence of the indebtedness of the banks. Withdrawals of deposits are entered in the same books, so that the deposit book always, with the addition of any interest, shows the actual state of the accounts between the depositor and the bank, and the whole indebtedness of the bank. It answers the same purpose in the case of a savings bank that is answered by a certificate of deposit in the case of other banks. The decisions are not entirely harmonious as to the sufficiency of the mere delivery of such deposit books to constitute a valid gift, either *inter vivos* or *causa mortis*. But the general rule in England and in this country, and particularly in this state, is that any delivery of property which transfers to the donee either the legal or equitable title is sufficient to effectuate a gift; and hence it has been held that the mere delivery of non-negotiable notes, bonds, mortgages, or certificates of stock is sufficient to effectuate a gift. 2 Redf. Wills, 312; Westerlo v. De Witt, 36 N. Y. 340; Champney v. Blanchard, 39 N. Y. 111; Penfield v. Thayer, 2 E. D. Smith, 305; Walsh v. Sexton, 55 Barb. 251; Johnson v. Spies, 5 Hun, 468; Allerton v. Lang, 10 Bosw. 362; Camp's Appeal, 36 Conn. 88; Bates v. Kempton, 7 Gray, 382; Chase v. Redding, 13 Gray, 418; Pierce v. Bank, 129 Mass. 425; Tillinghast v. Wheaton, 8 R. I. 536; In re Mead, 15 Ch. Div. 651; Moore v. Moore, L. R. 18 Eq. 474.

But the learned counsel for the appellants calls our attention to one of the by laws of the bank printed in the deposit

book in question in this action, and claims that the delivery was not effectual without the written order of the donor. The by-law is as follows: "Drafts may be made personally or by the order, in writing, of the depositor, if the bank have the signature of the party on their signature book, or by letters of attorney duly authenticated; but no person shall have the right to demand any part of the principal or interest without producing the pass-book, that such payments may be entered therein. If the person giving the order or power of attorney cannot write, he or she must make his or her mark, in the presence of a subscribing magistrate or some one whose signature is known at the bank, and any person presenting said order or power of attorney must be known or made known to the bank as the one authorized to receive the money." This by-law requires an order or power of attorney when some one seeks to draw money for the depositor or the depositor's money. But the depositor can draw the money without making an order, simply by the presentation of the deposit book, and so can any owner of the book. Suppose the plaintiff had purchased the book, and had thus become the absolute owner thereof. He could have drawn the money as owner on presentation of the book, and the bank could not have required, as a condition of payment, that he should procure a power of attorney or an order from one having no interest, legal or equitable, in the deposit. The owner in such a case should produce satisfactory evidence of his ownership of the book, and if the bank refused to pay he would be obliged to establish such ownership by any competent evidence, and nothing more; and his rights as purchaser would be no greater than his rights as donee. He has the same right to enforce a payment that he would have had if he had been the donee of any non-negotiable chose in action, or a certificate of deposit or unindorsed note. He could establish his right to payment in such a case by any proof showing that he was the absolute legal or equitable owner.

The claim is also made that the donor could not make the gift in the apprehension of death from a surgical operation to be performed in the future, to which he intended voluntarily to expose himself. But, without taking a broader view, death from a surgical operation, made necessary by a present disease, is, in a proper sense, death from the disease, and the gift may in such case be upheld as made in the apprehension of death from the disease.

We now come to the question, was the gift invalid because the donor did not die of the same disease from which he apprehended death? Gifts *causa mortis*, as well as gifts *inter vivos*, are based upon the fundamental right every one has of disposing of his property as he wills. The law leaves the power of disposition complete, but, to guard against fraud and imposition, regulates the methods by which it is accomplished. To consummate a gift, whether *inter vivos* or *causa mortis*, the property must be actually delivered, and the donor must surrender the possession and dominion thereof to the donee. In the case of gifts *inter vivos*, the moment the gift is thus consummated it becomes absolute and irrevocable. But in the case of gifts *causa mortis* more is needed. The gift must be made under the apprehension of death from some present disease, or some other impending peril, and it becomes void by recovery from the disease or escape from the peril. It is also revocable at any time by the donor, and becomes void by the death of the donee in the life-time of the donor. It is not needful that the gift be made *in extremis* when there is no time or opportunity to make a will. In many of the reported cases the gift was made weeks, and even months, before the death of the donor, when there was abundant time and opportunity for him to have made a will. These are the main features of a valid gift *causa mortis* as they are set forth in many text-books and reported cases. Just. Inst. lib. 2, tit. 7, § 1; Mack. Rom. Law, § 793; Civil Code Cal. §§ 1149, 1151; 1 Rop. Leg. 26; 2 Schouler, Pers. Prop. § 157; 2 Kent, Comm. 444; 1 Story, Eq. Jur. §§ 606, 607; 3 Pom. Eq. Jur. § 1146; Grymes v. Hone, 49 N. Y. 17; Williams v. Guile, 117 N. Y. 343, 22 N. E. Rep. 1071; Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. Rep. 415.

Counsel for the appellants would add one more prerequisite to an effectual gift, and that is that the donor, when the gift has been made in the apprehension of death from disease, must have died of the same disease, and he calls our attention to expressions of judges to that effect. I have examined all the cases to which he refers, and many more, and find that these expressions were all made in cases where the donor died from the same disease from which he apprehended death when he made the gift, and that none of them were needful to the decisions made. The doctrine meant to be laid down was that the donor must not recover from the disease from which he apprehended death. I am quite sure that no case can be found in which it was decided that death must ensue from the same disease, and not from some other disease existing at the same time, but not known. There is no reason for this additional prerequisite. The rule is that the donor must not recover from the disease from which he then apprehended death. If he recovers, the gift is void; if he does not recover, and the gift is not revoked, it becomes effectual. In this case the condition was that if he did not recover from the consequences of the operation and return from the hospital, the gift should take effect. That was a perfectly lawful condition for him as the owner of the property to impose, and no reason can be perceived for refusing to uphold a gift made under such circumstances. A donor may have several diseases, and may in making a gift apprehend death from one and not from the others, and shall the gift be invalid if, before he recovers from the disease feared, he dies from one of the other diseases? In such a case it might be, and generally would be, difficult, if not impossible, to tell what share any of the diseases had in causing the death. No medical skill could ordinarily tell that the donor would have suc-

cumbed to the disease feared, if the other diseases had not been present. Here the immediate cause of death appeared to be heart disease, and the autopsy did not disclose that there was any connection between the hernia or the operation and the heart disease. But who could tell that the death would have ensued from the heart disease at that particular time but for the operation? No medical skill can tell that the shock from the operation, and the debility and disturbance caused thereby, did not hasten death; and the death, therefore, in a proper sense, may have ensued, and probably did ensue, from both causes. Sound policy requires that the laws regulating gifts *causa mortis* should not be extended, and that the range of such gifts should not be enlarged. We therefore confine our decision to the precise facts of this case, and we go no further than to hold that when a gift is made in the apprehension of death from some disease from which the donor did not recover, and the apparent immediate cause of death was some other disease with which he was afflicted at the same time, the gift becomes effectual. The judgment should be affirmed, with costs. All concur.

DREW v. HAGERTY.

(17 Atl. 63, 81 Me. 231.)

Supreme Judicial Court of Maine. Jan. 18, 1889.

Exceptions from supreme judicial court, Androscoggin county.

Action for money had and received, brought by Franklin M. Drew, administrator, etc., of Daniel Hagerty, deceased, against Mary Hagerty. Defendant claimed the property, which was money deposited in a savings bank, under an alleged gift *causa mortis* of the savings bank book made by the intestate on the day of his death. Verdict for plaintiff which defendant moved to set aside, and also excepted to the charge of the court.

Newell & Judkins, for plaintiff. *Frank L. Noble*, for defendant.

WALTON, J. The most important question is whether the gift of a savings bank book from husband to wife, *causa mortis*, is valid without delivery, provided the book is at the time of the alleged gift already in the possession of the wife. The action was tried before the chief justice, and he ruled that, to constitute a valid gift *causa mortis*, there must be a delivery; that, if the property "be at the time already in the possession of the donee, the donor's saying to the donee, 'You may have it,' or 'You may keep it; it shall be yours,'—does not pass the property in the case of a gift *causa mortis*."

We think this ruling was correct. If the act of delivery was for no other purpose than to invest the donee with possession, no reason is perceived why it might not be dispensed with when the donee already had possession. But such is not its only purpose. It is essential, in order to distinguish a gift *causa mortis* from a legacy. Without an act of delivery, an oral disposition of property, in contemplation of death, could be sustained only as a nuncupative will, and in the manner and with the limitations provided for such wills. Delivery is also important as evidence of deliberation and intention. It is a test of sincerity, and distinguishes idle talk from serious purposes; and it makes fraud and perjury more difficult. Mere words are easily misrepresented. Even the change of an emphasis may make them convey a meaning different from what the speaker intended. Not so of an act of delivery. Like the delivery of a turf, or the delivery of a twig, in the ancient mode of conveying estates, or the delivery of a kernel of corn, or the payment of one cent of the purchase money, to make valid a contract for the sale of a cargo of grain, an act of delivery accomplishes that which words alone cannot accomplish. Gifts *causa mortis* ought not to be encouraged. They are often sustained by fraud and perjury. It was an attempt to sustain such a gift by fraud and perjury that led to the enactment of the statute for the prevention of fraud and perjury. See Mathews v. Warner, 4 Ves. 187, 196, note; Leathers v. Greenacre, 53 Me. 561, 569. As said in Hatch v. Atkinson, 56 Me. 326, it is far better that occasionally a gift of this kind should fail than that the rules of law be so relaxed as to encourage fraud and perjury.

We are aware that some text writers have assumed that, when the property is already in the possession of the donee, a delivery is not necessary. But the cases cited in support of the doctrine nearly all relate to gifts *inter vivos*, and not to gifts *causa mortis*. A gift *inter vivos* may be sustained without a distinct act of delivery at the time of the gift, if the property is then in the possession of the donee, and the gift is supported by long acquiescence of the donor, or other entirely satisfactory evidence. This court so held in Wing v. Merchant, 57 Me. 383, and the jury were so instructed in this case, and the defendant had the benefit of the instruction. But the question we are now considering is not whether a gift *inter vivos* can be sustained without a distinct act of delivery, but whether such a relaxation of the law can be allowed in the case of a gift *causa mortis*. We think not. Reason and the weight of authority are opposed to such a relaxation. Hatch v. Atkinson, 56 Me. 326; Lane v. Lane, 76 Me. 521; Parcher v. Savings Inst., 78 Me. 470, 7 Atl. Rep. 266; Dunbar v. Dunbar, 80 Me. 152, 13 Atl. Rep. 578; Miller v. Jeffress, 4 Grat. 472; French v. Raymond, 39 Vt. 623; Cutting v. Gilman, 41 N. H. 147; Delmotte v. Taylor, 1 Redf. Sur. 417; Egerton v. Egerton, 17 N. J. Eq. 419; Kenney v. Public Adm'r, 2 Bradf. Sur. 319; 2 Kent, Comm. (10th Ed.) 602, and note; Dickeschied v. Bank, 28 W. Va. 340; Walsh's Appeal, (Pa.) 15 Atl. Rep. 470, and note.

It is the opinion of the court that the gift of a savings bank book *causa mortis*, to be valid, must be accompanied by an actual delivery of the book from the donor to the donee, or to some one for the donee, and that the delivery must be made for the express purpose of consummating the gift, and that a previous and continuing possession by the donee is not sufficient; and that in this and in all particulars the rulings in the court below were correct and that no cause exists for granting a new trial. Motion and exceptions overruled.

PETERS, C. J., and DANFORTH, VIRGIN, EMERY, and HASKELL, JJ., concurred.

JONES v. WEAKLEY.

(12 South. 420, 99 Ala. 441.)

Supreme Court of Alabama. Feb. 6, 1893.

Appeal from circuit court, Jefferson county; James B. Head, Judge.

Action by John H. Jones against S. D. Weakley, as administrator of the estate of Nat Jenkins, deceased, to recover money had and received. From a judgment for defendant, plaintiff appeals. Affirmed.

White & Howze, for appellant. Cabaniss & Weakley, for appellee.

STONE, C. J. This case was tried by the court, without a jury, and presents a single question: Does the testimony prove that the deceased, Nat Jenkins, made a valid, executed gift causa mortis to John H. Jones, the plaintiff, of the money he had on deposit with the First National Bank of Birmingham? There is no material conflict in the testimony. The first National Bank of Birmingham was a bank of issue, discount, and deposit, and was not a savings bank. Nat Jenkins was a colored man, was lying seriously wounded from a railroad disaster, believed he would die of his wounds, and did in fact die therefrom two days afterwards. He had a deposit account with the First National Bank. He had in his possession a pass book, in which was an account with the caption, "Dr. The First National Bank, in acc't with Nat Jenkins, Cr." In this pass book were items of debit and credit, but the account was not balanced. There was in fact a balance due the depositor of near $900. Jones was a nephew of Jenkins, and was visiting the latter as he lay in the hospital, the effect of his injuries. He gave Jones the key to his box, and requested him to go and bring to him his pass book and other articles. On the next day, and in the presence of witnesses, Jenkins, after stating he was going to die, handed to plaintiff, Jones, the bank book, keys, and papers, and said to him: "Take this book. I give you this money, and all I have got. Go and get it. I don't want the old man or any of his folks to have anything that I have got. All I want is for you to see that I am decently buried." Jones took possession of the tendered pass book, keys, and papers, and retained them. After Weakley was appointed administrator, he checked the money out of the bank, and this action was brought by Jones to recover the same as so much money had and received for his use.

The general rule is that to constitute a valid gift, whether inter viv s or causa mortis, the donor must part with dominion over the thing attempted to be given; must do the act or acts which are, or appear to be, the most pronounced and decisive of the intention to part with possession and control; and the acts must of themselves amount to a parting with the possession and control. Authorities on this question are very abundant, and they cover almost every conceivable phase of the question. McHugh v. O'Connor, 91 Ala. 243, 9 South. Rep. 165; Dacus v. Streety, 59 Ala. 183, 8 Amer. & Eng. Enc. Law, p 1341 et seq., and the numerous authorities cited by counsel.

The direct question presented by this record has been many times considered. A pass book issued by a savings bank, it is held, rests on a peculiar footing. Such book is the record of the customer's account, and its production authorizes control of the deposit. Like the key of a locked box, its delivery is treated as a delivery of all it contains. It follows that the delivery in this case, accompanied by the declared intention to give, if the deposit had been in a savings bank, would have been a valid gift causa mortis of the money on deposit, of which it was the evidence. It would furnish the key to the locked contents. 8 Amer. & Eng. Enc. Law, 1324. 1325; Pierce v. Bank, 129 Mass. 425; Curtis v. Bank, 77 Me. 151; Hill v. Stevenson, 63 Me. 364; Camp's Appeal, 36 Conn. 88. Not so, however, with the present book. The First National Bank, as we have seen, was a bank of issue, discount, and deposit. The money could be withdrawn from the bank, not by the production of the pass book, but on the check of the depositor. It was not the best delivery available under the circumstances. It did not give dominion and control of the money,—the thing claimed to have been given,—for the money was as subject to check without the production of the book as with it. Thomas' Adm'r v. Lewis (Va.) 15 S. E. Rep. 389; Dole v. Lincoln, 31 Me. 422; Hillebrant v. Brewer, 6 Tex. 45; Noble v. Smith, 2 Johns. 52; Jones v. Brown, 34 N. H. 445; Beak v. Beak, L. R. 13 Eq. 489; 8 Amer. & Eng. Enc. Law, p. 1345, note 2. There is no error in the record. Affirmed.

WADDINGTON v. BUZBY.

(45 N. J. Eq. 173, 16 Atl. Rep. 690.)

Court of Errors and Appeals of New Jersey. Feb. 1, 1889.

Appeal from prerogative court; McGill, Ordinary. 43 N. J. Eq. 154, 10 Atl. Rep. 862.

A written instrument alleged to be the last will and testament of Ruth W. Buzby was offered to the orphans' court of Salem county for probate, by George G. Waddington, executor therein named, and probate was refused on objections raised by Nathan W. Buzby. On appeal the order refusing probate was affirmed by the ordinary, and the proponent appealed to this court.

W. T. Hilliard and W. E. Potter, for appellant. C. H. Sinnickson, for appellee.

SCUDDER, J. A careful consideration of the facts in this case has changed my first impression, and led me to a different result from that reached in the courts which have made the prior examinations of the questions presented. It appears, in my judgment, that sufficient weight has not been given to the extent of the right which the law gives to the owners of property to dispose of it by will, the moderate capacity required for the exercise of this right, and the aid they may invoke from others in giving order and legal form to their wishes without subjecting them to the charge of fraud and undue influence. At the date of this writing and its execution, April 20, 1882, Ruth W. Buzby was about 83 years old, and she died in 1886. She was feeble and forgetful to the extent that persons ordinarily are at such an advanced age, and she was nearly blind, so that she could not read, or did so with difficulty. But she could at that time go about the house, knew the members of the family, talked about her business affairs, remembered the amount of her property and where it was invested, objected to the reduction of the percentage of interest, took a part in the routine of the house and the payment of bills, and conversed with visitors whom she knew. She had been an intelligent woman, but not of very strong will, rather reticent than talkative, and became more silent and absent-minded as she grew old. She was injured by a fall, and failed in physical and mental strength from that time gradually until her death. The opinions of witnesses as to her mental capacity are of no weight unless sustained by facts on which such opinions are founded; and those who saw her seldom, or but once, and say she was silent, and appeared absent-minded, give little aid in determining this question. Lowe v. Williamson, 2 N. J. Eq. 82; Sloan v. Maxwell, 3 N. J. Eq. 581; Whitenack v. Stryker, 2 N. J. Eq. 8; Andress v. Weller, 3 N. J. Eq. 605; Stackhouse v. Horton, 15 N. J. Eq. 202; Pancoast v. Graham, Id. 294; Stevens v. Vancleve, 4 Wash. C. C. 262; Den v. Vancleve, 5 N. J. Law, 589; Harrison v. Rowan, 3 Wash. C. C. 580; Turner v. Cheesman, 15 N. J. Eq. 243; Eddy's Case, 32 N. J. Eq. 701, 33 N. J. Eq. 574; Collins v. Osborn, 34 N. J. Eq. 511; and others that might be cited,—are cases in our state where persons who were aged, diseased, blind, and infirm have executed wills, and the rule of capacity by which they may be sustained has been enunciated.

It is shown to my satisfaction that the testatrix, at the time she executed this writing, was capable of recollecting the property she was about to dispose of, understanding the manner of distributing it therein set forth, the objects of her bounty, and the nature of the business in which she was engaged. If so, she had the requisite testamentary capacity. The paper was in fact executed by her as her last will and testament, in the presence of two witnesses present at her house at the same time. The attesting clause does not say that they signed in the presence of the testatrix. One of these subscribing witnesses is dead; the other is living, but does not remember the circumstances. He is certain as to his signature, and that of the other witness is proved by his son. It is shown by the testimony of the other two persons who were present at the signing of the paper that they were all together in the dining-room when she signed and requested them to sign as witnesses to her will. This completes the attestation. It also appears that the will was read to her before signing. She took the will after execution, herself, up stairs, put it in a box with her other papers in a drawer of her room where she slept, and it remained in her possession until her death, about five years after its date. Of the fact of its due execution, and her capacity to make it, there seems to me to be satisfactory proof offered.

The more serious question in the case is whether Ruth W. Buzby executed this writing, purporting to be her last will and testament, through the undue influence of George G. Waddington, the proponent. The influence that will vitiate a will must be such as in some degree destroys the free agency of the testator, and constrains him to do what is against his will, but what he is unable to refuse, or too weak to resist. 1 Jarm. Wills, § 37; Lynch v. Clements, 24 N. J. Eq. 431; Moore v. Blauvelt, 15 N. J. Eq. 367.

It is claimed that this appears in several particulars. The proponent wrote the will, in which he was made sole executor, and his son and wife were favored legatees. In Rusling v. Rusling, 35 N. J. Eq. 120, 36 N. J. Eq. 603, it was said that the fact that the will was drawn by a favored legatee, while it calls for suspicious scrutiny of the circumstances, does not, of itself, invalidate the will. The same rule would apply where the legacies were given, not to himself, but to those who stand in such near relationship to him as a son and wife. We must therefore look for other circumstances. Each case

must be judged by its own circumstances, and no general rule can be made applicable to all cases. The testatrix had three children,—Mary Buzby, Beulah Gaskill, and Nathan Buzby. The son had died some years before her death, leaving a son of the same name, who is the caveator against the probate of this will. Mary Buzby lived with her mother until she died, on March 29, 1882. She cared for her in their home, aided her in the management of her property, but there is no evidence that she exercised undue influence over her. Her entire property was the sum of $5,200 invested in bonds and mortgages, and some household furniture of no great value. Some years before her death she made a will by which she bequeathed $1,200 to Beulah Gaskill, and the residue to Mary Buzby. That will was drawn by Aaron Fogg, a neighbor. On the evening before Mary died, a codicil was written by Aaron Fogg to this will. He went to the testatrix's house, at the request of the proponent, and it was there executed by Ruth W. Buzby and witnessed by him and his daughter, who went with him for that purpose. The exact form of the codicil is not given, but it was for the benefit of Mary B. Waddington, the proponent's wife, who is the daughter of Beulah Gaskill, and granddaughter of Ruth W. Buzby. She was taken by the testatrix when an infant, named after her daughter Mary, brought up by them with care and affection, and remained with them until her marriage. By the will in controversy $1,500 is given to Beulah Gaskill, and some furniture; $100 to Ann B. Gaskill, and some silver-ware; $100 to Isabella P. Gaskill, and some silver-ware; $600 to Asher B. Waddington, her great-grandson; $600 to Martha Hancock, in lieu of any charge for services or otherwise she might make against her estate; and the residue to Mary B. Waddington, her granddaughter. Her reason for giving no legacy to her grandson Nathan W. Buzby, the caveator, is stated in her will in these words: "My grandson Nathan W. Buzby heired a legacy for one thousand dollars by the will of his grandfather, Asher Buzby. By the failure of my co-executor, George W. Ward, I have been compelled to pay the greater part of said legacy out of my own resources, and this is the reason my said grandson Nathan W. Buzby is not mentioned as a legatee in this instrument." This payment was demanded of her by her grandson when it was said that she had but $10 left in the house for their present support; and there is evidence that, although she was patient at the time, and afterwards treated him with kindness and affection, she was displeased with his demand for the money, and his extravagance in spending it after he had received it.

Beulah Gaskill went to live with her mother after Mary's death, and remained with her until her death, with the promise that she would be provided for. She also received $1,500 by the will of her sister Mary. From this disposition of the property it will appear that all, excepting $600 given to Martha Hancock for services in the family from the time she was a child, was bequeathed to Beulah Gaskill and her children; Mary B. Waddington and her son, Asher, namesake of his grandfather, receiving the greater portion of the estate. The exclusion of Nathan W. Buzby was in the former will drawn by Aaron Fogg, with which Waddington had no connection, and Beulah Gaskill's individual portion was largely increased after the death of her sister, Mary, by her will and by the terms of this will, though in these proceedings she is hostile to the proponent. These dispositions appear more like the natural operation of the mind and affection of the testatrix than results of the fraudulent contrivance or undue influence of Waddington, who wrote this will. His conduct, his character, and relationship to her do not warrant such charges against him without more direct and certain evidence. Until about the time of Mary's death it does not appear that he took any interest in her business. He lived at Elsinboro, two and a half miles from the testatrix's home in Salem. After Mary's death, he attended to her money matters, collected her interest, and deposited it for her, advised the investment of her money when the security was changed, and with her consent reinvested it for the best rate of interest she could obtain. He was the husband of her granddaughter, and apparently the nearest connection with whom she could advise, and on whose judgment she could rely, as the infirmities of age increased. While it would have been more delicate and prudent for him, under the circumstances, to secure the services of a stranger to prepare a will for the testatrix, yet, if she had sufficient capacity to make it, and this is the voluntary expression of her wishes in disposing of her property, his mistake or even officiousness in tendering his services should not be allowed to defeat her purpose, long entertained and expressed in a former will, to exclude the caveator from any portion in her property. The decree should be reversed, and the will admitted to probate.

Under the peculiar circumstances of this case the caveator will be allowed $250 in lieu of costs, expenses, and allowances in all courts; and the executor will be given his costs and expenses out of the estate.

Decree reversed.

KNAPP and PATERSON, JJ., for affirmance. The CHIEF JUSTICE, DEPUE, DIXON, GARRISON, SCUDDER, VAN SYCKEL, BROWN, CLEMENT, COLE, and McGREGOR, for reversal.

MIDDLEDITCH et al. v. WILLIAMS et al.

(45 N. J. Eq. 726, 17 Atl. Rep. 826.)

Prerogative Court of New Jersey. June 17, 1889.

Appeal from orphans' court, Essex county; Kirkpatrick, Buttner, and Ledwith, Judges.

Francis E. Marsh, for appellants. J. Frank Fort, for respondents.

VAN FLEET, Vice Ordinary. The question presented by the appeal in this case is whether a decree made by the orphans' court of Essex county, on the 4th day of June, 1888, admitting to probate a paper purporting to be the last will of William H. Livingston, deceased, is such a decree as the court should, in view of the facts of the case and the law applicable to them, have made. The paper in question was executed on the 11th day of January, 1887, in the city of New York, where the testator then resided. It appears to have been executed in strict conformity to the requirements of our statute regulating the execution of wills. After the execution of the paper in question, Mr. Livingston removed to the city of Newark, in this state, where he died, on the 4th day of February, 1888. His wife died in August, 1886, and after that date, up to the time of his own death, his family consisted of himself, his daughter, Lillian, (his only surviving child,) and his mother-in-law, Marie C. Williams. His daughter, at the time of her mother's death, was five or six years of age. The testator, by the paper in question, gives all his property, of every kind and description, to his mother-in-law, and at her death to her son William P. Williams, in trust for his daughter, to be held until his daughter has attained the age of 25 years, when, in the language of the will, "said property shall be handed over intact to her: provided, however, that in consideration of taking care of Lillian till twenty-five years of age, or until her marriage, said Marie C. Williams shall be supported and maintained, in her ordinary manner of living, out of the income derived from said property; and should Marie C. Williams be living when Lillian shall arrive at twenty-five years of age, then Lillian shall give unto Marie C. Williams a satisfactory bond or guaranty for securing to Marie means for her support during the balance of her life. Should my daughter, Lillian, die before Marie C. Williams, then my property shall belong to the latter; and should both Lillian and Marie die before William P. Williams, then my property shall belong to the last named, William P. Williams." Mrs. Williams and William P. Williams are appointed executors. It is not shown who drew this paper, nor where, nor under what circumstances, it was drawn. One of the subscribing witnesses says that he thinks the testator wrote it himself. That is the only information we have respecting its preparation or origin.

The validity of this paper, as the will of William H. Livingston, is contested on two grounds: First, it is said that it is shown to be the product of an insane mind; and, second, that it is shown to be the result of the exercise of undue influence. And it is claimed that the contents of the paper itself furnish strong evidence of the truth of both these objections. A will may be contrary to the principles of justice and humanity,—its provisions may be shockingly unnatural and extremely unjust; nevertheless, if it appears to have been made by a person of sufficient age to be competent to make a will, and also to be the free and unconstrained product of a sound mind, the courts are bound to uphold it. The courts must so treat papers of this kind, in order to maintain that great principle which confers upon every citizen, of full age and sound mind, the right to do with his own as he pleases, so long as he does not attempt to apply his property to an immoral or unlawful purpose. But in cases where want of testamentary capacity or undue influence is alleged, it is the duty of the court to scan the provisions of the will to see whether or not they furnish any evidence of the truth of the charges made against its validity.

The feature of the paper under consideration which is most likely to attract attention, as tending to show that the disposition which the testator made of the property is both unnatural and unjust, is the fact that he has, either inconsiderately or designedly, manifested an unnatural preference for his mother-in-law and brother-in-law over the issue of his daughter. On scanning the will, it will be observed that it contains no indication whatever that the testator intended, in case his daughter should have issue, but did not survive her grandmother and her uncle, that her issue should take his property. On the contrary, if the will be read according to its plain words, it would seem to be entirely clear that he intended, if his daughter died in the life-time of either her grandmother or her uncle, that his property should go, even if his daughter left issue, not to her issue, but first to her grandmother, if she was then living, but, if not living, then to her uncle. Such I understand to be the plain direction of the will. It says: "Should my daughter Lillian die before Marie C. Williams, then my property shall belong to the latter; and, should both Lillian and Marie die before William P. Williams, then my property shall belong to the last named, William P. Williams." Death is here spoken of generally, and without restriction as to time. The testator does not say, "If my daughter Lillian shall die without leaving lawful issue surviving her, before attaining twenty-five years of age, then my property shall go either to her grandmother or her uncle;" but what he says is, if Lillian shall die before her grandmother or before her uncle, then his property shall go to her grandmother, if living, but, if

not, then to her uncle. Lillian's issue is not mentioned, nor is any provision made for it, either expressly or constructively, though the possibility that she might have issue before attaining 25 is a thing which, it would seem, must have been before the testator's mind; for in making provision for her care he limits the period that her grandmother shall take care of her to the time when she attains 25, or until her marriage. But suppose we say that, according to the settled rule of construction in such cases, the true meaning of the will is that neither the grandmother nor the uncle will take unless Lillian shall die before attaining 25 years of age,—and that, I think, is the construction which should be adopted,—still it is apparent that under this view the will is not such a one as a father, having an only child, and in the full possession of his senses, and with the instincts and affections common to our nature, would, when entirely free from any sinister influence, have been likely to make; for under this view it will be seen that if Lillian marries, has issue, and dies before attaining 25, her grandmother or her uncle will take the property given by the will to the exclusion of her issue. The will in this respect is, in my judgment, both unnatural and unjust.

But this, standing alone, constitutes no reason why the paper should not be given effect as the will of the testator. It may help to show that the testator lacked testamentary capacity, or that his will is not the free expression of his mind and heart, but in a case where it appears that he had the requisite capacity, and that his will is the unfettered expression of his wishes, it amounts to nothing at all. The paper in question is, however, assailed on other grounds. It is charged that it is the direct product of an insane delusion. The testator was a believer in spiritualism; that is, he believed the spirits of the dead can communicate with the living, through the agency of persons called "mediums," and who possess qualities or gifts not possessed by mankind in general. The proofs show that the testator stated to several persons, prior to the execution of his will, that the spirit of his dead wife had requested him, through a medium residing in Forty-Sixth street, in the city of New York, to make provision for his mother-in-law in his will. To one person he said that his wife's spirit had requested him to give all his property to her mother, and to do it in such a way that none of his relatives could get it away from her. To the same person he said, at another time, that the spirit of his wife was constantly urging him to make a will in favor of her mother. To another person he said that the spirit of his wife had requested him to be good to her mother, and see that she was made comfortable during the remainder of her life, and he also said that he intended to make a will, leaving enough to his mother-in-law to make her comfortable, because his wife wanted him to do so. The testator's wife, by her will, gave all her property to the testator, subject, however, to an annual payment of $500 to her mother, and a like sum to her brother, William P. Williams, during their joint lives, and, after the death of either, then to the payment of $1,000 annually to the survivor during his or her life. The evidence shows, I think, beyond doubt, that the testator believed, fully and thoroughly, that the messages which were delivered to him, as communications from his wife, actually came from her spirit, and that her spirit knew constantly all that he was doing.

The important question which this branch of the case presents for decision is, was such belief an insane delusion? The prevailing doctrine in England, up to the time the court of queen's bench decided Banks v. Goodfellow, L. R. 5 Q. B. 549, was that any degree of mental unsoundness, however slight, and even if it exercised no influence over the testator in making his will, and was wholly unconnected with the disposition he had made of his property, would, nevertheless, be fatal to the validity of his will. The course of reasoning which led to the adoption of this doctrine is stated as follows by Cockburn, C. J., in Banks v. Goodfellow, (page 559): "To constitute testamentary capacity, soundness of mind is indispensably necessary. But the mind, though it has various faculties, is one and indivisible. If it is disordered in any one of these faculties, if it labors under any delusion arising from such disorder, though its other faculties and functions may remain undisturbed, it cannot be said to be sound. Such a mind is unsound, and testamentary incapacity is the necessary consequence." A different doctrine was established by Banks v. Goodfellow. It was there held that if a testator possesses sufficient mental power to take into account all the considerations necessary to the proper making of a will, though he is subject to some delusion, yet if it appears that such delusion did not influence him, and was not calculated to influence him, in making his will, his will is entitled to be regarded as a valid testamentary act, and should be upheld. The principle established by that case is expressed in the following sentence of Chief Justice Cockburn's opinion: "If it be conceded, as we think it must be, that the only legitimate or rational ground for denying testamentary capacity to persons of unsound mind is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in making his will, and to influence his decision as to the disposal of his property, it follows that a degree or form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result, ought not to take away the power of making a will, or place a person so circumstanced in a less advantageous position than others with regard to this right." All sub-

sequent cases arising in England have been decided according to this principle, and it is now the established law of that country. Boughton v. Knight, L. R. 3 Prob. & Div. 64; Jenkins v. Morris, 14 Ch. Div. 674; Smee v. Smee, 5 Prob. Div. 84. The same principle has, in its substance, been recognized by the court of errors and appeals of this state. Chief Justice Beasley, in pronouncing the judgment of that court in Lozear v. Shields, 23 N. J. Eq. 509, declared that partial insanity was insufficient of itself to justify a decree setting aside a sale of real property or any other act. He said: "Mania does not, per se, vitiate any transaction; for the question is whether such transaction has been affected by it. Where a pure defense of mental incapacity is interposed, I think the true test in this class of cases is whether the party had the ability to comprehend, in a reasonable manner, the nature of the affair in which he participated. This is the rule, in the absence of fraud; for fraud, when present, introduces other principles of decision." My own view as to the true rule on this subject may be stated as follows: Even if it appears that a testator was subject to an insane delusion when he made his will, but it is also made to appear that his delusion was not of a character likely to influence him, and did not influence him, in the disposition which he made of his property, his will should be declared valid.

But this is somewhat aside from the question mainly in contest on this branch of the case, namely, is a belief in spiritualism an insane delusion? Sir John Nicholl, in the celebrated case of Dew v. Clark, 3 Addams, Ecc. 79, (2 Eng. Ecc. R. 441,) defined "insane delusion" as follows: "Wherever the patient once conceives something extravagant to exist, which has still no existence whatever but in his own heated imagination, and wherever, at the same time, having once so conceived, he is incapable of being, or at least of being permanently, reasoned out of that conception, such a patient is said to be under a delusion, in a peculiar, half-technical sense of the term, and the absence or presence of delusion, so understood, forms, in my judgment, the true and only test or criterion of present or absent insanity." Dr. Haggard's report of the opinion pronounced in Dew v. Clark attributes somewhat different language to Sir John Nicholl. The following is the definition, as he reports it: "When persons believe things to exist which exist only, or at least in that degree exist only, in their own imagination, and of the non-existence of which neither argument nor proof can convince them, they are of unsound mind; or, as one of the counsel accurately expressed it, 'it is only the belief of facts which no rational person would have believed, that is insane delusion.'" 1 Williams, Ex'rs, 35; 1 Redf. Wills, 71. Sir James Hannen in Boughton v. Knight, L. R. 3 Prob. & Div. 64–68, adopted the definition as reported in 3 Addams as the true one. He said he believed it would solve most, if not all, the difficulties which could arise in investigations of the kind now under consideration. Chief Judge Denio, in Society v. Hopper, 33 N. Y. 619–624, said: "If a person persistently believes supposed facts, which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion; and delusion, in that sense, is insanity." And Cockburn, C. J., in Banks v. Goodfellow, (page 560,) says: "When delusions exist which have no foundation in reality, and spring only from a diseased and morbid condition of the mind, to that extent the mind must necessarily be taken to be unsound."

According to these definitions, it is only a delusion or conception which springs up spontaneously in the mind of a testator, and is not the result of extrinsic evidence of any kind that can be regarded as furnishing evidence that his mind is diseased or unsound; in other words, that he is subject to an insane delusion. If, without evidence of any kind, he imagines or conceives something to exist which does not in fact exist, and which no rational person would, in the absence of evidence, believe to exist, then it is manifest that the only way in which his irrational belief can be accounted for is that it is the product of mental disorder. Delusions of this kind can be accounted for upon no reasonable theory except that they are the creations of some derangement of the mind in which they originate. To illustrate: In Smee v. Smee, 5 Prob. Div. 84, the testator imagined himself to be the son of George IV., and that when he was born a large sum of money had been put in his father's hands for him, but which his father, in fraud of his rights, had distributed to his brothers; and in Smith v. Tebbitt, L. R. 1 Prob. & Div. 398, the testatrix imagined herself to be one of the persons of the Trinity, and her chief legatee to be another. The delusion, in both instances, as will be noticed, was indisputably a wild and baseless fancy, not the product of evidence of any kind, but obviously the offspring of a disordered condition of mind. But where a testator is induced, by false evidence or false statements, to believe a fact to exist which does not exist, or where, in consequence of his faith in evidence which is true, but which is wholly insufficient to prove the truth of what he believes, he believes a fact to exist which in reality has no existence, his belief may show want of discernment, that he is overcredulous and easily duped, or that he lacks power to analyze and weigh evidence, or to discriminate between what is true and what is false, but it furnishes no evidence whatever that his mind is

diseased. His belief may show lack of judgment or want of reasoning power, but not that his mind is unsound.

The testator's belief in spiritualism was not a morbid fancy, rising spontaneously in his mind, but a conviction produced by evidence. The proofs show that when he first commenced attending what are called "séances" he was inclined to be skeptical. Afterwards his mind seemed to be in an unstable condition, —he sometimes believed and at others doubted; and that it was not until the spirits gave an extraordinary exhibition of their power, by printing or painting on a pin, worn by his mother-in-law on her neck, in brilliant letters, which sparkled like diamonds, the word "Dickie," a pet name of his dead wife, that his last doubts as to the reality of the manifestations were removed. Believing, as I do, that these manifestations were correctly described by Vice-Chancellor Giffard, in Lyon v. Home, L. R. 6 Eq. 655–681, when he called them "mischievous nonsense, well calculated, on the one hand, to delude the vain, the weak, the foolish, and the superstitious, and, on the other, to assist the projects of the needy and of the adventurer," still it seems to me to be entirely clear that it cannot be said that a person who does believe in their reality is, because of such belief, of unsound mind, or subject to an insane delusion. No court has as yet so held. No cases on this subject were cited on the argument. Those which I have examined uniformly hold that a belief in spiritualism is not insanity. The court in Robinson v. Adams, 62 Me. 369, said: "Belief in spiritualism is not insanity, nor an insane delusion. * * * The term 'delusion,' as applied to insanity, is not a mere mistake of fact, or the being misled by false testimony or statements to believe that a fact exists which does not exist." And in Brown v. Ward, 53 Md. 376, it was said: "The court cannot say, as matter of law, that a person is insane because he holds the belief that he can communicate with spirits, (of the dead,) and can be and is advised and directed by them in his business transactions and in the disposal of his property." Substantially the same view was expressed in Otto v. Doty, 61 Iowa, 23, 15 N. W. Rep. 578, and also in the matter of Smith's Will, 52 Wis. 543, 8 N. W. Rep. 616, and 9 N. W. Rep. 665. The utmost length to which any court has as yet gone on this subject is to declare that a belief in spiritualism may justify the setting aside of a will when it is shown that the testator, through fear, dread, or reverence of the spirit with which he believed himself to be in communication, allowed his will and judgment to be overpowered, and in disposing of his property followed implicitly the directions which he believed the spirit gave him; but in such case the will is set aside, not on the ground of insanity, but of undue influence. Thompson v. Hawks, 14 Fed. Rep. 902.

There is no evidence in this case which will support a conclusion that the testator, at the time he executed his will, was subject to an insane delusion. Nor do I think there is any evidence in the case which will support a judgment declaring that the will in question is the result of undue influence. There is no proof tending to show what influence the spirits or the medium exercised over the testator in making his will, except that which proceeded from the testator's own mouth. His declarations are competent to show the condition of his mind, but not to prove undue influence against either persons or spirits. Rusling v. Rusling, 36 N. J. Eq. 603–607. For the purpose of proving undue influence, they are without the least force. Neither the medium, nor Mrs. Williams, (the mother-in-law,) nor any other person who was present at any of the séances, has been examined as a witness. No legal evidence of what occurred at any of them is before the court. The charge of undue influence is mainly directed against Mrs. Williams. She is said to be a believer in spiritualism, and the proofs show that she went with the testator frequently when he went to the medium to consult the spirit of his dead wife. There are some things in her conduct which are calculated to create strong suspicion. Without apparent cause she seems to have entertained feelings of strong dislike towards all the testator's relatives. On the day of his wife's funeral she ordered his sister out of the house, without cause or right, and in utter defiance of the proprieties of the occasion, and after his sister refused to go she put herself so near to the testator and his sister as to be able to overhear everything they said. From that time forward, up to the time of testator's death, Mrs. Williams continued to reside with him, and his sister never, after the funeral, went to his house, nor, so far as appears, did any of his other relatives. When the testator died Mrs. Williams not only neglected to send notice of his death to any of his relatives, but did what she could to conceal his death from them. After the testator's death she admitted that she had persuaded or gotten him to insert the clause in his will which defers the turning over of his property to his daughter until she is 25, stating that the reason she did so was because she thought that when the daughter was of age some old fool might come after her for her money, and she wanted to protect her against such persons; and it also appears that she was present when the spirits gave the testator such evidence of their presence as he regarded conclusive, by printing on a pin on her neck, in brilliant letters, the pet name of his wife. These things naturally breed suspicions and create fears. They show that it is possible that every message the testator received, purporting to come from the spirit of his dead wife, came, not from the dead, but from the living, and that everything that was done to dispel the testa-

tor's doubts, and to induce him to believe in the reality of the spiritual manifestations which he witnessed, was, from beginning to end, a prearranged scheme of deception and fraud. But there is no proof in the case which will support a judgment that such was the fact. There is enough to raise a strong suspicion, but not enough to produce conviction. Undue influence, like fraud, cannot, in a case where no relation of trust exists, be presumed, but must be proved. I strongly suspect that the testator was duped. It may also be true that he was unduly influenced. I believe that the examination of Mrs. Williams, or the medium, as a witness, would, in all probability, have made many things which now seem dark and obscure, plain and clear. The question, however, whether or not the paper in question is the will of the testator, must be decided by the evidence before the court. Taking that as the sole guide to the judgment to be pronounced, I think it is the duty of the court to affirm the decree made below.

In re MacPHERSON'S WILL.

(4 N. Y. Supp. 181.)

Surrogate's Court, New York County. Jan. 2, 1889.

The will of Sara J. MacPherson, deceased, was offered for probate by John MacPherson, father of the executrix therein named, who was an infant. Elizabeth Hammond contested it on the ground of want of testamentary capacity. The letter referred to in the opinion as having been left at the house of Judge Angell, consisted of disconnected and irrelevant expressions, wholly without meaning.

Blair & Rudd, for proponent. James R. Angell, for contestant.

RANSOM, S. A perusal of the testimony taken in this case must lead any mind to the conclusion that the testatrix, for a considerable period before her death, was an excitable, sickly woman, who, on slight provocation, and often with no apparent cause, flew into fits of passion, and displayed many symptoms of a diseased mind. Conversation upon topics connected with certain of her relatives invariably excited her to some outburst. No person in the enjoyment of her senses would have composed the letter which appears to have been left at the house of Judge Angell by the deceased. Nevertheless, the unanimous testimony of the witnessess (with, possibly, the single exception of Mrs. Angell) is to the effect that, while these manifestations of an unhealthy mind were chronic from the date of her first illness, she was sometimes, for continued periods of time, in the possession of her faculties. In the light of these facts, the law as laid down in the case of Gombault v. Public Administrator, 4 Bradf. Sur. 226, might be taken as the text upon which to write a decision of this cause, viz.: "A will made in a lucid interval may be valid, but the facts establishing intelligent action must be shown. The nature and character of the instrument, and of its dispositions, have great influence, * * * and it is important to ascertain whether the contents of the will harmonize with the state of the decedent's affections and intentions otherwise expressed." In the case at bar the subscribing witnesses prove the due execution of the will, and that at the time the testatrix had mental capacity to make a will. One of the subscribing witnesses was a law clerk, and presumably familiar with the legal requisites. The will was drawn by Mr. Rudd, after an interview with testatrix, who called at his office for the purpose of giving instructions therefor. Thereafter he received a note from testatrix, containing substantially similar directions, and the will was drawn accordingly, and sent to her by a messenger, who superintended its execution at the house of decedent. At this interview with M. Rudd he testifies that she conversed rationally upon the subjects introduced. That the will is in accord with her expressed intentions appears by the testimony of her brother, as well as by the evidence of Mr. Rudd. In the case of Chambers v. Queen's Proctor, 7 Eng. Ecc. R. 164, cited in Gombault v. Public Administrator, supra, the decedent died by his own hand the day after he executed the will. There had been indications of insanity immediately before and after its execution. The court said: "If done during a lucid interval, the act will be valid, notwithstanding previous and subsequent insanity,"—and the will was upheld mainly on the ground of the reasonable dispositions contained in the instrument, the absence of proof of delusion at the time of the factum, and the rational manner in which the act was performed. Every incident specified in that case is supplied here for the purpose of supporting the will, and I am of opinion that the will should be admitted to probate.

BANNISTER et al. v. JACKSON.

(45 N. J. Eq. 702, 17 Atl. Rep. 692.)

Prerogative Court of New Jersey. May 24, 1889.

Appeal from orphans' court, Essex county; Kirkpatrick, Buttner, and Ledwith, Judges.

Proceedings for the probate of the will of George M. Bannister, offered by John Jackson, executor, named therein, contested by Caroline F. Bannister and Caroline J. Marsh, heirs at law. The orphans' court admitted the will to probate, and contestants appealed.

C. W. Riker, for appellants. M. T. Barrett and Henry Young, for respondent.

McGILL, Ordinary. This appeal is from a decree of the orphans' court of Essex county, which directs that a paper purporting to be the last will and testament of George M. Bannister be admitted to probate. The paper was executed in accordance with the requirements of the statute, on the 24th of April, 1884, and on the 22d of March, 1887, the testator died of chronic alcoholism at the German hospital, in the city of Newark. The appellants are his widow and only child. By the disputed paper, $500 is bequeathed to the widow, and declared to be in addition to her dower right, and $500 is given to the daughter, Caroline J. Marsh, who was then a widow, and provision is made that that sum shall be her own property, free from the control of her husband, Edward Marsh. The residue of the estate is divided equally between the four brothers of the testator, who reside in England; with the proviso that, in case two of the brothers, who are named, should die before the testator, without leaving issue, then their share shall be divided equally between the surviving brothers or their heirs. John Jackson, a friend and former business agent of Mr. Bannister, is named as the executor of the will, and power is given him to sell real estate. The estate disposed of is valued at from $12,000 to $15,000, and consists entirely of personal property. When the will was made the testator and Mr. Jackson were the equitable owners of a farm at Brookdale, in this state, the legal title to which was in the name of one McCartney, who held it in trust for him, and the testator alone was the equitable owner of a house and lot in the city of Newark, the legal title to which was then held in trust for him by Mr. Jackson. The admission of the will to probate is resisted upon the ground that at the time of its execution Bannister did not possess testamentary capacity. It is insisted that he had become an habitual drunkard, was afflicted with chronic alcoholism, and at the very moment of the paper's execution was so far intoxicated that he did not comprehend the act in which he was engaged. Bannister was married to the appellant Caroline F. Bannister, in 1855. She had been married before, but was then a widow. By her he had a daughter, the appellant Caroline J. Marsh. Until 1875 he was a prosperous slipper manufacturer in Newark. In that year he commenced to use intoxicating liquors to excess, and a year later left his wife and daughter, to live with a woman of disreputable character, and from that time until his death he continued in excessive indulgence in intoxicating drink. Witnesses describe the quantity of liquor that he consumed as "enormous." When sober he was nervous, sleepless, and irritable. His hand trembled continuously. He spoke of seeing strange figures and imps, and otherwise exhibited characteristics of the habitual inebriate. Yet, notwithstanding his condition, he managed to keep his business together, and, at about the time of making the paper in question, to sell it at considerable advantage. Sometimes he appeared to be afflicted with dullness and loss of memory, and at other times he exhibited a keen, shrewd capacity for business, and a strong will. In the spring of 1884 he declared that he had determined to go to Europe for the benefit of his health, and then made the advantageous sale of his business above spoken of, and at about the same time transferred to his mistress, in settlement of all her claims upon him, the furniture of the house in which they had lived together. He then made the will in dispute, and then, for the benefit of his health, went for two weeks to his Brookdale farm, and then to England. During all the time that he was separated from his wife and daughter, except while he was in England, he contributed to their support, remitting to them weekly a certain allowance. While he was in England his daughter wrote to him for assistance, and he answered her by the following letter, which should be inserted here because of its value in ascertaining his condition of mind and capacity at the time he wrote it: "London, July 12th, 1884. Carrie: Your letter just received. Glad to hear that all is well. You will please to understand that I am so placed that I cannot occupy but one home. I have for over nine years gave you and your ma a good living. Now there is a change. If your mother wants me, I will make arrangements to come, and I will make her as happy as a man can make his loving wife. Yours, G. M. B. P. S. I have sent by mail to Mr. Jackson to carry out all arrangements that you might make. Now, to you, my D. Can you lay your head on your pillow at night, and say to your God that you have been a loving, faithful child? If you can, then your God is not mine. G. M. B." In August of the same year he returned to Newark, and immediately took up his residence with his wife and daughter, and remained with them until some time in the following December. He had not been able to break his pernicious habits, and while he thus lived with them he was seldom sober. In December he returned to his mis-

tress, and resided with her until he died, in the spring of 1887. For some years before he went to England he had been the vice-president and a director of the Mutual Building & Loan Association of Newark. When he went to England he resigned those offices, but upon his return from England was re-elected a director of the corporation. The president of that association says that he was valued as a man of excellent judgment, and was frequently selected to act upon committees to audit accounts and appraise the value of property upon which loans were to be placed. He was not thought by this witness to be incompetent to transact business until a month or two before his death. After his return he was employed by Thomas Phaup, a slipper manufacturer, as the manager and foreman of his business, and for fifteen months was paid $15 a week in that capacity. During this employment he loaned Phaup $1,000, taking security for the loan, and so managed that he ultimately became the owner of Phaup's business. Up to the time of his death he kept a bank account in his own name. His money was chiefly invested in mortgages placed by himself, the interest from which he or his friend Jackson collected. While he was in England Jackson managed his affairs, and rendered him regular accounts. His securities were always kept in Jackson's safe.

The proofs satisfy me that at the time the will was made Bannister had become addicted to the excessive use of intoxicating liquors, and that to some extent such indulgence had impaired both his mental and physical powers, and had probably contributed to the degradation of his moral character, but at the same time I am satisfied that the impairment of his mental faculties did not extend so far as to render him incompetent to perform a legal act when he was not under the immediate influence of intoxication. The test of testamentary capacity in this state is that the testator can comprehend the property he is about to dispose of, the objects of his bounty, the meaning of the business in which he is engaged, the relation of each of these factors to the others, and the distribution that is made by the will. The capacity required is moderate, and, though the testator be subject to many infirmities, though he be feeble, absent-minded, forgetful, aged, diseased, blind, or otherwise infirm, if he yet possess the powers required by this test, he will be held to have testamentary capacity. Waddington v. Buzby, 43 N. J. Eq. 154, 10 Atl. Rep. 862. I am entirely satisfied that Mr. Bannister had testamentary capacity when he made the document in dispute. Much stress was laid by the counsel for the appellant upon the fact that the will provided that the money which was left to the testator's daughter was to be free from the control of her husband, when in fact, at the time the will was made, that husband had been dead two years. The daughter's marriage, her separation from her husband, the husband's death, and the making of the will, all occurred while Bannister lived apart from his wife and daughter. The testimony that he had been informed of the death of his son-in-law comes from the daughter alone. Possibly she may be mistaken as to her statement of it, or possibly it may have been conveyed to him at a time when he was under the influence of strong drink, and incapable of appreciating or remembering the information. His separation from his wife and daughter, and the daughter's separation from her husband, created a situation of affairs in which the death of the son-in-law would fail to disturb existing relations, so as to emphasize it and impress it upon his memory. I cannot but believe that the testator's failure to remember the death when he made his will must be attributed to other causes than disease of mind or incapacitating failure of memory.

The remaining inquiry is whether at the very time of the making of the will the testator was under the influence of liquor. The three persons present at the execution of that paper have been sworn. John Otto, the justice of the peace and conveyancer who drew the will, was not directly questioned upon the subject, but he says that Bannister came to his office at about 10 o'clock in the morning, and told him that he was going to Europe, and that he desired to arrange his affairs before he left, and then gave Otto directions for the will, and, as Otto says, the ideas to put in it. Otto then told him that he must have another witness, and he went out, saying that he would get Frank J. Merz. Mr. Merz was a saloon-keeper near by. He says that Bannister came in his saloon at about 11 o'clock in the morning, and called him aside, and asked him if he would be a witness to his will, and that he (Merz) assented, and went with him. He further says that Bannister was a little excited, and that he (the witness) thought that he had been drinking a little, for he smelt the liquor upon him, and Bannister seemed to be nervous. John Jackson, who was also present at the execution of the will, states that Bannister either came to him or met him that morning, and requested him to accompany him (Bannister) to Mr. Otto's office, where he proposed to have his will drawn. He told Jackson that he was going to Europe, and that he wished Jackson to be the executor of the will. Jackson says that the testator was sober, and knew what he was doing. When the will was completed Mr. Otto read it, and after it had been executed Bannister paid Otto for drawing it, and handed the will to Jackson. It may be that Bannister had been drinking immediately before his will. Merz says that he had been drinking a little,—was a little excited; to use his expression, was "kind o' nervous,"—but he does not pretend to say that Bannister did not appreciate the business in which he was en-

gaged. To Jackson he seemed to be sober, and that which he did and said throughout the transaction seems to clearly indicate that he was not intoxicated; at all events, to such a degree as to disorder his faculties or pervert his judgment. In Peck v. Cary, 27 N. Y. 9, 23, Chief Justice Denio said: "It is not the law that a dissipated man cannot make a contract or execute a will, nor that one who is in the habit of excessive indulgence in strong drink must be wholly free from its influence when performing such acts. If fixed mental disease has supervened upon intemperate habits, the man is incompetent and irresponsible for his acts. * * * If he is so excited by present intoxication as not to be master of himself, his legal acts are void, though he may be responsible for his crimes." My conclusion, after a careful examination of this case, is that at the time the will in dispute was made Mr. Bannister's habitually excessive indulgence in strong drink had not produced a fixed mental disease sufficient to destroy his testamentary capacity, and that at the very moment of the execution of that document he was not so intoxicated that the act in which he was engaged was vitiated. I will therefore affirm the decree of the orphans' court.

ROLLWAGEN v. ROLLWAGEN et al.

(63 N. Y. 504.)

Court of Appeals of New York. Jan. 18, 1876.

Appeal from supreme court, general term, First department.

Instruments purporting to be the last will and testament of Frederick Rollwagen, deceased, and a codicil thereto, were, by the executors therein named, offered for probate to the surrogate of New York county, and probate was refused. On appeal to the supreme court, the decree of the surrogate was affirmed, and the proponents appealed to this court.

In 1871 testator, an uneducated man, who could neither read nor write, worth about $700,000 in real estate, married a niece of his deceased wife, who for several years had been his housekeeper. At that time he was a confirmed invalid, having nearly lost the power of speech, and his infirmities increased until his death, in October, 1873. In the year 1872 it appeared from the evidence of his intimate friend that he could not speak a word nor utter an intelligible sound. In April, 1873, he discharged his old business agent, and employed a brother of his wife, a man of no business capacity, to take charge of his property, and a large and expensive residence was purchased and furnished. In the fall of 1872, and again in June, 1873, the brother employed attorneys to draw wills for testator in favor of the wife, by which the residuary estate was tied up until his youngest grandchild should come of age, the brother being made trustee. The wife gave all the directions for making the will, claiming to understand the sounds made by testator, none of which were intelligible to the attorney, nor did testator at such time utter any word or intelligible sound. In September, 1873, a codicil was drawn under similar circumstances, increasing the gift to the wife. None of testator's children or grandchildren were present at the execution of the wills or codicil, nor did it appear that they knew of them.

Wm. H. Arnoux and Wm. A. Beach, for appellant. Henry L. Clinton and George F. Langbein, for respondents.

EARL, J. The decedent probably had sufficient mind to make a will, and this is not denied by contestants' counsel. His mind was, however, undoubtedly impaired and his will enfeebled by paralysis and disease; to what extent we are unable to determine. If, therefore, the only objection to the probate of this will was mental incompetency to make it, the objection could not prevail. A party who offers an instrument for probate as a will must show satisfactorily that it is the will of the alleged testator, and upon this question he has the burden of proof. If he fails to satisfy the court that the instrument speaks the language and contains the will of the testator, probate must be refused. The laws in reference to the distribution of the estates of persons dying intestate are founded upon principles of public policy and justice, and must regulate the transmission of property, unless a person before death has, in the mode prescribed by law, himself provided how his property after death shall be disposed of. As said by Judge Davies in Delafield v. Parish, 25 N. Y. 9, 35: "It is not the duty of the court to strain after probate, nor in any case to grant it, where grave doubts remain unremoved and great difficulties oppose themselves to so doing." And this was substantially the language of Lord Brougham in Panton v. Williams, 2 Curt. Ecc. 530. Ordinarily, when a testator subscribes and executes a will in the mode required by law, the facts of such subscription and execution are sufficient proof that the instrument speaks his language and expresses his will; but when a testator is deaf and dumb, or unable to read or write and speak, something more is demanded. There must then not only be proof of the factum of the will, but also that the mind of the testator accompanied the act, and that the instrument executed speaks his language, and really expresses his will. This will is somewhat complicated in its terms, and I am satisfied that there was no time in the year 1873 when the decedent could utter the words or give expression to the language therein contained. Even if, according to some of the evidence, he could at times talk some, it was only at intervals, and to a limited extent. However it may have been at other times, he could not talk or utter an intelligible sound on the days when the will and codicil were executed, and the attorney who drew the will could not hold any conversation with him, and received all his instructions from his wife. It is true that the will and codicil were read to him, and that he is claimed to have assented by the nod of his head, and the nasal sound without meaning; but it was shown that when in health he had a habit of nodding with his head when he did not mean assent, and hence that furnished no certain indication of his assent to what was read. The will disposes of a large estate in a method by no means simple and direct; and the proof that he understood and assented to its provisions should be quite clear and satisfactory before it should be admitted to probate. Barry v. Butlin, 1 Curt. Ecc. 639; Chaffee v. Baptist Miss. Con., 10 Paige, 90; Boyd v. Cook, 3 Leigh, 35; Van Pelt v. Van Pelt, 30 Barb. 134; Longchamp v. Fish, 2 Bos. & P. 415.

It is said in 1 Jarm. Wills, 29, "that, in proportion as the infirmities of the testator expose him to deception, it becomes imperatively the duty, and should be anxiously the care, of all persons assisting in the testamentary transaction, to be prepared with the clearest proof that no imposition has been practiced, but that the testator did in fact fully under-

stand every portion of the paper which he executed as his will." In Weir v. Fitzgerald, 2 Bradf. Sur. 42, the learned surrogate says: "Something more is necessary to establish the validity of the will, in cases where, from infirmities of the testator, his impaired capacity, or the circumstances attending the transaction, the usual inference cannot be drawn from the mere formal execution. Additional evidence is therefore required that the testator's mind accompanied the will; that he knew what he was executing, and was cognizant of the provisions of the will." Satisfactory evidence of this kind has not been produced in this case, and hence probate was properly refused.

But if we assume that the will and codicil were formally executed, and that the mind of the testator accompanied the act, and that the contents of the instruments were known to him and assented to by him, probate would still have to be refused on account of undue influence. It is impossible to define or describe with precision and exactness what is undue influence, what the quality and the extent of the power of one mind over another must be, to make it "undue" in the sense of the law, when exerted in making a will. Like the question of insanity, it is to some degree open and vague, and must be decided by the application of sound principles and good sense to the facts of each given case. Lynch v. Clements, 24 N. J. Eq. 431. But the influence exercised over a testator which the law regards as undue or illegal must be such as to destroy his free agency; but, no matter how little the influence, if the free agency is destroyed it vitiates the act which is the result of it. In 1 Jarm. Wills, 36, it is said "that the amount of undue influence which will be sufficient to invalidate a will must, of course, vary with the strength or weakness of the mind of the testator; and the influence which would subdue and control a mind naturally weak, or one which had become impaired by age, sickness, disease, intemperance, or any other cause, might have no effect to overcome or mislead a mind naturally strong and unimpaired." The undue influence is not often the subject of direct proof. It can be shown by all the facts and circumstances surrounding the testator, the nature of the will, his family relations, the condition of his health and mind, his dependency upon and subjection to the control of the person supposed to have wielded the influence, the opportunity and disposition of the person to wield it, and the acts and declarations of such person. Marvin v. Marvin, 3 Abb. Dec. 192; Reynolds v. Root, 62 Barb. 250; Tyler v. Gardiner, 35 N. Y. 559; Forman v. Smith, 7 Lans. 443; Lee v. Dill, 11 Abb. Pr. 214; Dean v. Negley, 41 Pa. St. 312.

It is not sufficient to avoid a will that it is obtained by the legitimate influence which affection or gratitude gives a relative over the testator. A competent testator may bestow his property upon the objects of his affection, and he may, from gratitude, reward those who have rendered him service; but if one takes advantage of the affection or gratitude of another to obtain an unjust will in his favor, using his position to subdue and control the mind of the testator so as, substantially, to deprive him of his free agency, then the fact that affection or gratitude was the moving cause makes it no less a case of undue influence. In this case, in the space of about a year, we find the testator executing three successive instruments, in which the share of his wife goes on increasing. We cannot presume that his bounty to his wife and her relatives was prompted by affection. On his part, his marriage was a matter of convenience, and he had lived with his wife less than two years when the last instrument was executed, and less than one when the first was executed. It is not a case where husband and wife had lived together for years after a marriage prompted by mutual affection, which had been increased by years of tender care and a thousand acts of love and kindness, until the husband deemed no bounty he could bestow upon his wife too great. It is the case of a scheming woman, marrying an old man, her uncle, broken in body and enfeebled in mind, and then scheming to secure an undue share of his property for herself and her relatives. We cannot presume that the testator was influenced by gratitude. It is true that she rendered him faithful and valuable service. She was diligent and kind in her constant attention to his wants; so she was before her marriage, at $14 per month. By his marriage with her he had elevated her to a condition of independence, and had secured to her, by operation of law, an income by law far in excess of her reasonable wants. A change from $14 per month to $12,000 per year was certainly all the reward which mere gratitude would prompt or be expected to bestow. How, then, is this will to be accounted for? She was the constant attendant of the testator; his only organ of communication with others. He was entirely dependent upon her for all his wants. She procured the appointment of her brother as his agent, and thus had the entire control and management of his estate. She introduced her brother and mother into the household, and his own children, though not formally shut out of his house, were probably not welcome visitors, judging from the death-bed scene, when she refused to send for them to see their dying father. Upon all occasions, so far as disclosed in the evidence, he was submissive to her will. She procured the will to be drawn, instructed the scrivener, and had it executed when he was speechless. Besides the large bounty conferred upon her, the corpus of the estate is tied up, and placed in the control of her brother. She was alone with him, and had every opportunity, in the helpless condition of his body and the enfeebled condition of his mind and will, to impose upon him,

and subdue him entirely to her will. We have no direct proof of what she did, because no witnesses were present, and she was not sworn. These and the other circumstances above alluded to, and all the inferences to be drawn from the immense mass of evidence given before the surrogate, convince us that this will and the codicil were the result of undue influence, imposition, or fraud of some kind, and that they should not be admitted to probate. It matters not that she did not take for herself and relatives a larger share of his estate. She took enough to show her grasping disposition and overpowering influence.

I freely admit that there are some difficulties standing in the way of the conclusion which we have thus reached, and that strong arguments were urged, with great ability, for the proponents by their learned counsel; but the difficulties lying in the pathway of the proponents are still greater. An immense estate should not be disposed of by a will more or less unjust, and tied up by complicated provisions, except upon clear and satisfactory proof that it is really the will of a competent testator, exercising his free agency. As said by Lord Brougham in Panton v. Williams, supra: "It is much less material that those who seek to impeach a testamentary instrument should be unable to explain certain things in their case, and should be forced to admit that their argument is not, in every point, consistent with all the facts, than that they who seek to establish the will should give no rational, consistent, or intelligible solution of those difficulties which incumber their supposition and obstruct the path towards the conclusion they would have us arrive at."

Our attention is called to certain rulings of the surrogate excluding questions put to witnesses by the counsel of proponents, and the claim is made that gross errors were committed prejudicial to the proponents. I have carefully considered all of them, and believe that most of the rulings were clearly right, and if any of them were wrong they were not of such a character as materially to affect the case, and hence are not grounds for reversal upon this appeal. Clapp v. Fullerton, 34 N. Y. 190; Gardiner v. Gardiner, Id. 155, 164.

The judgment must be affirmed, with costs.

MONROE et al. v. BARCLAY et al.

(17 Ohio St. 302.)

Supreme Court of Ohio. Dec. Term, 1867.

Error to district court, Mahoning county.

Action brought by George Monroe, Catherine Monroe, and Erastus Jacobs against John McClelland and Francis Barclay in the court of common pleas to set aside the will of Mary McClelland, deceased, on the ground of fraud, undue influence, and want of testamentary capacity. It appeared at the trial before a jury that deceased married Erastus Jacobs in 1838, and that they lived together until 1852, when he went to California; that deceased and McClelland were married by defendant Barclay, a justice of the peace, in 1856, and lived together as husband and wife until her death. The plaintiffs gave evidence tending to show that McClelland married Mary for her property only; that he combined with others to induce her to make a will; that she was advised to marry him, and that she had a right so to do; that McClelland was about 35 years of age at the time of the marriage, and that Mary was over 57; that she was deformed, filthy, drunken, profane, and lewd; and that they lived together most unhappily. The defendants gave evidence tending to establish her capacity to make a will, and to show that before and ever since her marriage with McClelland she expressed her determination not to give her property to the plaintiffs. They further gave evidence tending to rebut all fraud or undue influence upon the testatrix. Verdict and judgment for defendant. On error to the district court, the judgment was affirmed, and plaintiffs filed their petition in error.

Geo. M. Tuttle and John M. Stull, for plaintiffs in error. F. E. Hutchins, for defendants in error.

DAY, C. J. The original case was a proceeding in the court of common pleas, to contest the validity of the last will of Mary McClelland, deceased, upon three grounds: (1) That at the time of executing the will she was not of sound mind and memory; (2) that she was fraudulently induced to make the will; (3) that the will was procured by undue influence of defendants upon the testatrix. The issues joined by the parties upon these grounds were tried to a jury, and a verdict was rendered in favor of the defendants, sustaining the will.

The testimony is not fully set forth in the bill of exceptions. It is therefore to be presumed that the finding of the jury was, under the charge of the court, warranted by the evidence.

The only errors insisted on here arise upon exceptions taken by the plaintiffs to the refusal of the court to charge the jury as requested by them and to the charge as given. The plaintiffs submitted to the court 21 propositions in writing, which they requested the court to give in its charge to the jury. It is stated in the record that "the court refused to charge as requested, except as stated" in the charge given to the jury; and that the plaintiffs excepted to the "refusal to charge as requested, and to the charge, so far as the same is contrary to said request."

The charge and the propositions submitted by the plaintiffs are fully set forth in the bill of exceptions, but no reference is made in the charge to any one of the propositions; so that it is not specified in the record which one of the propositions the court refused to give as requested. This is left to be discovered, by seeing what part of the plaintiffs' requests were not embraced in the charge given. It will be seen, moreover, that the plaintiffs excepted to the charge so far only as the court omitted to adopt the written proposition submitted by them, and so far as the charge was contrary thereto. It is not deemed necessary, for the purpose of presenting the questions made by the exceptions, to recite here said propositions or the charge in full. Suffice it to say that most of the propositions were substantially given in the charge to the jury as requested. This does not seem to be strenuously controverted by the counsel for the plaintiffs, except as to the propositions numbered from 16 to 20, inclusive. Indeed, the whole controversy, arising out of the neglect of the court to charge as requested, and upon the charge as given, may be fairly presented by stating these five propositions, and the charge relating to them. The propositions are as follows: "(16) If, previous to the will being made, John McClelland, or any person acting in concert with him, took advantage of imperfect, though not absolutely unsound, judgment on the part of the testatrix, and, by advice known by them to be false, induced her to believe that she owed to Erastus Jacobs no duty as a wife, and she made the will under the continued influence of that persuasion, the will is void. (17) That for this purpose it makes no difference whether it relates to matters of fact merely, or whether it related to matters of judgment only, provided it related to matters about which she, in her imperfect condition of judgment, might be, and actually was, misled by the advice. (18) If, at the time of making the will in question, Mary Jacobs, the testatrix, from false advice, knowingly given by John McClelland, or by any other person acting with him, believed that Erastus Jacobs was not her lawful husband, when in fact he was, and that John McClelland was her lawful husband, when in fact he was not, the will is void. (19) It makes no difference whether the false advice thus given was in relation to some matter of fact or in relation to some matter of law, concerning her relation to Jacobs and McClelland, provided she, being then possessed of impaired powers of judgment, believed

the advice to be true, and acted accordingly. (20) It a man knowingly and wrongfully marries and cohablts in a state of adultery with a woman who is the lawful wife of another man, and whose husband has not forfeited his claims to her comfort and society, and, by the influence of such marriage and cohabitation, procures a will from her in his favor, and disinheriting her real husband, that will is void for illegal influence."

It is to be observed that these propositions make no allowance for any other facts or circumstances which might modify the assumed facts, but assert that the facts assumed would, under any circumstances, invalidate the will.

Under the sixteenth proposition, it is assumed that it would make no difference when, or for what purpose, the testatrix was induced to believe that she owed to Erastus Jacobs no duty, no matter if it was for a purpose having no reference to a disposition of her property; still it is assumed that, if the advice was ever given for any purpose, and the false belief continued, the will is void, although the advice had no effect whatever in producing the will. Under the seventeenth proposition it is claimed that the will would be void if the testatrix was misled by the false advice, without assuming that she was thereby induced to make the will, or that such advice had the least influence on the testamentary act. Indeed, these two propositions, taken together, assume that, if the testatrix was, at any time and for any purpose, misled by the false advice of McClelland as to her duty to Jacobs, and remained under such false impression when the will was made, though it had no relation thereto, and in no way tended to produce it, still the will was void.

The same may be said, substantially, as to the eighteenth and nineteenth propositions. In the nineteenth, which is the most explicit, it is not assumed that, in acting upon the false advice, she did so in relation to the will. It is undoubtedly well settled that, to invalidate a will for fraud or undue influence, it must appear that the fraud or undue influence had some effect "upon the testator in producing the very act of making his will." Redf. Wills, 516, 524, 525, 527. But, however this may be, the most that can be claimed of these four propositions is that they are based on that kind of undue influence which amounted to fraud upon the testatrix. This is the gist of them; and upon a fair construction of the charge, so far as they tended to induce the will, they were substantially given to the jury. It is difficult, therefore, to see wherein the plaintiffs were not permitted to have all the benefit of these propositions, to which they were entitled. Upon this point the court charged the jury "to inquire whether any fraud or misrepresentations were resorted to to induce the execution of this will. If such fraud was exercised, then it would, however slight, destroy the validity of the will; that is, if it was sufficient to and has, in your judgment, tended to induce the execution." Here the court, in reply to these four requests, told the jury that if "any fraud or misrepresentations were resorted to to induce the execution of the will, * * * however slight, * * * if it tended to induce the execution" thereof, the will was void. If these requests are construed as relating to the act of the testatrix in making the will, then the plaintiffs had the full benefit of them in the charge. In that case, the record does not show affirmatively that they were refused by the court, or that they are embraced in the exceptions taken by the plaintiffs.

But the point that seems to be chiefly relied on by the plaintiffs is made on the twentieth proposition. Upon the facts there assumed, it was claimed, as a presumption of the law, that the will was produced by illegal, and therefore undue influence. The court did not accede to this proposition, but left the question of undue influence to be determined by the jury, under the following instructions relating to this and other propositions: "Inquire whether, through the exercise of force, or by fear produced, or in any manner, such an influence was exerted over her as to induce her to make a disposition of her property contrary to her own will and inclinations; or whether such an undue and overruling influence was exercised upon her mind as to control or overpower her own inclinations and judgment, or induce her, without or contrary to her own intention and will, to execute the paper. If either of these propositions are found in the affirmative, it would defeat the will." Construing the charge strongest against the plaintiffs, it would seem that the court intended to be understood as holding the law to be that, in the absence of fraud, no matter by what influence a testator may be exercised, so long as it does not overpower his inclinations and judgment, and induce a disposition of his property contrary to his own wishes and desires, his will cannot be invalidated for undue influence. Indeed, it is not denied but that the charge, as applied to ordinary cases, may be sustained by both reason and authority; but it is claimed that a distinction is to be taken between influences that are lawful and those that are unlawful.

The gist of the claim is that the will was void because it was induced by influences growing out of an unlawful relation. No matter for what reason the testatrix may have been abandoned by her husband, or why she may desire to disinherit him and her kindred, or what obligations may have arisen from the unlawful relation; no matter if the will was made without any influence of the devisee other than that which sprung from their association; and no mat-

ter if it was made in accordance with her own inclinations and judgment,—still it is assumed that the will would be void. If no other objection than this was urged against a gift of property between living parties, it would hardly be contended that it would be void. It is difficult to see why a bequest or devise should be subjected to a more stringent rule. Every will, it may fairly be presumed, is prompted by influences strong enough to induce its provisions, and it would seem, therefore, that the most that ought to be claimed from such influences in the contest of a will is to have them submitted to the jury, to enable them to determine whether the testator was misled, or so influenced thereby as to affect his own free choice and judgment in the disposition of his property. The power to make a will is granted by the statute to "any person of full age and sound memory"; and, under its provisions, the will is to be admitted to record as valid when "duly attested and executed, and the testator at the time of executing the same, was of full age and sound mind and memory, and not under any restraint." Swan & C. St. p. 1615, §§ 1, 15. Restrictions are imposed upon none, but all are alike left to the exercise of their own free wills and inclinations in the disposition of their property. The power thus given to dispose of property does not depend upon the disposition made thereof, nor is it restricted to those who may employ it only for just and wise purposes; but all upon whom the right is conferred may use it without "any restraint." Indeed, it is contemplated by the statute that this is the only way in which it can be exercised. Freedom from restraint is essential to the validity of a will. So careful is the law in this respect, that it will not uphold a will that has been induced by restraint upon the testator, whether in the form of fraud practiced upon him or any other influence that destroys the free exercise of his own will. Redf. Wills, 524, 527. It would be inconsistent with the right conferred by the statute, and with the spirit of the construction it has hitherto received, to sanction restraints upon a testator, based alone on the character of the motives or causes that may have induced any disposition of his property that he may make while in the free exercise of his own inclinations and judgment. He may give his property to whomsoever he pleases; and his motives or reasons therefor, so long as he is "not under any restraint," are matters of his own conscience, for which he is not accountable to the law. His will, executed in conformity to the statute, if it be his own, and not in any sense the will of another, cannot be invalidated, however much its provisions may be disapproved by others.

It is claimed in the proposition under consideration that the will, upon the facts therein assumed, would be void for "illegal influence." In the solution of the question made by this proposition, much of the difficulty disappears when we consider what "influence," as applied to the invalidation of wills, is "illegal." Every will, as before remarked, is the result of influences strong enough to produce it. Since, then, it is the policy of the law to secure to every one the right to dispose of his property in accordance with his individual will, that influence alone is illegal which places the freedom of a testator's will under some kind of restraint. If this be so, it follows that it matters not what may be the origin or character of any influence operating upon a testator, if it does not place him "under any restraint." It would seem to follow, also, that it would be equally immaterial how an individual may have acquired an influence over a testator, unless such influence is exerted in a manner that tends to restrain the free exercise of his will in the disposition of his property. It is claimed in this proposition that the influence that produced the will was illegal only because it sprung from an unlawful relation. If this be so, then the principle would be equally applicable to any other unlawful relation, and would destroy a will made under influences springing therefrom, although the testator, without being placed under restraint, could not be persuaded to make a will otherwise than as prompted by such influences. However reprehensible such influences may be, if a testator voluntarily chooses to be actuated by them, it is a privilege he may enjoy under the law that secures to every one alike the right to dispose of his property without restraint upon his own judgment and conscience. It is undoubtedly well settled that a will cannot be invalidated because it was produced by influences springing from a lawful marital relation, unless such influence has been unduly exerted. The influence arising from an unlawful marital relation may be as strong as that of the other; but, unless it impairs more than the other the free exercise of the testator's will, it is difficult to see how the influence arising from the unlawful relation is necessarily such undue influence as will invalidate a will, while that of the other will not. It would seem, upon the principles already stated, that the question would be essentially the same in either case, whether the influence had been, in fact, exerted in restraint of the testator's will. However justly an adulterous marital relation may be reprobated, it by no means follows that every will produced by influences arising from that relation is tainted with such turpitude that to uphold it would "do violence to the morality of the law." This is the theory upon which the claim of the plaintiffs rests. But the moral test will not in all cases avail. If the principle be correct, it makes no difference which party makes the will; whether the devise be from the woman to the man, or the man to the woman, it would be equally void. It would

be easy to suppose cases where considerations of moral obligation, as well as that of public duty, would require a man to make suitable provision for a woman with whom he had sustained this relation. In such cases it would do no violence to the morality of the law to sustain such provision, though it be made by will, and induced solely by influences springing from the unlawful cohabitation.

It may, however, be admitted that the influences growing out of an unlawful marital relation do not stand, and should not be permitted to stand, upon an equal footing with those coming from the lawful relation; but the question recurs whether the difference is in matter of law or of fact. If it be the former, then every will induced by an unlawful relation is void, though the testator might not have been "under any restraint"; but this, it has been shown, is contrary to the general policy of the law. If it be the latter, then the proof of the unlawful relation should go, with the other evidence, to the jury, to enable them to determine the question of undue influence. We think this would be in accordance with the law, and, in general, best subserve the ends of justice.

We have not been furnished with authorities, nor do we see any sufficient reason, to warrant us in making this class of cases an exception to the general principles relating to the validity of wills. It is true that the position of the counsel for the plaintiffs is strongly supported obiter in the able opinion delivered in the case of Dean v. Negley, 41 Pa. St. 312. The point there ruled, however, went to the extent only that proof of the making a will under and in the direction of an unlawful relation like that in this case was such evidence of undue influence "that it may justify a verdict against the validity of the will"; and it was held, therefore, that it was error to exclude it from the jury. That the same court must hold the question to be one "of fact, merely," and not "a presumption of law," is shown in a still more recent case, where it was declared that "undue influence, to avoid a will, must be such as to overcome the free agency of the testator at the time the instrument was made." Eckert v. Flowry, 43 Pa. St. 46; Redf. Wills, 534. The propositions which the counsel for the plaintiffs requested the court to give in its charge to the jury, although separately numbered, were in fact, many of them, a connected series of propositions, dependent one upon another, some of which, we have shown, the court could not properly give. Other independent propositions were properly refused, as has been shown, and the remaining ones were embraced in the charge. There was, therefore, no error in refusing to charge as requested. For the reasons already stated we think that there was no error in the charge as given to the jury by the court of common pleas. It follows that the district court rightfully affirmed the judgment of that court, and that the judgment of the district court must therefore be affirmed.

WHITE, WELCH, BRINKERHOFF, and SCOTT, JJ., concurred.

WINGROVE v. WINGROVE et al.

(11 Prob. Div. 81.)

Court of Probate. Nov. 19, 1885.

Plaintiff, as a legatee, offered for probate the will of Elizabeth Wingrove, dated September 15, 1869, and alleged that a codicil, dated October 9, 1880, which revoked some of the gifts to him, was procured by undue influence of defendants. Defendants denied that the codicil was procured by undue influence, and claimed probate of it together with the will. The action was tried by a common jury, who found a verdict for the plaintiff, which was subsequently set aside, and a new trial ordered by a special jury.

Mr. Murphy, Q. C., and Mr. Gye, for plaintiff. Mr. Inderwick, Q. C., and Mr. Pritchard, for defendants.

Sir JAMES HANNEN, (President,) in addressing the jury said:

Gentlemen of the jury, I must ask your particular attention to the exposition which I am about to give you of the law upon this subject of undue influence, for I find, from now a long experience in this court, that there is no subject upon which there is a greater misapprehension. The misapprehension to which I have referred arises from the particular form of the expression. We are all familiar with the use of the word "influence." We say that one person has an unbounded influence over another, and we speak of evil influences and good influences; but it is not because one person has unbounded influence over another that, therefore, when exercised, even though it may be very bad indeed, it is undue influence in the legal sense of the word.

To give you some illustrations of what I mean: A young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favor, to the exclusion of his relatives. It is unfortunately quite natural that a man so entangled should yield to that influence, and confer large bounties on the person with whom he has been brought into such relation; yet the law does not attempt to guard against those contingencies. A man may be the companion of another, and may encourage him in evil courses, and so obtain what is called an "undue influence" over him, and the consequence may be a will made in his favor. But that, again, shocking as it is, perhaps even worse than the other, will not amount to undue influence. To be undue influence in the eye of the law there must be—to sum it up in a word—coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she will make a will in a particular person's favor, because, if the testator has only been persuaded or induced, by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate, in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do that it is undue influence. The coercion may, of course, be of different kinds. It may be in the grossest form, such as actual confinement or violence; or a person in the last days or hours of life may have become so weak and feeble that a very little pressure will be sufficient to bring about the desired result; and it may even be that the mere talking to him at that stage of illness, and pressing something upon him, may so fatigue the brain that the sick person may be induced, for quietness' sake, to do anything. This would equally be coercion, though not actual violence.

These illustrations will sufficiently bring home to your minds that even very immoral considerations, either on the part of the testator or of some one else offering them, do not amount to undue influence unless the testator is in such a condition that, if he could speak his wishes to the last, he would say: "This is not my wish, but I must do it." If, therefore, the act is shown to be the result of the wish and will of the testator at the time, then, however it has been brought about,—for we are not dealing with a case of fraud,—though you may condemn the testator for having such a wish, though you may condemn any person who has endeavored to persuade and has succeeded in persuading the testator to adopt that view, still it is not undue influence. There remains another general observation that I must make, and it is this: That it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary also to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power that the will, such as it is, has been produced.

In re GOODS OF HUNT.

(L. R. 3 Prob. & Div. 250.)

Court of Probate. May 4, 1875.

Application to probate will.

Sarah Hunt and Ann Hunt, spinsters and sisters, residing together, in 1873 agreed to make their respective wills, the object being that, in the event of the death of either of them, the survivor should enjoy the joint property for life. Two wills were prepared in the handwriting of Sarah. The legacies in each were identical, save that where one gave a legacy to a certain charitable institution the other gave a similar legacy to another charitable institution; and in each case a life-interest was given to the survivor in the bulk of her sister's property. After the death of Sarah Hunt the two wills were found together, indorsed, "The wills of Sarah and Ann Hunt;" but on opening them it was discovered that each sister had executed the will prepared for the other. Most of the persons interested in an intestacy consented that the document executed by the deceased should be recognized as her will, and probate thereof be granted to the executors named in it; but some of the persons were abroad, and could not be communicated with.

Mr. Bayford, for the motion.

Sir J. HANNEN. I should be glad to give effect to the intentions of the testatrix, by granting probate of this instrument, if I could, but I must not allow myself to be led away from what appears to me to be very plain ground by such a desire. No doubt there has been an unfortunate blunder. The lady signed as her will something which in fact was not her will. If I were to attempt to read it as her will, it would lead to a variety of absurdities. She leaves to her sister, Sarah, that is, to herself, a life-interest in a portion of her property, and all the furniture, plate, etc., which she holds in part with herself. I am asked to treat this as a misdescription. If by accident a wrong name had been introduced, and it was clear what person was intended, the court would give effect to the instrument, providing the mistake could be corrected. But it would be contrary to truth in this case if I acted on such an assumption. If I were to put such a construction upon this will, I should be assuming, in order to do substantial justice, what every one who hears me would know is contrary to the fact. And no court ought to base its judgment on something wholly artificial, and contrary to what every one must see is the real state of the circumstances. It is enough to say that there has been an unfortunate blunder. A paper has been signed as the lady's will which, as it happens, if treated as her will, would to a great extent, although not entirely, carry out her wishes. But in one respect it does not, for by it a legacy is bequeathed to one charity which she intended to leave to another. As regards this legacy, it is suggested that it might be treated as if the deceased did not know and approve of that part of the will. But she did not in fact know and approve of any part of the contents of the paper as her will; for it is quite clear that if she had known of the contents she would not have signed it. I regret the blunder, but I cannot repair it. I reject the motion, but I allow the executors costs out of the estate.

GIFFORD v. DYER.

(2 R. I. 99.)

Supreme Court of Rhode Island. March Term, 1852.

Appeal from court of probate, Little Compton county.

Abigail Irish, who died December 6, 1850, made a will two days prior to her death, by which, after making small bequests to the children of Robin Gifford and to others, she gave the residue of her property to her brother-in-law, John Dyer, and her two nephews, Jesse and Alexander Dyer. Robin Gifford, her only child, was not mentioned in the will. The will was offered for probate by John Dyer, executor therein named, and was contested by Robin Gifford. It appeared in evidence that at the date of the will he had been absent from home, leaving a family, for 10 years, unheard from, and was generally considered dead, his estate having been administered upon. Testatrix had resided with John Dyer for some time previous to her death. The scrivener who drew the will testified as follows: "After I had read the will to her, she asked if it made any difference if she did not mention her son. I asked if she considered him living. She said she supposed he had been dead for years. She said, if it would make any difference, she would put his name in, 'for they will break the will if they can.' I think that was the expression she used. I think she said what she had given to her grandchildren was in lieu of what he would have, but am not positive. I think her son left in 1841, and was not heard of, to my knowledge. She was speaking of a home at Mr. Dyer's and said what she had given him would pay him well. She said her grandchildren had not been to see her while she was sick." The court of probate admitted the will, and Robin Gifford appealed.

Mr. Sheffield, for appellant. A. C. Greene, for appellee.

GREENE, C. J. It is very apparent in the present case that the testatrix would have made the same will had she known her son was living. She did not intend to give him anything if living. But if this were not apparent, and she had made the will under a mistake as to the supposed death of her son, this could not be shown dehors the will. The mistake must appear on the face of the will, and it must also appear what would have been the will of the testatrix but for the mistake. Thus, where the testator revokes a legacy, upon the mistaken supposition that the legatee is dead, and this appears on the face of the instrument of revocation, such revocation was held void. Campbell v. French, 3 Ves. 321.

In re CAWLEY'S ESTATE.

(136 Pa. St. 628, 20 Atl. 567.)

Supreme Court of Pennsylvania. Oct. 6, 1890.

Certiorari sur appeal to orphans' court, Union county.

The facts are thus stated in the opinion of the court below: "This case arises in the following manner: On the 16th of March, 1886, Benjamin Cawley and his sister, Mary Cawley, both unmarried, made what may be termed a 'joint will and testament,' duly executed, and by which it is directed that, 'upon the death of either, the survivor shall pay all the debts of the decedent if the estate will reach, and bury decedent properly, and provide tombstones. Secondly. If Benjamin should be the first to die, or if Mary should be the first to die, each gives to the survivor all the rest and residue of his or her estate for life, and, if needed, the body of the estate so far as is necessary, and at the death of the survivor, after burial, tombstones, and so forth are paid for, the residue is divided into nine parts, and given to relatives and parties named; and Horace C. Cawley named executor. Benjamin Cawley died the 12th of August, 1887, and on the 22d August, 1887, the joint will was duly proved as the will of Benjamin, and its provision as to his estate carried into effect; Mary, the survivor, receiving Benjamin's estate for life, as provided in his will. Mary Cawley, however, on the 5th of September, 1887, made a separate will, and revoked the joint will, and died on the 29th January, 1888; and the joint will was offered as Mary's will, and admitted to probate by the register, on the 1st of February, 1888, and letters testamentary issued to Horace B. Cawley, the executor therein named. But, on the same day, Mary's second will, of the 5th of September, A. D. 1887, was also offered for probate; but the register refused to consider it, and treated the joint will as irrevocable, and that it must stand as Mary's last will and testament. From this decision, and admission of the joint will as Mary Cawley's will, and the refusal to allow the proving of her second will, this appeal has been taken to the orphans' court."

J. Merrill Linn and S. H. Orwig, for appellants. Charles S. Wolfe, P. L. Hackenburg, and Andrew A. Leiser, for appellees.

WILLIAMS, J. The question presented by this appeal is one that has not arisen in Pennsylvania until now. It is important to a correct understanding of the real ground of controversy to bear in mind the peculiar characteristics of a contract, and those of a will. A contract is an agreement between parties for the doing or not doing of some particular thing. The undertaking of one party is made in consideration of something to be paid or done by or on behalf of the other party, so that the obligation to do and the right to require performance are reciprocal. A will, on the other hand, is simply a statement of a purpose or wish of the maker as it exists at the time. As often as his purpose or wish changes, he may change the expression of it. When and why a change shall be made depends on himself alone. He is answerable to no one for his determination to make one rather than another disposition of his property. After he has written out his will, and executed it in accordance with the forms of the law, it does not bind him; but, so long as he lives, he may change his own purpose, with or without a reason, and his last purpose properly written out and executed is his "last will and testament," because death makes any further change impossible. The binding force of a contract comes from the aggregatio mentium of the parties. The binding force of a will comes from the fact that it is the last expressed purpose of the testator in regard to the disposition of his property after his own death. While he lives, it is without force or value, but it begins to speak when he ceases to do so, and thereafter is heard in his stead. Although these instruments are so unlike, they may be, and sometimes are, combined so as to give a testamentary character to what purports to be a contract, or to convert a will into an irrevocable agreement. Whether any given writing is a will or a contract must be determined by the character of its contents, rather than from its title, or any formal words with which it may begin or conclude. The familiar form of a will is that by which the testator directs how his property shall be disposed of after his death, and may be distinguished or described as the simple will of the maker. If two or more persons own property in common, they may convey it by joining in a deed, or by executing separate conveyances at their convenience. They may transmit the title, each for himself, by a separate will; and there is no objection, on principle, to their joining in a testamentary disposition of it. Such a will might be properly called a "joint will," because executed jointly by several owners, as a means of transferring their several titles to one devisee. The validity of a joint will was at one time denied in England, and has been denied in some of the United States, but the reasons for such denial relate rather to questions of probate than to the power of the several testators, and do not seem to have been regarded as settling the question in the countries where the decisions were rendered. 1 Williams, Ex'rs, 10. Whether after the death of one or more of the makers of such a will the surviving maker may make a valid revocation as to his own title or share of the property devised is an unsettled question, and is not involved in the case before us, for the property to which this will relates was not held in common by the testators. Another class of questions is presented when two or more persons make reciprocal testamentary provisions in favor of each other, whether they unite in one will or each executes a separate one. Such wills

may be described as "mutual" or "reciprocal." Their validity does not seem to be doubted after the death of the respective testators; but the extent of the power of revocation in the survivor after the death of one or more of the testators is a question still in controversy, and upon which different conclusions have been reached. In Evans v. Smith, 28 Ga. 98, the will was signed by two, and presented by the survivor for probate. No revocation was attempted, and the only question really before the court was the validity of the paper as the will of the deceased signer. The court held it valid, characterizing it as a "double will." In Lewis v. Scofield, 26 Conn. 452, a similar will was presented, and its validity upheld by the court. In Betts v. Harper, 39 Ohio St. 639, the testators were tenants in common. After the death of both, it was probated as the separate will of each, and the earlier case of Walker v. Walker, 14 Ohio St. 157, which had denied the validity of such a will, was distinguished and qualified. The will of a husband and wife making reciprocal provisions for each other, and executed by both, was sustained in Diez's Will, 50 N. Y. 88. In Schumaker v. Schmidt, 44 Ala. 454, two persons, who describe themselves as "friends of many years standing," joined in a will by which the survivor was to take the property of the one dying first. Auerback, one of the joint makers, made a later will, with a different disposition of his property, and died. The survivor insisted on the irrevocability of the first will, and claimed the estate, but the court upheld the last one. The point in controversy was stated in the opening sentence of the opinion of the court as follows: "Was the writing between Schumaker and Auerback a compact, and not a will, or a will containing a compact, and therefore irrevocable?" The conclusion of the court was that the writing was not a compact, but a will, and therefore revocable at pleasure. It is worthy of note that the only consideration expressed for the mutual provisions made by the first will was the "mutual esteem" which each entertained for the other. This might change in degree, or cease altogether, at any time. While it existed, it explained the mutual or reciprocal provisions contained in the will. It afforded not a consideration, but a reason, for them.

The will now before us was executed by a brother and sister. They were single, had lived many years together, and were feeling the infirmities of age. One owned a house and lot worth about $3,000. The other owned bank-stock of about the same value. Their household goods seem not to have been the exclusive property of either. They appear to have lived together in the house, and used the income from the bank-stock without keeping an account with each other. By their will they provided that the survivor should have the property of the one first to die during life, and that it should then go over to remainder-men named. The learned gentleman by whom it was drawn seems to have had Walker v. Walker, 14 Ohio St. 157, in his mind, and to have drawn the paper with the purpose of steering clear of the difficulty suggested by it. To this end the will is made to speak for each devisor separately, thus: "I, Benjamin Cawley, should I be the first to die, and I, Mary Cawley, should I be the first to die, give, devise, and bequeath and to the survivor of either of us, all the rest and residue of the decedent's estate, both real and personal, to have and to hold and enjoy the same during the life of the survivor, without impeachment for waste, and with leave to use the body of the estate for necessity." After the payment of debts and expenses, and the expiration of the life-estate, the will directs that the residue be divided into nine parts, and then proceeds: "Three of which parts I give and bequeath to John Cawley; two parts to Hepburn Cawley; one part to Horace Cawley; one part to Mary Henson; * * * one part to Ada Gilmore; * * * and one part to Emma Harter." H. C. Cawley was made a trustee for Ada, and her share was devised to him thus: "I give and bequeath to H. C. Cawley, in trust," etc.; and the will then defines the nature of the trust, and uses the words, "I distinctly declare that the above trust is an active one." The singular number is invariably used throughout the will, each testator speaking for himself or herself only, and neither attempting to speak for the other or of the other's property. Each seems to have desired to make the same disposition of what he or she owned. Both adopted the same written expression of that desire, and executed it. The will so made must be regarded, therefore, as the separate will of each testator, as fully as though the will of each had been separately drawn up and signed. There was no joint property or joint devise. It is not, therefore, a joint will. It is not a contract between the makers in form or in effect. No consideration passed from one to the other, and none is suggested, except the affectionate interest which this aged brother and sister felt for each other. This moved them to provide for each other's comfort by a life-estate in the survivor, but beyond that each gave to the remainder-men only what each owned. Such a will is properly described by the phrase in Evans v. Smith, supra, as a "double will." It must be construed and treated as the separate will of each testator who signed it, in the same manner as though a separate copy had been executed by each. It was therefore revocable by both. Benjamin Cawley did not revoke, and his will is to be executed in accordance with its terms. Mary Cawley has exercised the power of revocation, and changed the ultimate destination of her property. Her last will must be followed, therefore, in the distribution of her estate. The decree of the court below is affirmed, at the cost of the appellant.

SHARP et al. v. HALL.

(86 Ala. 110, 5 South. 497.)

Supreme Court of Alabama. Feb. 26, 1889.

Appeal from probate court, Colbert county; John A. Steele, Judge.

Proceedings to probate an alleged will of Ann E. Hornsby, deceased. The instrument in question was signed by Mrs. Hornsby, under seal, attested by two witnesses on an acknowledgment of her signature, February 23, 1886, and was in the following words: "The state of Alabama, Colbert county. These presents show that, in consideration of the love and affection I have to Julia M. Hall, I do here now give and deliver to her the following property, to wit, a certain lot, or part of lot, situated in the city of Tuscumbia, known as part of lot No. 317, according to the plat of said city, [describing it by metes and bounds], together with all the tenements and hereditaments thereunto appertaining, all of which I now hold and possess. But I do hereby reserve the use, control, and consumption of the same to myself, for and during my natural life; and this is done in part to do away with the necessity of taking out letters of administration after my death. Teste my hand and seal, this ——— day of February, 1886." Mrs. Hornsby died in July, 1887. Letters of administration on her estate as an intestate were granted soon after her death, to Robert B. Lindsay, who, while searching among her papers, found the above instrument in a locked drawer, inclosed in an envelope on which were written the words "Not to be opened until after my death." Mrs. Hornsby's name was not signed to the memorandum, nor was it in her handwriting. The administrator delivered the paper to Julia M. Hall, August 2, 1888, and it was propounded for probate by her. G. A. and U. M. Sharp, who claimed as next of kin, contested the probate on the following grounds: "(1) Because said written instrument is not in fact the will and testament of said Ann E. Hornsby; (2) because said instrument was not duly executed, so as to pass title to said real estate under the laws of Alabama; (3) because said instrument was not executed by said Ann E. Hornsby; (4) because said instrument is not testamentary in its character; (5) because said instrument was not executed as required by law of a last will and testament." An issue was duly formed. On the trial of the cause the contestants objected, and excepted to the admission in evidence of the circumstances of the making of the instrument contested; of the relation the petitioner bore the deceased, Ann E. Hornsby; of the non-delivery of the instrument; and of the other facts as shown by the opinion. There were also separate exceptions reserved to the admission of the testimony of the witness Davis to the effect that he considered the instrument a will, and that he intended to draft a will. The defendants requested the followiug charge in writing, and excepted to the court's refusal to give the same: "(6) The fact, if it be a fact, that Mrs. Hornsby did not dispose of all the property, must be considered with the other evidence by the jury to ascertain whether or not the instrument was intended to be a will." There was a trial by jury, and a verdict for the proponent, followed by a judgment admitting the will to probate. Contestants appeal.

Kirk & Almon, for appellants. J. B. Moore, for appellee.

STONE, C. J. There are few, if any, questions less clearly defined in the law-books than an intelligible, uniform test by which to determine when a given paper is a deed, and when it is a will. Deeds, once executed, are irrevocable, unless such power is reserved in the instrument. Wills are always revocable so long as the testator lives and retains testamentary capacity. Deeds take effect by delivery, and are operative and binding during the life of the grantor. Wills are ambulatory during the life of the testator, and have no effect until his death. Out of this has grown one of the tests of testamentary purpose, namely, that its operation shall be posthumous. If this distinction were carried into uniform, complete effect, and if it were invariably ruled that instruments which confer no actual use, possession, enjoyment, or usufruct on the donee or grantee during the life of the maker are always wills, and never deeds, this would seem to be a simple rule, and easy of application. The corollary would also appear to result naturally and necessarily that if the instrument, during the lifetime of the maker, secured to the grantee any actual use, possession, enjoyment, or usufruct of the property, this would stamp it irrefutably as a deed. The authorities, however, will not permit us to declare such inflexible rule. A declaration of trust by which the grantor stipulates to hold in trust for himself during life, with remainder to a donee, or succession of donees, certainly secures no use, enjoyment, or usufruct to the remainder-man during the grantor's life. Yet it is a deed, and not a will. 1 Bigelow, Jarm. Wills, 17, and notes; Gillham v. Mustin, 42 Ala. 365. Can a tangible distinction be drawn between such case and a direct conveyance, in form a deed, by which A. conveys to B., to take effect at the death of A.? The human mind is not content with a distinction that rests on no substantial difference. Conveyances reserving a life-estate to the grantor have been upheld as deeds. 2 Devlin, Deeds, § 983; Robinson v. Schly, 6 Ga. 515; Elmore v. Mustin, 28 Ala. 309; Hall v. Burkham, 59 Ala. 349. In Daniel v. Hill, 52 Ala. 430, 436, this court said: "A deed may be so framed that the grantor reserves to himself the use and possession during his life, and on his death creates a remainder in fee in a stranger." Almost every

conceivable form of conveyance, obligation, or writing, by which men attempt to convey, bind, or declare the legal status of property have, even in courts of the highest character, been adjudged to be wills. The form of the instrument stands for but little. Whenever the paper contemplates posthumous operation, the inquiry is, what was intended? 1 Bigelow, Jarm. Wills, 20, 25; Habergham v. Vincent, 2 Ves. Jr. 204; Jordan v. Jordan, 65 Ala. 301; Daniel v. Hill, 52 Ala. 430; Shepherd v. Nabors, 6 Ala. 631; Kinnebrew v. Kinnebrew, 35 Ala. 638. The intention of the maker is the controlling inquiry, and that intention is to be gathered primarily from the language of the instrument itself. Dunn v. Bank, 2 Ala. 152. The intention cannot be proved by a witness speaking directly thereto. But this does not, in cases of inapt phraseology,—such as the present instrument discloses,—preclude proof of instructions given to the draughtsman, in reference to the nature of the paper he was expected to prepare. In Green v. Proude, 1 Mod. 117, 3 Keb. 310, the paper had striking characteristics of a deed; but the court said: "Here being directions given to make a will, and a person sent for to that end and purpose, this is a good will." Speaking of this case, Jarman (1 Bigelow's Ed. p. 19) says: "The court seems to have been influenced by the circumstance that the person who prepared it was instructed to make a will." In Wareham v. Sellers, 9 Gill & J. 98, the court decided that testimony should have been received of "conversations of the deceased, made at the time of executing the said paper, and from the other circumstances, that the said P. S. made and executed the said paper as and for his last will and testament, and intended it as such." In this case the controversy was whether the paper was a deed or a will. To the same effect is Witherspoon v. Witherspoon, 2 McCord, 520. So all the attending circumstances may be put in proof as aids in determining whether the maker intended the paper should operate as a deed or a will, whenever it is so framed as to postpone actual enjoyment under it until the death of the maker. Gillham v. Mustin, 42 Ala. 365; Daniel v. Hill, 52 Ala. 430; Campbell v. Gilbert, 57 Ala. 569; Jordan v. Jordan, 65 Ala. 301; Rice v. Rice, 68 Ala. 216; Lee v. Shivers, 70 Ala. 288; 1 Bigelow, Jarm. Wills, 25; Gage v. Gage, 12 N. H. 371; Mealing v. Pace, 14 Ga. 596, 630; Symmes v. Arnold, 10 Ga. 506; Jackson v. Jackson, 6 Dana, 257. Another pertinent inquiry: If a paper cannot have operation as a deed, but may as a will, then in doubtful cases we should pronounce it a will, ut res magis valeat. Bigelow, Jarm. Wills, 21, 22, 24, 25; Attorney General v. Jones, 3 Price, 379; Gage v. Gage, 12 N. H. 371; Symmes v. Arnold, 10 Ga. 506.

The instrument sought to be established as a will is in form a nondescript. It clearly shows on its face that the donee or grantee was to have no actual enjoyment of the property—no usufruct—during the life of the maker. Its language is: "I do hereby reserve the use, control, and consumption of the same to myself for and during my natural life." We hold that the paper, on its face, falls within the indeterminate class, which, according to circumstances, may be pronounced a deed or a will. We also hold that, on the trial of the issue, it was competent to prove that the maker was without lineal or other very near relatives; that she was attached to the donee, who was a member of her household; that she sent for the draughtsman of the paper, and employed him to write her will, and that, in pursuance of such employment, he wrote the paper in controversy; that she signed it with a knowledge of its contents, and had it attested; that she did not deliver it, but had it placed in an envelope, and indorsed, "Not to be opened till after my death;" and that she carefully preserved it in such envelope until her death. Now, all these facts and circumstances, if proved and believed, were competent and proper for the consideration of the jury in determining the issue of devisavit vel non. And the fact, if believed, that the paper had never been delivered, and therefore could not take effect as a deed, should also be considered in arriving at the maker's intention.

In excluding from contestants' exceptive allegation the averment that the paper is a deed, the probate court committed a technical error. That was the real issue in the case. This ruling, however, did the contestants no injury, as they had the benefit of the defense it sought to interpose. 3 Brick. Dig. p. 405, § 20.

* * * * * *

The paper over which the present contention arose contains the following clause: "And this [the execution of the paper] is done in part to do away with all need or necessity of taking out letters of administration after my death." This clause is a circumstance which the jury may look at and consider in determining whether Mrs. Hornsby intended that Julia M. Hall should take or enjoy any interest during the former's life. It is not conclusive, but must be weighed with the other evidence. It would probably be more weighty if it made provision for Mrs. Hornsby's entire estate. Attempts—fruitless, of course—are sometimes made to dispense with administration, even in documents that are unmistakably testamentary.

Charge No. 6, asked by contestants, should have been given. The remaining charges asked by them were, in the light of the evidence, calculated to confuse or mislead, and were rightly refused on that account.

We have now considered all the questions we deem necessary. In a very few of the many rulings the probate court erred.

Reversed and remanded.

In re KEHOE.

(L. R. 13 Ir. 13.)

Court of Probate. Jan. 28, 1884.

Motion for probate, and that certain directions be ordered to be incorporated in the will of the testator, the Rev. J. Kehoe. An affidavit of the Rev. Simon McWry was filed, as follows: "That, to the best of my knowledge and belief, the paper writing marked 'A,' now produced and shown to me, entitled 'Directions to the executors of my last will and testament, executed this 13th day of February, 1879—How they are to manage my affairs,' signed John Kehoe, P. P., and dated February 13, 1879, which is all in the handwriting of the said Rev. John Kehoe, was written out by him previous to the execution of his will; and immediately after such execution copies of said will and said direction, previously made by the said testator, and by one Maurice Kealy, were placed by testator in an envelope, and handed to me for safe custody." The Rev. Patrick F. Nolan, who was appointed executor of the will by the codicil of the 20th of July, 1883, made the following affidavit: "The testator, by his will having bequeathed all his property in trust to be disposed of in such manner as he might direct, did give a direction in writing as to the disposal of the same, as of same date as of the will, viz., the 13th of February, 1879, and upon which direction, marked with the letter 'A,' I have indorsed my name."

William P. Ball, for executor.

WARREN, J. The Rev. John Kehoe, the testator, made a will dated the 13th of February, 1879, which contained this clause: "I hereby bequeath to the Right Rev. James Walsh and the Rev. Michael Conroy all property I die possessed of," "in trust to be disposed of in charity in such manner as I may direct them; and, in case I may not leave directions or instructions, then they may dispose of it in charity in such manner as they may think fit;" and the same persons are named executors. One of these executors—Mr. Conroy—having died, the testator made a codicil, dated the 20th of July, 1883, by which he nominated the Rev. Patrick Nolan an executor of this will. The testator signed a paper bearing the same date as the will, containing directions for the management of his affairs for charitable purposes. This paper is in the handwriting of the testator, and is headed, "Directions to the executors of my last will, executed on the 13th day of February, 1879—How they are to manage my affairs." The court has been moved for probate of the will and codicil of the testator, with the paper of directions incorporated.

The law of the subject of the incorporation of papers, so far as it is necessary to consider it on the present application, is thus stated in Jarman on Wills, (volume 1, p. 90:) "Three things are necessary: (1) That the will should refer to some document as then in existence; (2) proof that the document propounded was in fact written before the will was made; and (3) proof of the identity of such document with that referred to in the will." The affidavit of the Rev. Simon McWry is slightly ambiguous, (In re Ash, 11 Ir. R. Eq. 60, note,) in consequence of the introductory words, "to the best of my knowledge and belief;" but still, if that affidavit be admissible in evidence, I think it sufficient to prove that the paper of directions was in existence when the will was executed. It is certainly sufficient proof that it was in existence before the execution of the codicil; and the cases, including that of Lady Truro, L. R. 1 Prob. & Div. 201, to which I was referred by Mr. Ball, have established that, in considering this question of incorporation, the words of the will which refer to directions must be taken as if brought down to the date of the codicil,—as if repeated in the codicil. It does appear to me that, if the affidavit of Mr. McWry be admissible, the evidence is sufficient to identify the paper of directions signed by the testator as the directions to which he referred in his will. Therefore, if this affidavit is admissible, two of the requisites for incorporation are found in the case before the court, viz., proof of the fact of the existence of the paper when the will was made, and proof of the identity of the paper with that referred to in the will. As to the necessity of these two of the elements mentioned in Jarman there can be no doubt. I may refer to Singleton v. Tomlinson, L. R. 3 App. Cas. 404, in the house of lords.

It remains to consider the third circumstance mentioned in the passage I have quoted from Jarman. Does the will refer to or describe this paper of directions as then existing? If it does not, can the court receive any parol evidence on the subject of these directions? As a matter of construction, it is clear that the will does not refer to any document as then in existence. The words are, "as I may direct," "in case I may not have directed." But "may" and "may not" imply that at the time the will was written any directions had not been given or written, and certainly do not suggest that any existed at the time of execution. In Sunderland's Case, L. R. 1 Prob. & Div. 198, the words, "as shall be ticketed in papers in my own handwriting," were held in point of construction not to describe as then existing certain papers which did then exist as a matter of fact. If, then, this will does not refer to any papers as then existing, can the court receive parol evidence,—that is to say, as Sir C. Cresswell puts it, (3 Swab. & T 12,) "to aid in the construction of what the testator has written?" In my opinion, the cases of Allen v. Maddock, 11 Moore, P. C. 427; Van Straubenzee v. Monck, 3 Swab.

& T 12; and The Goods of Sunderland, L. R. 1 Prob. & Div. 198,—establish the law as laid down by Lord Penzance at the conclusion of his judgment in the last-mentioned case: "In order to let in parol evidence to ascertain the truth, so far as it can be ascertained by such evidence, with regard to an unexpected testamentary document, the passage in the will by which reference is made to it must describe it as a written document then existing." The paper of directions in the present case is not so described, and it must be excluded from probate.

It is ordered by the court that the said Rev. Patrick F. Nolan, one of the executors in said codicil named, be at liberty to apply for probate of the said will and codicil, dated, respectively, the 13th day of February, 1879, and 20th of July, 1883, without incorporating in such probate the said paper writing dated the 13th of February, 1879, and marked "A."

HUBBARD v. HUBBARD.

(8 N. Y. 196.)

Court of Appeals of New York. March, 1853.

Appeal from supreme court, second judicial district.

Proceedings before the surrogate of Suffolk county by Maria J. Hubbard to establish an alleged nuncupative will of her deceased husband, William L. Hubbard. William L. Hubbard was master and owner of a coasting schooner of Greenport, Long Island. While on a return trip from Philadelphia with a load of coal, and lying at anchor inside the Delaware breakwater on account of headwinds, he was taken sick with Asiatic cholera, and died the same day. The vessel was anchored in tide-water about a mile from the main-land, the same distance from the open sea, and three miles from the nearest place of settlement on shore. While deceased was suffering from his disease, and about an hour before he died, being of sound mind and memory, he was asked if he had a will, and replied that he had not. He was then asked as to the disposition of his property, and in reply stated, in the presence of the surrounding seamen, that he wished his wife to have all his personal property. Beckwith, his mate, asked him if he wished her to have his real property too, and he replied, "Yes, all." Beckwith then asked him what he should tell his wife, and he replied, "Tell her I loved her to the end." Beckwith again asked him whom he wanted to settle his affairs, and he replied, "I want you to do it." He did not ask any one to bear witness that what he stated was his will. These conversations being proved by four witnesses, the surrogate adjudged them a good nuncupative will. Elias Hubbard, father of the deceased and his heir at law, appealed to the special term, where the decree of the surrogate admitting the will to probate was reversed. On a further appeal the judgment of the special term was reversed, and Elias Hubbard appealed to this court.

S. D. Craig, for appellant. G. Miller, for respondent.

MASON, J. It is provided in this state by statute that no nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual service, or by a mariner while at sea. 2 Rev. St. p. 60, § 22. As to the wills of soldiers in actual service and mariners at sea, they are left entirely untrammeled by our statutes, and are governed by the principles of the common law. The exception in our statute of wills in favor of soldiers and mariners was taken from the 29 Car. II. c. 3, and is precisely the same, and the same exception is retained in England by their new statute of wills. 1 Vict. c. 26, § 11. The testator was a mariner, within the meaning of the statute. The courts have given a very liberal construction to this exception in behalf of mariners, and have held it to include the whole service, applying equally to superior officers, up to the commander in chief, as to common seamen. In re Goods of Hayes, 2 Curt. Ecc. 338; 1 Williams, Ex'rs, 97. It has been held to apply to the purser of a man of war, and embraces all seamen in the merchant service. Morrell v. Morrell, 1 Hagg. Ecc. 51; In re Goods of Hayes, 2 Curt. Ecc. 338; 1 Williams, Ex'rs, 97. This will was made at sea. In legal parlance, waters within the ebb and flow of the tide are considered the sea. Bouv. Law Dict. tit. "Sea;" Ang. Tide-Waters, 44–49; Thackarey v. The Farmer, Gilp. 528; The Thomas Jefferson, 10 Wheat. 428; Baker v. Hoag, 7 N. Y. 561. Lord Hale says the sea is either that which lies within the body of the county or without it; that an arm or branch of the sea within the "fauces terræ," where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county, but that part of the sea which lies not within the body of a county is called the main sea, or ocean. Harg. Law Tracts, c. 4, p. 10; Smith, Const. § 588. He adds, "That is called an arm of the sea where the sea flows and reflows, and so far only as the sea flows and reflows;" and in this he follows the exact definition given by the Book of Assizes, 22 Id. 93; and this is the doctrine recognized by the courts of this country. Thackarey v. The Farmer, Gilp. 524; U. S. v. Grush, 5 Mason, 290; U. S. v. Wiltberger, 5 Wheat. 76–94; U. S. v. Robinson, 4 Mason, 307; U. S. v. Ross, 1 Gall. 626.

The courts in England have gone to the utmost verge of construction in extending this exception in behalf of seamen. In a case which came before the prerogative court of Canterbury in 1840, when the deceased was mate of her majesty's ship Calliope, and while the vessel was in the harbor of Buenos Ayres, he obtained leave to go on shore, when he met with a serious fall, and was so severely injured that he died on shore a few days after. Immediately after the accident he wrote on a watch bill with a pencil his will, and which was unattested, but which was cut out and certified to by the officers on board the ship, and the court held it a good will of a seaman at sea, and ordered it to probate. In re Goods of Lay, 2 Curt. Ecc. 375. The common-law doctrine in regard to nuncupative wills was borrowed from the civil law. Drummond v. Parish, 3 Curt. Ecc. 522, 531, et seq. By the civil law, the strict formalities, both in the execution and construction of nuncupative wills of soldiers, were dispensed with; and although they should neither call the legal number of witnesses, nor observe any other solemnity, yet their testament was held good if they were in actual service. Just. Inst. lib. 2, tit. 11; 1 Lomax, Ex'rs, 40. The civil law was

extremely indulgent in regard to the wills of soldiers. If a soldier wrote anything in bloody letters upon his shield, or in the dust of the field with his sword, it was held a good military testament. 1 Bl. Comm. 417; 1 Lomax, Ex'rs, 40, 41. The common law, however, has not extended this privilege so far as the civil. 1 Bl. Comm. supra. Blackstone says that soldiers in actual military service may make nuncupative wills, and dispose of their goods, wages, and other personal chattels without those forms, solemnity, and expenses which the law requires in other cases.

The rules, however, which are to be observed in making wills by soldiers and mariners, are the same by the common law and yet it must be confessed that the formalities which are necessary to be observed in the making of wills by soldiers and seamen are not defined with any very satisfactory precision in any of the English elementary treatises upon the subject of wills. Swinborne says that those solemnities only are necessary which are juris gentium. Swinb. Wills, pt. 1, § 14. Before the statute the ecclesiastical courts to whose jurisdiction the establishment of personal testaments belonged required no ceremonies in the publication thereof, or the subscription of any witnesses to attest the same. 1 Rob. Wills, 147. A will of personal estate, if written in the testator's own hand, though it had neither his name nor seal to it, nor witnesses present at its publication, was held effectual, provided the handwriting could be proved. 1 Rob. Wills, 148. And so if written by another person by the testator's directions, and without his signing it, it was held good. Id. 148. It is laid down in books of very high authority that a nuncupative testament may be made, not only by the proper motions of the testator, but also at the interrogation of another. Swinb. Wills, pt. 1, § 12, p. 6; Lomax, Ex'rs, 38; 1 Williams, Ex'rs, 102. And Swinborne says, "As for any precise form of words, none is required, neither is it material whether the testator speak properly or improperly, so that his meaning appears," (2 Swinb. Wills, pt. 4, § 26, p. 643;) and he says, concerning the solemnities of the civil law to be observed in the making of testaments, soldiers are clearly acquitted from the observation thereof, saving that, in the opinion of divers writers, soldiers, when they make their testaments, ought to require the witnesses to be present. 1 Swinb. Wills, pt. 1, § 14, p. 94. It is necessary, however, that the testamentary capacity of the deceased and the animus testandi at the time of the alleged nuncupation should be clearly and satisfactorily proved in the case of nuncupative will. 1 Williams, Ex'rs, 102; Lemann v. Bonsall, 1 Addams, Ecc. 389, 390.

In the present case the evidence most clearly shows that the deceased was of sound mind and memory, and I think the evidence in the case satisfactorily establishes the animus testandi at the time of the alleged nuncupation. He told his mate, Beckwith, to tell his wife that he loved her till the end. He was extremely sick, and undoubtedly apprehending death; and, when asked if he had a will, he replied that he had not; and, on being asked what disposition he wished to make of his property, he said he wished his wife to have all of his personal property, and at the same time requested Beckwith to settle his affairs and see to his business. It should be borne in mind that as well the testator as all of the witnesses present were seamen, and were undoubtedly acquainted with the rights of mariners in regard to making their wills. They evidently understood it to be a will, and spoke of it as such; and I think the animus testandi is satisfactorily established. The evidence is quite as strong in the case under consideration as it was in the case of Parsons v. Parsons, 2 Greenl. 298, 300, where the testator was asked to whom he wished to give his property, and replied, "To my wife; that is agreed upon;" and the supreme court of Maine sustained the will in that case. I am aware that it is said in some of the books that it is essential to a nuncupative will that an executor be named. But this is no more essential than in a written will. Rolle, Abr. 907; How v. Godfrey, Finch, 361; Prince v. Hazleton, 20 Johns. 522. I am inclined to think, however, that the evidence is sufficient, in the present case, to show that the testator intended to make Beckwith his executor, but it is not necessary that he should have named one. It is not necessary to decide whether the mariner must make his will in his last sickness and in extremis, as was held to be the case under our former statute of wills, (Prince v. Hazleton, 20 Johns. 503,) and as is required under the statutes of several of our sister states, (Boyer v. Frick, 4 Watts & S. 357; Baker v. Dodson, 4 Humph. 342; Offutt v. Offutt, 3 B. Mon. 162; In re Will of Yarnall, 4 Rawle, 46; Werkheiser v. Werkheiser, 6 Watts & S. 184; Winn v. Bob, 3 Leigh, 140; Mason v. Dunman, 1 Munf. 456; Portwood v. Hunter, 6 B. Mon. 538; Tally v. Butterworth, 10 Yerg. 501; Parsons v. Parsons, 2 Greenl. 298;) for there can be no doubt, upon the evidence in this case, but this will was made both in extremis, and in the last sickness, and under circumstances which precluded the making of a written will. I think that the factum of this nuncupative will is clearly established by the evidence in the case, and also the testamentary capacity of the deceased, and that the animus testandi at the time of the alleged nuncupation is sufficiently apparent from the evidence in the case, and that the judgment of the supreme court should be affirmed.

Judgment affirmed.

PRINCE, Public Administrator, v. HAZLETON et ux.

(20 Johns. 502.)

Court of Errors of New York. Nov. 11, 1822.

Appeal from court of probates.

Application by Benjamin Prince, public administrator in the city of New York, for administration on the estate of William Jones, who died in New York city, April 17, 1820. Mary Hazleton appeared before the surrogate, with her husband, George Hazleton, and offered for probate an alleged nuncupative will of Samuel Jones, with the deposition of four witnesses thereto, taken ex parte before a commissioner, May 4, 1820, as follows: "The last will and testament of William Jones, late of the city of New York, gentleman, by word of mouth, made and declared by him, on or about the eleventh day of April, last past, in presence of us, the undersigned, Jacob S. Arden, William Lee, George Wateres, and Ellen Taylor, who have hereunto subscribed our names as witnesses to such last will and testament: 'I now say, as I have repeatedly said before, that I leave all the property I am possessed of to Mary Hazleton. I do this in consequence of the good treatment and kind attentions I have received from her during my sickness. She is worthy of it. No other person shall inherit my property. I wish you all in the room to take notice of this.' In witness whereof we have hereunto set our hands, this seventeenth day of May, in the year of our Lord one thousand eight hundred and twenty." The surrogate refused to sustain the alleged nuncupative will, under Laws N. Y. Sess. 36, c. 23, § 14, which provided that a nuncupative will shall not be good unless "made in the time of the last sickness of the deceased." Proponents appealed to the court of probate, where the decree of the surrogate was reversed, and the will admitted. Prince appealed to this court.

Hoffman and T. A. Emmet, for appellants. Henry & Van Buren, for respondents.

KENT, Ch. The question to be discussed is, whether the nuncupative will of William Jones, as stated to have been made on the 11th of April, 1820, can be admitted to probate as being valid in law. It becomes a complicated question, under the circumstances, and involves in the inquiry matter of fact mixed with matter of law. I shall consider it to be my duty to speak frankly and freely on the whole subject of the case, but, at the same time, with a sincere respect for the character of the court whose opinion is now under review, and from which I shall be obliged very greatly to dissent.

William Jones was an Irishman by birth, and a religious Catholic by profession. He was born in the county of Dublin, in Ireland, and received a school education about 30 years before his death, and which carries us back to the year 1790. He had then living parents, brothers and sisters, and he was the youngest of the family. He was apprenticed to a house-carpenter in the city of Dublin, and served a regular apprenticeship of seven years. When this service expired, he worked as a journeyman, for nine or twelve months, and then emigrated to the United States. This brings us, in the history of his life, to year 1798, and perhaps that fact may enable us to give some probable solution of the only circumstance that seems (if we except the will) to cast any shade over the memory of this man. I allude to the change of his paternal name, O'Connor, for that of Jones. It does not appear, precisely, when he changed his name, but I refer it back to that period as the probable time, and presume that he and his family were more or less implicated in the peril of the rebellion, which broke out in Ireland in 1798, in consequence of an ill-fated attempt to effect a revolution in that kingdom. It is probable that he may have emigrated for safety; and, for greater safety, laid down the name of O'Connor, which was then memorable in the Irish annals, on the side of the unfortunate. But, be this conjecture as it may, we find him first at New York, then for two years at Savannah, then living, for 12 or 14 years, in the island of Cuba, and learning the Spanish language, and where he probably made his fortune. He is next traced, on his return to the United States, to the cities of Baltimore, Philadelphia, and New York; and in all of them he seems to have had business, pecuniary concerns, and friends.

These are the few and imperfect sketches of his biography to be selected from the case, before we find him rich in the fruits of his enterprise, but sick with a disease of the liver, at the boarding-house of Mrs. Fox, in Cherry street, in New York, the latter end of March, 1820. Jones, while at the house of Mrs. Fox, claimed to be worth, altogether, $65,000, in property existing in New York, Philadelphia, Baltimore, and the island of Cuba; and, to show that this claim had pretty fair pretensions to truth, there was actually found at his lodgings, at his death, bank-books, showing deposits to his credit, in one or more banks of New York, to between thirteen and fourteen thousand dollars. He had been sick at Mrs. Fox's about five weeks, when he is said to have made the will now under consideration. During that time he had one Ellen Taylor, a colored woman, for his hired nurse; and there was a Mrs. Hazleton, who had rooms, and boarded in the same house, who also acted as his nurse. Whether Jones ever saw or heard of Mrs. H. before he came to board at Mrs. Fox's does not appear, nor have we in the case any distinct lineaments of the character which Mrs. H. sustains, or the business or purpose of her life. She rented the two front rooms in the boarding-house, and yet, her brother says,

she followed no kind of business. She has had two husbands, and her present one is said to be a seafaring man by one of her witnesses, and another of them says that he had been voyages at sea, and had been on the gaol limits, and was then following his trade of a whitesmith at Savannah. Why she lives in this detached situation, without a family of her own, and a husband to live with and provide for her, as is quite common with married persons, must be left to conjecture. She was able, all at once, and, as it would seem, without any adequate cause, and without any remarkable display of goodness, or even of attention, to gain a wonderful ascendency over the affections of this sick man. If her story be true, and the will genuine, she obliterated from Jones' breast the sense of friendship, the charities of religion, the deep-rooted traces of national affection, every tender recollection of the ties of blood, of his natal soil, of the school-fellows of his youth, of father and mother, brother and sister, relative and friend. He was persuaded, at one nod, to pour the accumulated treasures of his varied life into the lap of this mysterious woman,—the acquaintance of a day.

The will, as certified by the four witnesses, is in these words: "I now say, as I have repeatedly said before, that I leave all the property I am possessed of to Mary Hazleton. I do this in consequence of the good treatment and kind attentions I have received from her during my sickness. She is worthy of it. No other person shall inherit my property. I wish you all in the room to take notice of this." This will carries marks of fraud on its very face. Let us examine it attentively. This sweeping donation is made for what? For good treatment and kind attention received from her during his sickness. This sickness had lasted only five weeks, and it was not so bad but that he was able occasionally to ride out. No person apprehended any immediate danger. He had a hired nurse, a colored woman, who was by him totally forgotten. What could this other woman have possibly done, in the course of five weeks, to awaken, in any rational mind, a sense of such enormous obligation, or to call forth such stupendous remuneration? I am forcibly struck with the folly and falsehood of the motive assigned. But the will goes on, and adds, "she is worthy of it." And where does her great merit appear, and from what circumstance does she entitle herself to this extravagant eulogy? The very declaration that she was worthy to possess all his estate proves that Jones must have been insane, or that the whole is a base fabrication. The will goes on further, and says, "No other person shall inherit my property." And why these words of special exclusion of the rest of the world? They seem to imply a heartlessness and misanthropy, very unnatural and very improbable for any man to express in the contemplation of death, and who was in the enjoyment of the comforts and the smiles of fortune; and especially for a native-born Irishman, who was in the midst of his emigrant countrymen, and could not but have heard and felt the claims of religion, of charity, of the widow, and the orphan. He then adds, "I wish you all to take notice of this," —a speech which looks so much like contrivance that it does, of itself, throw a suspicion over the whole piece. This man must have been previously told that the statute required that, in making a nuncupative will, the testator must bid the persons present to bear witness that such was his will. It was made in the middle of the day, when he was quite comfortable, and far from the apprehension of death, and, in this respect, with all punctilious and technical adherence to forms. It had the requisite number of witnesses and the address to the by-standers. Jones must have deliberately determined on a nuncupative instead of a written will, and have previously known and studied all the circumstances that were requisite to make it valid, or else this will has been since got up for him, like a puppet-show by the art and cunning of some juggler behind the scene.

[His honor here went minutely, and at large, into the examination of the testimony in the cause, and particularly of that of the four witnesses to the will, and observed that, from the nature, the improbabilities, the inconsistencies, and the absurdity of the story, and the character and conduct of the witnesses, he drew the conclusion that the testimony of those witnesses was uttterly unworthy of credit, and that the will was evidently the production of fraud and perjury. After having disposed of the question of fact, his honor proceeded as follows:]

But if we were to admit, against the truth of the fact, that the will of the 11th of April was actually and fairly made, according to the certificate of the four witnesses, it would then become a question of law whether it amounted to a valid nuncupative will. A "nuncupative will" is defined by Perkins, (Conv. s. § 476,) in his book which was published under Henry VIII., to be properly when the testator "lieth languishing for fear of sudden death, dareth not to stay the writing of his testament, and therefore he prayeth his curate, and others, his neighbors, to bear witness of his last will, and declareth by word what his last will is." So, again, in Swinburne, (Wills, p. 32,) whose treatise was published in the time of King James I., it is said that this kind of testament is commonly made when the testator is now very sick, weak, and past all hope of recovery. I do not infer from these passages that unwritten wills were always bad at common law, unless made in a case of extremity, when death was just overtaking the testator. In ignorant ages, there was no other way of making a will but by words or signs. Reading was so rare an accomplishment in the earliest ages of the

common law that it conferred great privileges, and the person who possessed it was entitled, under the name of benefit of clergy, to an exemption from civil punishment. But these ancient writers mean to be understood that in the ages of Henry VIII., Elizabeth, and James letters had become so generally cultivated, and reading and writing so widely diffused, that nuncupative wills were properly, according to Perkins, and commonly, according to Swinburne, confined to extreme cases, and to be justified only upon the plea of necessity. And this has been the uniform language of the English law-writers from that time down to this day, so that it has become the acknowledged doctrine that a nuncupative will is only to be tolerated when made in extremis. Thus in Bacon's Abridgement, which was first published in 1736, and compiled chiefly from materials left by Lord Chancellor Baron Gilbert, a nuncupative will is taken from Perkins, and defined to be when a man is sick, and for fear that death, or want of memory or speech, should surprise him, that he should be prevented, if he stayed the writing of his testament, desires his neighbors and friends to bear witness of his will, and declares the same presently before them. 7 Bac. Abr., by Gwillim, 305. The same definition is adopted by Wood in his laborious work on Conveyancing, (volume 6, p. 574;) and in Blackstone's Commentaries, (volume 2, pp. 500, 501,) a nuncupative will is defined to be one declared by the testator in extremis before a sufficient number of witnesses. After reciting the substance of the provisions of the statute of 29 Car. II., (and which we have re-enacted,) he adds: "Thus has the legislature provided against any frauds in setting up nuncupative wills by so numerous a train of requisites that the thing itself has fallen into disuse, and hardly ever heard of, but in the only instance where favor ought to be shown to it,—when the testator is surprised by sudden and violent sickness." And, while I am citing so many English definitions of nuncupative wills, it cannot be thought useless, and will not be deemed unacceptable, that I should also refer to the very respectable opinion of the late chief justice of Connecticut, who declares, when speaking of nuncupative wills as understood in the English law, that they are allowed only in cases where, in extreme and dangerous sickness, the testator has neither time nor opportunity to make a written will. 1 Swift, Syst. 420.

It appears to me that these various writers must be satisfactory to every one, as to the true sense and meaning of a nuncupative will under the English law. It is not easy to recur to more accurate sources. The probate of wills being in England a matter of ecclesiastical cognizance, cases on that point rarely appear in the reports of decisions in the courts of common law. I have, however, been able to select two or three cases of nuncupative wills, which I shall submit to the consideration of the court.

Cole v. Mordaunt, 4 Ves. 196, note, was the case of a nuncupative will, in the 28th year of Car. II., and it is well worthy of notice that this was only one year before the 29th Car. II., when the statute relating to nuncupative wills was passed, and is said to be the principal case which gave rise to that statute. The case was this: Mr. Cole, at a very advanced age, married a young woman, who, during his life, did not conduct herself with propriety. After his death, she set up a nuncupative will, said to have been made in extremis, (for those are the words used in the report of the case,) and by which the whole estate was given to her, in opposition to a written will made three years before, giving 3,000 pounds to charitable uses. The nuncupative will was proved by nine witnesses, but the court of probate rejected the will, and, on appeal to the delegates, a trial was had at the bar of the king's bench, and it appeared that most of the witnesses for the nuncupative will were perjured, and Mrs. Cole herself was guilty of subornation of perjury. It was upon the occasion of this shocking and foul conspiracy that Lord Chancellor Nottingham said "he hoped to see one day a law that no written will should ever be revoked but by writing." He was gratified in seeing such a law the succeeding year; and I will venture most respectfully to add that, if this nuncupative will be established, I should also hope to see one day a law that no nuncupative will should be valid in any case. The case I have cited contains a monitory lesson; and it very much resembles, in its principal features, the one before us.

In Philips v. Parish of St. Clements' Danes, 1 Eq. Cas. Abr. 404, pl. 2, which was cited upon the argument, and arose in 1704, one Doctor Shallmer, by will, in writing, gave £200 to the parish, and Prew, a reader in the church, coming to pray with him, he said, he gave £200 more towards building the church, and died on the next day. This was a case of a nuncupative will which only failed for want of three witnesses. But this testator was evidently in extremis. The particulars are not stated, except only that an officer of the church came to pray with him, and that he died the succeeding day; but those two circumstances well warrant the inference. There is a very close analogy between these nuncupative wills and a gift upon the death-bed or a donatio causa mortis; and these gifts are defined by the court of chancery in Hedges v. Hedges, Finch, Prec. 269, Gilb. 12, in the very terms of a proper nuncupative will. A donatio causa mortis is where a man lies in extremity, or being surprised by sickness, and not having an opportunity of making his will, but lest he should die before he could

make it, gives away personal property with his own hands. If he dies, it operates as a legacy. If he recovers, the property reverts to him.

Upon the strength of so much authority, I feel myself warranted in concluding that a nuncupative will is not good unless it be made by a testator when he is in extremis, or overtaken by sudden and violent sickness, and has not time or opportunity to make a written will. The statute of Car. II., so often referred to, and which we have literally adopted, requires a nuncupative will to be made by a testator in his last sickness, and in his own dwelling-house, or where he had been previously resident for 10 days, unless surprised by sickness on a journey, or from home. The last sickness, in the purview of the statute, has been always understood (for so I infer from the cases cited) to apply to the last extremity mentioned in the books; and it never was meant to uphold these wills, made when there was no immediate apprehension of death, and no inability to reduce the will to writing. A case of necessity is the only case, according to Blackstone, in which any favor ought to be shown them. If they are alleged to have been made in a case unaccompanied with necessity, the presumption of fraud attaches to the very allegation. Let us suppose, by way of illustration, the instance of a person gradually declining under the operation of some slow-paced disease, as the affection of the liver, or the consumption of the lungs, or the dropsy, or the cancer. The patient is himself, we will suppose, under no immediate apprehension of death, nor is any such alarm excited in others. He is comfortably seated in his chamber, in the midst of a populous city, and with ample means to command every kind of assistance. He has had a fair common education, and knows well how to read and write. He has been a man of good understanding, habits of business, and of successful enterprise, and has accumulated a fortune. He is well versed in the knowledge and in the affairs of mankind. He has pen, ink, and paper at hand, with an adroit physician at his elbow, and a favorite friend at his side, on whom he wishes to bestow his fortune. He is in the middle of life, with his intellect perfectly sound. He proposes, or it is proposed to him, to make his will. Would such a man, in such a case, ever dream of making a nuncupative will? Would any honest or discreet friend ever advise him to it? If that should be his wish, or if that should be the suggestion of others, would the law tolerate such an indulgence, under the notion that he was in his last sickness? Surely, the good sense of the law, as the books explain that law, and the cautious and jealous provisions of the statutes of frauds, never intended a nuncupative will for such an occasion. The law wisely discriminates between written and unwritten wills, and permits the latter only in cases of urgent necessity. To abolish that distinction would be to abolish protection to property, to encourage frauds and perjuries, and to throw us back upon the usages of the unlettered ages.

If nuncupative wills can be permitted at all, in the cases of chronic disorders, which make silent and slow, but sure and fatal, approaches, it is only in the very last stage and extremity of them. In no other period can such a disorder be deemed, within any reasonable construction of the statute of frauds, a man's last sickness. Such diseases continue for months, and sometimes for years. In one of Captain Cook's voyages, he states that he lost his first lieutenant, Mr. Hicks, near the conclusion of the voyage of three years, and almost within sight of the English coast. But he adds, that, as his disease was the consumption, and as it existed when he left England, it might be truly said that he was dying during the whole voyage. What would the law call that man's last sickness? Not the whole voyage, surely, and, probably, it would be narrowed down to the last day, and to the last hour, of his existence. We must give a reasonable interpretation to the statute in reference to the mischief and to the remedy. We cannot safely apply a man's last sickness to the whole continuance of a protracted disease, without giving to the statute an absurd construction. I do, therefore, most confidently insist that Jones was not in this last sickness on the 11th of April, within the sense or within the policy of the statute, and that he was not then entitled to make a nuncupative will.

There is one other consideration that imparts to this subject of nuncupative wills a momentous character, and ought to incline us to give to them as little countenance as possible. As soon as a nuncupative will is made, it becomes the interest of the legatee that the party's sickness should prove to be his last sickness; for, if he recovers, the will, of course, falls to the ground. Not so with a written will. That remains good until revoked, and it cannot be revoked but by writing. Let us for one moment pause over this consequence of nuncupative wills, and observe with what a deleterious influence they must suddenly act upon the heart, and what a powerful appeal they at once make to the selfish and dark passions of the human mind. The title of the legatee depends altogether upon the precipitate death of the testator. Every day that his life is prolonged more and more impairs the character of the will, and it vanishes if he becomes convalescent. Suppose the testator was understood to possess a large amount of cash in hand, and that he gives it all, by a nuncupative will, to a stranger to whom the law would not have given it. Suppose that stranger to be his physician, or, as in the present case, his nurse, what

hold has the testator on her fidelity, her kindness, or her integrity? Her interest and her wishes (if indeed her wishes procured the will) must be to destroy, and not to heal, her benefactor. The legacy operates as a bounty upon his death. One cannot contemplate a nuncupative will under this aspect without sensations of horror. Well might such a man exclaim, as Jones is said to have done, repeatedly, "My life depends upon that woman."

I am accordingly of opinion, both upon the law and upon the fact, that the decree of the court of probate, directing the nuncupative will of William Jones to be admitted to probate, was erroneous, and ought to be reversed; and that the decree of the surrogate of the city and county of New York, of the 17th October, 1820, directing the application to admit the said nuncupative will to probate to be dismissed, and that letters of administration of the goods, chattels, and credits which were of William Jones, deceased, be granted and issued, according to law, as in cases of intestates, be confirmed.

Decree of reversal.

For reversal, 23.

For affirmance, 7.

COOK v. WINCHESTER et al.

(81 Mich. 581, 46 N. W. Rep. 106.)

Supreme Court of Michigan. July 2, 1890.

Case made from circuit court, Kent county; Grove, Judge.

Petition by Ariston J. Cook to admit to probate the alleged will of Alzina Page, deceased. Contested by Laaden Winchester and Clarissa Winchester. Probate was refused by the probate judge, and, on appeal to the circuit court, this action was affirmed. Proponent appealed to this court.

Maher & Felker, for appellant. Butterfield & Keeney and Thompson & Temple, for respondents.

MORSE, J. This controversy involves the validity of a will, the sole question being whether or not it was duly executed, or rather witnessed, under the laws of this state. There is no question of fraud or undue influence in the case, nor did the testatrix lack mental capacity to execute a will. It must be conceded from all the testimony in the case that the will was drawn by an honest, disinterested, and trustworthy man; that he was the chosen instrument of Mrs. Page to draft it; that she had frequently consulted and advised with him before as to the disposition of her property, and had told him how she intended to bequeath it; that the will as made was just as she wanted it, and as she had long intended to make it; that it was read to her before she signed it and after she signed, at both of which times she expressed herself as fully satisfied with it; that she signed it in the presence of the persons who witnessed it, and that she requested them to witness it; that she asked them after it was executed if they had witnessed it, and received an affirmative answer, and was then shown their signatures, and their names were read over to her. If the will is not sustained, the property will certainly go, under the law, where she did not wish it to go. It is therefore the duty of the courts to uphold it if possible. It is claimed that the requirements of our statute were not complied with in the witnessing of this will. The statute provides (How. St. § 5789) that three things are requisite to the validity of a will: (1) That it shall be in writing; (2) that it shall be signed by the testator, or by some person in his presence, and by his express direction; (3) that it shall be attested and subscribed, in the presence of the testator, by two or more competent witnesses.

The will was drawn by James Toland, supervisor of the township of Byron, Kent county, who lived only a few rods from Mrs. Page, and with whom she had frequently talked about making her will, and how she wished it drawn. On June 30, 1888, she sent for him. Mrs. Page had been an invalid for many years, and at this time was confined to her bed, and unable to leave it without help. Toland found her in a bedroom adjoining, and opening by a door into, the kitchen,—a kitchen bedroom,—which communicated with no other room. He asked Mrs. Page, who said that she was ready to make her will, and wished him to draw it, if she wanted it drawn in the same manner as she had before told him to draw it. She said, "Yes," and he proceeded. There was no table in the room where Mrs. Page was, and he drew the will on a table in the kitchen. This table was near the bedroom door, but when the door was open it was impossible for any one lying squarely on the bed to see the table or any one sitting at it. Mrs. Page could not move in bed, and was not able to see the table. Toland drew the will, and took it into the bedroom, and read it to Mrs. Page. She was satisfied with the will. Not being able to handle a pen very well, she requested Toland to write her name. He went to the kitchen table and wrote it. He then came in, and she made her mark. Three ladies were present in the room, Mrs. Weaver, Mrs. McConnell, and Mrs. Miller. Mrs. Page requested Mrs. Weaver and Mrs. McConnell to witness the will. Mrs. Weaver did not wish to sign it for some reason, and Mrs. Page then signified that she wished Mrs. Miller to witness it. Mrs. Miller and Mrs. McConnell then stepped into the kitchen and signed the will as witnesses. Mr. Toland and the witnesses then went into the room again, and Toland read the will over to her again, and asked her if it suited her. She said it was all right,—just as she intended it should be. Toland showed the names of the witnesses to her, and also read them to her. He testified that previous to his showing it to her she asked the witnesses if they had signed it, and they told her they had. The door was open between the kitchen and bedroom when the witnessing was done. Mrs. Miller's testimony agrees with Toland, except she says that she stood in the door when the will was being read over after the witnesses had signed it, and did not hear Mrs. Page ask her or Mrs. Connell if they had signed as witnesses, but heard Toland tell her that they had witnessed the will, and read their names to her. Mrs. McConnell (now Mrs. Merritt) states that when they went back into the bedroom after witnessing the will, and Toland read it all over to Mrs. Page again, she said it was all right, and just as she wanted it; the witnesses and everything were all right. "She asked me if we had signed it, and I told her we had. Mrs. Miller and Mr. Toland were there." The room in which Mrs. Page was lying was eight feet square. The kitchen was about fifteen feet square. The distance from where the witnesses sat while signing the will to the bed of Mrs. Page was about twelve feet. The will was denied probate

by the judge of probate of Kent county, and on appeal to the circuit court his action was affirmed.

It is claimed that the will was not executed—witnessed—in the presence of the testatrix. It is true that it was physically impossible for her to see the witnesses when they were in the act of signing it without moving herself upon the edge of the bed, which she was unable to do. And it is argued by counsel for the contestants that there are no cases to be found in the books, except possibly two, which can be claimed as authority for the admission of the will to probate. That the statute has been uniformly held to require that "the condition and position of the testator when his will is attested, and in reference to the act of signing by the witnesses, and their locality when signing, must be such that he has knowledge of what is going forward, and is mentally observant of the specific act in progress, and, unless he is blind, the signing by the witnesses must occur where the testator, as he is circumstanced, may see them sign if he choose to do so. If in this state of things some change in the testator's posture is requisite to bring the action of the witnesses within the scope of his vision, and such movement is not prevented by his physical infirmity, but is caused by an indisposition or indifference on his part to take visual notice of the proceeding, the act of witnessing is to be considered as done in his presence. If, however, the testator's ability to see the witnesses subscribe is dependent upon his ability to make the requisite movement, then if his ailment so operates upon him as to prevent this movement, and on this account he does not see the witnesses subscribe, the will is not witnessed in his presence." Aikin v. Weckerly, 19 Mich. 504, 505. A large number of cases are cited in support of the counsel's claim, to wit: Mandeville v. Parker, 31 N. J. Eq. 242; Wright v. Manifold, 1 Maule & S. 294; Reynolds v. Reynolds, 1 Speers, 253; Robinson v. King, 6 Ga. 539; Brooks v. Duffell, 23 Ga. 441; Reed v. Roberts, 26 Ga. 294; Jones v. Tuck, 3 Jones (N. C.) 202; Eccleston v. Petty, Carth. 79; Broderick v. Broderick, 1 P. Wms. 239; Lamb v. Girtman, 33 Ga. 289; Neil v. Neil, 1 Leigh, 6; Orndorff v. Hummer, 12 B. Mon. 626; In re Downie's Will, 42 Wis. 66; Duffie v. Corridon, 40 Ga. 122; Edelen v. Hardey's Lessee, 7 Har. & J. 61; Russell v. Falls, 3 Har. & McH. 457; Graham v. Graham, 10 Ired. 219; In re Cox's Will, 1 Jones (N. C.) 321; Ragland v. Huntingdon, 1 Ired. 561; Chase v. Kittredge, 11 Allen, 49; Compton v. Mitton, 12 N. J. Law, 71; Combs v. Jolly, 3 N. J. Eq. 625; Mickle v. Matlack, 17 N. J. Law, 86; Hindmarsh v. Carlton, 8 H. L. Cas. 160.

It must be conceded that these cases all fully support the contention that the will must be witnessed in the same room with the testator, or, if out of the room, where he can see them sign if he desires to do so; he must be in a position where it is possible to see them. The fact that the will, after being witnessed out of the testator's sight, is brought to the view of the testator, and he looks upon the signatures of the witnesses, and they then acknowledge the witnessing of it before him, will not cure this defect in its execution, according to the authority of some of these cases. See Chase v. Kittredge, 11 Allen, 61; In re Cox's Will, 1 Jones (N. C.) 321; Graham v. Graham, 10 Ired. 219; Russell v. Falls, 3 Har. & McH. 457; Lamb v. Girtman, 33 Ga. 289; In re Downie's Will, 42 Wis. 66.

The extreme rule laid down in some of these cases cited by counsel for contestants, notably Graham v. Graham, supra, a North Carolina case, was criticised, and I think justly so, by Justice Champlin in Maynard v. Vinton, 59 Mich., at pages 148, 149, and 26 N. W. Rep., at pages 405, 406, but for the purposes of that case the doctrine of Aikin v. Weckerly was adhered to. In Maynard v. Vinton, the testatrix was in a position where she might have seen the witnesses sign, as they were within the range of her vision if she saw fit to look, as was also the case with the testator in Aikin v. Weckerly. The precise question raised by the record in this case has never been presented to this court, and neither of the two cases above mentioned seems to stand in the way of a just and liberal construction of the statute in this case in favor of the validity of the execution of this will of Alzina Page. I agree with Judge Champlin that "presence," as used in the statute, has been too narrowly construed by many of the courts as meaning that the witnesses must be under the eye of the testator. I find two cases referred to on the argument where the facts are almost identical with those found by the circuit judge in this case, and in both of which the will was sustained. In the first, (Sturdivant v. Birchett, 10 Grat. 67,) the will was attested by the witnesses subscribing their names as such in a different room from that in which the testator was lying at the time of such signing. The testator could not see the witnesses in the act of signing, either from the bed on which he lay or from any other place within the room. The testator signed the will in the presence of the witnesses, and requested them to attest it. They went together into another room for that purpose, it being inconvenient to do so in the room where the testator was lying. When they subscribed their names no other person was in the room, and they immediately returned to the room where the testator was. They were gone from that room not over two minutes. They took the will to the testator, who was lying in bed, and, both of the witnesses being together, one of them said to him, "Mr. Sturdivant, here is your will witnessed;" at the same time pointing with his finger to the names of the

witnesses, and holding the will open before him, the names of said witnesses being on the same page, and close to that of the testator. He took the will in his hands, and looked at it as if he was examining it. He then closed or folded it. On being told that he was ill, and had better give the will to some one to keep for him, he asked whether if he got well he could take it back from the person to whom he might give it. Being answered in the affirmative, he said: "It is my will, and I wish it to stand, but I may hereafter, on getting well, wish to make some slight alteration in it." He then handed the will to a friend. In the other case, of Riggs v. Riggs, 135 Mass. 238, (decided June 21, 1883,) the witnesses to the will saw the testator sign it, and were in the room with him at the time. They signed it as witnesses in a room adjoining the one testator was in, and at a distance of about nine feet from him, the door being open. The testator was in bed, and in such a position that if he had been able to turn his head round he might, by so turning it, have seen the witnesses when they signed their names, and also the will itself, unless during a part of the time when their bodies obstructed the view; but from the effect of an injury which he had received he could not in point of fact turn his head sufficiently to see them and the will at the time when they were signing their names as witnesses. After the witnesses had signed the will it was handed to the testator as he was lying upon the bed, and he read their names as signed, and said he was glad that it was done.

These cases differ from the one at bar only in the fact that the will was taken, after witnessing, into the hands of the testator, who in one case looked at it, and in the other read the names, while in Mrs. Page's case the names were shown her while the will was in the hands of the scrivener and read to her, as well as the names of the witnesses to it. The difference is unimportant. In all three of the cases the maker of the will knew what he or she was doing, and what was being done, being conscious of all that took place, and no claim of fraud is made or entertainable in any of them. The majority of the Virginia supreme court (three out of five judges) sustained the will in the first case, and held that the statute was substantially complied with, in a very able and exhaustive opinion by Justice Lee. In his opinion the learned justice shows conclusively from the authorities that the words "in presence of" do not necessarily imply that the testator and the witnesses must be in the same room, nor that actual sight or inspection of the process of signing is peremptorily required, because it is well settled that a blind man may make a will. He holds that the recognition by the witnesses of their signatures to the will made within the immediate sight and presence of the testator, immediately after they have signed it in an adjoining room, furnishes as complete a security against the frauds and impositions sought to be guarded against by the statute as the actual manual operation of writing their names by the witnesses under his eye. The identity of the witnesses is also equally assured in both modes. In the Massachusetts case the court was unanimous in sustaining the will. In referring to the holding by some of the courts that an attestation was insufficient when the testator did not and could not see the witnesses subscribe their names, Chief Justice Morton, speaking for the court, says: "We are of opinion that so nice and narrow a construction is not required by the letter, and would defeat the spirit, of our statute. * * * The statute does not make the test of the validity of a will to be that the testator must see the witnesses subscribe their names. They must subscribe 'in his presence,' but in cases where he has lost or cannot use his sense of sight, if his mind and hearing are not affected, if he is sensible of what is being done, if the witnesses subscribe in the same room, or in such close proximity as to be within the line of vision of one in his position who could see, and within his hearing, they subscribe in his presence. * * * In a case like the one before us, there is much less liability to deception or imposition than there would be in the case of a blind man, because the testator, by holding the will before his eyes, could determine by sight that the will subscribed by the witnesses was the same will executed by him. * * * The door was open, and the table was within the line of vision of the testator, if he had been able to look, and the witnesses were within his hearing. The testator could hear all that was said, and knew and understood all that was done; and, after the witnesses had signed it, * * * it was handed to the testator, and he read their names as signed, and said he was glad it was done. For the reasons before stated, we are of opinion that this was an attestation in his presence, and was sufficient."

So, in this case, the witnesses were in the line of the testatrix's vision if she could have moved to one side of the bed, which she could not do, as in the Massachusetts case the witnesses were in the range of the testator's vision if he could have turned his head, but he could not. I am better satisfied with the liberal construction of the statute and the reasoning of these two cases than I am with the authorities cited to the opposite, and sustaining the "nice and narrow" interpretation of the statute; and in the case at bar, such holding, as it will in most cases, reaches the justice and equity of the case, which adds to my satisfaction. No fraud was perpetrated, and none well could have been, under the circumstances of the execution of this will. But in holding the will invalid, a fraud is committed upon the testatrix, as well as her chosen

beneficiary, by the law, and her property is disposed of contrary to her wish and intention, to those from whom she sought to keep it away. It is not the purpose or province of the law to do this when it can be avoided. In the definition of the phrase "in the presence of" due regard must be had to the circumstances of each particular case, as it is well settled by all the authorities that the statute does not require absolutely that the witnessing must be done in the actual sight of the testator, nor yet within the same room with him. If, as before shown, they sign within his hearing, knowledge, and understanding, and so near as not to be substantially away from him, they are considered to be in his presence. But we hold that the execution of this will was valid expressly upon the ground that not only was the act of signing by the witnesses within the hearing, knowledge, and understanding of the testatrix, but after such signing the witnesses came back into the room where she was with the will, which was on one sheet of paper; that the will was then again all read over to her by the scrivener, and the names of the witnesses read to her and their signatures shown to her, and she informed by the witnesses, or one of them in the presence of the other, that the will had been signed by them; and that she then said it was all right, "just as she wanted it; witnesses and everything was all right." This seems to us to have been a substantial compliance with the statute, and a witnessing in the presence of the testatrix. The circuit judge returns in his findings of fact that his decision was based entirely on the ground that the will was not properly witnessed under the statute; that, the will not being admitted in evidence for this reason, the case proceeded no further, the proponent taking an exception, and resting. The contestants announced that they were prepared to show that the testatrix was incompetent to make a will. The judgment of the circuit court will be reversed, and a new trial granted. The other justices concurred.

ADAMS v. FIELD.

(21 Vt. 256.)

Supreme Court of Vermont. Feb. Term, 1849.

This is an appeal from a decree of the probate court of the district of Fairhaven, which approved and allowed an instrument in writing presented as the last will and testament of Samuel Adams, deceased. It was objected by the appellant (1) that said instrument was not signed by said Samuel Adams, nor by any other person in his presence, and with his express direction; (2) that it was not subscribed by three credible witnesses in the presence of said Samuel Adams and of each other; and (3) that it was not the last will and testament of said Samuel Adams. The instrument commenced: "I, Samuel Adams, of Westhaven, * * * do hereby make this, my last will and testament;" and concluded as follows: "In testimony whereof I have hereunto set my hand and seal, and publish and declare this to be my last will and testament, this 12th day of September, in the year of our Lord eighteen hundred and thirty-seven. Signed, sealed, published, and declared by the said Samuel Adams, as his last will and testament, in presence of us, who have hereunto subscribed our names as witnesses thereof, at the request and in the presence of the testator, and in the presence of each other. [Seal.]" This last clause purported to be signed by three witnesses; but the name of Samuel Adams did not appear in any place upon the instrument, except in the first clause of the will, and in the attesting clause, as above shown. The case was tried before a jury, and evidence was received which tended to prove that the will, though written at different times, was wholly in the testator's handwriting, and that it was subscribed by the three attesting witnesses in the presence of the testator and of each other, and at his request, he declaring it at the time to be his will. The judge instructed the jury that the writing by Samuel Adams of his name in the attestation clause was a sufficient and legal signing under the statute of the state; also that it was not necessary that the writing of his name in the beginning of the instrument should have been one simultaneous act with the writing by him of the whole instrument, in order to constitute the same a legal or sufficient signing, nor was it necessary that the whole act or intended instrument should have been in his contemplation when he so wrote his name; and that, even if the different parts of the instrument were written at different times, yet if the jury should find that the instrument commenced in his name, and was wholly written by him, and that, after it was completed, he produced the same to the three witnesses, and declared it to be his will in their presence, and requested them to witness it as his will, and that they subscribed their names to the instrument in his presence, and in the presence of each other, as witnesses to his last will, the jury should also find that the instrument was sufficiently signed and executed by him as a will. The jury found that the instrument was signed by Samuel Adams, and that it was attested and subscribed agreeably to the statute, and is the last will and testament of said Samuel Adams, deceased. Exceptions by appellant.

L. C. Kellogg and E. N. Briggs, for appellant. R. Pierpoint and I. T. Wright, for appellee.

BENNETT, J. * * * Questions arise under the charge of the court; and the first is, what will satisfy the statutory requirement of signing? Was the name of this testator in the beginning of the will a sufficient signing to satisfy the statute? In the case of Lemayne v. Stanley, 3 Lev. 1, the will was in the handwriting of the testator, and such a signing was held sufficient, within the statute of 29 Car. II., which required all wills of land to be signed. In that case, as in this, the will commenced, "I, John Stanley, make," etc. After that decision the law was regarded as settled in England; and the case of Lemayne v. Stanley has not only since been followed in that country, but also in our sister states which have, by legislative enactment, adopted the statute of Car. II. The rule was so effectually established that courts of justice, though repeatedly solicited, could not be induced to break in upon it. In England they have found that a statute was necessary to change the law in this particular; and in the reign of the present queen one has been passed requiring a will to be signed at its foot. The same has been done by some of our neighboring states. It was said in England, and the same has been said in the argument of this cause, that the case of Lemayne v. Stanley was an evasion of the statute, and opened a door for the perpetration of frauds, and was so nonsensical that it ought not to be followed. If that decision had the effect to open a door for the commission of frauds, this certainly is a cogent reason why it should not have been made in the first place, or since followed. But I am not aware that such has been its effect. Where the whole will is in the handwriting of the testator, and is attested by three witnesses in the presence of the testator, and published by him as his last will, in their presence, it is difficult for me to see how the fact that the signing at the top of the will is held a sufficient signing can open a door to fraud. It must be shown that the will possesses finality before it can be operative; and, to give it this quality, the testator must, at least, at the final execution of the will, adopt the writing of his name, at the beginning of the will, as a signing, and so intend it. I think in New York they have, or have had, a statute which requires a will to be subscribed by the testator; and this, their courts have

said, requires a will to be signed at the foot. This was doubtless according to the etymology of the word "subscribed;" though, if I mistake not, the supreme court of that state held that the introduction of the word "subscribe" in their statute, instead of "sign," should not change the construction from that which had been given to the statute of Car. II.; but the court of errors thought otherwise. The etymology of the word "sign" does not necessarily require the signing to be at the bottom of the instrument, and it is much a matter of taste as to the place of signing. If the question were res integra, we might think the bottom of the will was the place where the statute intended it should be signed by the testator; but to me it seems rather immaterial in which place the will is signed, provided it is shown to have the necessary authenticity. The law, as established in the Case of Stanley's Will, has become a rule of property, and stare decisis seems wisest to me. When our statute of wills was enacted, the statute of Car. II. had received a long, fixed, and well-known construction; and when we adopt an English statute we take it with the construction which it had received, and this upon the ground that such was the implied intention of the legislature. We think the case of Lemayne v. Stanley should be binding upon this court. To impugn or overthrow it would be to impugn or overthrow a rule of property which has long been settled and acted upon. This should never be done unless upon the most urgent necessity. The case of Lemayne v. Stanley does not stand alone. In Knight v. Crockford, 1 Esp. 190, it was held that where a writing began, "I, A. B., agree," etc., it was a sufficient signing, within the statute of frauds; and there are other cases to the like effect, which, in principle, are like the case of Lemayne v. Stanley. See 1 Jarm. Wills, 70.

The counsel for the appellant seem constrained to admit, in substance, that the signing of a will at the beginning may, if so designed, be a sufficient signing, within the statute of Car. II.; but they insist that, in the case before us, the testator intended to sign this will at the foot, and that consequently the will was incomplete and wanting in finality until it was so signed. I think it is hardly possible not to see that, at the time the testator inserted his name at the beginning of the will, a further signing of it was in contemplation before it should have authenticity; and if the jury have not, by their verdict, found the will to be complete and finished at the time of its publication, it should not have been established. In the treatise Modern Probate of Wills (page 154) the writer says: "Although the testator may have commenced his will thus, 'I, A. B., make,' etc., with an intent of repeating his signature at the end of the will, yet if he subsequently acknowledge the instrument as his will to the attesting witnesses, without allusion to the signature, we presume that the will was sufficiently signed." In 1 Jarman on Wills (page 70) it is said: "If the testator contemplated a further signature, which he never made, the will must be regarded as unsigned;" and so, doubtless, are the authorities, as well as the reason of the thing. But he well remarks that the reasoning seems only to apply where the intention of repeating the signature remained unchanged to the last; for a name, originally written with such design, might afterwards be adopted by a testator as the final signature; and such, the writer says, "would probably be the presumed intention, if the testator acknowledged the instrument as his will to the attesting witnesses, without alluding to any further act of signing." We think this is a sound view of the subject. If the will, as the jury must have found in this case, was attested by three witnesses in the presence of the testator, and in presence of one another, and published by the testator in their presence as his last will and testament, it was to all intents and purposes an adoption of such a signature as was then affixed to the will; and if the will then had such a signature as could be held sufficient under the statute, nothing further need be done. The will then becomes complete, and possesses all the finality which can be required. It is the same thing, in effect, as if the signature had been originally made animo signandi. The case of Hubert v. Treherne, 42 E. C. L. 388, is regarded by the appellant's counsel as a leading case to show that this will was incomplete. The names of the parties to the agreement were stated in the beginning of the articles; and it concluded, "as witness our hands," but no signatures followed. The court, it is true, held that this agreement was not signed, within the statute of frauds, for the reason that the words, "as witness our hands," imported that a further signing was intended. I fully accord with this decision; but it should be remembered that there was nothing in that case to show an adoption of the signatures in the commencement of the articles as the final signatures. Tindal, C. J., says: "There was no sufficient original signing, and no subsequent recognition." Coltman, J., remarks that "there was no sufficient authority to give out the copy in behalf of the party to be charged with the agreement;" and Erskine, J., says he is "not prepared to say that, if the articles had been delivered by any proper authority, the signing would not have been sufficient." Had the case shown a subsequent recognition of the articles, I can have but little doubt the decision would have been different. The cases of Saunderson v. Jackson, 2 Bos. & P. 238, and Schneider v. Norris, 2 Maule & S. 286, rest upon the ground of a subsequent recognition. Though the case of Johnson v. Dodgson, 2 Mees. & W. 659, is much relied upon by the appellant, yet it recognizes all the principles necessary to sustain the charge of the county court. Lord Abinger remarks

that the cases have decided that, although the signing be in the beginning or middle of the instrument, yet it is as binding as if it were at the foot; the question being always open to the jury whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood or whether it was left so unsigned because he refused to complete it. This principle we apply to the case before us. The jury have found that the testator produced the will in question to the witnesses, and declared it to be his will, and requested them to witness it as his will. This shows that the testator did not then contemplate a further signing of the will, and is, in effect, a finding by the jury that the testator adopted the instrument as it was then signed as his will; and, if so, then the signing was sufficient to satisfy the claims of the statute. It might, perhaps, have been urged with some propriety that, though this will contains the usual ad testimonium clause, yet that, upon its face, it furnishes no evidence from that circumstance that a further signing was intended at the time the testator drew up his will. This clause is written on the original will, it appears, so close to the seal that there is no room for his signature opposite to the seal, or very near to it; but, as the case was not put to the jury upon any such ground, it is not necessary to consider it. The case is right, going upon the ground that the ad testimonium clause to this will furnished evidence prima facie that at the time it was written a further signing was in the mind of the testator. The case of Waller v. Waller, 1 Grat. 454, has been pressed upon us; but we cannot accede to the doctrine of that case. It is there said that the finality of the testamentary intent must be ascertained from the face of the paper, and that, to constitute a sufficient signing under their statute, it must appear from the frame of the instrument, and upon its face, that the signing was intended to give it authenticity as a signature, and that it was complete without any further signature, and that the paper itself must show all this. We think that unless there is something peculiar in the statute of that state, this case is unsound and stands opposed to the whole current of decision under the statute of Car. II. The case of Sarah Miles' Will, 4 Dana, 1, which the appellant has referred the court to, contains the sound doctrine on this subject. Her will was drawn by a neighbor, at her request, and under her dictation, and commenced thus, "In the name of God, I, Sarah Miles," etc., and concluded with the usual ad testimonium clause. It was read to and approved by her, but not then signed or attested. After this she acknowledged the paper as her will, in the presence of the witnesses who attested it in her presence and at her request; she being at that time unable to write. The principle adopted by the court was that though her name in the beginning of her will was not intended, when written, to be her signature, yet, as it was so designed at the time of the publication, and there was then no intention on her part further to sign her will, it was a sufficient signing within their statute, which was a copy of the English statute. This is in accordance with the English cases.

It has been argued that the writing of the testator's name in the beginning of the will could not be an act recognizing the whole substance of the instrument, unless the whole factum was simultaneous with it, and was also in the contemplation of the testator at the time he wrote his name. It may be true that when the signing of the name in the beginning of the will is, in and of itself, to be taken as a signing of the will within the statute, without any subsequent recognition, it must appear that the testator had the whole object of the instrument in prospect when he wrote his name, and that the instrument must be completed by one simultaneous act; yet, suppose it to be so, it cannot apply to a case like this. Here the signature did not become a sufficient signature, within the statute, until it was adopted as such at the time of the publication of the will; and then the whole subject-matter of the will was in the mind of the testator, and the will was completed by one simultaneous act. Since the cases of Ellis v. Smith, 1 Ves. Jr. 11, and Carleton v. Griffin, 1 Burrows, 549, the law has been settled that the testator need not in fact sign the will in the presence of the attesting witnesses; and it is there held, if the will be so signed that it can in any event satisfy the statute, and the testator declare it to be his will before three witnesses, that this is equivalent to signing it before them, and satisfies the statute. This case has been very fully examined by the counsel, and every consideration has been urged that could bear upon the question before us; and we may well admire the learning and ability which have been displayed in the argument, yet we do not feel at liberty to depart from well-established landmarks. The statute of Car. II. had received a settled construction when our statute was passed, and we must regard that construction as binding upon us. If we should change a rule of property, because we might think that the more obvious and popular meaning of the word "sign" might import a signing of the instrument only at its foot, we should, in my opinion, be far from duty.

The result is, the judgment of the county court is affirmed.

In re O'NEIL'S WILL.

(91 N. Y. 516.)

Court of Appeals of New York. March 6, 1883.

Appeal from supreme court, general term, third department.

Proceedings before the surrogate of Essex county for the probate of an instrument purporting to be the will of James O'Neil, deceased. The will was drawn upon a printed blank of four pages, with a printed heading and formal commencement at the top of the first page, and a printed formal termination at the foot of the third page, where the testator and the witnesses signed. The intervening blank spaces on the first, second, and third pages were filled with the peculiar provisions of the will, but, being insufficient for all of the writing, about two-thirds of the last written article was carried over to the fourth page. Such article was as follows: "(13) And I authorize and empower my executors hereinafter named to sell, convey, assign, and transfer my real property for the bequests, hereinbefore named and mentioned, either at private—[Here followed, at the end of the third page, the appointment of executors, the signature of the testator, the attestation clause and signatures of subscribing witnesses, and then at the top of the fourth page appeared the following paragraph:]—Or public sale, and in the manner which they will deem the most profitable and advantageous to my said estate; but in no case shall my said executors be process by law or otherwise to sell and convey and dispose of my said real property before the lapse of five years after my death, unless my said executors shall see fit and proper to sell and dispose of the same by virtue of the power and authority hereinbefore given them as aforesaid." The will so drawn was read to testator, the portion written at the top of the fourth page being read as if written in the blank space preceding the printed matter on the third page. The surrogate admitted the will to probate, and contestants appealed to the general term, where the decree of the surrogate was reversed. Proponents appealed to this court.

Matthew Hale, for appellants. Samuel Hand, for respondents.

RUGER, C. J. The matter in controversy arises between some of the heirs at law and the executors over the alleged improper execution of what purports to be the will of James O'Neil. The instrument was drawn upon a printed blank, consisting of four pages, the formal commencement being printed on the first page, and the formal termination, also printed, appearing at the foot of the third page; and the intermediate space being originally left blank for the insertion of such special provisions as the testator might desire to make. When presented for probate, the entire blank space was filled in, and, it being apparently insufficient in extent to contain all of the provisions sought to be introduced into the will, the thirteenth seems to have been carried over and finished on the first eight or ten lines of the fourth page. That portion of the will seems in no way to be authenticated, and leaves a blank space of two-thirds of a page below the written lines. The names of the testator and of the witnesses were subscribed towards the bottom of the third page, below the formal printed termination of the will, and there only. The portion of the thirteenth paragraph, immediately preceding the printed termination, was manifestly incomplete, and the lines written on the fourth page were obviously a continuation of this broken paragraph. The two portions were not, however, sought to be connected by means of a reference, an asterisk, words, or symbol, indicating the relation to each other. Material provisions are contained in the writing on the fourth page. Upon this state of facts, the question is raised that this is not such a subscription and signing by the testator and witnesses, at the "end of the will," as is required by our statute. 2 Rev. St. p. 63, § 40.

The application of some of the elementary principles governing the interpreting of statutes would seem to furnish a safe and certain guide for the determination of the question presented. The words of the statute must be construed in their plain, obvious sense, according to their signification among the people to whom they were directed. Ogden v. Saunders, 12 Wheat. 312; Story, Const. § 449. Also that construction must be adopted which will effectuate, as far as possible, the intent of the framers of the statute, and obviate the anticipated evils which were the occasion thereof. Tonnele v. Hall, 4 N. Y. 140. The legislative intent was doubtless to guard against frauds and uncertainty in the testamentary disposition of property, by prescribing fixed and certain rules by which to determine the validity of all instruments purporting to be wills of deceased persons. Reviser's notes, Willis v. Lowe, 5 Notes Cas. Adm. & Ecc. 428. The question, then, arises whether the "end of the will" referred to in the statute means the actual physical termination of the instrument, or that portion thereof which the testator intended to be the end of the will. While it is possible that, in isolated cases, the latter construction might sometimes preclude the perpetration of a wrong, it certainly would not satisfy the general object of the statute of furnishing a certain fixed and definite rule applicable to all cases. While the primary rule governing the interpretation of wills, when admitted to probate, recognizes and endeavors to carry out the intention of the testator, that rule cannot be invoked in the construction of the statute regulating

their execution. In the latter case courts do not consider the intention of the testator, but that of the legislature.

In considering the question stated upon authority, some cases are found which apparently sustain the contention of appellant's counsel. In all of them, however, there was a failure to observe the rules of construction which we consider controlling. We think, however, that the weight of authority favors the theory that the statute fixes an inflexible rule by which to determine the proper execution of all testamentary instruments. The cases cited from the English Reports, except certain ones hereinafter referred to, do not afford much assistance in construing our statute, from the fact that they cover a period during which material changes were wrought in their statutes, and the further fact that those statutes differ in material respects from our own.

The statutes of 15 & 16 Vict. c. 24, among other things, provided that no signature "shall be operative to give effect to any disposition or direction which is underneath, or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made." From this alone might be deduced arguments sufficient to dispose of the question involved in this case, if our statutes contained similar provisions.

As early as 1847, Sir Jenner Fust, in the case of Willis v. Lowe, supra, says: "Cases have occurred before the real purpose of the act had been ascertained, in which the court has given construction to the statute, as far as possible, to fulfill the real intention of the parties; but the court is under the necessity of looking at the clear intention of the act. The court was of the opinion, at first, that the intention of this part of the act was to remove the difficulty which had arisen under the statute of frauds, by the construction of which the signature at the commencement of a will was equally good with the signature at its end. But there was another reason for the provision, viz., to guard against fraud. The act required the signature to be at the foot or end of the will, to prevent any addition to the will being made after its execution in presence of witnesses." In Dallow's Case, L. R. 1 Prob. & Div. 189, immediately following the signatures of the testator and the witnesses was the clause, "My executors are," A., B., and C. The will contained clauses in the body referring to the executors as "hereinafter named," but they were named in no other place except after the signature. It was held that the clause naming the executors could not be admitted to probate, Sir J. P. Wilde saying: "The question is whether, under St. Leonard's act, (15 & 16 Vict.,) the clause appointing executors can be admitted to probate. Although parol evidence may show that the clause appointing executors was written before the signature, it is not made manifest by any words in the will of the testator so describing that clause when he referred 'to my executors hereinafter named.' And parol evidence cannot be received for that purpose; and it seems to me, also, that it would be directly contrary to the statute, which requires the will to be signed at the foot or end, to permit probate of this clause." In Sweetland v. Sweetland, 4 Swab. & T. 6, Sir J. P. Wilde says: "I have no doubt the testator did intend to execute in proper form the will; the question is whether he has done so." In Hays v. Harden, 6 Pa. St. 409, Gibson, C. J., says: "Signing at the end of the will was required to prevent evasion of its provisions." In Glancy v. Glancy, 17 Ohio St. 134, Day, C. J., says: "The testator is required by this portion of the statute to sign his will at the end thereof. The reason of this requisition is obviously to prevent improper alterations of a will." The provision is a judicious one, and care should be taken not to break in upon it by a lax interpretation.

We think this question has been substantially determined in this court in the case of Sisters of Charity v. Kelly, 67 N. Y. 409. Folger, J., says: "Can we say that the end of the will has been found until the last word of all the provisions of it has been reached? To say that where the name is, there is the end of the will, is not to observe the statute. That requires that where the end of the will is, there shall be the name. It is to make a new law to saw that where we find the name, there is the end of the will. The statutory provision requiring the subscription of the name to be at the end is a wholesome one, and was adopted to remedy real or threatened evils. It should not be frittered away by exceptions."

It will be seen, in all of the cases cited, there was no reason to doubt the testator's intention to make a valid disposition of his property; and yet in each case the will was denied probate, because in the execution thereof the testator did not conform to the provisions of the statute, in failing to place his signature at the physical end of the will.

It is claimed by the counsel for appellant that the clause in question may be regarded as an interlineation, and thus held to be constructively a part of the body of the will. We think that this claim cannot be supported without opening the door to all of the evils which the statute was intended to prevent, and substantially abrogating its wholesome provisions. The same argument would validate the addition of a fourteenth paragraph to the unauthenticated lines appearing on the fourth page, and lead, by logical deduction, to indefinite extension.

It is said, also, that the cases holding that a paper or document referred to in the body of a will may be considered as a part thereof, afford support to the construction claimed by appellant's counsel. It is not believed

that any paper or document containing testamentary provisions not authenticated according to the provisions of our statute of wills has yet been held to be a part of a valid testamentary disposition of property, simply because it was referred to in the body of the will. It was held in Tonnele v. Hall, 4 N. Y. 140, that a map appearing after the signature upon a will, and said to be a reduced copy of a map made by the testator of his real estate and filed in the county clerk's office of New York, and which was referred to in the body of the will, did not require the signature of the testator and witnesses to follow it in order to make it a part of the will. It is to be observed that the paper there in question was referred to merely to identify the subject devised, and contained no testamentary provisions. It is further to be observed that the will in the case cited was complete without such additions, and that the maps could probably have been used as evidence to identify the property devised, even if no reference had been made thereto in the will. Independent of authority, the argument, upon principle, leads inevitably to the conclusion that the will was improperly executed. The signatures to it are confessedly between the various operative and disposing parts of the instrument, and in no sense at the literal or physical end of the will. That the signatures are where the testator intended the will should end, we have already seen, is not a material circumstance. A blank space covering two-thirds of a page of foolscap paper is left immediately after the language we are invited to insert in the will, and no possible guard is provided against the addition thereto of any such provision as the person in possession of this paper may be tempted to make. There can be no answer to the proposition that to uphold this will is to defeat the object of the statute in requiring a will to be subscribed at the end. The opportunity of adding indefinitely to a testamentary provision will be legalized by so holding, and the statute, instead of establishing an inflexible rule by which to determine the proper execution of a will, will be open to as many different constructions as varying circumstances may invite.

We thus arrive at the conclusion that the will in question was not properly executed, and it cannot, therefore, be admitted to probate. The claim that such parts of the will as precede the signatures may be received, and the remainder rejected, cannot be supported. The statute denies probate to a will not executed in accordance with its provisions. It is either valid or invalid, as an entirety, as far as its execution is concerned. It is undeniable that the portion following the testator's signature contains material provisions, and formed part of his scheme in making a will. At all events, we have no way of determining the extent to which he deemed them material, and cannot give effect to one part, and deny force to another. This point was decided adversely to the appellant in Sisters of Charity v. Kelly and other cases above cited. The judgment should be affirmed.

All concur, except RAPALLO, J., not voting.

Judgment affirmed.

In re MACKAY'S WILL.

(110 N. Y. 611, 18 N. E. Rep. 433.)

Court of Appeals of New York. Oct. 26, 1888.

Appeal from supreme court, general term, third department.

Application to surrogate's court of St. Lawrence county to probate the will of James Mackay, deceased. From a decree refusing probate the executors and legatees appealed to the general term, where the surrogate's decree was affirmed, and they appeal to the court of appeals. For opinion of the general term, see 44 Hun, 571.

Louis Hasbrouck, for appellants. Wm. H. Sawyer, for respondent.

EARL, J. The subscribing witnesses came to the dwelling-house of the deceased by previous appointment, and, while seated at his writing-desk, he said to them: "Gentlemen, what I sent for you for was to sign my last will and testament." Thereupon he took from his writing-desk the instrument offered for probate, and, laying it before the witnesses, said: "It is now all ready, awaiting your signatures." He then presented the instrument to the witness McCarrier for his signature, and he signed it, saying, as he did so, "I am glad, Father Mackay, you are making your will at this time; I don't suppose it will shorten your life any," to which he replied, "Yes," he wanted it done, and off his mind; and then the witness Mulligan, who had joined in this conversation, signed the instrument, as a witness. At the time of exhibiting the instrument to the subscribing witnesses he told them it was his will; but he handed it to them so folded that they could see no part of the writing, except the attestation clause, and they did not see either his signature or seal.

There would undoubtedly have been a formal execution of the will, in compliance with the statutes, if the witnesses had at the time seen the signature of the testator to the will. Subscribing witnesses to a will are required by law, for the purpose of attesting and identifying the signature of the testator, and that they cannot do unless at the time of the attestation they see it. And so it has been held in this court. In Lewis v. Lewis, 11 N. Y. 221, where the alleged will was not subscribed by the testator in the presence of the witnesses, and when they signed their names to it it was so folded that they could not see whether it was signed by him or not, and the only acknowledgment or declaration made by him to them, or in their presence, as to the instrument, was, "I declare the within to be my will and deed," it was held that this was not a sufficient acknowledgment of his subscription to the witnesses within the statute. In that case Allen, J., writing the opinion, said: "A signature neither seen, identified, nor in any manner referred to as a separate and distinct thing, cannot in any just sense be said to be acknowledged by a reference to the entire instrument by name to which the signature may or not be at the time subscribed." In Mitchell v. Mitchell, 16 Hun, 97, affirmed in this court in 77 N. Y. 596, the deceased came into a store where two persons were, and produced a paper, and said: "I have a paper which I want you to sign." One of the persons took the paper, and saw what it was and the signature of the deceased. The testator then said: "This is my will; I want you to witness it." Both of the persons thereupon signed the paper as witnesses, under the attestation clause. The deceased then took the paper, and said, "I declare this to be my last will and testament," and delivered it to one of the witnesses for safe-keeping. At the time when this took place the paper had the name of the deceased at the end thereof. It was held that the will was not properly executed, for the reason that one of the witnesses did not see the testator's signature, and as to that witness there was not a sufficient acknowledgment of the signature or a proper attestation. It is true that in Willis v. Mott, 36 N. Y. 486, 491, Davies, C. J., writing the opinion of the court, said that "the statute does not require that the testator shall exhibit his subscription to the will at the time he makes the acknowledgment. It would therefore follow that when the subscription is acknowledged to an attesting witness it is not essential that the signature be exhibited to the witness." This is a mere dictum, unnecessary to the decision in that case, and therefore cannot have weight as authority. The formalities prescribed by the statute are safeguards thrown around the testator to prevent fraud and imposition. To this end the witnesses should either see the testator subscribe his name, or he should, the signature being visible to him and to them, acknowledge it to be his signature. Otherwise imposition might be possible, and sometimes the purpose of the statute might be frustrated. We think, therefore, that probate of the will was properly refused, and that the judgment below should be affirmed, without costs. All concur.

SIMMONS et al. v. LEONARD et al.

(18 S. W. 280, 91 Tenn. 183.)

Supreme Court of Tennessee. Feb. 2, 1892.

Error to circuit court, Marshall county; ROBERT CANTRELL, Judge.

Bill by D. P. Simmons and others against John M. Leonard and others, executors under the will of Margaret Simmons, deceased, to set aside the will and for an accounting. From a decree in favor of defendants, complainants bring error. Reversed.

W. W. Walker, P. C. Smithson, and W. N. Cowden, for plaintiffs in error. Jones & Murray, J. H. Lewis, Z. W. Ewing, W. Leonard, and L. A. Thompson, for defendants in error.

CALDWELL, J. This is a contested will case. In February, 1877, Miss Margaret Simmons, who was both old and illiterate, died at her residence in Marshall county, leaving a valuable tract of land and some personalty. In March following a certain paper writing, alleged to be her last will and testament, and making disposition of her entire estate, was admitted to probate, in common form, in the county court of that county. Dr. John M. Leonard, the principal devisee, was qualified as executor, at the same time. In July, 1887, D. P. Simmons, a brother of the deceased, and other relatives, filed a bill in the chancery court, alleging that the said instrument was not her last will and testament, and seeking an account with the executor. In pursuance of the direction of the chancellor in interlocutory order, complainants sought to make up and try an issue of *devisavit vel non* in the circuit court; but the circuit judge refused to take jurisdiction because of the pendency of the suit in the chancery court. On appeal in error this court decided (89 Tenn. 622, 15 S. W. Rep. 444) that the circuit court alone had jurisdiction to try an issue of *devisavit vel non*, and thereupon remanded the case. The honorable circuit judge thereafter tried the issue without a jury, and pronounced judgment in favor of the will. Contestants have appealed in error.

Our first inquiry shall be whether or not Eleazar Cochran and W. F. McDaniel, whose names appear on the propounded instrument as those of subscribing witnesses, make out a case of due and formal execution under the statute. How that is can be determined only by a careful consideration of what they say occurred at the time, the certificate to which their names are attached being in proper form, and reciting all necessary facts. McDaniel testified that he was notified by Dr. John M. Leonard that Margaret Simmons wanted him to witness her will; that he afterwards went by Leonard's house, and they went together to her house, that she brought a paper out on the porch and told him she desired him to witness her will, whereupon he then and there, in her presence, and at her request, signed his name to the paper as a subscribing witness; that he, at that time, saw the names of Margaret Simmons, the testatrix, and Eleazar Cochran, the other subscribing witness, upon the paper; that no one was then present except the testatrix, Dr. Leonard, a small negro, and witness; and, finally, the paper in contest being produced, the witness said it was the same to which he subscribed his name at the time and under the circumstances already detailed. This witness shows himself to have been competent, and by his testimony makes a case of due execution, so far as one subscribing witness can make it. It was not at all necessary that he should see the testatrix sign the paper, nor that he should subscribe it in the presence of the other witness. Logue v. Stanton, 5 Sneed, 98; Rose v. Allen, 1 Cold. 24; Bartee v. Thompson, 8 Baxt. 512; Beadles v. Alexander, 9 Baxt. 606; 2 Greenl. Ev. § 676; 1 Jarm. Wills, (Rand. & T. Ed.) 212, 213; Dewey v. Dewey, 1 Metc. (Mass.) 349; Jauncey v. Thorne, 2 Barb. Ch. 40; Burwell v. Corbin, 10 Amer. Dec. 494; Ela v. Edwards, 16 Gray, 92; Tilden v. Tilden, 13 Gray, 110; Ellis v. Smith, 1 Ves. Jr. 16; Eelbeck v. Granberry, 2 Amer. Dec. 624; Johnson v. Johnson, (Ind. Sup.) 7 N. E. Rep. 201; 4 Kent, Comm. *516; Rosser v. Franklin, 6 Grat. 1. Cochran, the other subscribing witness, died before the trial, and therefore could not be examined in the presence of the court; but his deposition, which had been taken in the chancery cause, was used as evidence in this case. He deposed that he was a neighbor of Margaret Simmons, deceased; that Dr. John M. Leonard called on him twice, and told him she wanted him to witness her will; that a negro man, living on her place, was subsequently sent for him, and he then went to her house; that he found her alone, and when he first got there she told him she wanted him "to sign a will" for her, though she did not then produce it, or say more about it; that Dr. Leonard afterwards came and "got the will out of the bureau, or off the top of it," and then, at the request of witness, signed the name of witness to it; that this request was made by witness because he was so nearly blind that he could not see well enough to sign his own name; that he (witness) did not have the will in his own hands, or see the testatrix have it in her hands, at any time; that she did not sign it in his presence, and he did not know whether she signed it before he went to her house or after he left, if at all; that he did not have the will read, or learn its contents. His name, without more, is attached to the certificate. It is "ELEAZAR COCHRAN," simply, and not "ELEAZAR X COCHRAN," as is usual when a person, unable to write, has another sign his name for him. There is no mark or sign to indicate that Cochran did not sign his own name, though the fact is, as he states himself, that it was written by Dr. Leonard, at his request. Clearly Cochran was not a proper subscribing witness. He was competent in the sense of being disinterested, but the part he took in the execution of the alleged will did not give him the full character and functions essential to a subscribing witness. His evidence does not establish such a subscrip-

his mark.

tion as the law requires. To constitute a valid will of real estate the instrument must be subscribed by two witnesses, at least, neither of whom is interested in the devise. Code, (Mill & V.) § 3003; Maxwell v. Hill, 89 Tenn. 588, 15 S. W. Rep. 253; Guthrie v. Owen, 2 Humph. 202; Davis v. Davis, 6 Lea, 543. The attempted subscription by Cochran is incomplete, because his name, being signed by another person, is not accompanied by some mark or sign indicating his adoption of that other person's act. This court has gone no further in liberal construction of the word "subscribe" than to hold that a person whose name is written by another, and who makes his mark thereto, is a good attesting witness to a will. Ford v. Ford, 7 Humph. 96, 97. Though a mark so made, is held to be a sufficient subscription, it is never advisable, where it can be avoided, to employ marksmen as witnesses. 1 Jarm. Wills, 213. It seems to have been deemed sufficient, not only because the name of the witness is written by his authority, but also because, in making his mark, he has a share in the writing; as when another person guides his hand and he makes his own signature. Chase v. Kittredge, 87 Amer. Dec. 694; Jesse v. Parker, 52 Amer. Dec. 102; Montgomery v. Perkins, 74 Amer. Dec. 419. By statute the word "'signature' or 'subscription' includes a mark, the name being written near the mark, and witnessed." Code, (Mill. & V.) § 48. There is even a greater objection, if possible, to Cochran as a subscribing witness, though not interested in the devise himself. Dr. Leonard, who wrote his name for him, was the principal devisee under the will. This made the subscription utterly ineffectual. Cochran, though legally competent to become a subscribing witness, could not effectively perform the act of subscription through another person, who was legally incompetent to become such witness in his own name and right. To permit the devisee to write the name of the subscribing witness would expose the will to little less danger of wrongful alteration and substitution than would exist if the devisee himself were allowed to become the witness. The same evil consequences would follow in the one case as in the other. If he may sign the name of one subscribing witness, he may sign the names of both, and in that way become a more potent factor in the execution and probate of the will than if he were allowed to become a subscribing witness himself.

He may not lawfully take the matter so largely into his own hands. A proper construction of the statute excludes the devisee from the doing of any act, even for the subscribing witness, which is essential to a valid subscription. Again, though identification has always been the main reason for requiring subscribing witnesses in the execution of wills, Cochran was not asked to identify the paper propounded in this case as the one he claims to have witnessed for Margaret Simmons. Presumably he could not have done so if asked. Indeed, he shows affirmatively that he could not. He made no inspection of the instrument, to which he requested Dr. Leonard to sign his name; did not have sufficient eye-sight to inspect it, hence he could not afterwards recognize it by its physical appearance. No name, mark, or sign did he impress upon it, that subsequent recognition might be assured, or even rendered possible. Nor was he informed of its contents, so that he might thereby preserve its identity in his memory. Of course, it was not essential that the witness should be informed of the provisions of the will, (Higdon's Will, 6 J. J. Marsh. 444; Jauncey v. Thorne, 2 Barb. Ch. 40; Ela v. Edwards, 16 Gray, 92; Tilden v. Tilden, 13 Gray, 110; 1 Jarm. Wills, 231;) yet, if the information had been imparted, it might have served him as one means of future identification. It was necessary, however, that something should occur, and that he should do some act, (and that according to law,) which, if remembered, would thereafter enable him to swear to the identity of the paper. If no such thing occurred, and no such act was done, then there was no valid subscription. We do not hold that the fact of due subscription can be shown alone by the subscribing witness; on the contrary, it is well settled that such fact may be established by other persons, though his recollection fail him, or he become openly hostile to the will. Rose v. Allen, 1 Cold. 23; Jones v. Arterburn, 11 Humph. 98; Alexander v. Beadle, 7 Cold. 128; Dewey v. Dewey, 1 Metc. (Mass.) 349; Jauncey v. Thorne, 2 Barb. Ch. 40. But the proof of other persons will not suffice, unless it in truth shows that all formalities requisite to a valid subscription were observed. There is no such proof of other persons in this case. Cochrau states the whole transaction, so far as he had part in it, without lapse of memory or unfriendliness to the cause of proponent; and no one discloses any additional fact occurring at the time he is said to have subscribed the will. Whether the paper propounded is the same he attempted to subscribe or a different one cannot possibly be determined from the completest narration of all that was then said and done. Speaking alone from the part he took in the matter, Dr. Leonard says it is the same. He recognizes his own handwriting in the name of the witness, and in that way, by something he did himself, and not by anything the witness did, is enabled to make the statement. The necessity and use of his evidence for so important a purpose furnish a striking illustration of the correctness of our conclusion that Cochran's attempted subscription was inoperative in law, because his name was written by a devisee under the will.

Aside from the questions already discussed, it is by no means clear that the paper referred to by Cochran was ready for subscription when he was called upon to witness it. He does not know whether the testatrix had signed it or not. He did not see her signature, and no one told him it was on the paper. Since it is the signature of the testator that subscribing witnesses are to attest, there can be no valid attestation or subscription unless it be a fact that the testator has actually signed his name, or caused it to be signed, before they subscribed their names. There is no will to witness until

it has been signed by the testator. Chase v. Kittredge, 11 Allen, 49. See, also, Reed v. Watson, 27 Ind. 448; 1 Jarm. Wills, 253, 254; Shaw v. Neville, 33 Eng. Law & Eq. 615; Lewis v. Lewis, 11 N. Y. 220; Ragland v. Huntingdon, 1 Ired. 565; Cox's Will, 1 Jones, (N. C.) 324. It is not essential that the testator sign his name in the presence of the subscribing witnesses, nor that they actually see his signature at all. Ellis v. Smith, 1 Ves. Jr. 11; 1 Jarm. Wills, (Rand. & T. Ed.) 212, 213; Dewey v. Dewey, 35 Amer. Dec. 367; Ela v. Edwards, 16 Gray, 92; Tilden v. Tilden, 13 Gray, 110. The production of the will with his name signed to it, and in such a way that his signature may be seen by the witnesses, accompanied by a request of the testator that they witness it as his will, is a sufficient acknowledgment of the signature to render the will valid. Id.; Jauncey v. Thorne, 45 Amer. Dec. 432; 1 Jarm. Wills, 254. In Tilden v. Tilden, 13 Gray, 110, the last of three subscribing witnesses neither saw the testator's signature, nor heard him make any allusion to it. Yet in that case it was held that the words, "I wish you to witness this," constituted a sufficient acknowledgment, when considered in connection with the fact that the testator, who used the expression, at the same time presented to the witness, for attestation, a paper, which he had already signed as his will, and to which he had procured the names of two other witnesses, who did see his name before they signed their own names. Giving the facts disclosed in this record the most favorable construction of which they are fairly susceptible, it may well be gravely doubted that the name of the alleged testatrix had been signed to the particular paper propounded at the time Cochran attempted to become a witness. It is true, she is shown to have said to the witness that she desired him "to sign a will" for her; but she did not say anything about having already signed it herself, nor did she produce it then or afterwards. After she made that request she seems to have done nothing, except acquiesce in the production of some paper from her bureau, by another person, and its presentment by him to the witness for the latter's name,—that other person being the principal beneficiary, and the supposed testatrix being old and illiterate. Though allowed the same weight in this court as the verdict of a jury, (Eller v. Richardson, 89 Tenn. 576, 15 S. W. Rep. 650,) the finding of the trial judge on the main question in this case is without legal support. That the contested paper was duly executed as the will of Margaret Simmons is not established by sufficient competent proof. Ordinarily the testimony of one witness is entirely sufficient to sustain the finding of the court or verdict of a jury upon an issue of fact; but that rule is not controlling in a case like this, where the law requires two witnesses to make out the matter in issue. The statute requires two competent subscribing witnesses in every devise of land, and nothing less than that will justify a judgment in favor of the will. The law prescribes the quantum of proof requisite in such a case; and neither the jury, nor court sitting as a jury, is allowed to find in favor of the will on less evidence than that prescribed. There is no dispute as to the facts with reference to Cochran's attempted subscription. Whether under those facts he was a competent subscribing witness is a question of law. We think he clearly was not. Then, in legal contemplation, there was but one subscribing witness, and the judgment in favor of the will was necessarily erroneous. Reverse and enter judgment here.

NEWCOMB v. WEBSTER et al.

(113 N. Y. 191, 21 N. E. Rep. 77.)

Court of Appeals of New York. April 16, 1889.

Appeal from a judgment of the general term, fifth department, of the supreme court, affirming a judgment of Monroe county special term, upon trial by the court without a jury. There was no dispute about the facts. It appeared that Angeline B. Walker died on the 7th of June, 1884, leaving real and personal property in Monroe county; that by her will, dated April 23, 1881, she, by its first clause, gave to her sister Olive, for life, house No. 89 Frank street; remainder to Mrs. A. B. Johnson, Mary A. Hatch, and Milicent J Johnson. By the second clause, to Anna Newcomb, for life, house and lot No. 14 Spencer street; remainder to the surviving children of Anna. Third. She directed house No. 89½ Frank street to be sold, and its proceeds applied in part to the erection of a monument on "my lot in Mt. Hope;" $100 to the Mt. Hope commissioners to keep the same and lot in order; and the residue to Emeline Soper, William Springstead, Huber Herrick, Nelly Soper, Frances Spencely, and Elliot Hodges, of Rochester, N. Y., share and share alike, after first paying $100 each to Mrs. Rose Chrichton, of Rochester, N. Y., and to Charles P. Hodges, of Cleveland, Ohio, which "I bequeath to them." The legacy of William Springstead to be deposited in the Monroe County Savings Bank, and paid over, with its accumulations, when he arrives at 21 years of age. Fourth. Directs No. 102 Jones street to be sold, and proceeds to be divided between the six children of George Walker. Fifth. She gives her piano to Robert P. Newcomb, son of Anna L. Newcomb; and all her household furniture and household goods and effects to her nieces, Mrs. Adelia Johnson, Mary Hatch, Anna Newcomb, Ida Springstead, of Rochester, and Minerva Herrick, of Watertown, N. Y., and also all residuary interests and estate; and finally appoints Aaron N. Newcomb and Edward Webster executors of the will, with power to sell and convey real estate. It further appeared that in the year 1882 she sold lot 14, referred to in the second clause of the will, and also sold 102 Jones street, referred to in the fourth clause. Afterwards, in 1884, she executed an instrument in these words: "I, Angelina B. Walker, of the city of Rochester, county of Monroe, and state of New York, do make, publish, and declare this first codicil to my last will and testament, hereby revoking so much of my said last will and testament as is inconsistent with the provisions of this codicil: Item First. I direct one hundred dollars to be set aside and paid over to the commissioners of Mount Hope as a perpetual fund, the interest of which shall be annually expended to keep the lot in said Mount Hope belonging to my late husband, Robert Walker, and my brother, Perry Hodges. Second. I give and bequeath to the Rochester Home for the Friendless one hundred and fifty dollars. Third. I give and bequeath to the Frank Street (otherwise Sixth) Methodist Episcopal Church of Rochester, to be expended by the trustees thereof towards erecting a parsonage for the use of their pastor, the sum of five hundred (500) dollars. Fourth. I give and bequeath to the Rochester Orphan Asylum three hundred dollars, to be expended for the rearing and education of an orphan, Belle Peer by name. Fifth. I give and bequeath to Hubert Herrick, of Rochester, five hundred dollars, to be placed on interest in the Monroe County Savings Bank, paid over to him on arriving at twenty-one years of age. If he shall die before that date, then said legacy shall go to his mother, Minerva Herrick. Sixth. I give and bequeath to my sisters, Emeline Soper and Olive J. Hatch, each the sum of five hundred (500) dollars. Seventh. I give and bequeath to the six (6) children of my brother-in-law, George Walker, each the sum of two hundred (200) dollars. Eighth. I give and bequeath to my four nieces, Mrs. Anna Newcomb, Frances Spencely, (of Canada,) Adelia B. Johnson, and Mary N. Hatch, all the rest, residue, and remainder of my estate, both real and personal, to be divided equally between them, and share and share alike." The trial judge found "that no part of said will is revoked by said codicil, except the second and fourth clauses thereof, and the residuary devise in the fifth clause of said will, but that all other legacies and devises in said will and codicil ought to be carried into effect."

D. C. Barnum, for appellants. Roy C. Webster, for respondents.

DANFORTH, J., (after stating the facts as above.) Both will and codicil were admitted to probate by the surrogate of Monroe county, and administration granted to the persons named in the will as executors, and, some difference having arisen as to the effect of the codicil, this action was brought by Executor Newcomb and others against Executor Webster and others, for the purpose of obtaining a judicial construction of its provisions. The plaintiffs contend that the codicil revokes all the provisions of the will, except those relating to the appointment of executors, while the defendants suppose that both instruments can stand, and the legacies and devises in each take effect. The court at special and general terms have substantially sustained the view of the defendants, and from that decision the plaintiffs appeal. It may be taken as a well-settled general rule that a will and codicil are to be construed together, as parts of one and the same instrument, and that a codicil is no revocation of a will, further than it is so expressed. Westcott v. Cady, 5 Johns. Ch. 343. But if, regarded as one instrument, it is found to con-

tain repugnant bequests in separate clauses, one or the other, or both, must fail; and therefore the rule is that of the two the bequest contained in the later clause shall stand. The same principle applies with greater force where there are two distinct instruments relating to the same subject-matter. In such a case an inconsistent devise or bequest in the second or last instrument is a complete revocation of the former. But if part is inconsistent, and part is consistent, the first will is deemed to be revoked only to the extent of the discordant dispositions, and so far as may be necessary to give effect to the one last made. Nelson v. McGiffert, 3 Barb. Ch. 158. In the case under consideration it appears that the testatrix, in her lifetime, and after the making of the will, so dealt with the principal real estate described in it as by sale to revoke the gifts mentioned in the second and fourth clauses. She also acquired other real estate, and entertained a desire that beneficiaries other than those first selected should share in her bounty. These circumstances would naturally require a redistribution of her estate, and in view of them we think it clear that the testatrix intended to make new disposition of her entire property. Such is, at any rate, the effect of the language employed by her. There is, moreover, an express revocation of so much of the will as is inconsistent with the provisions of the codicil. If we apply this language literally, it is obvious that the entire will is to be discarded, except so much as appoints executors and defines their powers. The codicil does not deal with that subject, and to that extent the testatrix was justified in regarding the will as a subsisting instrument. The codicil does, however, make a complete disposition of all the property of the decedent, either by special legacy or residuary clause. It is capable of operation without aid from the will, and in fact is entirely independent of it. The property, divided according to its terms, would leave nothing to apply upon the legacies or bequests of the will. The codicil, moreover, introduces new beneficiaries, and, while it provides also for persons already named in the will, does so, not by referring to the will or by way of increase or addition to shares given by it, but evidently by substitution; and then by formal and explicit language the testatrix gives to her four nieces all the rest and remainder of her estate, both real and personal, to be divided equally among them. The remainder here spoken of is that which is left after satisfying the legacies provided for in the same instrument, and it is impossible for the disposition made by the will to stand with that made by the codicil. Both instruments were, however, properly admitted to probate, for the appointment of executors by the will holds good, although the estate is to be administered according to the provisions of the codicil. The plaintiffs are, we think, entitled to a decree to that effect, and, so far as the judgment appealed from is to the contrary, it should be reversed, with costs to the appellant. But as the defendants have heretofore succeeded, they also should have one bill of costs, both to be paid out of the estate. All concur.

RICH et al. v. GILKEY.[1]

(73 Me. 595.)

Supreme Judicial Court of Maine. Nov. 28, 1881.

Appeal from judge of probate.

Sylvanus Rich, having made his will dated April 9, 1872, made a codicil thereto in March, 1879, giving to his niece, Mary A. Gilkey, during her life, the income of certain property of the value of $10,000. On March 16, 1880, he destroyed this codicil, and made another, by which he made a different disposition of the property, which by the former codicil was given in trust to pay the income to his niece. He died April 18, 1880. In proceedings for probate of his will, the judge of probate upheld the destroyed codicil, and admitted it to probate. At the trial of the cause on appeal from his decision, the following entry was made by mutual agreement of the parties: "Referred to the presiding judge, who may decide all questions upon the merits as affected by considerations of expediency and compromise, including costs, and enter all and any decrees necessary to carry his decision into effect."

A. W. Paine and John Varney, for plaintiffs. Barker, Vose & Barker, for defendant.

PETERS, J. When this cause was referred to me for decision, in view of the fact that the jury trial might be broken off by the sickness of a juror, I hardly comprehended the extent of the duties which have been cast upon me. I had supposed my office would be performed by the recommendation of some sum which the estate had better pay, and the other party had better receive, in a spirit of compromise, than to pursue the case to an end upon the strict application of legal principles and a close sifting of all the facts that might be produced in evidence. Had I anticipated that the respective parties would adhere so closely as they have to supposed legal rights, I should not have so readily taken upon myself a self-imposed responsibility. Having, however, examined and considered all the issues of law and fact sufficiently to form as satisfactory conclusions as it is probable I ever could arrive at, I file in the case the following opinion:

There is no doubt that Capt. Rich, the testator, destroyed the codicil in favor of Mary Gilkey in his life-time. The questions of fact are these: First. Was the testator at the date of the destruction of the codicil possessed of testamentary capacity? Second. If he had testamentary capacity, was he induced to do the act by undue influence? It would not be inconsistent to find that a testator was not possessed of sufficient mental capacity to make a will, and also that he was operated upon by undue influence. The questions of law are: First, whether, if the codicil was destroyed by the testator, while lacking the possession of testamentary capacity, it can be legally upheld and probated by means of oral evidence; and, secondly, whether the same result follows, if the destruction was induced by undue influence alone.

An examination of the questions of law comes first in the natural order. I feel clear in the belief that a person who has not testamentary capacity cannot revoke a will in any manner whatever. He can neither make nor unmake a will. A codicil stands upon the same footing as a will. A will, legally made, stands until legally revoked. It cannot be revoked by any act of destruction, unless the act is done with an intention to revoke; and a person not having testamentary capacity cannot have an intention to revoke a will; he is legally incapable of it. In such case the burning of the will can have no effect whatever, provided the contents can be clearly and certainly proved by other evidence. The written instrument may be burnt, the surest and best evidence of the will may be thus destroyed, but the will itself, if a draft of it can be proved, outlives the act of destruction, and the testamentary dispositions stand. This is a common principle in the law, applicable to the loss or destruction of papers and records generally. For instance, A. gives B. a deed of land. The deed is lost or accidentally destroyed; but the conveyance stands, if the contents of the deed can be proved by satisfactory evidence. It is said that this opens a wide field for error and fraud, to establish wills upon oral evidence. To my mind, many more frauds would be committed if the contrary rule were admitted. It is upon proof complete and undoubted, and not upon less than proof, that wills may be orally established, it is to be noticed.

The counsel for the executors contend that, if a will destroyed after a testator's death can be upheld and established by oral evidence, one destroyed before his death cannot be. I do not concur in this view of the learned counsel. I do not find the distinction admitted by the authorities, excepting, possibly, where the law is so enacted in one or two of the states. Nor do I see the force of any such attempted distinction. I cannot well perceive that the act of wrongfully destroying a will five minutes before death would be valid, and the same act be not valid, if done by the same hand and in the same way five minutes afterwards.

It is said that a wrongful or accidental destruction of a will might take place many

[1] Foot-note in 73 Me. 595: "This case was heard at nisi prius, and the report of it is here inserted because of the great learning employed in the preparation of the opinion, its literary merit, and the importance of the question discussed, together with the fact that other members of the court were consulted upon these questions, and, having carefully considered them, they concurred in the views expressed by Judge Peters in all particulars."

years before a testator's death, and in the mean time the testator might become satisfied with the fact of destruction, and in his mind ratify the act, and still the instrument be established as his will after his death, if this doctrine be tenable. But the answer to this apprehension of danger consists in the requirement of the law that any person propounding for probate a will destroyed in the testator's life-time has upon himself the burden to prove that, notwithstanding destruction, the will continued to be the will of the testator, unrevoked, up to the testator's death. The presumption would be that the will was destroyed animo revocandi, and the burden would be upon the proponent to show, by circumstances or otherwise, that the will was not revoked by the destruction, or by a ratification of the destruction, while the testator lived.

I think these views are sustained by the great current of authority. The English cases, earlier and later, are that way. The old work on Wills by Swinburne, who compiled his book as long ago as during the reign of Queen Elizabeth, gives this exception to the cases where a will becomes void by canceling or defacing: "Where the testament was canceled by the testator himself unadvisedly, or by some other person without the testator's consent, or by some other casualty." Jarman, the best authority on Wills, English or American, (volume 1, p. 130,) says: "The mere physical act of destruction is itself equivocal, and may be deprived of all revoking efficacy by explanatory evidence, indicating the animus revocandi to be wanting." He further says: "Thus if a testator inadvertently throws ink upon his will, instead of sand, or obliterates or attempts to destroy it in a fit of insanity, or tears it up under the mistaken impression that it is invalid, it will remain in full force, notwithstanding such accidental or involuntary or mistaken act." Mr. Bigelow, the American editor of Jarman's work, in his notes fully approves the doctrine quoted, citing many American cases in its support. The same doctrine is maintained by Prof. Greenleaf in his work on Evidence, (section 681, vol. 2,) and notes. Redfield, in his treatise on Wills, in many places restates the same rule; and upon page 323, vol. 1, (1st Ed.,) says: "The soundness of the mind and memory is requisite to the valid revocation of a will as to its execution. It follows, of course, that the performance of the mere act of tearing, canceling, obliterating, burning, etc., without the animo revocandi, and which could not exist unless the testator were in his sane mind, could have no legal operation upon the instrument." In Bacon's Abridgment (vol. 10, p. 546) it is laid down "that the destruction of a will, even by the testator himself, does not amount to a revocation, if the testator had not capacity. Though the instrument is not in being, if its contents are known it can be proved." Mr. Wharton expresses it this way: "Revocation will not be complete unless the act of spoliation be deliberately effected on the document animo revocandi. This is expressly rendered necessary by the will act, and is impliedly required by the statute of frauds." In Smith's Probate Law, a Massachusetts work of merit, at page 51, the author says: "It may be that the will was destroyed by the testator in a fit of insanity, or that it was lost, or accidentally or fraudulently destroyed. Such accidental or fraudulent destruction will not deprive parties of their rights under its provisions, if they can produce the evidence necessary to establish the will." In Clark v. Wright, 3 Pick. 67, a codicil fraudulently destroyed in the testator's life-time was established upon parol proof of its contents by the Massachusetts supreme court of probate. The same doctrine was affirmed by the same court in the case of Davis v. Sigourney, 8 Metc. (Mass.) 487, and reaffirmed in Wallis v. Wallis, 114 Mass. 510. In Newell v. Homer, 120 Mass. 277, the petitioner was held to prove a destruction of the will after the death of the testator, merely because he in his petition had so alleged the fact.

The New York cases are in accord with the foregoing cases. In Smith v. Wait, 4 Barb. 28, it was ruled that, if a testator was incompetent to make a will, he was incompetent to revoke a will made before, and that an insane man can have no intent such as is necessary to revoke a will. In Idley v. Bowen, 11 Wend. 227, it was held that a revocation by burning the will by the testator could be impeached by showing the incompetency of the testator at the time of the act. Schultz v. Schultz, 35 N. Y. 653, is an instructive case to the same effect. In Nelson v. McGiffert, 3 Barb. Ch. 158, Chancellor Walworth held it was competent to show that a will had been destroyed by a testator when his mind had become so far impaired that he was incompetent to perform a testamentary act. The case of Johnson's Will, 40 Conn. 587, strongly supports the same view. So does the case of Collagan v. Burns, 57 Me. 449, as far as it goes. Many other cases in the state courts do.

Late cases in the English court of probate are emphatical in the same direction. In one case it is said: "The act done [burning a will] by the testator can in no sense be his act, for he was out of his mind." In another case the court said: "All the destroying in the world, without intention, will not revoke a will; nor all the intention in the world, without destroying; there must be the two." In another case,—the famous case involving the will of Lord St. Leonards,—decided as late as 1876, the late Chief Justice Cockburn said: "The consequences of a contrary ruling would be in the highest degree mischievous. To disallow oral proof might lead to the defeating of justice in many, if not in as many, instances as might arise

from the court acting upon such testimony." Much more could be profitably quoted from late English cases, in elucidation of this legal question, did these limits allow.

The English cases have gone so far as to decide that a revocation of a will by spoliation may be of a conditional character. A testator destroyed a codicil not knowing that it disturbed a previous will. The court said: "Where there has been a physical destruction of a testamentary paper, the court has often been called upon to form an opinion as to the intention of the deceased at the time he did the act. In this case we have come to the conclusion that the testator destroyed the codicil with no intention of revoking the will, and that the court should give no more effect to the act than it would do if the testator had destroyed the paper under a mistake as to the instrument he was destroying. It was not done animo revocandi." The following cases will verify the foregoing propositions: Brunt v. Brunt, L. R. 3 Prob. & Div. 37; Cheese v. Lovejoy, 2 Prob. Div. 251; Sugden v. Lord St. Leonards, 1 Prob. Div. 154; James v. Shrimpton, 1 Prob. Div. 431; Brown v. Brown, 8 El. & Bl. 876; Powell v. Powell, L. R. 1 Prob. & Div. 209. I therefore have no doubt that a will destroyed by a person not possessing testamentary capacity is not a revocation of such will. There must be animus revocandi; and such a person does not and cannot possess an intention of revocation any more than an insane man can.

As to the question of law secondly stated, namely, the effect of the exercise upon the mind of the testator of undue influence, although at first having doubts about the point, I am of the opinion that the same result follows where the act of destruction is produced by undue influence as where incapacity exists. There can hardly be a logical difference whether the act of destruction be accomplished by a testator who has no mind to exercise, or, having a mind of his own, is prevented from exercising it. Insanity takes away testamentary power, while undue influence does not allow it to act. There must be animus revocandi. In the one case, Providence prevents it; in the other case, it is prevented by the wrongful act of man. In each case the hand of the testator acts, but the mind does not go with the act. The hands survive the head. If the rule were otherwise, the law would allow one man to cancel another man's will without his consent. It must be borne in mind that, where undue influence is practiced, the testator's will is overpowered and subverted, and the will of another is substituted in its stead. He is not his own master. He does not act voluntarily, for his own volition does not play a part. Proper influences merely persuade the will, while undue influences take it away. The first are an appeal; the last are a usurping and conquering force. The old tree, forsooth, sends out its life, but the graft incorporated upon it turns it into unnatural fruit.

This is the more apparent from another view of the same facts. A man makes a legal will. In a codicil he undertakes to cancel the will. But if he has not mental capacity, or if he is induced by undue influences to attempt a revocation, the codicil is of no avail, and the will stands unrevoked. Suppose, however, instead of revoking the will by a codicil, the attempt is made to do it by destroying the will. Must not the act in this way be as free and unconstrained as if done in the other way? Does not the same principle apply? If the mind or will of the testator be held in imprisonment by undue influence, can it revoke a will in one way when it cannot in another? Can a testator accomplish by burning what, under the same conditions, he cannot do with pen and ink? I think not. The question in this phase has not so often arisen as in the form first discussed, namely, a want of capacity; but no particular distinction between the two is found in the cases, nor does, in my judgment, a valid distinction exist.

Then comes a question whether the general or common law is changed by any of our statutes. I think not. Section 3, c. 74, Rev. St., our statute of wills, is this: "A will so executed is valid until destroyed, altered, or revoked by being intentionally burnt, canceled, torn, or obliterated by the maker, or by some person by his direction and in his presence, or by a subsequent will, codicil, or writing, executed as a will is required to be," etc. This is substantially like the English statute of wills, and similar to statutes in most, if not all, the American states, and is in precise accordance and consistency with the views already expressed and the cases cited. Nothing can be much plainer. To revoke, there must be an intention to revoke. If a testator has not a sound or sane intention, he has no intention. If his intention is supplanted by another man's intention, then legally he has no intention.

But another statute is relied upon as upsetting or qualifying this statute. Section 7, c. 64, Rev. St., reads thus: "When the last will of any deceased person, who had his domicile in this state at the time of his death, is lost, destroyed, suppressed, or carried out of the state, and cannot be obtained after reasonable diligence, the execution and contents thereof may be proved by a copy, and the legal testimony of the subscribing witnesses to the will, or by any other evidence competent to prove the execution and contents of a will; and, upon proof of the continued existence of such will up to the time of the decease of said testator unrevoked, letters testamentary shall be granted as on the last will of the deceased, the same as if the original had been produced and proved." The latter statute was first enacted in 1861. The former has existed ever since we were a state. Even if the phrase,

"continued existence of such last will," means physical existence, which I do not agree to, even then the two acts are not inconsistent, and do not clash with each other. One would not repeal or limit the other, any more than the other would the one. One would go further in some respects than the other, and the other further in other respects. Each occupies its own ground. The 1861 act allows oral or parol proof of a will not destroyed, but which is merely suppressed or carried out of the state, while the other is silent about such a case. The act of 1861 is declarative and cumulative only, and does not abrogate, or undertake to abrogate, any other act. If the act of 1861 had been passed to alter the great body of the law of the world upon this subject-matter, its terms would have been more positive and significant. It directly admits "other evidence competent to prove the execution and contents of a will" than the will itself.

But my judgment inclines strongly to the belief that the phrase, "continued existence of such last will up to the time of the decease of such testator unrevoked," does not mean the continued physical existence of the will. The word "existence" sometimes means a physical and sometimes a legal existence. A will may have a physical and not a legal existence, and vice versa, or it may have both. A deed may be destroyed so as to have no physical existence, and still have a legal existence, if its contents can be proved. So a will may exist although the written instrument be destroyed, and oftentimes a will does not exist as a will although not destroyed. By the statute first quoted, "a will so executed is valid until destroyed by being intentionally burnt." If unintentionally burnt, it is still valid, is still a will, and still has a legal, but not a physical, existence.

I think the phrase, "continued existence * * * unrevoked," means no more than that the will shall continue or remain unrevoked. The statute in this respect merely repeats the requirement of the common law, that a person setting up a destroyed will shall show that such will had a continued legal existence down to the testator's death; that is, that the testator continued in the same mind down to the day of his death. The phrase "continued existence" is explained in Betts v. Jackson, 6 Wend. 173, to mean that the testator permitted it to stand as his will till his death; and it is there said: "The execution of the will not only must be proved, but there must be also satisfactory evidence of its existence at the death of the testator, or of his intention that it should exist, and stand until his death; that the mere fact of due execution is not evidence of such existence or intention." The deduction is that if a will is made and adhered to by a testator till his death, and he desires it to exist, or supposes it to, then it does legally exist till his death, unrevoked, though prior thereto it has been lost or mislaid, or accidentally or fraudulently despoiled. The writing or script may be gone, but the will remains. But, in either interpretation of the statute of 1861, the conclusions reached will stand. I am happy to add that I have consulted some of my judicial associates upon these questions, who have carefully considered them, and concur in the views expressed by me in all particulars.

So much for the law of the case; then as to the facts. Here I possess the functions of a jury. In deciding facts which are suitable for the jury tribunal, I feel a disposition to be somewhat influenced by what I think an intelligent and fair-minded jury, properly instructed, would be likely to do upon the same testimony. Certain important facts appear to me to be unquestionable, namely: That for Miss Gilkey, the beneficiary under the destroyed codicil, the testator had the fondest and warmest affection. Its depth and strength are disclosed by a continuous stream of evidence in his letters produced, which I think could never have been fully appreciated, had it come merely from the mouth of witnesses. He spoke it; wrote it; acted it. She seemed, partially at least, to fill a void in his heart created by the loss of a dearly loved wife, to whom she alone, of all the family about him, was related. This affection continued from her childhood to womanhood. It never abated. It baffled all family opposition. He educated and supported her, and seemed desirous to make her dependent upon him for all her wants. His letters held up before her vision the rainbow of promise against want in the future. In consonance with all this, when he found the sun of his life descending, although in full health and strength, unasked by her, uninfluenced by anybody that I can see, with much deliberation, against family wishes, he made this codicil. He took his executors as trustees of the fund, but fortified himself against doubt by adding another trustee. He resolutely adhered to the codicil till his last sickness, at least. Now, after he had lain a month on his deathbed, a very aged man, weighed down and weakened by disease, so far into the sunset of his life that the shadows of its twilight were fast settling over his understanding, surrounded by persons naturally disturbed by the existence of the codicil, with no notice to the beneficiary, with no after mention of it to her, the affection between her and him lasting till his last sands of life ran out,—he destroyed the codicil. What cause was there for this change which so suddenly came over his mind? I think the inference is irresistible that the act was caused by another or others, whether the influence exerted over his mind was an undue influence or not. What his strength did, his weakness would not have repudiated. How much truth in the situation scripturally described: "Verily, verily, I say unto thee, when thou wast young, thou girdest thyself, and walkest whither thou wouldst; but when thou shalt

be old, thou shalt stretch forth thy hands, and another shall gird thee, and carry thee where thou wouldst not." Nor was it unnatural that the heirs should have unwillingly seen this bestowment upon one not an heir, or that they should have resisted it. Perhaps it would have been unnatural in them if they had not resisted it. Undoubtedly they did no more than seemed proper to do, looking at the matter from their stand-point. Nor do I, possessing plenary powers, under the terms of the reference, feel bound to declare whether there was an undue influence exercised or not, or declare an absolute conclusion one way or another upon the issues, whether the testator was incapacitated from having a reasonable or intelligent intention of revocation, or whether the will was destroyed by him through some misunderstanding or mistake.

Suffice it to say that, under all the circumstances and conditions of the case, I deem it expedient to uphold the codicil in favor of Miss Gilkey as unrevoked, and allow it to be probated, allowing to the other side some concessions and considerations therefor. First of which (concessions and considerations) is that the last codicil shall also be probated. Logically, perhaps, if the first codicil stands, the second should fall. But as there is no contradiction between the two, except a recital in the last which ignores the first, both may stand. Precisely the same point occurred in an English case. Robinson v. Clarke, 2 Prob. Div. 269. The court there said: "In a testamentary suit where the parties have come to an arrangement, under the terms of which the court is applied to, to grant probate of two testamentary instruments, it will do so, provided such documents are not entirely inconsistent with one another." In Goods of Honywood, L. R. 2 Prob. & Div. 251, the court thought improper words in the recital of a will could be corrected by an explanation upon the record.

Another concession is that the taxable costs of the appellee, claimed to be several hundred dollars, shall not be recovered from the estate.

Another concession is that the estate shall not pay the expense of counsel fees to the appellee, though claimed, upon the ground that the estate should be taxed to pay for the expense of sustaining a codicil which by law should be sustained. But the bill therefor, $500, which seems not an unreasonable amount for entire services, shall be paid by the executors, and charged to the earnings of the trust-estate now on hand. Or, if both parties should prefer it, I should award as above, and, instead of the life annuity, order an absolute conveyance to Miss Gilkey of the $5,000 of Boston & Albany stock, together with the earnings of the $9,000 of stocks named in the codicil, which have been due and payable since the death of the testator to this time. Or I would make any other commutation of the life-estate into ready money or absolute property which the parties may agree to. And whatever conclusion may be accepted, suitable decrees will be entered accordingly.

ESCHBACH v. COLLINS et al.

(61 Md. 478.)

Court of Appeals of Maryland. March 26, 1884.

Appeals from circuit court of Baltimore city.

Action by Elizabeth H. Collins and Richard Bernard, administrators with the will annexed, and trustees under the will of John Eschbach, late of Baltimore city, deceased, for the purpose of obtaining a judicial construction of said will. The will contained the following provisions: "First. [I hereby appoint my sons Leo Eschbach and John E. Eschbach executors of this, my last will and testament,] and direct them to pay my just debts and funeral expenses; giving them power, as executors, to sell, to such extent as may be necessary to make such payment, such parts of my estate, real or personal, as may be necessary, and the like power to any administrator of my estate. Second. I give, devise, and bequeath all the rest and residue of my estate, of every kind and description, which I may leave at the time of my death, to my said sons, [Leo Eschbach and John E. Eschbach,] and their successors in the trust thereby reposed in them; it being my will that there shall at all times be at least two trustees, and that one alone shall not be competent to act, and that, in case of death, refusal to act, inability from any cause, or resignation, that a successor or successors shall be appointed by some court having jurisdiction over trust-estates, in trust to and for the following uses and purposes: That the amounts which I have advanced or may advance up to the time of my death, to any of my sons or daughters, or to any son-in-law, evidenced by notes or otherwise, shall be ascertained by the said trustees, or their successors, as speedily after settling in the orphans' court as possible; and that the entire amount thereof shall be added to the rest and residue of my estate bequeathed as aforesaid; and the aggregate amount thereof shall be divided into ten equal parts, the number of my present living children, by three disinterested persons, to be appointed by some court having jurisdiction over trust-estates, the decision of a majority of whom to be final, and such appointments to be continued until a division shall have been had; each of my sons to have one share, and to be charged with advances made or to be made to him; and each daughter to have one share, and to be charged with advances made or to be made to her or her husband; and the portion of each son and daughter in the said rest and residue to be reduced to the extent of such advance made, or to be made, as aforesaid; the division to be so made as aforesaid to be reduced to writing, and to show the share or portion of each, and each piece of property to be separately valued; the said division to be acknowledged before a justice of the peace by the parties making the same as their act and deed, and to be recorded in the court having jurisdiction of trusts making the said appointments, and also recorded among the land records of Baltimore city; the share of my sons [Leo] and [John E. Eschbach] to be held by each of them who may survive me, absolutely, and the trust hereby created to cease as respects them, or the one who may survive me. The shares of my other children to be held for their respective lives, my daughters' shares to be for their and each of their sole and separate use, freed from the control of any husband, and in no way liable for his debts. In case any of my said children, exclusive of [Leo] and [John E. Eschbach,] should die, leaving a child or descendant, then such share shall pass to such child, children, descendant, or descendants per stirpes, and not per capita; but, in case of the death of any such child, leaving no child or descendant at the time of such death, then the part or share of the one so dying shall pass to my surviving children and descendants of any deceased child per stirpes, absolutely and forever. * * * In case any of my ten children now living should die before me, leaving no child or descendant living at the time of my death, then my said estate shall be so divided as to reduce the number of shares, and to make the number equal to the number of my children who may survive me; and of such of my children as may have died before me, leaving a child or descendant surviving me, it being my will that in the case now supposed the descendant of a deceased child shall take the share of the parent; it being also my intention to pass life-estates to all my children and descendants of a deceased child, who may take at the time of my death, with the exception that my sons [Leo] and [John E. Eschbach] shall each, if he survives me, take absolute fee-simple estates in their respective shares."

When the will was found, after the death of the testator, the words in brackets in the foregoing extracts had been marked over with pen strokes, as if for the purpose of erasure, but were still legible. The testator left no widow, but he left ten children,—seven sons and three daughters.

The court (Dobbin, J.) adjudged and decreed that the true construction of the will as it stood affected by the erasures, which it was shown by the evidence that testator made therein, was that Leo Eschbach and John E. Eschbach were to be omitted as executors and trustees; and that the complainants were, under the order of 27th September, 1881, appointing them trustees under said will, in place of said Leo Eschbach and John E. Eschbach, to hold the estate of said testator for the trust purposes mentioned in said will, as affected by said erasures; that is to say, for the use of all the children of said John Eschbach for and during the term of their respective lives, the

shares of the daughters to be for their sole and separate use, freed from the control of any husband, and in no way liable for his debts; and in case any of the said children of said testator die, leaving a child or descendant, then such share should pass to such child, children, or descendant or descendants, per stirpes, and not per capita; but, in case of the death of any child leaving no child or descendant at the time of such death, then the part or share of the one so dying should pass to the testator's surviving children, and descendants of any deceased child, per stirpes, absolutely and forever, freed from any further trust.

From this decree three appeals were taken, —one by the widow of Joseph A. Eschbach, a son; one by the executor of the said Joseph; and a third by judgment creditors of John E. Eschbach, another son.

A. Leo Knott, for Annie Maria Eschbach and executor of Joseph A. Eschbach. Bernard Carter and Arthur W. Machen, for Burke and Reddington, judgment creditors of John E. Eschbach. Richard Bernard, for appellees.

YELLOTT, J. The bill of complaint in this cause invokes a judicial construction of the will of John Eschbach, the meaning of which having been rendered ambiguous, obscure, and in some places apparently incomprehensible, by obliterations made by the testator a number of years subsequent to the date of its execution. The will was originally executed in conformity with the requirements of the statute prescribing the formalities to be observed in making a testamentary disposition of real estate. In the first clause two of the testator's sons, Leo Eschbach and John E. Eschbach, are appointed executors, with the usual directions in regard to funeral expenses and the payment of debts. In the second clause, the whole estate, real and personal, is devised and bequeathed to the said Leo and John E. Eschbach in trust. The testator then proceeds to declare the nature and purposes of the trust thus created, and the mode and manner in which it shall be executed, with a multitude of provisions not necessary to be here recited, as they involve no questions now presented for adjudication. The corpus of the estate is to be divided into 10 equal parts, corresponding to the number of the testator's children. Leo Eschbach and John E. Eschbach are each to take one-tenth, entirely exempted from the operation of the trust, and to be held by them absolutely or in fee-simple. To the other sons and the daughters' life-estates are given with remainders as prescribed by the terms of the will. It becomes important, in the construction of this will, to observe that none of the children of the testator are mentioned by name except Leo and John E. Eschbach. The others are simply designated as sons or daughters.

After the death of the testator the will was discovered with certain words written below the signatures of the attesting witnesses. This writing is somewhat deficient in perspicuity, which is, perhaps, attributable less to the imperfection of human language than to the peculiarity of the diction employed. It was not there when the will was executed. It has no attestation, but is supposed to be in the handwriting of the testator, and was signed by him. It is in these words: "February 3, '80. For Good & soun Reason, I arrest John E. Eschbach Name, and Leo Eschbach his Name, the above date, in Good Health and Reason, Signed the above date. John Eschbach." In each clause of the will, wherever the names of Leo Eschbach and John E. Eschbach occur, a pen has been drawn across, leaving the names legible, but the writing partially defaced by the attempted obliterations. Two important changes in the will result from these erasures. The first is the removal of Leo and John E. Eschbach as executors and trustees. No question here arises for the determination of this court; the said Leo and John E. having declined to act as executors, and their formal renunciation being embodied in the record. The circuit court has also, in the exercise of its jurisdiction, and in conformity with the provisions of the will, appointed trustees, and Leo and John E. Eschbach have admitted and averred in their answer that said trustees have been duly appointed. But another and more material change has been effected by these erasures. The will, as originally executed, gave life-estates to all the sons except Leo and John E. Eschbach. The erasure of the two names operates to confer estates in fee-simple on all the sons. The testator says in the second clause: "The shares of my sons Leo and John E. Eschbach to be held by each of them who may survive me, absolutely, and the trust hereby created to cease as respects them, or the one who may survive me. The shares of my other children to be held for their respective lives," etc. The testator had other sons besides the two specially mentioned by name. Omit the words erased, and it will be seen at a glance that all the sons take absolutely, and the words "my other children" apply only to the daughters. Again, in the concluding portion of this clause, the testator says: "It being also my intention to pass life-estates to all my children and descendants of a deceased child who may take at the time of my death, with the exception that my sons Leo and John E. Eschbach shall each, if he survives me, take absolute fee-simple estates in their respective shares." He has erased the names of Leo Eschbach and John E. Eschbach, and this obliteration manifestly creates a fee-simple estate in each son, and renders the word "children" applicable only to the daughters.

The first question presented for adjudica-

tion is whether a testator can, by the obliteration of certain words in his will, cause the transmutation of a life-estate into a fee-simple. This is the converse of the proposition presented by the case of Swinton v. Bailey, 1 Exch. Div. 112. There the effect of the obliteration was to diminish an estate in fee-simple, and convert it into an estate for life. Chief Baron Kelly in the exchequer held that this could not be done. The judgment of the exchequer was reversed in the court of appeals, Cockburn, C. J., saying: "Although it is a devise in fee-simple, I think that is (so far as it is a matter of revocation) divisible into two parts, and that the man who has given the larger estate may revoke the gift to that extent, and cut it down to the smaller gift or devise of an estate for life. It may be that you cannot add to the will." The decision of the court of appeals was affirmed in the house of lords, (48 Law J. 57.) The only principle determined in this case was that an estate might be diminished by the erasure of certain words, and any general observations made by judges, which extended beyond the scope of the question in controversy, could hardly be recognized as establishing a safe precedent, even within the jurisdiction where the decisions of that court must be received as authoritative. In Larkins v. Larkins, 3 Bos. & P. 20, Lord Alvanley, C. J., said: "If the remaining devises were to acquire any estate which they had not before, something beyond a mere revocation would be necessary."

A careful analysis of either the English or the Maryland statute would seem to lead irresistibly to the conclusion that every testamentary act by which property is transmitted should be authenticated in the manner prescribed by the legislature. A man may devise the whole of his estate in fee-simple. This is one testamentary act. He may subsequently change his intention, and, as the fee is susceptible of subdivision, he may determine to give a less estate. This would certainly be another and a distinct testamentary disposition, and, when it is alleged that he has so determined, the adduction of the proper proof is requisite. It is apparent that this proof must be supplied by the production of another will or a codicil properly attested and executed. Hence it would seem to have formerly been the settled doctrine in England that "any alteration that amounts to a new devise of the land requires that the will should be re-executed according to the statute." Love. Wills, 349.

The American cases fully recognize this doctrine, and, when an attempt has been made by interlineation or obliteration to make a different disposition of the estate, the attempt has been held to be abortive, and the will operated as originally executed. In Jackson v. Holloway, 7 Johns. 395, a testator, having made his will devising his lands then in possession to his four sons, subsequently acquired other lands, which, by the statutes of the state, did not pass by a will executed antecedently to the seisin. He attempted an alteration by erasures and interlineations, so as to make the devise extend to all the lands of which he should die seised, and indorsed a memorandum to that effect on the will, stating the alterations which he had made. This memorandum was attested by two witnesses only. It was held that the erasures and interlineations did not destroy the original devise, but that the alterations, not having been attested by three witnesses, could not operate. The court said: "The obliterations in the will were made, not with an intent to destroy the devise already made, but to enlarge it, by extending it to lands subsequently acquired. The testator, however, failed in making interlineations and corrections which could operate, from not having the amendments attested according to law. The obliterations cannot, therefore, destroy the previous devise, for that was not the testator's intention." In McPherson v. Clark, 3 Bradf. Sur. 99, the testator attempted to revoke the devise to his daughter by striking out the words "my children," and inserting "my two sons." The court said: "This insertion is inoperative for want of re-execution and attestation; and, the intent failing as to the substitution intended, it must fail likewise as to the revocation intended. Enough remains on the face of the will to show that the word erased was 'children,' and the will must be so recorded." In the case of Wolf v. Bollinger, 62 Ill. 372, the testator, after having devised his estate to one person, afterwards attempted to transfer it to another. The alteration was made by an interlineation which was not attested in the presence of the testator. The court said that, for want of a compliance with this statutory requirement, the instrument did not operate as a disposing will. The cancellation was not made with intent to revoke the devise to the complainant simply, but with intent to substitute in her stead the defendant; and, the ultimate object of substitution having failed of accomplishment, the canceling, which was done only in the view of and in order to effect that object, should be esteemed for nothing, and be considered as not having been made absolutely, but only conditionally, upon the attempted substitution being made effectual. To give it effect, under the circumstances, would seem to be to thwart the intention of the testator, and make him intestate when he manifested a contrary intent by his will. In the case of Bigelow v. Gillott, 123 Mass. 102, there was an entire obliteration of the sixth and thirteenth clauses of the will by ink lines drawn through and across every word constituting those clauses. This was held to be a revocation of these two clauses, leaving intact the other clauses in the will. The court said: "He revoked the sixth and thirteenth clauses, and purposely and intelligently left the other provisions to stand as

his will." "The argument that this view is in conflict with the provisions of law which require that a will disposing of property should be executed in the presence of three witnesses is not sound. It is true that the act of revocation need not be done in the presence of witnesses; but such act does not dispose of the property."

If this was simply a case of revocation, its determination would involve a construction of section 302 of article 93 of the Maryland Code of General Laws, which prescribes the mode by which a revocation may be effected. The language of the statute is: "No devise in writing of lands, tenements, or hereditaments, or any clause thereof, shall be revocable" except in the manner designated. An entire will can thus be revoked, or any clause thereof. What, then, is a clause? Does it consist of two or three words which, disjoined from the context and transferred to a separate sheet of paper, would be devoid of sense or meaning? Do the mere names of two persons constitute a clause? Is not a clause always understood to mean one of the subdivisions of a written or printed document? Is the word ever used in any other sense? Wills are frequently subdivided into a number of clauses. In one, the testator may provide for the payment of his debts; in another, dispose of his personal property; in a third, devise his real estate; in a fourth, leave legacies; and then there may be a residuary clause. Is it not apparent that the statute has reference to one of these subdivisions of a will when the word "clause" is used in connection with "revocation?" It is true that a whole will might be revoked, or any clause thereof, by obliterating all the words necessary to give them meaning. To deprive a will of all meaning would be as effectual a revocation as if it had been consumed to ashes.

It is manifest that in the construction of this will a question is encountered that involves something more than mere revocation. The will has not been revoked; it has been altered. It cannot be supposed that when the legislature uses the word "revocation" it is to be construed to mean "mutation." "Revocation" is certainly not a synonym of "alteration." To revoke a testamentary disposition plainly means to annul it, and the revocation of a clause implies the destruction of that clause. In legal contemplation, it ceases to exist, and is as inoperative as if it had never been written. It is not necessary that the words erased should be wholly illegible, but the act of the testator must be such as to clearly indicate an intention to expunge the whole clause, so that it shall no longer constitute a subdivision of the will. But when, by the obliteration of certain words, a different meaning is imparted, there is not a mere revocation. There is something more than the destruction of that which has been antecedently done. There is a transmutation by which a new clause is created. There is another and a distinct testamentary disposition, which must be authenticated by the observance of the statutory requirements. The statute, after designating the modes of revocation, whereby that which has already been done is rendered inoperative by being destroyed, says, in language wholly free from ambiguity, and therefore needing no construction: "Or unless the same be altered by some other will or codicil in writing, signed in the presence of three or four witnesses, declaring the same." There can therefore be no alteration in a testamentary disposition of real estate except by an observauce of the formalities prescribed by the statute. In the will now to be construed, the obliterations, so far from operating as a mere revocation, by destroying the sense of the context, impart to the clause a different and more important significance. Not only does this become apparent, but it is also evident that the construction which has been contended would be productive of the very evils which the legislature intended to provide against. The obliteration of two or three words might wholly change the character of a devise. As aptly illustrated by learned counsel in argument, if the words were, "To my son William I give nothing, and give all my estate to my son John," the will could be made to read, without the insertion of any additional words, "To my son William I give all my estate." But, as already intimated, the record does not present a question of revocation. It is clear that the testator did not contemplate an intestacy. He evidently intended to make a testamentary disposition of the whole of his property. It was supposed by the learned judge of the circuit court that he intended by the obliterations to diminish the fee-simple estates of Leo and John E. Eschbach to life-estates. If such was his purpose, he has attempted to make another and a different devise of one-fifth of his whole property. He transfers the legal title, vested in Leo and John E. Eschbach, to trustees, and carves out the fee-simple equitable life-estates, with remainders to the children of the life-tenants. This is a new will, as respects one-fifth of his property. Let it be supposed, by way of illustration, that the entire estate had been devised to Leo in fee-simple. How could the testator subsequently vest the legal title in trustees, and create an equitable life-estate, with remainders? Not certainly by obliterations and interlineations, without attestation or the observance of any of the formalities prescribed by the statute. And is a testamentary disposition of the one-fifth of an estate governed by a different principle? The intention of a testator is only to be regarded when the law sanctions the means he has adopted to carry it into effect. If what he has done is invalid, the intent cannot be respected.

In the formation of a judicial opinion, the

calm investigating faculty of reason should exercise a paramount control; but in an effort to ascertain, by an inspection of this mutilated will, the real intention of the testator, the aid of imagination seems to become necessary. The aged testator declined to seek the advice and assistance of those whose professional learning and experience would have afforded safe guidance, and, relying solely upon his own judgment, failed in the accomplishment of an intent which he has left involved in obscurity. The true construction of this will is that the attempted obliterations are inoperative, and that the will must be read just as it was originally written and executed. The renunciation of Leo and John E. Eschbach as executors, and the appointment of the complainants as trustees, by the order of September 27, 1881, from which no appeal has been taken, render a construction of the first clause of the will unnecessary. The trustees appointed in conformity with a provision in the second clause, and by a competent court, having jurisdiction of trusts, have the control over the estate given to the trustees by the will as it was executed. The shares of Leo and John E. Eschbach are exempted from the operations of the trust thus created, and are to be held by them absolutely and in fee-simple. The learned judge of the circuit court having sought to give effect to the supposed intention of the testator to diminish the estates of Leo and John E. Eschbach, his decree is, in this respect, erroneous. But no other error is perceptible in said decree, which must therefore be affirmed in part and reversed in part.

Decree affirmed in part and reversed in part, and cause remanded.

STONE and BRYAN, JJ., concurred. ALVEY, C. J., and MILLER and IRVING, JJ., concurred in the conclusion, but not the reasoning of YELLOTT, J. ROBINSON, J., dissented.

HOITT v. HOITT.

(63 N. H. 475, 3 Atl. 604.)

Supreme Court of New Hampshire. March 12, 1886.

Appeal from probate court.

Alfred Hoitt duly executed a will, bearing date February 12, 1864. At that date his family consisted of his wife and their six sons and seven daughters, of whom ten were of age. His wife died April 25, 1877, and one of his sons, who was one of four sons named in the will as residuary legatees, died unmarried in 1877. He married a second wife January 6, 1879, who survived him. There was no issue of the second marriage. The testator died November 9, 1883. At the time of making the will his estate amounted to some $26,000, about two-thirds of which was realty, and consisted of eight different parcels. Included in the personalty were 60 shares of the Boston & Maine Railroad, and 20 shares in the Langdon Bank. These stocks were specifically bequeathed, but, with the exception of four shares of the railroad stock, were subsequently sold by the testator, and not replaced. All of the realty was specifically devised, but the testator afterwards disposed of the greater portion of it. He subsequently acquired by purchase and was possessed at his decease of other real estate of the value of about $52,000. His entire estate, at the time of his death, was appraised at $70,951.82. Four sons were named by the testator as residuary legatees, one of whom died unmarried in 1877. All the other children survived the testator. When the will was executed, the residue of the estate was inconsiderable. After the testator's decease the will was found in his safe, in a bundle of papers of no pecuniary value. Included in this bundle were several apparently incomplete drafts or memoranda of wills, never executed, without date, some of which were apparently made since the date of said will.

In the trial court the appellee offered evidence of the oral declarations of the testator to show that it was his understanding that the will was revoked, and also to show that it was not his intention to pass by his will after-acquired real estate. To this the appellant objected. The court sustained the objection, and the appellee excepted. The decree of the probate court disallowed the will.

Augustus Russ, Jeremiah Smith, and Dodge & Caverly, for appellant. Marston & Eastman and Frink & Batchelder, for appellee.

BLODGETT, J. No express revocation appears in this case. The will of the testator, executed in accordance with the statute formalities, has not been revoked by any subsequent "will or codicil, or by some writing executed in the same manner, or by canceling, tearing, obliterating, or otherwise destroying the same by the testator, or by some person by his consent and in his presence," as required by Gen. Laws, c. 193, § 14. On the contrary, it was found in his safe after his decease, and in its original condition. It is true that it was in a bundle of papers of no pecuniary value, and that "included in this bundle were several apparently incomplete drafts or memoranda of wills never executed, without date, some of which were apparently made since the date of said will." But Fellows v. Allen, 60 N. H. 439, 441, is a recent and direct authority that the fact of a will being found among worthless papers works no revocation of it; and the authorities, as well as reason, demonstrate that the memoranda, which, at most, are merely evidentiary facts of an inchoate intention to make another will, have no legal significance as acts of revocation; for, although the purpose of the mind always gives character to the act done, still, the legislature having established certain modes by which a will may be revoked, it is not within the legitimate power of courts to dispense with such requirements, and accept even a definite intention to perform the prescribed act for the act itself.

Neither has the will become inoperative, as a whole, from necessity, either by an entire loss of the testator's estate, or its total alienation, or by the decease of all the devisees without descendants, and so leaving nothing upon which it can operate. If, therefore, there has been a valid revocation, it must be one arising from legal presumption or implication; and this in fact is the principal contention.

The existing statute as to the revocation of wills, which was originally adopted in 1822, after pointing out the modes by which a will may be revoked, expressly excepts any revocation implied by law from changes in the circumstances of the testator, his family, devisees, or estate, occurring between the time of making the will and his death. Gen. Laws, c. 193, §§ 14, 15. But what those changes are, section 15 does not in any manner attempt to define; and the effect consequently is to leave the matter of revocation by legal implication just as it stood before the enactment of that section. That is to say, section 15 (which in the act of 1822 was a proviso to what is now section 14) is to be taken, not as a recognition and adoption of the common-law doctrine of implied revocation, but as a recognition and adoption of the English decisions under sections 5, 6, and 22 of the English statute of frauds relative to the revocation of wills, passed in 1676; for the common law as to such revocations was abrogated by that statute. The English statute was doubtless the basis and model of our statute, directly or indirectly, and the proviso in the latter, we think, is to be regarded as merely explanatory of the preceding part of the section prescribing the manner of express revocation. Practically

and in effect it was an adoption, under then existing conditions, of such implied revocations as had been introduced and established by the English courts, contrary to the plain meaning of the English statute, and solely through the usurpation of legislative power. But the English courts did not go the length of establishing a rule that revocation might be shown by any change of circumstances affording satisfactory evidence of the testator's revoking intention, but stopped far short of it, and restricted its application to a few exceptional cases, as to which it was held the statute did not apply. Hence there is no tenable ground for holding that any causes of revocation were intended by our legislature to be embraced in the proviso to the act of 1822, aside from the existing exceptions established by the English courts upon supposed equitable considerations; and much less can it be held that any alteration was effected or intended by the Revision of 1842, making the proviso a separate section, and slightly changing its phraseology. And, as strongly tending to show that the purpose of the legislature was such as has been indicated, and that such has been the universal understanding of the bar of this state, it is a significant fact that no litigation has arisen as to the legislative intent, or the meaning of the language used in its expression, during the more than 60 years which have elapsed since the statute was first enacted.

No new cause of revocation being introduced by the statute, the true inquiry is whether the facts of this case bring it within any of the exceptions upon the subject of implied revocation recognized by the English courts after the adoption of the statute of 1676, which were quite limited in number, and reasonably well defined and understood at the time our statute was enacted. The causes assigned upon this point as ground of revocation are subsequent changes in the circumstances of the deceased, his family and estate. They are, substantially, the death of his wife and his son Franklin, both of whom were legatees; his second marriage, but without issue; the alienation of the larger portion of his estate; and its nearly threefold increase in value through natural causes and judicious investments.

But total revocation cannot be implied from the death of the wife and the son. "The death of a devisee is a contingency always in view." Shaw, C. J., in Warner v. Beach, 4 Gray, 162, 164. "I know of no case," said Denman, C. J., in Doe v. Edlin, 4 Adol. & E. 586, "where it has been held that the removal of an object of affection and bounty, by death, has been taken to be an implied revocation of a will, and, in my opinion, it does not operate so." And see Fellows v. Allen, supra.

Nor can it be implied from the testator's remarriage, because the indispensable common-law requisite of the subsequent birth of a child is lacking. 1 Jarm. Wills, (5th Amer. Ed.) 272; 1 Redf. Wills, 293; Pars. Wills, *59; Worth. Wills, *528. "This principle of law is incontrovertibly established." 4 Kent, Comm. 522. And in this connection it should also be borne in mind that the rule never applied except in cases where the wife and after-born children, the new objects of duty, were wholly unprovided for in the will, and where there was an entire disposition of the whole estate to their exclusion and prejudice; therefore, inasmuch as the widow and children of a testator not provided for in a will are, under our statute, entitled to the same share of the estate as if he had died intestate, the sole reason upon which the rule was grounded no longer exists, and so the rule itself has become inoperative and obsolete in this jurisdiction.

The inquiry thus becomes restricted to the effect of the changes in the testator's property; the phrase "circumstances of the testator," etc., relating to new family ties, and not to changes in property. 4 Kent, Comm. 521, and authorities generally. But if it were apparent, as it certainly is not, that in the case of a testator an entire revocation by legal implication resulted, either before or after the statute of 1676, from any change whatever of condition or circumstances except that of a subsequent marriage and child, it is the undoubted general rule that a partial revocation only produces what is inaptly and inaccurately termed a revocation pro tanto, instead of an ademption, of the subject of the devise, and thus necessarily limits the operation of the will to the extent of the alienation; not, however, by reason of any defect in the will itself, but because it pleased the testator to make a disposition of such part of his estate different from what he originally intended, which it is always competent for him to do either by a conveyance, or a new will or codicil. See Fellows v. Allen, supra; Carter v. Thomas, 4 Greenl. 341, 343, 344; Graves v. Sheldon, 2 D. Chip. 71, 75; Blandin v. Blandin, 9 Vt. 210, 211; Hawes v. Humphrey, 9 Pick. 350; Terry v. Edminster, Id. 355, note; Webster v. Webster, 105 Mass. 538, 542; Balliet's Appeal, 14 Pa. St. 451; Brush v. Brush, 11 Ohio, 287; Floyd v. Floyd, 7 B. Mon. 290; In re Nan Mickel, 14 Johns. 324; McNaughton v. McNaughton, 34 N. Y. 201; Warren v. Taylor, 56 Iowa, 182, 9 N. W. Rep. 128; Wells v. Wells, 35 Miss. 638; Brydges v. Duchess of Chandos, 2 Ves. Jr. 417; 4 Dane, Abr. 576, 577; Love. Wills, 358; 1 Redf. Wills, 335; Pars. Wills, 63. "Conveying a part of the estate upon which the will would otherwise operate, indicates a change of purpose in the testator as to that part; but suffering the will to remain uncanceled evinces that his intention is unchanged with respect to other property bequeathed or devised therein." Weston, J., in Carter v. Thomas, supra, 344.

The remaining circumstance, that of the

increase of the estate, upon obvious considerations of public policy, has no weight; and to this effect is the great preponderance of authority. Warner v. Beach, Webster v. Webster, Graves v. Sheldon, Blandin v. Blandin, and Balliet's Appeal, supra; Brush v. Wilkins, 4 Johns. Ch. 507, 518, 519; Wogan v. Small, 11 Serg. & R. 141, 145; Vandemark v. Vandemark, 26 Barb. 416; Verdier v. Verdier, 8 Rich. Law, 135. "A merely general change in the testator's circumstances, as it regards the amount and relative value of his property, will not in general, if ever, have the effect to revoke a will, since the testator, by suffering it to remain uncanceled, does in effect reaffirm it, from day to day, until the termination of his conscious existence." 1 Redf. Wills, 298.

The conclusion, then, is that the subsequent changes in the circumstances of the testator, his family and estate, do not imply a revocation of his will. To effect a revocation both the English and New Hampshire statutes require certain specified things, which are lacking in this case, to be done, and not merely contemplated or even actually intended to be done. It is true that at an early day the English common-law courts fell into the error of exercising legislative power, and materially amending the statute of 1676 by enlarging its specific methods of revocation so as to include revocations founded upon new family ties and obligations on the part of the testator, arising from subsequent marriage, issue, and leaving wife and child without provision; and that, inasmuch as our statute must be regarded as a substantial re-enactment of that statute in the sense in which it had been interpreted by the English courts anterior to 1822, full effect must be given to their decisions, although plain encroachments upon legislative power; yet no rule was expressly established, and none can be inferred from the decisions, that makes it our duty to trespass still further upon the legislative domain, and so far judicially repeal the statute as to hold that the present case does not come within the purview of its fourteenth section. Even the English courts had come to a halt prior to 1822, and refused to extend the rule as to implied revocations beyond the precedents, and so have the American courts quite uniformly. See Doe v. Barford, 4 Maule & S. 10; Tilghman, C. J., in Wogan v. Small, supra, and authorities generally.

The rule for which the appellee contends is that a revocation may be proved or disproved by any circumstantial evidence showing the testator's intention; but the precedents do not support the contention. On the contrary, after a most thorough examination of the cases reported before the enactment of the New Hampshire statute, it was unanimously held in Marston v. Roe, 8 Adol. & E. 14, by the 14 judges sitting in the cause, that implied revocation takes place in consequence of a rule or principle of law, independently altogether of any question of intention; and there is no reason to suppose that the legislature of 1822 took a different view of the reported cases. If their purpose was to make intention of itself a ground of revocation, and thus inevitably incite litigation and "produce infinite uncertainty and delay in the settlement of estates," the presumption is that the statute would have been drawn accordingly. Even Johnston v. Johnston, 1 Phillim. Ecc. 447, upon which great stress has been laid by the appellee, while holding the subsequent birth of a portionless child to be an indispensable requisite which would effect a revocation when aided by other circumstances, and a subsequent marriage not to be an essential requisite, does not hold that the revoking intent may be inferred from a general change of circumstances simply, but makes the controlling principle rest upon new moral obligations and family ties arising after the making of the will, and thus limits its application to cases of subsequent marriage or birth in which the wife or child would otherwise be left without provision for support. This case, however, is not relevant, the will being one of personalty only, and the decision being made by an ecclesiastical court, unincumbered by statute provisions; and if it were relevant, its governing principle, when applied to this case, would be fatal to the appellees, for the reason that no child was born to the testator subsequently to the execution of his will. This being so, it is of no practical consequence here whether the doctrine of implied revocation rests upon the fact of a changed intention, as held in Johnston v. Johnston, or takes place in consequence of a rule or principle of law founded on a tacit condition annexed to the will itself when made, independently altogether of any question of intention, as held in Marston v. Roe; for the application of either principle to the facts of this case leaves the will unrevoked, because they fail to bring it within any of the exceptions introduced by the ecclesiastical or common-law courts.

But in respect of intention there is another consideration which may properly be adverted to. If the circumstantial evidence appearing in the case were competent in law and sufficient in fact to show a change of intention on the part of the testator as to his final disposition of his property, it would not appear that his intention would be less defeated by disallowing this will than by allowing it. The only issue is testacy or intestacy. To this issue the inquiry as to the testator's intention is limited; and, whatever testamentary change he may have thought of making, he had no thought of dying intestate, and leaving his property to be disposed of by the statutory rule of descent and distribution. There is no authorized conjecture that, if the alternative of intestacy or the unaltered will had been presented to him, he would have preferred the for-

mer rather than the latter. Hence, if all the circumstantial evidence were admissible, and if it proved all the appellee claims, the question it would present would be, not how the testator's intent could be carried into effect, but how it should be defeated. The choice would be restricted to two modes of violation, one testate, and the other intestate; and the former, supported by the written and uncanceled evidence, which the law regards as the best, would prevail over the latter, which would be sustained by no proof, competent or incompetent, and by no presumption of law or fact. The testator not intending to die intestate, the decree of disallowance for which the appellee contends would be an intestate reversal of a testamentary purpose. "But Gen. Hoitt intended to change his will." Suppose he did; the change could not now be made. The intended alteration (if there was one) is not known, and the altering power has ceased.

The proffered oral declarations of the testator to the effect that he understood the will was revoked, were rightly rejected. The mere understanding of a testator cannot revoke his will, for legal requirements cannot be thus abrogated; nor can his oral declarations, for wills cannot be revoked by parol; nor, upon the great weight of authority, are such declarations evidence, unless they accompany some act of revocation, and thereby become a part of the res gestæ. Jackson v. Kniffen, 2 Johns. 31; Dan v. Brown, 4 Cow. 483; Clark v. Smith, 34 Barb. 140; Waterman v. Whitney, 11 N. Y. 157; Randall v. Beatty, 31 N. J. Eq. 643; Lewis v. Lewis, 2 Watts & S. 455; Hargroves v. Redd, 43 Ga. 142, 160; Gay v. Gay, 60 Iowa, 415, 14 N. W. Rep. 238; Rodgers v. Rodgers, 6 Heisk. 489; Smith v. Fenner, 1 Gall. 170; Doe v. Palmer, 16 Adol. & E. 747; 2 Greenl. Ev. (9th Ed.) § 690; Abb. Tr. Ev. 124; 2 Starkie, Ev. (3d Ed.) 1286; 1 Redf. Wills, 331.

Such declarations, also, were not competent, upon the testator's intention not to pass by his will after-acquired real estate. If a contrary intent is inferable from the will itself, it cannot be disproved by extrinsic evidence. If it is not thus inferable, and may be ascertained by the weight of competent evidence, his declarations are not a part of such evidence.

Decree of the probate court reversed. Will allowed.

ALLEN, J., did not sit. The others concurred.

SWAN v. HAMMOND.

(138 Mass. 45.)

Supreme Judicial Court of Massachusetts. Oct. 23, 1884.

Appeal from probate court, Middlesex county.

E. F. Dewing and G. L. Sleeper, for appellant. W. B. Gale and W. N. Mason, for executrix.

COLBURN, J. It appears by the record and agreed facts in this case that Susan E. Haven, an unmarried woman, made her will May 20, 1853; that she was then possessed of real and personal estate, all of which by her will she devised and bequeathed to her sister, who was named as executrix: that on October 3, 1861, she married Thomas F. Hammond, and lived with him until her death, on January 18, 1883. Her husband had no knowledge of the existence of the will until after her decease. No child was born of the marriage. The will was presented for probate in Middlesex by the executrix therein named, and was approved and allowed on April, 1883, and the husband appealed. The only question presented is whether the will was revoked by the marriage. It has been well settled by common law, at least since Forse and Hembling's Case, 4 Coke, 60b, (decided in 1589,) that the marriage of a feme sole revokes her will. In case of a man it is equally well settled that marriage alone does not revoke his will, but that marriage and the birth of a child do. 1 Jarm. Wills, 122; Warner v. Beach, 4 Gray, 162. The reason why the will of a feme sole is revoked by her marriage is commonly stated to be that marriage takes away her testamentary capacity, and destroys the ambulatory nature of her will; and it is urged in argument that since the statutes allowing a married woman to make a will, with certain limitations as to the rights of the husband, were passed, the reason upon which the rule was founded, that the will of a feme sole is revoked by marriage, no longer exists; and that her will, like that of a man, should be held to be revoked, not by marriage alone, but by marriage and the birth of a child. This argument is not without force, but its force would be much greater if we could see any good reason why, in the case of a man, both marriage and the birth of a child should be held necessary for the revocation of his will. The rule was adopted from the civil law, and is now firmly established as part of the common law; but the reason upon which it is founded is not obvious. Marriage alone, in the case of a man or woman, would seem to be a sufficient change in condition and circumstances to cause an implied revocation of a will previously made. A will made before marriage, and taking effect after marriage, must take effect in a very different manner from that in the mind of the testator when the will was made. The rights of the husband or wife must greatly modify its provisions; and it can hardly be supposed that an unmarried person would make the same will he or she would make after marriage. If we were under no restraint, we might well hesitate to hold that, since testamentary capacity has been given to women, a will made by a woman when sole should be revoked only by marriage and the birth of a child, as in case of a man, for the sake of uniformity only, when we are inclined to think a better rule would be that in case of a man his will should be revoked by marriage alone. But such a rule can only be introduced by the legislature. In England, by St. 7 Wm. IV. and 1 Vict. c. 26, § 18, and in many of the states in this country, it has been provided by statute that the wills of both men and women shall be revoked by marriage. See collection of statutes in 1 Jarm. Wills, (5th Amer. Ed., by Bigelow,) 122, note.

But we are of the opinion that the question now before us has been so far settled by statute as not to admit of change by construction. Section 8, Pub. St. c. 127, after providing that no will shall be revoked, unless by burning, tearing, etc., or some other writing executed in the manner required in the case of a will, goes on as follows: "But nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." It is not apparent that an entire revocation, by implication of law, results from any change of condition or circumstances except that of a subsequent marriage. See the discussion in Warner v. Beach, ubi supra. This clause as to implied revocations was first introduced into Rev. St. c. 62, § 9. The other provisions as to revocation were substantially taken from St. 1783, c. 24, § 2. The commissioners in their note to this section say: "The clause as to implied revocations recognizes and adopts the existing law, as established and understood among us." And their further discussion of this subject shows clearly that they had in mind the rule of the common law, that, in case of a man, marriage and the birth of a child, and, in case of a woman, marriage alone, revoked a will previously made. We are of opinion that this provision as to implied revocations, from its language, and the reasons given for its introduction, has substantially the force of an express enactment of the rules of the common law, which we are not at liberty to change, even if the reason for the rule, in case of a woman, no longer exists. This was the view taken in Brown v. Clark, 77 N. Y. 369, upon a similar question, under a statute of New York. We are therefore of opinion that the will of Susan E. Hammond was not properly admitted to probate.

Decree of probate court reversed.

BALDWIN et al. v. SPRIGGS.

(65 Md. 373, 5 Atl. Rep. 295.)

Court of Appeals of Maryland. June 22, 1886.

Appeal from orphans' court, Anne Arundel county.

Proceedings to probate a will claimed to have been revoked by the testator's subsequent marriage and the birth of surviving issue. Decree for contestant, and proponent appeals.

Edward C. Gantt, for appellants. James Revell and Daniel R. Magruder, for appellees.

STONE, J. There is no dispute about the material facts in this case. James Spriggs, of Anne Arundel county, on the 25th of July, 1865, duly executed his will. By that will he disposed of all the property, real and personal, which he then owned. James Spriggs, at the time of the execution of the said will, had a wife, Ruth Spriggs, then living, and several children by her, also living. By his said will he devised all his property to said wife and children. His wife, Ruth, died in 1871, and said James, soon after the death of said Ruth, about 1874, intermarried with Maggie E. Vane, and also had by her several children. Said James Spriggs died in January, 1886, leaving a widow, the said Maggie E. Spriggs, and a child by the said Ruth and children by the said Maggie E. surviving him. After the execution of the will the said James Spriggs purchased certain other real estate which was unaffected by said will. His will, as to his real estate, contained no residuary clause, but disposed of all the real estate he owned at its date, by specific description. After the death of James Spriggs his will was offered for probate in the orphans' court of Anne Arundel county, and a caveat was filed thereto by his second wife, Maggie E. Spriggs, in behalf of herself and her children, and upon such caveat plenary proceedings were had, and the orphans' court ordered and decreed that said will was revoked by his subsequent marriage and the birth of issue, and refused to admit the paper to probate. From this decree the daughter of the testator by his first wife and two of his grandchlidren have appealed to this court.

These are all the facts necessary to elucidate the legal proposition which we are called upon to decide, and which is simply whether, upon this state of the facts, the will of James Spriggs has been revoked by operation of law. It would be a profitless task to review all the English cases on the subject. They may be found by the curious fully discussed by Chancellor Kent with his usual ability in the case of Brush v. Wilkins, 4 Johns. Ch. 506. It is enough for us to say that, after a good deal of doubt and hesitation, it was finally settled in England, before our Revolution, that marriage and issue taken together did amount to an implied revocation of a will previously made, and that such implied revocations were not within the statute of frauds, but that such implied revocations might be rebutted and controlled by circumstances. The final determination of the matter seems to have been reached by the cases of Christopher v. Christopher, 2 Dick. 445, (decided by the court of exchequer, Parker, C. B., presiding, in 1771,) and in the case of Spraage v. Stone, 1 Amb. 721, (decided in 1773.) These cases appear to have definitely settled the law that a subsequent marriage and birth of a child, standing alone, and unaccompanied by other circumstances, amount to an implied revocation of a will.

The whole subject, says Chancellor Kent, has continued to receive great discussion in the English courts since the era of our Revolution, growing out of new cases constantly arising amidst the endless variety of human affairs. The most important of the English cases since the Revolution is the case of Marston v. Fox, 8 Adol. & E. 14, (decided in 1838 by 14 out of the 15 English judges,) where the general doctrine we have stated was reaffirmed. We will recur to this case again for another purpose. But we are not without decisive authority in our own state. The unreported case of Sedwick v. Sedwick, decided at June term, 1844, was a case similar to the one at bar. And the court of appeals decided that the subsequent marriage, and birth of a child, did revoke the will, and they affirmed the decree of the orphans' court refusing it probate. No opinion was filed in the case, although a large amount of property was involved, and the case was argued by some of the most eminent counsel in Maryland. But they did flatly decide the question by a decree declaring the will revoked by the subsequent marriage, and birth of a child.

But while such is the general rule, like other general rules, it has been held in England subject to some exceptions. Among the exceptions is the one where the testator has made provision for his children born after the execution of the will. As the origin of the rule was the duty of the parent to provide for his offspring, this exception seems right and proper. Another matter upon which the English courts have exercised themselves is the determination of the ground upon which the doctrine of implied revocation ought to be rested. This is of practical importance in this case, and will require some examination. Lord Mansfield, in the case of Brady v. Cubitt, 1 Doug. 31, thought the rule should rest on the presumption that the testator intended to revoke his will, and that it therefore followed that such presumption might be rebutted by even parol evidence,—to use his own words, that such presumption might be rebutted by "every sort of evidence." But Lord Mansfield's view seems to us irreconcilable with the statute of frauds. It would in effect allow the will to be revoked by the subsequent intention of the testator, without such intention being evi-

denced by the positive acts so expressly required by that statute. That view leads to another difficulty: that the testator may change his first intention, and adopt a contrary one; and, if so, which of the two intentions is to prevail? The conclusion, however, that Lord Mansfield reached, that every sort of evidence was admissible, was but the logical consequence of the ground upon which he rested the rule, namely, that of presumed alteration of intention. This case was decided in 1778. But the courts there seem to have felt the difficulties that would result from such a view, and Lord Kenyon, in Doe v. Lancashire, 5 Term R. 49, (decided in 1792,) placed the rule upon another ground, namely, a tacit condition annexed to the will, when made, that it should not take effect if there should be a total change in the situation of the testator's family. This view of Lord Kenyon was afterwards adopted by Lord Ellenborough in the case of Kenebel v. Scrafton, 2 East, 534, (decided in 1802.) Finally, the court, in Marston v. Fox, heretofore cited, unanimously adopted the views of Lord Kenyon, and it may now be considered as settled in England that the doctrine of implied revocation rests upon the ground of a tacit condition annexed to the will, when made, that it should not take effect if there should be a total change in the situation of the testator's family. In this we concur.

If we adopt the English rule that the will is not revoked if the testator makes provision for the children of the subsequent marriage, the question arises in the case at bar whether he can be considered to have made such provision by the purchase of the property acquired by him between the date of his will and his death. This question must be answered, both upon reason and authority, in the negative. The testator disposed of all the property he then owned, by his will; but he lived 20 years after its date, and in the mean time purchased other real estate, which the children of the second wife would share with those of the first. But the mere accumulation of additional property cannot, upon any ground of reason, be considered a provision made by the testator for the second set of children, any more than for the first set, as the latter are equally benefited by it. The injustice of considering after-acquired property a provision for the second children will be the more readily seen if we consider a case—and such have frequently occurred—where the beneficiaries under the will were comparative strangers, or remote collaterals. Again, if after-acquired property should be held a provision for the after-born children, how much property must be so acquired? It could hardly be said that the purchase of an acre of poor land, or a cow or horse, could be so considered; and, if not, by what rule should the value of such property be estimated? But we are not without authority on this subject. In Marston v. Fox, above cited, the point was made that an after-purchased estate did not pass by the will, but descended to the son in fee, and thereby became a provision for him, and prevented the revocation; but in answer to this objection, the court said: "In the first place, we answer that no case can be found in which after-acquired property descending upon a child has been allowed to have that effect; and, indeed, such a proposition seems incompatible with the nature of a condition annexed to the will."

To determine that after-acquired property was a provision for the after-born child would be totally inconsistent with the theory that the rule of implied revocation rests upon the tacit condition annexed to the will, when made, that it should not take effect if there should be a total change in the situation of the testator's family. Instead of the change in the family, it would make a change in the property,—one of the essential elements to determine the implied revocation. The will of the successful testator would stand; that of the unfortunate would be revoked.

Upon the whole case presented by the record before us, we are of opinion that, the testator having disposed of the whole of the estate owned by him at the date of his will, and having again married, and had children by his second wife, and having made no provision for such children, his will was revoked by operation of law, and that the order of the orphans' court must be affirmed; the costs to be paid out of the estate.

BROWN et al. v. CLARK et al.

(77 N. Y. 369.)

Court of Appeals of New York. May 20, 1879.

Appeal from supreme court, general term, fourth department.

Proceedings before the surrogate of Monroe county by Fortune C. Brown and others, executors named in a codicil executed by Mary J. Clark Proctor, deceased, for probate of a will and codicil executed by said Mary J. Clark Proctor. The will was executed by the deceased, then Mary J. Clark, on August 25, 1873. She subsequently married Truman A. Proctor, and after such marriage, and on December 7, 1876, she executed a codicil. She died October 1, 1877. The surrogate denied probate of the will on objection by Warren C. Clark and others, and the executors appealed to the general term, where the decree of the surrogate was reversed, and the objectors appealed to this court.

J. C. Cochrane, for appellants. H. R. Selden, for respondents.

ANDREWS, J. The evidence justifies the conclusion of the surrogate that there was a due execution of the will of August 25, 1873. The will was drawn by Mr. Clark, who was a lawyer by profession, and was executed by the testatrix under his supervision. She was his adopted daughter, and sole legatee under his will. When her will was executed she had little, if any, property of her own, and her will was made to provide for the disposition of the estate which she would receive under the will of Mr. Clark in the event of her surviving him. In substance, the two wills constituted a scheme for the disposal of the property of Mr. Clark after his death and the death of the testatrix. The attestation clause is full, and recites all the facts constituting a due execution, and is signed by two witnesses. The witnesses were not lawyers, and were not, so far as appears, conversant with the statute requirements for the execution of wills, and when examined were unable to state that they signed the will as witnesses at the request of the testatrix, or that she at the time declared it to be her will. But it is undisputed that the testatrix executed the will in their presence, and that they were requested by some one to become witnesses to a will, and that they attended on the occasion of the execution of the will in pursuance of such request. There is no evidence contradicting the recitals in the attestation clause. Neither of the witnesses deny that it contained a true account of what occurred when the will was executed. The proof was taken five years after its execution. Mr. Clark was then dead, and no persons were living who were present at the execution except the two witnesses. The case is therefore one where the attestation clause recites all the essential acts to constitute a due execution and publication of the instrument as a will, and the other circumstances tend to corroborate the truth of the recitals. The witnesses, after a lapse of several years, fail to recollect affirmatively the facts attested by them over their own signatures. The mere non-recollection of witnesses, under these circumstances, would not justify a finding that the statute requirements were not observed. Their lack of memory does not rebut the presumption of due publication arising from the attestation clause and the other circumstances. Brinckerhoof v. Remsen, 8 Paige, 499, 26 Wend. 332; In re Kellum, 52 N. Y. 517.

We concur in the conclusion reached by the surrogate that the will was revoked by the subsequent marriage of the testatrix. It was the rule of the common law that the marriage of a woman operated as an absolute revocation of her prior will. Forse and Hembling's Case, 4 Coke, 61. The reason of the rule is stated by Lord Chancellor Thurlow in Hodsden v. Lloyd, 2 Brown, Ch. 534. He says: "It is contrary to the nature of the instrument, which must be ambulatory during the life of the testatrix; and, as by the marriage she disables herself from making any other will, this instrument ceases to be of that sort and must be void." The rule that the marriage of a feme sole revoked her will was made a part of the statute law of this state by the Revised Statutes, (2 Rev. St. p. 64, § 44.) The language of the statute, that the will of an unmarried woman shall be deemed revoked by her subsequent marriage, is the declaration of an absolute rule. The statute does not make the marriage a presumptive revocation, which may be rebutted by proof of a contrary intention, but makes it operate eo instanti as a revocation. 4 Kent, Comm. 528.

It is claimed by the contestants that the testamentary capacity conferred upon married women by the recent statutes in this state takes away the reason of the rule of the common law, and that upon the maxim, cessante ratione legis cessat lex ipse, the rule should be deemed to be abrogated. Upon the same ground it might have been urged at common law that the marriage of a feme sole should only be deemed a revocation or suspension of her prior will during the marriage, and that when the woman's testamentary capacity was restored by the death of her husband, leaving her surviving, the will should be revived; but the contrary was settled. Forse and Hembling's Case; 1 Jarm. Wills, 106; 4 Kent, Comm. 598. But the courts cannot dispense with a statutory rule because it may appear that the policy upon which it was established has ceased. The married women acts confer testamentary capacity upon married women, but they do not undertake to interfere with or abrogate the statute prescribing the effect of marriage as

a revocation. It was quite consistent that the legislature should have intended to leave the statute of 1830 in force, although the new statutes took away the reason upon which it was based. The legislature may have deemed it proper to continue it, for the reason that the new relation created by the marriage would be likely to induce a change of testamentary intention, and that a disposition by a married woman of her property by will should depend upon a new testamentary act after the marriage.

The remaining question is as to the legal effect of the codicil of December 7, 1876. This was executed after the marriage of the testatrix, and refers to the will by its date, and the names of the attesting witnesses; and in the body of the codicil the testatrix declares her intention thereby to republish, reaffirm, and adopt the will as modified by the codicil as her present will, in the same manner as if then executed by her, and following this declaration is this clause: "Which, [codicil,] in connection with and amendment of my will, I now publish and declare together, as constituting my last will and testament." The codicil was executed with the formalities required by the statute. It was signed by the testatrix in the presence of two witnesses, and was attested by them in her presence, by her request; and she, at that same time, declared the instrument to be "a codicil to her last will and testament, and a reaffirmation of the latter." The original will was present when the codicil was executed, and the attention of the witnesses was called to it, and one of them examined and identified it.

The evidence leaves no room for doubt that the main purpose of the testatrix in making the codicil was to re-establish the will, which had been revoked by her marriage. The inference from the proof is that she understood the will had been revoked by her marriage. The codicil made some provision for a brother of the testatrix not contained in the will, but the paramount intention of the testatrix in executing the codicil was, as appears by the codicil and the extrinsic circumstances, to reaffirm the disposition of her property made by the will, so that the bulk of her estate should go according to its provisions. The contestants claim that the intention of the testatrix to reaffirm the will cannot take effect, for the reason that there was no republication of that instrument after her marriage, and that what occurred at the time of the execution of the codicil was a publication of that instrument only, and did not operate to revive the will, or incorporate its provisions with those of the codicil. The general doctrine is well settled that a codicil executed with the formalities required by the statute for the execution of wills operates as a republication of a will so far as it is not changed by the codicil. Acherly v. Vernon, 1 Comyn, 381; Barnes v. Crowe, 1 Ves. Jr. 486; Mooers v. White, 6 Johns. Ch. 375; Van Cortlandt v. Kip, 1 Hill, 590, 7 Hill, 346. In Van Cortlandt v. Kip, 1 Hill, 593, Cowen, J., said: "It seems to me that at this day it would be a violation of all reliable authority to deny that a codicil, duly attested to pass real estate, would per se, whether it relates to real or personal property, operate as a republication of a devise, unless the testator declares that he does not intend that it shall have that effect." This doctrine was attended with important consequences. By the English law prior to the wills act, (1 Vict. c. 26), a testator must have been seised of the lands devised at the time of making his will, and after-acquired lands would not pass under a residuary devise; and this was also the rule in this state prior to the Revised Statutes. 4 Kent, Comm. 601. But the execution of a codicil was held to make the will speak as of the time the codicil was executed, and to extend a general devise to lands acquired intermediate the making of the will and the codicil. The cases in 1 Ves. Jr. 486, and 1 Hill, 590, supra, proceeded upon this doctrine. In each of these cases lands acquired by the testator, after making the will, and before the execution of the codicil, were held to pass under the will. It was not essential to the application of this rule that the codicil should be annexed to the will, or express an intention to republish the will or refer to the devise. It was sufficient if the codicil was executed with the formalities required for the execution of a will of lands. Goodtitle v. Meredith, 2 Maule & S. 5; Jackson v. Holloway, 7 Johns. 394; Jackson v. Potter, 9 Johns. 312. The statute of frauds (29 Car. II.) enacted that all devises of lands shall be in writing, and signed by the devisor, or by some person in his presence, and by his express directions, and shall be attested and subscribed in his presence by three or four credible witnesses, or else they shall be void. Prior to 1830 this statute had been substantially re-enacted in this state, and governed the execution of wills here. 2 Rev. Laws, c. 23. § 2. It will be observed from the cases cited that the attestation of a codicil by the requisite number of witnesses was deemed a compliance with the statute, so as to make the will operative upon after-acquired lands, although they were not mentioned in the codicil, and there was no express republication of the will. The attestation of the codicil is, according to the decisions, an attestation of the will, within the meaning of St. Car. II. So, also, it was held that a will, revoked by marriage or otherwise, was revived by the execution of a codicil. Lord Walpole v. Lord Orford, 3 Ves. 402; Neate v. Pickard, 2 Notes of Cas. Adm. & Ecc. 406; 1 Jarm. Wills, 187; 1 Redf. Wills, 367. This subject is now regulated in England by the twenty-second section of the wills act, (1 Vict. c. 26,) which provides, in substance, that no will or codicil which shall

in any manner be revoked shall be revived otherwise than by the re-execution thereof, or by a codicil executed in the manner prescribed by the act, and showing an intention to revive the same.

Upon the authorities cited, it is clear that, under the law in this state as it stood prior to 1830, there was a valid republication of the will in question by the execution of the codicil of December 7, 1876. The Revised Statutes changed, in several respects, the ceremonies to be observed in the execution of wills; and, among other things, it is expressly required that the testator shall, at the time of making or acknowledging his subscription to the will, declare the instrument to be his last will and testament. 2 Rev. St. p. 63, § 40, subd. 3. There is nothing in the statute indicating that it was intended to change the rule that a codicil, duly executed, was a republication of the will. The codicil in the case of Van Cortlandt v. Kip, 1 Hill, 590, was executed after the present statute was enacted. It referred to the will executed in 1824, but did not in terms republish it, and made no reference to the lands acquired by the testator after the will was made; but the court held, in accordance with the law which existed before the Revised Statutes were passed, that the codicil was a republication of the devise in the will, and that the after-acquired lands passed to the surviving devisee. The Revised Statutes did not affect the construction of wills made before the chapter relating to wills took effect. 2 Rev. St. p. 68, § 70. This case seems to be a direct authority that the due execution and publication of a codicil is, under the Revised Statutes, as it was prior thereto, a republication of the will to which it refers. The codicil in this case refers to the will, and expressly adopts and reaffirms it. The testatrix, by publishing the codicil, published the will, which was clearly identified by the reference in the codicil and the extrinsic proof. It is established by a long line of authorities that any written testamentary document in existence at the execution of a will may, by reference, be incorporated into and become a part of the will, provided the reference in the will is distinct, and clearly identifies, or renders capable of identification by the aid of extrinsic proof, the document to which reference is made. I will cite a few of them: Habergham v. Vincent, 2 Ves. Jr. 228; Smart v. Prujean, 6 Ves. 565; Williams v. Evans, 1 Cromp. & M. 42; Allen v. Maddock, 11 Moore, P. C. 427; Burton v. Newbery, 1 Ch. Div. 234; Tonnell v. Hall, 4 N. Y. 145. In Williams on Executors (page 97) it is said: "If a testator in a will or codicil or other testamentary paper, duly executed, refers to an existing unattested will or other paper, the instrument so referred to becomes part of the will;" and Jarman says, (1 Jarm. Wills, 78:) "A codicil, duly attested, communicates the efficiency of its attestation to an unattested will or previous codicil, so as to render effectual any devise of a freehold estate which may be contained in such prior unattested instrument;" and further on, speaking of the incorporation of documents by reference in the will, he says this is permitted "without violating the principle of the enactment which requires an attestation by witnesses, the testator's intention to adopt the contents of such instrument being manifested by a will duly attested." Page 83. In this case, if the will of Mrs. Proctor had been an unattested instrument, it would, upon the authorities, have been incorporated with and made a part of the testamentary instrument originally executed, by reason of the reference to it in the codicil. I am of the opinion that the publication of the codicil was a publication of the will, and that both papers together are to be considered as the will of the testatrix. There was no proof to sustain the allegations of undue influence or want of testamentary capacity in the testatrix when it was executed. The only question before us is one of law, upon substantially uncontroverted facts; and the order of the general term reversing the decree of the surrogate, and remitting the proceedings to him with directions to admit the will to probate, should be affirmed. Hoysradt v. Kingman, 22 N. Y. 372; Gilbert v. Knox, 52 N. Y. 125.

All concur. Order affirmed.

(Read In re Cawley's Estate, p. 32, supra.)

In re DIEZ'S WILL.

(50 N. Y. 88.)

Court of Appeals of New York. Nov. 12, 1872.

Appeal from supreme court, general term, second department.

Proceedings by Ursula Diez before the surrogate of New York county for the probate of an alleged will of Frederick Diez. The testator was a naturalized citizen of New York state, domiciled in New York city. He went to Germany in May, 1868, and died at Southofen, Bavaria, November 1, 1868. Previous to his death the following instrument was executed:

"Matrimonial and also testamentary agreement: G. K. N., 898. This day, Sunday, November 1st, 1868, (one thousand eight hundred and sixty-eight,) at eleven a. m., appeared before me, Francis Xaver Malor, royal notary at Southofen, in the house No. 80 at Southofen, whither I went at once, according to the request of the parties. (1) The hotel proprietor, Mr. Frederick Diez, from New York, in the United States of America, at present being in Southofen, who, although lying in bed in an upper room in the above-named house, suffering from a complaint in the stomach and very weak, is in full possession of his mental faculties, and therefore must be deemed fully competent to make dispositions, whereof I have convinced myself by conversation with him. (2) His wife, Mrs. Ursula Diez, born Trunk, of the same place. Lastly, (3) the two impartial witnesses, whose presence had been especially requested, and who, after examination, have been found free of all exceptions—(a) The practicing physician, Dr. Leonard Stich, of Southofen; and (b) the merchant, Mr. Max Mathes, of Southofen; both of the latter I am personally acquainted with as to name, occupation, and residence, while the name, occupation, and residence of the former two persons were only made known to me by the two witnesses present. And Mr. Frederick Diez and his wife, Mrs. Ursula Diez, requested me to reduce to writing and certify in my official capacity the following: 'Matrimonial and also testamentary agreement: (I.) We have made, as yet, no conjoint disposition of any kind concerning the hereditary succession in case of death. (II.) Inasmuch as we have, by joint exertions, acquired the property now in our possession; and inasmuch as the offspring of our marriage, our only child, Mary Diez, has already, in the tenderest age, departed this life,—we hereby determine that, upon the decease of one or the other of us, the surviving husband or wife shall receive the entire property of the one having died first, —that is to say, the existing jointly acquired property,—to his or her unconditionally, free, sole possession and sole ownership, and shall not be bound to pay over anything to any person in case of a death. (III.) Also all former dispositions concerning the hereditary succession which may have been made by us singly, or with the consent of both, however and wherever made, between the living, or for the case of death, are hereby set aside and declared null and void. (IV.) We desire that a first exemplified copy of the foregoing matrimonial and also testamentary agreement be delivered to us, and we will bear (V.) the expenses incurred jointly.' Hereupon the present instrument was drawn up by special request of the parties, and after it had been read to them in the presence of the two above-named witnesses, and after their attention had been called to all such legal relations as might possibly stand in the way of such a contract, and after being approved by them, it was ratified to the full contents of it, and signed by them, by the two witnesses, and by myself, the undersigned royal notary.

"Mark of Mr. Frederick Diez, who is unable to write on account of great weakness; wherefore the two witnesses have subscribed for him. } X

"Ursula Diez.
"L. Stich, Physician.
"Max Mathes.
"Franz Xaver Malor,
[L. S.] "Royal Notary."

This instrument was offered for probate by Ursula Diez, the widow of deceased. Probate was contested by Christian Supp, a residuary legatee under a former will. Contestant appealed from a decree admitting the will to probate. The general term of the first department sent the case to the second department, where the decree of the surrogate was affirmed, and contestant appealed to this court.

H. P. Townsend, for contestant and appellant. F. S. Stallknecht and Elial F. Hall, for proponent and respondent.

RAPALLO, J. * * * The two objections relied upon in the appellant's points are—First, that, not being under seal, the instrument cannot be regarded as a will of real estate; and, second, that it is in form a contract, and not a will.

The first objection is wholly unfounded; a seal is not required to a will of real or personal estate. The statute requires only that it be subscribed by the testator at the end. 2 Rev. St. p. 63, § 40; 1 Jarm. Wills, 70, note.

The second objection presents a more debatable question. The instrument is entitled, and refers to itself in one place as, a matrimonial and testamentary agreement, and in another as a contract, and contains no expression declaratory of its testamentary character, except the words "testamentary agreement," or, as translated in the first deposition, "contract of marriage and inheritance," and, in the third, "marriage and

inheritance contract." These designations are not, however, conclusive as to the character of the instrument. That must be determined by the dispositions which it makes. 1 Jarm. Wills, p. 13; Ex parte Day, 1 Bradf. Sur. 482, and authorities there cited. These dispositions are, in substance, that Diez and his wife each declare that they thereby determine that, upon the decease of one or the other of them, the surviving husband or wife shall receive, unconditionally, the entire property of the one having died first; and that all former dispositions concerning the hereditary succession, which may have been made by either of the parties singly, or with the consent of both, are annulled. These provisions are preceded by a declaration of the motives leading to such a disposition of the property, which were that it had been acquired by the joint exertions of the parties, and that their only offspring had in the tenderest age departed this life. It is claimed that the fact that the property, upon which the instrument was to operate, was the product of the joint labor of the parties, furnished a consideration for an agreement between them that, on the death of either, it should belong to the survivor, and that the instrument in question was such an agreement, and not a will. The distinguishing feature of a will is that it is not to take effect except upon the death of the testator. An instrument which is to operate in the lifetime of the donor, and to pass an interest in the property before his death, even though its absolute enjoyment by the donee be postponed till after the death of the donor, or even though it be contingent upon the survivorship of the donee, is a deed or contract, and not a will. But if the instrument is not to have any operation until after death, then it is a will, notwithstanding that it may have been executed in pursuance of a previous promise or obligation appearing upon its face.

Testing the document now before us by this rule, we think that it was the will of that one of the signers who should first die; that it did not purport to convey any present estate or interest in the property, or to deprive either of the parties of the absolute power of disposition of his or her own property, during his or her life, but was an arrangement testamentary in its character, and not intended to operate except upon the death of one of the parties, and then only as expressive of the intention of the one dying as to the posthumous destination of his or her property. It does not use words of grant or mutual contract, but states that the parties have determined that, upon the death of either, the survivor shall receive the entire property. The reasons given for this determination do not necessarily make it a contract. The fact that by the same instrument the husband and wife devised reciprocally to each other, or, in other words, that it was a mutual will, does not deprive it of validity. There is no just objection to such a form of testating. The instrument operates as the separate will of whoever dies first. Here, the husband having died first, it can be proved as his will, and the efficacy of his dispositions is in no way impaired by those portions of the instrument which, if the wife had died first, would have constituted her will, but which have now become inoperative. The result is precisely the same as if like reciprocal dispositions had been made by the husband and wife by means of two separate instruments. The combining of such reciprocal dispositions in one instrument is sanctioned by several authorities. Ex parte Day, 1 Bradf. Sur. 476; Lewis v. Scofield, 26 Conn. 452; Evans v. Smith, 28 Ga. 98; 1 Redf. Wills, 182; Rogers, Appellants, 11 Me. 303; In re Stracey, Deane & S. 6; In re Lovegrove, 2 Swab. & T. 453; Dufour v. Pereira, 1 Dick. 419; 2 Harg. State Tr. 310, 311.

The order should be affirmed, with costs. All concur. Order affirmed.

BETTS v. HARPER.

(39 Ohio St. 639.)

Supreme Court of Ohio. Jan. Term, 1884.

Error to district court, Hocking county.

Agnes Harper and Penrose Harper, sisters domiciled in Hocking county, each owning personal property, and being owners as tenants in common of real estate in that county, signed the following instrument, dated April 17, 1862: "We, Agnes Harper and Penrose Harper, of the county of Hocking, in the state of Ohio, do make and publish this, our last will and testament, in manner and form following; that is to say: First, it is our will that our funeral expenses and all our just debts be first fully paid; second, that all of our property, both real and personal, go to James Betts and John Drue Betts and their heirs forever; lastly, we hereby constitute James Betts to be executor of this, our last will and testament, revoking and annulling all former wills by us made, and ratifying and confirming this, and no other, to be our last will and testament." This instrument was subscribed at the time of its execution by two witnesses in due form; and Agnes having died in 1872, and Penrose in 1874, the instrument was admitted to probate in the probate court of Hocking county, as their will, in April, 1875. In September, 1875, the heirs at law of Agnes Harper and Penrose Harper filed a petition in the court of common pleas of Hocking county, against James Betts and John D. Betts, to set the will aside. On the trial of the issue in the district court, to which the cause was appealed, the court charged the jury, in effect, that the will, being joint, was void; to which charge the defendants below excepted. A verdict having been returned in accordance with the charge, judgment was rendered setting the will aside. James Betts and John D. Betts filed this petition in error.

M. A. Daugherty and J. R. Grogan, for plaintiffs in error. J. H. Collins, for defendant in error.

OKEY, J. The construction placed by the majority of the court in Walker v. Walker, 14 Ohio St. 157, on the instrument there in question, viewed in the light of the facts existing at the time of its execution, was that the alleged will should be regarded as simply a compact, joint in form and substance, between Walker and his wife, to treat their several estates as one estate, and jointly dispose of it as such among the objects of their bounty; that it was a matter of negotiation between them, and the disposition which each made of his or her property was influenced and modified by the disposition made of the property of the other; that each devise and bequest was, in fact, made in consideration of each and all the rest; and that it was part of the compact that neither of the parties should revoke or cancel the instrument, or any part of it, without the consent of the other. Moreover, subsequently to the death of Mrs. Walker, Walker, in violation of the agreement, conveyed to others portions of his lands so devised. The majority held that the instrument was not valid as a will, and that the remedy of the devisees and legatees, if they had any, was in equity to enforce the agreement.

Assuming, as we should,—more than 20 years having elapsed since the case was decided,—that the instrument received the proper construction, we are not disposed to question the decision. But it is said, in the opinion, that the policy of the state, as indicated in our legislation, is opposed to joint wills; and attention is directed to the language of the wills act, which it is said plainly refers to an instrument to be executed by one person only. It will be seen, however, that our statute is not peculiar in this respect. The provisions of the English statutes and the statutes of the various states upon the subject are precisely similar to our own; and the conclusion that they indicate a policy that two or more persons may not unite in the same instrument in making their wills, whatever the form of the instrument may be, is only reached by a rigid, and, as we think, altogether unwarranted, adherence to the mere letter of the statute. The provisions of the statute relating to the execution of deeds are similar, and yet nobody has ever doubted that any number of persons having an interest in property may join in an instrument conveying it.

The case before us is unlike the case of Walker v. Walker. Agnes Harper and Penrose Harper were each the owner of personal property, and they were owners as tenants in common of real estate. Each desired to bequeath her personal property to James Betts and John D. Betts, and each desired to devise to them her individual share of the real estate. They could unquestionably have done this by two instruments, but they could do it as effectually by one. This instrument was, in effect, the separate will of each. Either could have revoked it so far as it was her will. On the death of Agnes, in 1872, the instrument might have been admitted to probate as her will; and in 1874 it might have been admitted to probate as the will of Penrose; but in 1875 it was properly admitted to probate as the will of both. The authorities, it will be seen, are in some conflict; but the view we have stated is supported by reason and the manifest weight of authority. Ex parte Day, 1 Bradf. Sur. 481; Diez's Will, 50 N. Y. 88; Mosser v. Mosser, 32 Ala. 551; Schumaker v. Schmidt, 44 Ala. 454; Wyche v. Clapp, 43 Tex. 544; March v. Huyter, 50 Tex. 243; Breathitt v. Whittaker, 8 B. Mon. 530; Lewis v. Scofield, 26 Conn. 452; Evans v. Smith, 28 Ga. 98; In re Stracey, 1 Doct. & Stud. 6, 1 Jur. (N. S.) 1177;

Re Raine, 1 Swab. & T. 144; Re Lovegrove, 2 Swab. & T. 453, 8 Jur. (N. S.) 442; and see Denyssen v. Mostert, L. R. 4 P. C 236, 8 Moore, P. C. (N. S.) 502; Gould v. Mansfield, 103 Mass. 408; Clayton v. Liverman, 2 Dev. & B. 558; Hershy v. Clark, 35 Ark. 17, 23.

Judgment reversed.

WELLINGTON v. APTHORP.

(145 Mass. 69, 13 N. E. Rep. 10.)

Supreme Judicial Court of Massachusetts. Suffolk. Sept. 19, 1887.

On exceptions from superior court.

Action of contract by Darius Wellington against John V. Apthorp, as administrator with the will annexed of the estate of Mary Chism, deceased, upon an agreement, as the plaintiff alleged, made by her with the plaintiff on or about May 23, 1878, to bequeath to him, by her last will, the sum of $5,000, and pay his expenses of a journey to California and Nevada in accompanying her there in the fall of 1878; and also, upon an account annexed, for services in managing her property, in accompanying her to California and Nevada, and for cash paid as expenses on said visit. Hearing in the superior court for Suffolk county, before Bacon, J., before whom it appeared that plaintiff, after returning from the visit to California and Nevada, married without the knowledge of testatrix, and that when she heard of such marriage she revoked a prior will leaving plaintiff $5,000, and made a new one leaving him nothing. The court found for the defendant, and, upon the plaintiff excepting, reported the case for the determination of the supreme judicial court.

J. S. Patton, for plaintiff. A. M. Howe and T. J. Homer, for defendant.

C. ALLEN, J. It is not contended, on behalf of the defendant, that a contract, founded on a sufficient consideration, to make a certain provision by will for a particular person, is invalid in law. The contrary is well settled. Jenkins v. Stetson, 9 Allen, 128, 132; Parker v. Coburn, 10 Allen, 82; Canada v. Canada, 6 Cush. 15; Parsell v. Stryker, 41 N. Y. 480; Thompson v. Stevens, 71 Pa. St. 161; Updike v. Ten Broeck, 32 N. J. Law, 105; Caviness v. Rushton, 101 Ind. 500.

Nor is it contended that a contract to leave a certain amount of money by will to a particular person, though oral, is open to objection under the statute of frauds. It is not a contract for the sale of lands, or of goods: and it may be performed within a year. Peters v. Westborough, 19 Pick. 364; Fenton v. Emblers, 3 Burrows, 1278; Ridley v. Ridley, 34 Beav. 478; Kent v. Kent, 62 N. Y. 560; Bell v. Hewitt, 24 Ind. 280; Wallace v. Long, 105 Ind. 522, 5 N. E. Rep. 666. Such a contract differs essentially from a contract to devise all one's property, real and personal, which comes within the statute of frauds. Gould v. Mansfield, 103 Mass. 408. The obligation of such a contract is not impaired, though the consideration is to arise wholly or in part in the future, and though the person to whom the promise is made is under no mutual, binding obligation on his part. In Train v. Gold, 5 Pick. 380, 385, it was said by Mr. Justice Wilde that "if A. promises to B. to pay him a sum of money if he will do a particular act, and B. does the act, the promise thereupon becomes binding, although B., at the time of the promise, does not engage to do the act." This doctrine was quoted with approval in Gardner v. Webber, 17 Pick. 407, 413, and in Bornstein v. Lans, 104 Mass. 214, 216; and it is also affirmed in Goward v. Waters, 98 Mass. 596. In Cottage Street Church v. Kendall, 121 Mass. 528, 530, it was held that "where one promises to pay another a certain sum of money for doing a particular thing, which is to be done before the money is paid, and the promisee does the thing upon the faith of the promise, the promise, which was before but a mere revocable offer, thereby becomes a complete contract, upon a consideration moving from the promisee to the promisor; as in the ordinary case of the offer of a reward." See, also, Paige v. Parker, 8 Gray, 211, 213; Hubbard v. Coolidge, 1 Metc. (Mass.) 84; Todd v. Weber, 95 N. Y. 181, 192; Miller v. McKenzie, Id. 575, 579. It is therefore in law competent for a valid oral contract to be made to leave a certain sum of money by will to a particular person, in consideration of services thereafter to be rendered by the promisee to the promisor, provided such services are in fact thereafter rendered and accepted in pursuance of such contract, although the promisee did not bind himself in advance to render them. The performance of the consideration renders the contract binding, and gives a right of action upon it.

The objection mostly relied on by the defendant in the present case is that the auditor's report does not conclusively show such a contract, upon such a consideration. The auditor does not in terms, as he might properly have done, make any specific finding upon the question whether there was such a contract; but he states the facts in detail upon which he considered that question to rest, and leaves the determination of it to the court. The detailed facts stated by the auditor are not controverted, and the evidence upon which they were found is not before us. These facts are therefore to be taken as they stand, with no further explanation than is afforded by the circumstances. Looking at them in this manner, it is to be determined whether, on the whole, there is enough clearly and decisively to show that there was a contract, so that the judge who heard the case could not properly find the contrary; in other words, whether it appears there was a promise by the defendant's testator sufficiently definite to be enforced, and made with the understanding and intention that she would be legally bound thereby. A promise made with an understood intention that it is not to be legally binding, but only expressive of a present intention, is not a contract. Thruston v. Thornton, 1 Cush. 89; Chit. Comm. (11th Amer. Ed.) 12, 13.

Ordinarily, when there is a distinct promise for a sufficient consideration to do a par-

ticular thing, such promise is to be considered as a contract, unless there is something in the subject of the promise, or in the circumstances, to repel that assumption. But each case must be examined in the light of its own circumstances. In the present case it appears that the plaintiff was the brother-in-law of the defendant's testator, who was an unmarried woman; that he was early in the habit of advising with her about her business affairs, and not at the outset, if ever, in the expectation of being paid directly for his services. Nevertheless, there soon came to be a recognition on her part that the plaintiff's services were valuable in a money sense, and an intention to pay him for them in some form. By his advice, in 1866, she bought real estate on Chauncy street, and sold it again in 1868, at a profit of $10,000, the sale being advised and negotiated by him. Prior to the sale, she told him that, if such profit should be made, he should have one-half or a part of it. In fact, nothing was paid to him at this time, but it appears that she already contemplated putting the relation between them on a business basis; and shortly afterwards she told him that, if he would go on and act as her agent and adviser respecting her investments, she would make a will giving his wife $5,000; and, in the event of his wife's dying before him, she would then, by a new will or codicil, bequeath the legacy of $5,000 to him. He assented to this, and she made her will accordingly, bequeathing $5,000 to his wife. All this savored of a business arrangement. The sum mentioned was not greater than she had talked of paying to him, as a part of the profits on the sale of the Chauncy street real estate; indeed, not so great, for that was to be payable in 1868, while the bequest would not be payable till after her death. In 1868 another purchase was made of real estate, which was sold at a profit in 1869. In 1869 he admitted her to share in a purchase of real estate on Bedford street, which he had intended to make on his own account; the whole of the money was furnished by her; and in 1873 and 1874 the estate was sold at a profit of between $4,000 and $5,000, over and above the allowance to her of 7 per cent. interest on the purchase money, and this profit was equally divided between them. In 1876 a purchase was made of real estate on Mt. Vernon street. All of these purchases and sales were negotiated and advised by the plaintiff, and were made solely upon his judgment.

Such were the relations of the parties up to 1878. She had paid him nothing for his services; but her will, bequeathing $5,000 to his wife, had stood during all this time according to the understanding between them in 1868. Nothing had been said or done to vary the effect of her promise to bequeath the legacy of $5,000 to him, in the event of his wife's dying before him. In 1878 a new arrangement was made. The plaintiff's wife was fatally ill, and died in June of that year. A few weeks before her death, and when it had become apparent that she was fatally ill, the defendant's testator told the plaintiff that she desired to visit California, and a brother, who resided in Nevada, and, if he would accompany her there in the fall of that year, she, in consideration of his so accompanying her, and of the services he had rendered and might thereafter render her respecting the management of her property, would make a will giving him $5,000, and pay the expenses of the journey. The plaintiff assented thereto, and in May or June of that year she destroyed the will then existing, and executed a new one, wherein she gave to him a legacy of $5,000. According to the terms of what she had proposed in 1868, she was, by a new will or codicil, to bequeath to him the legacy of $5,000, in the event of which was now at hand, if he would go on and act as her agent and adviser respecting her investments. This he had done up to that time. She now proposed to him that she would make a will giving him $5,000 in consideration of his accompanying her to California and Nevada, and of the services he had rendered and might thereafter render to her. There was no stipulation binding him to render such services for any particular length of time in the future. The most that could fairly be implied is that he should render them as requested, and as long as he should be able to do so. Her proposition appears to have been intended as in the nature of business. The relations between the parties in the past had not been merely those of kindness and voluntary aid. The services which he had already rendered were substantial, and of a business character. They did not consist merely of advice, but he appears to have taken, to a large extent, the responsible charge of her business matters, and to have conducted them successfully. In addition to continuing such services, he was now asked to accompany her to California, which he did, in the fall of 1878 and the winter following,—a trip of several months. She proceeded at once to act upon his acceptance of her proposition, and made a new will accordingly. This new will remained unrevoked for two and a half years. In view of all these circumstances, it seems to us that, upon a just construction of the auditor's report, there is not enough to repel the ordinary assumption that the promise of the defendant's testatrix was a contract, which, when made, was intended and understood by both parties to be binding upon her.

The present case materially differs in its facts from Maddison v. Alderson, 8 App. Cas. 467, 5 Exch. Div. 293, and 7 Q. B. Div. 174. In that case doubt was expressed whether there was a contract, but the question was not finally determined. It depended in part upon a review of testimony, which is not fully reported. The terms of the alleged

promise and consideration differed from those in the case before us in certain respects, which might be found to be material. But the decision in that case turned finally upon the question whether, assuming a contract, it had been shown that there had been a part performance sufficient to take it out of the statute of frauds, and it was held in the negative.

Upon the auditor's report in the present case, we must now assume that the whole consideration stipulated for was performed by the plaintiff, and that it was sufficient. It is expressly found that his advice was valuable, and his management judicious, being given and rendered whenever requested or required; that he has received no compensation therefor, except as stated, respecting the division of the profits arising on the sale of the Bedford street real estate; that in the fall of 1878 and the winter following he accompanied her to Nevada and California, "and then and thereafter in all respects complied with and fulfilled the aforesaid agreement."

It is also suggested in behalf of the defendant that, even assuming a contract, it was not proved to be a contract to make a will which should not be revoked. But, looking at the language used in the light of the circumstances existing and preceding, so narrow a construction of the contract is not permissible. The substance of it was that she would bequeath to him the sum mentioned. An instrument effectual as a will was clearly contemplated; otherwise the promise was but illusory.

The result is, in the opinion of a majority of the court, that the plaintiff is entitled to judgment for the sum of $5,000, and interest, in addition to the amount found at the trial. The defendant's exceptions are overruled, and the plaintiff's exceptions are sustained. Ordered accordingly.

ROQUET v. ELDRIDGE et al

(118 Ind. 147, 20 N. E. Rep. 733.)

Supreme Court of Indiana. April 2, 1889.

Appeal from circuit court, Vigo county; Joshua Jump, Special Judge.

Action by Hugh D. Roquet, administrator c. t. a., etc., of William B. Eldridge, deceased, against William G. Eldridge and others, heirs, devisees, and legatees of said decedent, to settle the estate. From a judgment declaring certain legacies adeemed, the legatees, William G. Eldridge and others, appeal.

C. F. McNutt and Stimson & Stimson, for appellants. S. C. Davis and S. B. Davis, for appellee.

MITCHELL, J. After the issues were joined in the court below, the judgment appealed from was rendered upon an agreed statement of facts. The questions for decision arise out of the facts agreed upon, which, so far as they are material, are as follows: In November, 1863, William B. Eldridge executed his last will and testament, by the second clause of which he devised to his sons Hamilton Eldridge and Abram A. Eldridge his homestead farm, to be held by them jointly. To his daughters, Amanda and Cynthia, and to his sons William G. and Robert B., he bequeathed $500 each, to be paid in cash, which sums were to be taken and considered as in full of each of their respective interests in the homestead farm. The will contained a recital, the effect of which was that the devises and bequests thus made were to be considered as the disposition of the homestead farm among the testator's children, and were not to affect any other interest or estate. Afterwards, and during the life-time of the testator, his sons Hamilton and Abram A. Eldridge, devisees of the homestead farm, furnished their father $2,000 in money, out of which he paid to each of the four legatees above named the sum of $500, and received from each a receipt of the following tenor, viz.: "Received of William B. Eldridge, $500, in consideration of my interest in his homestead farm, corresponding with his last will." One of the daughters was a married woman at the time she received the money and executed the receipt therefor, as above. The testator died in February, 1881, having had but the six children named above. He had only about $500 in value of personal property, which, with the farm above mentioned, valued at about $6,400, comprised his whole estate.

On behalf of the administrator with the will annexed, it is insisted that the sums paid to the several legatees by the testator in his life-time constituted a satisfaction or ademption of the legacies provided by the will, while the legatees insist that the legacies are specific or demonstrative in their character, and that since it does not appear that the money paid them was raised out of, or derived from, the land comprised in the homestead farm, the payment did not work an ademption of the sums bequeathed by the will. The legacies were, however, neither specific nor demonstrative. Speaking upon the subject of specific legacies, the lord chancellor in Fielding v. Preston, 1 De Gex & J. 438, said: "There have been attempts in various cases to determine the meaning of a specific legacy, and what is the test whereby such legacies may be distinguished from general bequests. There are objections to most of the definitions, but I think we are quite safe in treating that as a specific bequest which the testator directs to be enjoyed in specie." A legacy is specific when it can be satisfied only by the transfer or delivery of some particular portion of or article belonging to the estate, which the testator intended should be transferred to the legatee in specie. 2 Redf. Wills, 122; 2 Rap. & L. Law Dict. tit. "Legacy." Lord Hardwicke said, in Ellis v. Walker, Amb. 309: "The court leans against considering legacies as specific." Unless, therefore, it appears that the money or thing to be transferred is so clearly identified and inherently described as that the legatee can say to the executor that all or a portion of the very fund or property in question was transferred by the will, the bequest will not be regarded as specific. Sidebotham v. Watson, 11 Hare, 170.

While it is true the doctrine of ademption does not apply to specific devises or legacies, as a general rule, (Swails v. Swails, 98 Ind. 511,) yet, even in case of a specific devise or bequest, if the very thing devised or bequeathed had been transferred to the devisee or legatee in the life-time of the testator, so that there would be nothing left for the will to operate upon, an effectual ademption would have taken place.

Accepting the foregoing as the true criterion of a specific legacy, it becomes clear that the bequest of $500 in cash to each of the sons and daughters named, and the further direction that this was to be considered in full of their respective interests in the homestead farm, and that the devises and bequests previously made were not to affect any other interest or estate, did not constitute a specific bequest of any portion of the testator's estate to be transferred in specie. Neither did the legacies belong to that intermediate class which are sometimes denominated "demonstrative," and which are peculiar, in that they are not ordinarily liable to be adeemed or abated by an advancement made in a general way. "A demonstrative legacy is a bequest of a sum of money payable out of a particular fund or thing. It is a pecuniary legacy, 'given generally, but with a demonstration of a particular fund as the source of its payment.'

It is therefore equivalent to, or in the nature of, a devise or bequest of so much or such a part of the fund or thing specified." Glass v. Dunn, 17 Ohio St. 413; 5 Amer. & Eng. Enc. Law, 541; 2 Redf. Wills, 140, 141.

While it is quite true the will plainly indicates that the sums bequeathed to the sons and daughters named were to be taken in full of their respective interests in the homestead farm, which was specifically devised to the two other sons named in the will, there is no direction that the bequests are to be paid out of any particular fund, or that the fund out of which payment is to be made is to be derived from the rents, issues, or profits of the land, or that the legatees are to have any interest, as such, in the land itself. The implication is that the bequests were chargeable against the devisees of the land, or, at most, that they should be chargeable upon the farm. Moreover, since it appears by the agreed statement of facts that the sons to whom the homestead farm was devised furnished the money with which the legacies were paid, it is not apparent why this should not be held to satisfy the bequests, even though it should be conceded that they were payable out of the land. If thus payable, it must have been contemplated that the amount should constitute a charge upon the farm, to be removed by the devisees at some time, by paying the several amounts to the legatees. We know of no authority which would justify a holding that a general legacy which is payable out of a particular fund, or in a specified manner, may not be satisfied, in case the legatee receives the amount thereof from the testator in his lifetime, out of the very fund devoted to the payment of the bequest, provided it clearly appears that the amount was given and received with the intention that it should work an ademption of the legacy. If we assume that the homestead farm was to be the source from which the fund was to be derived, out of which the legacies were payable, the conclusion follows that the devisees of the farm were to take it subject to the burden of paying the legacies after the testator's death. Having furnished the money to the testator during his life-time with which to pay off the bequests, and the money having been paid to the legatees and received by them for that purpose, the legacies are effectually satisfied from the very source contemplated by the will. An ademption results where a parent or other person standing in loco parentis, after having made a bequest, gives a portion to the child to whom the bequest is made, equal to or in excess of the amount bequeathed, the portion given and the legacy being ejusdem generis. Weston v. Johnson, 48 Ind. 1. Within the rule thus stated the legacies were adeemed.

Whether a legacy be specific or demonstrative, if it clearly appears that the particular thing or fund bequeathed has been irrevocably delivered over to the legatee in the lifetime of the testator, the legacy is adeemed because the testator's title to the thing or fund has been divested by the gift, and has become vested in the legatee during the lifetime of the testator. Clayton v. Akin, 38 Ga. 320.

The fact that one of the legatees was a married woman at the time she received the money from her father and signed the receipt is of no consequence. The receipt of the money from the source contemplated by the will satisfied the legacy by operation of law, and not by force of any contract. Money paid to a married woman in ademption of a legacy produces the same legal result as if she were unmarried.

There was no error. The judgment is affirmed, with costs.

WYCKOFF v. PERRINE'S EX'RS.

(37 N. J. Eq. 118.)

Court of Chancery of New Jersey. May Term, 1883.

On demurrer to bill.

Bill filed by Elizabeth Wyckoff against the executors, etc., of Matthias M. Perrine, deceased, to recover legacy.

Barker Gummere, for demurrants. Alan H. Strong, for complainant.

VAN FLEET, V. C. This is a suit for a legacy. The defendants have demurred to the complainant's bill, denying that on the case made by it she is entitled to relief. The complainant is a daughter of Matthias M. Perrine, who died testate in the month of October, 1878. She grounds her right of action on the following clause of her father's will: "Whereas, my son-in-law David B. Wyckoff borrowed of me the sum of twenty-three hundred dollars, which sum I loaned him on interest, now, it is my will, in order to do equal justice to and between my children, that the same shall be considered and taken as so much of the share of his wife, Elizabeth, of my estate; and I give and bequeath to my said daughter Elizabeth the further sum of five hundred dollars, which is to be in full of her share of my estate; and I make no further provisions for the said Elizabeth Wyckoff in this my last will and testament." The $500 have been paid. The debt of David B. Wyckoff to the testator was evidenced by a promissory note, dated April 1, 1874, and payable one year after date. A petition in bankruptcy was filed against Wyckoff on the 3d day of May, 1876, on which he was subsequently, in the language of the bill, in due course of law, adjudged a bankrupt. He was discharged on the 2d of April, 1878. The testator proved his debt, and received two dividends out of the bankrupt assets,—the first June 15, 1877, of $384.50; and the second March 14, 1878, of $123.62,—making a total of $508.12. The will bears date May 28, 1877. It was executed, it will be observed, more than a year after the commencement of the proceedings in bankruptcy, and less than three weeks before the testator received the first dividend.

The complainant contends that the legacy given by the clause under consideration is not specific, but demonstrative; in other words, properly construed, the clause means this: that she is, under any circumstances, to have a legacy of $2,300, the reference to the debt of her husband being intended simply to indicate the fund which should be applied primarily to its payment. Such a construction would, I think, not only do violence to the language used by the testator, but would attribute to him a purpose certainly not expressed, and probably never entertained. No gift is made by express words, but an intention to give is very clearly expressed by words of direction or command.

There can be no doubt that the thing which was before the testator's mind when he made his will, as the subject of the gift to the complainant, was a debt. He tells who the debtor was,—his son-in-law David Wyckoff; how he incurred the debt,—for borrowed money; the amount of the debt,—$2,300; the terms on which it was held,—loaned on interest; and then he says: "Now, it is my will, in order to do equal justice to and between my children, that the same [that is the debt due to me from my son-in-law] shall be considered and taken as so much of the share of his wife, Elizabeth, of my estate."

In construing a will, the court must always have regard to the circumstances, situation, and surroundings of the testator. At the time this will was made the son-in-law had been adjudged a bankrupt. The testator knew it. He knew, also, that the greater part of his debt was hopelessly lost; and for that reason, unquestionably, he thought it was his duty, in order that justice might be done to all his children, to treat the debt of his son-in-law as an advancement to his daughter, and to effect that purpose he gave her the debt. He intended to say by the provision under consideration, as I think he has quite clearly said: "I want each of my children to have an equal share of my estate. The husband of my daughter Elizabeth borrowed of me, some time ago, $2,300, which he cannot repay. In order to be just to my other children, I give Elizabeth the debt I hold against her husband, as part of her share, and the further sum of five hundred dollars, but she is to have nothing more." In deciding whether a legacy is specific or general, the intention of the testator must control, as it must the decision of every other question involving the construction of wills. There is no technical, arbitrary rule requiring the use of particular words or expressions to make a bequest specific. Such intention may be manifested either by clear words, or by the general scope and texture of the instrument; but in the latter case, in the language of Lord Eldon, the inference should rest upon a strong, solid, and rational interpretation of the will.

The rule of construction to be observed in such cases is thus stated by Roper: "A court of equity leans to the consideration that all bequests are general; it therefore requires expressions actually bequeathing the identical debt, or such reference to it, appearing upon a strong, solid, and rational interpretation of the will, as to raise a plain inference that the debt was the exclusive subject intended to be given by the testator to the legatee." 1 Rop. Leg. 234. In Norris v. Thompson, 16 N. J. Eq. 218, Chancellor Green held that, in order to make a legacy specific, there must be something on the face of the

will to individuate the thing given, or some form of expression must be used which clearly indicates a purpose on the part of the testator to give a specific thing, and nothing else. Here just such a condition of affairs exists. The testator has marked out, with great clearness and precision, just what the complainant is to take,—she is to have the debt of her husband and $500; and then he deciares she is to have nothing more. That such was his intention seems to me to be so obvious as to leave the complainant without any substantial ground upon which to rest the opposite contention. The words of exclusion must, I think, be regarded as furnishing an almost infallible test of the meaning of the testator.

The case involves another question: Has the legacy been adeemed? It is certain the debt which was the subject of the legacy did not exist at the time of the testator's death. So much of it as had not been paid to the testator out of the bankrupt's assets was extinguished by his discharge in bankruptcy, so that the subject of the gift did not exist at the testator's death. Some of the earlier decisions made a distinction between the effect of a voluntary payment and a compulsory payment of a debt, which was the subject of a specific legacy, in adeeming the legacy. They held that, where the debtor came forward of his own volition, and without solicitation, and paid the debt in the testator's life-time, the testator's acceptance of the money, under such circumstances, did not indicate an intention to take back the legacy; but if he, of his own will, and in the absence of any other apparent reason than that he wanted the debt paid, constrained the debtor to pay, then his act was regarded as evincing an intention to adeem the legacy. This distinction was recognized by the supreme court in Stout v. Hart, 7 N. J. Law, 414, 424. It was there said: "A voluntary payment is not an ademption, because accepting the money when tendered does not imply any alteration in the intentions of the testator; but when the testator compels payment this fact may or may not amount to an ademption, according to circumstances." The cases adopting this distinction as the rule of judgment will be found collected in 2 White & T. Lead. Cas. Eq. (4th Amer. Ed.) 624. The distinction, however, no longer prevails. The modern decisions, both of this country and England, with almost perfect unanimity, repudiate it as unsound and fallacious. The rule now generally recognized as an accurate statement of the law on this subject is that laid down by Lord Thurlow in Humphreys v. Humphreys, 2 Cox, Ch. 185. He said: "The only rule to be adhered to is 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; and the idea of discussing what were the particular motives and intentions of the testator in destroying the subject of the bequest would be productive of endless uncertainty and confusion." Chief Justice Black states the same rule, as follows: "If a thing bequeathed in a will, by such description as to distinguish it from all other things, be disposed of, so that it does not remain at the testator's death, or if it be so changed that it cannot be called the same thing, the bequest is gone. If such a legacy be of a debt, payment necessarily makes an end of it. The legatee is entitled to the very thing bequeathed, if it be possible for the executor to give it to him, but, if not, he cannot have money in the place of it. This results from an inflexible rule of law applied to the mere fact that the thing bequeathed does not exist, and it is not founded on any presumed intention of the testator." Hoke v. Herman, 21 Pa. St. 301, 305. The cases repudiating the distinction alluded to are too numerous to be cited. They will be found referred to in 2 Williams, Ex'rs (6th Amer. Ed.) 1323; 2 White & T. Lead. Cas. Eq. (4th Amer. Ed.) 623, 668; Theob. Wills, 121; Redf. Wills, 423. The question now is one of identity, and not of intention, as gathered from matters extrinsic the will. In such cases the test is, did the subject of the gift exist in specie at the testator's death? If it did, the legatee is entitled to it against all persons except creditors; if it did not, he is not. Trying the complainant's right to relief by this principle, it is clear that judgment must be awarded against her.

The demurrer must be sustained, with costs.

In MULLINS v. SMITH, 1 Drew. & S. 204, Kindersley, V. C., says: "The points of difference between specific and demonstrative legacies are these: A specific legacy is not liable to abatement for the payment of debts, but a demonstrative legacy is liable to abate when it becomes a general legacy by reason of the failure of the fund out of which it is payable. A specific legacy is liable to ademption, but a demonstrative legacy is not. A specific legacy, if of stock, carries with it the dividends which accrue from the death of the testator, while a demonstrative legacy does not carry interest from the testator's death."

ROBERTSON et ux. v. BROADBENT et al.

(L. R. 8 App. Cas. 812.)

House of Lords. July 23, 1883.

Appeal from the court of appeals, (20 Ch. Div. 676.)

Henry Ovey, by his will dated June 1, 1881, appointed John Barrow and John Herbert Greenhalgh (two of the respondents) executors and trustees; and after directing his executors to pay all his just debts, and funeral and testamentary expenses, and giving to various individuals and charities various sums, amounting to £48,600, proceeded thus: "I give all my personal estate and effects of which I shall die possessed, and which shall not consist of money or securities for money, unto the said Elizabeth Anne Robertson, for her own use and benefit absolutely. I give and devise all the rest, residue, and remainder of my estate, both real and personal, whatsoever and wheresoever, to the said John Barrow and John Herbert Greenhalgh; upon trust thereout, in the first place, to pay to Alfred Greenhalgh, of 30 Holborn, London, the sum of five hundred pounds sterling; and to R. L. Bloomfield, of Brighton, aforesaid, secretary to the said Tindal Robertson, the sum of one hundred pounds sterling for the use of his school in such manner as he shall think fit, in his uncontrolled discretion; and as to the residue thereof, or such part or parts thereof as may be lawfully appropriated to the purpose, for such one or more or any hospital of a charitable nature, and in such proportions as they, in their uncontrolled discretion, shall think fit. I direct that all the legacies given by this, my will, shall be paid free of legacy duty; and also that the aforesaid money legacies for charitable purposes shall be paid exclusively out of such part of my personal estate as may lawfully be appropriated to such purposes, and preferably to any other payment thereout." The testator having died, this action was brought by Broadbent and others of the respondents against the executors for the administration of his real and personal estate. The pecuniary legacies amounted to £49,200, of which £7,500 were in favor of charitable institutions. The personal estate was valued under £39,660, and the real estate at about £20,000. Upon a summons for the redelivery to the executors of certain chattels which had been given up to the appellant, Elizabeth Anne Robertson, Fry, J., being of opinion that the legacy to her of all the testator's personal estate, and effects of which he should die possessed, and which should not consist of money or securities for money, was a specific legacy, made no order, except as to costs. On appeal, the court (Jessel, M. R., and Lindley and Holker, L. JJ., 20 Ch. Div. 676) made an order, May 3, 1882, declaring, inter alia, that the legacy was not specific, and that all the pecuniary legacies were payable in full before Mrs. Robertson could be entitled to anything under the bequest to her, without prejudice to any question, as between her and the testator's heir at law, as to the liability of the real estate to the payment of such pecuniary legacies in priority to the property bequeathed to her.

Mr. Macnaghten, Q. C., (Decimus Sturges, with him,) for appellants. Mr. Fischer, Q. C., (Mr. Stirling, with him,) for the pecuniary legatees, respondents. Cecil Russell, (with him, Sir H. James, A. G.,) for the Attorney General, respondent. Borthwick, for the executors, respondents, was not heard.

SELBORNE, L. C. My lords, the question on this appeal is whether the general personal estate of the testator, Henry Ovey, given to the appellant Mrs. Robertson, is exempt from or subject to the payment of pecuniary legacies. The general rule of law as to pecuniary legacies (in the absence of any sufficient indication of a contrary intention) is that they are payable by the legal personal representatives of the testator (in whom the whole personal estate vests by law) out of the personal estate not specifically bequeathed. The presumption is that the testator intends them to be so paid. Unless charged upon it by the will, they are not payable out of the real estate. The principle of the exemption of personal estate specifically bequeathed is that it is necessary to give effect to the intention apparent by the gift. If the bequest is of a particular chattel, such as a horse or ship, it is manifest that the testator intended the thing to pass unconditionally, and in statu quo, to the legatee; which could not be if it were subject to the payment of funeral and testamentary expenses, debts, and pecuniary legacies. As against creditors, the testator cannot wholly release it from liability for his debts; but, as against all persons taking benefits under his will, he may. The same principle applies to everything which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed or taken in the state and condition indicated by that description, separates, in favor of a particular legatee, from the general mass of his personal estate,—the fund out of which pecuniary legacies are, in the ordinary course, payable.

This reasoning does not apply to a gift, in general terms, of the whole personal estate to which a testator may be entitled at the time of his death. 1 Rop. Leg. (4th Ed.) pp. 242, 243; Fairer v. Park, 3 Ch. Div. 312; Ouseley v. Anstruther, 10 Beav. 453. It is, of course, in the power of any testator, if he so pleases, to direct that his pecuniary legacies (and also his debts, etc., if he sufficiently provides for their payment) shall be exclusively charged on his real estate, or on any particular property, real or personal, which he may think fit. Lance v. Aglionby, 27 Beav. 65; Jones v. Bruce, 11 Sim. 221, 228.

But an intention to do so must be discoverable from the terms of his will. In the cases last cited, such an intention was sufficiently clear without any aid from the presumption applicable to specific legacies as such. It is true that in Jones v. Bruce, 11 Sim. 221, 228, Sir Lancelot Shadwell said that the gift of the whole personal estate was as specific as if the testator "had enumerated every chattel, and then said, 'I give them to my wife.'" But that dictum was not necessary for the decision; nor can I reconcile it (if his honor really intended to say that this, without more, would have been enough to exonerate the personalty, in the absence of any other provision for the large pecuniary legacies there in question) with either principle or authority. If that gift had been to the wife for life, with remainder over, the personal estate must have been converted into money and invested, and she would not have been entitled to enjoy it in specie, under the doctrine of Howe v. Earl of Dartmouth, 7 Ves. 137, and other cases of that class.

In the present will there is nothing from which an intention to exempt the general personal estate bequeathed to Mrs. Robertson from its ordinary burdens, or to give it the quality (in that respect) of a specific bequest, can be inferred, unless it be one or the other, or the combination, of these two circumstances: (1) That the "money, and securities for money," of which the testator might die possessed, are excepted from the gift; and (2) that it is followed by another gift of "all the rest, residue, and remainder" of the testator's estate, "both real and personal," (to the persons who are appointed executors at the outset of the will,) upon trust, to pay thereout two legacies, and to dispose of the rest for charitable purposes. The gift in question to Mrs. Robertson is preceded, first, by a direction to the executors to pay all the testator's debts and funeral and testamentary expenses as soon as conveniently may be after his death, and then by a great number of pecuniary legacies, amounting together to £48,600, of which £7,500 are for charitable objects, and £2,000 for Mrs. Robertson herself. The testator has nowhere said that his funeral and testamentary expenses and debts, or his pecuniary legacies, are to be paid in any other way than that in which they would be payable according to the ordinary course of law. It is contended that this consequence results from the residuary form of the gift which follows, as compared with the gift to Mrs. Robertson, which is not in form residuary; "residue" being that which remains of the estate after all necessary deductions, and after satisfying all prior gifts. The court of appeal appears to have thought that the excepted personalty would be primarily liable to the funeral and testamentary expenses, debts, and pecuniary legacies; but they decided that there was no exemption from those charges of the personalty given to Mrs. Robertson. As to the real estate nothing was determined. With this view I agree. I think that the exception of something specifically described from a gift (otherwise general) of the personal estate cannot make that gift more specific, in the proper sense of the term, than it would be if there were no such exception. It is indisputable that this testator intended his pecuniary legacies to be paid in full, free of legacy duty; and he expressly directed that such of them as were for charitable purposes should be paid exclusively "out of such part of his personal estate as might lawfully be appropriated to such purposes, and preferably to any other payment thereout." These words, in their natural sense, extend to every part of his personal estate which might lawfully be so appropriated, whether included or not included in the gift to Mrs. Robertson; and give the charitable legacies, as against the whole pure personalty, a preference over every other payment, and therefore over any payment to Mrs. Robertson. This could not have been disputed if the whole personal estate had been given to Mrs. Robertson. But the fact that "money," (which might and probably would, at the time of the testator's death, be quite insufficient,) and "securities for money," (which might be mortgages, or other securities savoring of realty,) are excepted, cannot reduce the right of the charitable legatees (in the event of Mrs. Robertson surviving the testator, as she did) to a charge upon such, if any, of those excepted things only as might consist of pure personalty. A gift which is subject to legacies, so far as relates to the charitable legatees, cannot, under the terms of this will, have a different character as to the other pecuniary legacies.

The order appealed from is, in my opinion, right, and I move your lordships to dismiss this appeal, with costs.

Lord BLACKBURN. My lords, at the close of the argument in this case I had not much doubt that the order appealed against was right, and that the appeal must be dismissed; but I was glad to have time to look at and consider the authorities cited, as the course of my practice as a barrister, and afterwards as a judge in a court of common law, did not make me familiar with this branch of law, which was principally administered in the courts of equity. A testator cannot deprive his creditors of their right to be paid their debts out of his assets, but, subject to their rights, he may dispose of the surplus as he pleases. I do not complicate the question by saying anything as to real estate. I suppose the case of a man having personal property only, such as chattels real, ships, stocks, goods, and money. If he, by his will, leaves legacies, the executor, who takes all the personal estate, must first pay the debts and other charges on the

testator's estate, and then, as far as he has assets, pay the legacies. If he has enough to do so in full, no question arises. But if, either from the testator having overestimated his pecuniary means, or having underestimated his liabilities, there is not enough to pay the whole in full, all the legatees cannot be paid as much as the testator intended; and the question arises whether some of the legacies are to bear the loss, before the others are abated at all, and then the others, if there is still a deficiency, are to be abated ratably. Sometimes a testator foresees this possibility of a deficiency, and provides for it. This was done by codicil in Farmer v. Mills, 4 Russ. 86. When a testator does so, there can be no doubt about it; his expressed intention governs. Sometimes, after giving legacies to a large amount, he leaves the residue to some one. It does not need authority to show that in such a case the residuary legatee can take nothing until all the other legacies are paid in full, for till then there is no residue. But, in the absence of something to show an intention on the part of a testator to the contrary, he must be taken to intend all his legacies to be paid in full; and, if that is impossible, all are to be reduced ratably, unless there is something to show the intention of the testator that one or more of the legacies are to be paid in full, though the consequence may be that the others are to be the more reduced, or perhaps not paid at all.

Let us suppose that a testator leaves his library, such as it should be at the time of his death, to A., £10,000 to B., and the residue of his personal estate to C., very probably believing, perhaps even indicating on the face of his will, that he thought his library would be worth £10,000, and the whole of his personal estate, including all library, worth £50,000; and owing either to miscalculation on his part, or to unforeseen disasters, his personal estate, including his library, turns out, after all debts and charges are paid, to be £19,000 only. No one can doubt that the testator, if alive, would remodel his will, and give something to C., perhaps burdening the library with a payment to C., and reducing the legacy to B., so as to get the means of giving something to C. But he is dead, and the court cannot make a will for him. C., hard as it may seem, can get nothing under the bequest of the residue, for there is no residue; and it is settled by decisions, and I think, if it was res integra, I should hold, that, as the intention on the face of the will is that A. should have the library, as a specific thing, such as it should be at the testator's death, he must have it, whether it is of more or less value than the testator supposed, and that B. can only get the £9,000. It is, as I think, on this ground, and on this principle, that, where there is a deficiency, the first to suffer is the residuary legatee. Then, if there still be a deficiency, the general legatees, and then the specific legatees. I think that, in considering the case below, more has been said as to the definition of what is a specific bequest, as if it were a technical question, than was quite requisite for the decision of the case. I do not know, if it were necessary to give a definition of a "specific legacy," that any would come nearer to my idea than what has just been said by the lord chancellor in this case,—"something which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed in the state and condition indicated by that description, separates, in favor of a particular legatee, from the general mass of his personal estate." I do not, however, like to bind myself even to saying that this is a precise definition. I think the real question is, what is the true construction of the will of this testator, by which, after giving large pecuniary legacies, some to charities and some to individuals, among whom is Mrs. Robertson herself, of £2,000,—though I do not think that material,—he proceeds thus: [His lordship read the extract from the will set out ante, p. 71.]

I think this is really a bequest of all the residue of his estate to Mrs. Robertson and the two trustees, the trustees to take the real estate, and the money, and securities for money, and Mrs. Robertson all the rest of the personal estate; and that there is nothing on the face of the will to indicate any intention that either she or the trustees were to take that property in the state and condition in which it should be at his death.

It was argued that the testator probably was thinking of the furniture, farm stock, etc., at Royden Lodge, which formed the bulk of his personal estate not consisting of money or securities for money, and that he really meant to give her those, to be enjoyed in the same state and condition in which he left them. It is possible he did, but he has not said so in his will. He has, no doubt, left her those, and his wine in London, and a steam-launch, and two boats, and a leasehold stable in London, which it is less probable that he meant to be enjoyed in the same state and condition in which he left them. But it all comes round to the same thing. The court cannot make a will for the testator; it must construe the will he has made. And I think that the bequest of the residue of his effects which shall not consist of money or securities for money to Mrs. Robertson, and the residue of his personal estate to the two trustees, is one residuary bequest to two persons.

I have spoken as if there had been no real estate, though, in fact, there was a considerable real estate. I have done so because, the heir not being before the court, it cannot now decide what portion of that real estate is available to pay the legacies, and ought to be so applied in relief of this residuary be-

quest. It may possibly be that the solution of the questions between Mrs. Robertson and those entitled to the real estate, which are reserved by the order, will render the present decision of no practical consequence. It is possible that it will leave it of great consequence. All I now say is that I think it rightly decided by the order appealed against.

Lord FITZ GERALD. My lords, I concur in the judgment of the lord chancellor, and adopt his reasons. The gift is to be read as a bequest to the trustees of the money and securities for money of which the testator should die possessed, and of all the residue of his personal estate and effects to Mrs. Robertson for her own use and benefit, absolutely. The gift is not specific, within the definition so carefully expressed by the lord chancellor, and there is nothing in the will to indicate any intention of the testator to exempt the subject of that bequest from its ordinary liabilities. There is much in the will leading to a contrary conclusion, and which the lord chancellor has already pointed out. I think the order appealed from is correct.

Order appealed from affirmed, and appeal dismissed, with costs.

DUNCAN v. INHABITANTS OF TOWNSHIP OF FRANKLIN.

(43 N. J. Eq. 143, 10 Atl. 546.)

Prerogative Court of New Jersey. May Term, 1887.

Appeal from orphans' court, Essex county; Kirkpatrick, Johnson, and Leedwith, Judges.

James M. C. Morrow, for appellant. John A. Miller, for appellees.

McGILL, Ordinary. Jane D. Poineer, by her will, dated September 27, 1875, and duly proved by the executors in it named, before the surrogate of Essex county, on April 6, 1882, after providing for the payment of her debts and funeral expenses, appointed the appellant, Henry B. Duncan, and one Hiram Van Winkle, executors of the will, and bequeathed several legacies, and among them one to the said Henry B. Duncan, in the following language: "Eighth. I give and bequeath to Henry Benson Duncan, for his services, (in assisting me at different times,) the sum of two thousand dollars." It appeared by the executors' account, filed with the surrogate on July 20, 1886, that the estate was insufficient to pay all the legacies in full, and also that the executors asked allowance for the payment of the legacy to Henry Benson Duncan by an item of discharge, as follows: "Paid Henry B. Duncan legacy under the will, for services rendered deceased in her life-time, as stated in the will $2,000." To this item an exception was filed. The executors did not offer proof that services had been in fact rendered by Mr. Duncan to the testatrix, for which an obligation to pay existed at her death, but relied entirely upon the will to justify their payment. The exception was sustained by the order of the orphans' court, and from such order this appeal is taken.

The established rule is that where general legatees are volunteers, taking of the testator's bounty, and there is nothing in the will to indicate that one shall be paid before another, their legacies must abate proportionately, in case of a deficiency of assets; but where a general legacy is sustained by a valuable consideration, such as the relinquishment of a debt or of a claim of dower, and the right to the claim, constituting the consideration, subsists at the testator's death, the legatee is entitled to the full payment of his legacy in preference to other general legatees, who take merely of the testator's bounty. Williams, Ex'rs, 1365; 1 Rop. Leg. 432; Schouler, Ex'rs, § 490, note; 2 Redf. Wills, 452.

The burden of proving that a general legacy is entitled to priority is upon him who asserts it, and the proof must be clear, conclusive, and unequivocal. Titus' Adm'r v. Titus, 26 N. J. Eq. 117; Shepherd v. Guernsey, 9 Paige, 357.

There is nothing in this bequest to Mr. Duncan, or in the will, to indicate that the testatrix intended that this bequest should be paid before the other legacies. The expression, "for his services, (in assisting me at different times,)" does not, standing alone, import an indebtedness from her to the legatee, for which payment may be exacted by process of law. For aught that appears to the contrary, the services may have been rendered gratuitously, and the legacy may have been given in grateful recognition of them. That the legacy was given because of a sense of moral obligation, or as compensation for services, or other favors rendered as a mere voluntary courtesy, will not, if no legal obligation to pay exist at the death of the testatrix, constitute such a valuable consideration as to entitle the legacy to priority in payment. Coppin v. Coppin, 2 P. Wms. 291; Turner v. Martin, 7 De Gex, M. & G. 429; Towle v. Swasey, 106 Mass. 100.

More than six years elapsed between the making of the will and the death of the testatrix, yet no evidence was offered to show that, if a legal indebtedness to Mr. Duncan existed at the making of the will, its payment was enforceable when the testatrix died. The burden of proof, which was upon the executors, was not discharged by the simple production of the will. As the case is presented, no error in the order is shown.

The order will therefore be affirmed, with costs.

TINDALL'S EX'RS v. TINDALL.

(24 N. J. Eq. 512.)

Court of Errors and Appeals of New Jersey. June Term, 1873.

Appeal from the court of chancery.

Bill in chancery by William Tindall against John Manning and Edward Paxton, executors, etc., of Aaron Tindall, deceased, for one eighth part of the sum of $5,000, a lapsed legacy to testator's wife. Testator, after the above bequest to his wife, and several other legacies, bequeathed as follows: "I give and bequeath whatever of my property shall remain after payment of the above, and due settlement of all my business, to my two friends, John H. Manning and Edward Paxton." He appointed Manning and Paxton executors. Testator left no issue, but had eight brothers and sisters. Two of these (of whom the complainant is one) survived him. The other six died before him. All left children living at the death of the testator. The defendant Paxton is one of these children. The case was argued before the chancellor upon bill and answer, who found for plaintiff, and defendants appealed.

I. W. Scudder, for appellants. J. R. Emery, for respondent.

DALRIMPLE, J. The question in this case is whether a certain lapsed legacy of $5,000, given in and by the will of Aaron Tindall, deceased, falls into the residuum of the estate and goes to the residuary legatees, or remains undisposed of, and is to be distributed among the next of kin of the testator. The will, after directing the payment of debts and funeral expenses, and the sale and disposition of all testator's property, real and personal, which he might own at the time of his decease, and the collection of the moneys due him, gives to his wife, Ann, in lieu of her right of dower at common law, the said legacy of $5,000. After certain general legacies and bequests, the residuum of the estate is disposed of as follows. "I give and bequeath whatever of my property shall remain after payment of the above, and due settlement of all my business, to my two friends, John H. Manning, to him, his heirs and assigns, and to Edward Paxton, to him, his heirs and assigns." The residuary legatees are appointed executors. The testator having survived his wife, the legacy of $5,000 to her lapsed. This suit is brought by one of the next of kin of the testator, to recover a share of the legacy which has thus lapsed, and his right to recover is put upon the ground that, as to the $5,000 in question, the testator died intestate.

The rule applicable to the question to be solved, as stated in the text-books, as well as in many adjudged cases, is that the residuary legatee is entitled as well to a residue caused by a lapsed legacy, or an invalid or illegal disposition, as to what remains after payment of debts and legacies. The only exception to the rule is that, where the words used show an intention on the part of the testator to exclude from the operation of the residuary clause certain portions of the estate, such intention, as gathered from the whole will, must not be defeated. Or the rule embracing the exception, as stated in some of the books, is that the residuary legatee must be a legatee of the residue generally, and not partially so only. The rule is so firmly established that citation of authority in its support is hardly necessary. I will, however, refer to the following text-books and adjudged cases: 2 Rop. Leg. 1672; 2 Williams, Ex'rs, 1313; Easum v. Appleford, 5 Mylne & C. 56; King v. Woodhull, 3 Edw. Ch. 86; James v. James, 4 Paige, 117; Banks v. Phelan, 4 Barb. 90; Cambridge v. Rous, 8 Ves. 25; 2 Redf. Wills, 442.

The learned chancellor, in the court below, held that the case now before us came within the exception to the general rule, because the estate given was that which should remain after payment of the legacies before given. But I cannot see that this form of expression in any wise limits or restricts the extent of the gift. The clause would have had precisely the same meaning and effect if it had been, in terms, of the residue of the estate. All that the testator could give to his residuary legatees was what remained of his estate after payment of his particular debts and legacies. The legal effect is precisely the same, whether the one form or the other is adopted. The chancellor bases his opinion upon what he conceives to be the rule as laid down in 2 Williams, Ex'rs, p. 1315, and in 2 Rop. Leg. pp. 1679, 1682. He also cites the case of Attorney General v. Johnstone, Amb. 577. Exactly what Mr. Williams states the true rule to be is as follows: "The testator may, by the terms of the bequest, narrow the title of the residuary legatee, so as to exclude him from lapsed legacies; as when it appears to be the intention of the testator that the residuary legatee should have only what remained after the payment of the legacies." Mr. Roper states the exception to the general rule in the following language: "When the legatee is not generally, but only partially, residuary legatee, he will not, in that character, be entitled to any benefit from lapses, though very special words are required to take a bequest of the residue out of the general rule; as, first, when it appears the testator intended the residuary legatee should have only what remained after the payment of legacies." If these authors intend to say (which, to my mind, is by no means clear) that when the clause of the will giving the residuum of the estate contains, or has annexed to it, the words, "after payment of debts and legacies," the settled rule of construction is that lapsed legacies are not embraced, but that as to them the testator is to be held as having died intestate I cannot yield my assent to the proposition. The cases cited by the authors referred to do not support such a doc-

trine, while there are several well-considered cases to the contrary. Vice-Chancellor Wood, in the case of Bernard v. Minshull, Johns. Eng. Ch. 276, 299, says: "All you have to consider is whether the property is excepted, in order to take it away, under all circumstances and for all purposes, from the person to whom the rest of the property is given, or whether it is excepted merely for the purpose of giving it to some one else. If the latter, and the gift to some one else fails, the donees of all except this property are entitled to take the whole." In Roberts v. Cooke, 16 Ves. 451, it was held that a general disposition of personal estate, not thereinbefore specifically disposed of, comprehended specific legacies lapsed; the word "specifically" being held to mean "particularly." In the case of King v. Woodhull, 3 Edw. Ch. 79, 84, the form of the bequest was: "The residue and remainder of my estate, if any there shall be, after the payment of the said $1,000 to the missionary society, I give and bequeath to the children of my niece." And it was held broad enough to embrace as well the legacy to the missionary society, which it was claimed was void, as a bequest to a mission school, which was held to be ineffectual. Vice-Chancellor McCoun in his opinion in that case says: "The words, 'after payment of debts and legacies,' or after payment of legacies specified or recapitulated in the residuary clause itself, are not restrictive of the bequest to any particular or partial residue; but the bequest, after all, is general of the remainder, and may be so understood without doing violence to the expressions of the will. Where the residuary clause is thus worded, the legatee is as much a general legatee of the residuum of the estate as if such words were not used." In Shanley v. Baker, 4 Ves. 732, the words were, all the rest and residue of my estate and effects "not by me hereinbefore particularly disposed of;" and they were held to embrace a leasehold property given as a legacy, which, by the statutes of mortmain, was void. To the same effect is the case of Brown v. Higgs, 4 Ves. 709. The case of Attorney General v. Johnstone, Amb. 577, was not decided upon the ground that the residuary bequest contained words of import similar to those now under consideration, for it did not; but the conclusion reached in that case was that, from the whole context of the will, it was evident that the testator did not intend that the void legacy should, in any event, become a part of the residuum of his estate. The syllabus of the case, which very well shows the point decided, is: "Residue, under particular circumstances, will not take in lapsed legacies;" the residue being given as a small remainder of about £100, and the lapsed legacies amounting to £20,000. I have not been able to see anything in the residuary clause, when taken by itself, or in the context of this will now before us, which will authorize the result sought by the complainant. It seems to me quite evident that the testator did not intend to die intestate as to any part of his property. He gave the legacy of $5,000 to his wife, to be accepted at her option, in lieu of her right of dower in his estate. If she should decline to accept it on these terms, or if, by reason of her death in the lifetime of her husband, it lapsed, the will of the testator, as ascertained from the well-settled meaning of the words he has used, was that the lapsed or rejected legacy should go into and form part of the residue of his estate.

For the reasons above stated, the decree below must be reversed, and the complainant's bill dismissed, but without costs in this court or the court below.

For reversal: THE CHANCELLOR, BEASLEY, C. J., and BEDLE, CLEMENT, DALRIMPLE, DEPUE, GREEN, SCUDDER, VAN SYCKEL, and WOODHULL, JJ.

For affirmance: None.

COVENHOVEN v. SHULER.

(2 Paige, 122.)

Court of Chancery of New York. April 6, 1830.

Suit by Peter Covenhoven and wife, Van Vleek Sh ler and Levi Shuler, and l awrence Shuler, an infant, against Lena Shuler and B. Herrick, her tenant, and John Shuler, the executor, and against William, Betsey, Sally, and Abraham Shuler, children of the decedent who had refused to join as complainants in the suit, for an accounting.

Lawrence Shuler died in 1808, possessed of a farm containing about 300 acres, in fee, together with a considerable personal estate. He left by his wife Lena Shuler 11 children him surviving, to wit: Peter Shuler, Levi Shuler, Mary, the wife of Jacob Serviss, Jeremiah Shuler, William Shuler, Caty, the wife of Peter Covenhoven, Betsey Shuler, Sally Shuler, Abraham Shuler, Van Vleek Shuler, and Lawrence Shuler. The youngest was then less than one year old, and became of age in December, 1828. The will of Lawrence Shuler, the elder, executed in due form of law to pass real estate, was in the following words: "I will and order that all my just debts and funeral expenses be paid out of my personal estate by my executors, as soon after my decease as they find themselves enabled conveniently to do it. Secondly, I give and bequeath unto my daughter Ann, wife of David Cady, the sum of $250, to be paid to her or her legal representatives, within one year after my decease, by my executors, out of such of my personals as they may think proper to dispose of for that purpose. Thirdly, I give, devise, and bequeath unto my beloved wife Lena the one-third of the residue of my personal estate, after my debts, funeral expenses, and the above legacy to my daughter Ann shall be paid off and discharged, together with the use of all the residue of the personal estate, and the occupation and enjoyment of that part of my real estate whereupon I now reside, containing 300 acres, more or less, just as the same is now possessed by me, so long as she remains my widow; and, after her marriage, I do give the use, occupation, and enjoyment of one-third of said real estate to her during her natural life, at which time the income of the remaining two-thirds is to be applied for the education and maintenance of such children as she has together by me; and, after the youngest of the said children shall become of age, I request and order my executors to make an equal division of all my real and personal estate to be made, equally to be divided among said children which I had by my wife Lena, to have and to hold them, their heirs and assigns, forever. And I do hereby declare that the devise or bequest above made to my said wife is by me intended to be in lieu of, and an extinguishment of, her right and title of dower to any part of my real estate. And, lastly, I do hereby nominate and appoint my son John Shuler and my brother-in-law George Serviss executors of this my last will and testament," etc. The bill alleged the death of George Serviss before the testator, and Jeremiah Shuler's death three years after his father, and that the other children had conveyed their interest in the estate to their mother, the widow, who still remained unmarried, and had leased the farm to Benjamin and Rufus Herrick for a term of five years, and that John Shuler, the executor, had converted moneys of the estate to his own use, and allowed the widow also to do so.

D. Cady, for complainants. M. T. Reynolds, for defendants.

WALWORTH, Ch. As the complainants have not given the defendants an opportunity to substantiate their answers by proof, every matter of fact stated or insisted upon therein is to be taken as true. The defendant W. L. Shuler disclaims all interest in the subject-matter of this suit. He says he sold and conveyed all his interest in the estate to his mother long before the filing of the bill, and that he believes that fact was known to the complainants. They had, therefore, no excuse for making him a party, and the bill as against him must be dismissed, with costs. Herrick was also unnecessarily and improperly made a party to the suit. He was a bona fide lessee, for a term of years which would expire before the youngest child became of age. Even upon the complainants' construction of the will, the widow was entitled to the rents and profits of the farm until that time. And if they were entitled to a receiver of the rents and profits, to secure and apply them in aid of any deficiency of the personal estate, the tenant of the estate need not be a party to the suit. If he refused to attorn to the receiver, the latter might be directed to proceed against him, in the name of the lessor, to recover the rent as it became due. But there was no pretense for appointing a receiver of the income of the farm in this case during the minority of any of the children. The bill, as against Herrick, must therefore be dismissed, with costs.

The defendants Betsey, Sally, and Abraham Shuler were necessary parties, if the complainants are entitled to an account to any other relief in this case. They had a common interest with the complainants in the estate, and in the establishment and construction of the will. If the bill can be sustained, even for the purpose of obtaining security, the complainants would be permitted to retain it for the purpose of having the trusts of the will carried into effect under the direction of the court. This could not be done if all the parties interested in the estate were not before the court. Whether these defendants must bear their own costs, or

whether they must be paid by the complainants, or out of the estate of the testator, are different questions.

The next question which arises in this case is, what interest in the property did the widow of the testator take under the will? The rule contended for by the complainants' counsel is undoubtedly correct, as stated by the master of the rolls in Sims v. Doughty, 5 Ves. 247. If two parts of a will are totally irreconcilable, the subsequent part is to be taken as evidence of a subsequent intention. But this rule is only adopted from necessity, to prevent the avoiding of both provisions for uncertainty. It is only applied in those cases where the intention of the testator cannot be discovered, and where the two provisions are so totally inconsistent that it is impossible for them to coincide with each other, or with the general intention of the testator. The great and leading principle in the construction of wills is that the intention of the testator, if not inconsistent with the rules of law, shall govern; and that intent must be ascertained from the whole will taken together, and no part thereof to which meaning and operation can be given, consistent with the general intention of the testator, shall be rejected. Where the words of one part of a will are capable of a twofold construction, that should be adopted which is most consistent with the intention of the testator, as ascertained by other provisions in the will; and, where the intention of the testator is incorrectly expressed, the court will effectuate it by supplying the proper words. The strict grammatical sense is not always regarded; but the words of the will may be transposed to make a limitation sensible, or to carry into effect the general intent of the testator. 11 Ves. 148; Bradhurst v. Bradhurst, 1 Paige, 343. In Jesson v. Wright, 2 Bligh, 56, Lord Redesdale says: "It cannot at this day be argued, because the testator uses in one part of his will words having a clear meaning in law, and in another part other words inconsistent with the former, that the first words are to be cancelled or overthrown."

Testing the will in this case by these principles, I think the widow of the testator is entitled to the use of the whole estate during her life or widowhood. The general intent of the testator appears to have been to give one-third of his personal estate to his wife absolutely, and the use of one-third of his real estate for life in lieu of dower if she married a second time; and to give her the use of the whole estate for life if she remained his widow. He undoubtedly supposed, if she remained single, that she would support and educate her children out of the income and profits of the estate, until they were able to provide for themselves. There was little probability she would do injustice to any while there were no other claims on her bounty; and, at her death, he intended they should share the property equally. It was, however, necessary to provide for the contingency of a second marriage, when the property would be no longer under her control, but under that of her husband. The devise to her of the use of all the residue of the personal estate, and the occupation of the farm so long as she remained his widow, is clear and explicit, and is expressed in language which can bear only one construction. The subsequent clause of the will, which was intended to provide for the contingency of a second marriage, is not so clear. The testator does not seem to have contemplated the possibility of her surviving him, and remaining unmarried until the youngest child, then an infant, became of age. He therefore directs that after her marriage she shall only have the use of one third of the estate, from which time the income of the other two-thirds was to be applied to the maintenance and education of the children; and that share of the estate was also in that case to be divided among the children equally, when the youngest became of age. If the last provision in the will can be considered as evidence of the final intention of the testator, a principle which I consider more fanciful than sound, it is in favor of the widow in this case; because the last declaration of the testator recognizes the devise and bequest before made to his wife, and declares that the same is intended to be in lieu of, and in extinguishment of, her dower. As the contingency has not yet happened which was to deprive her of the use of any part of the estate, the complainants cannot claim a division of the property until her death or marriage. There can be no doubt of the right of the children of the testator by his wife Lena to the whole of the property, on the death of their mother, except the one-third of the personals given to her absolutely. They take it by necessary implication, though not by the express words of the will. Where there is a bequest for life, or other limited period with a limitation over, of specific articles, such as books, plate, etc., which are not necessarily consumed in the using, the first taker was formerly required to give security that the articles should be forthcoming on the happening of the contemplated event. And the remainder-man must take them in the situation in which they will be left by the ordinary prudent use thereof by the first taker. Hayle v. Burrodale, 1 Eq. Cas. Abr. 361; Bracken v. Bentley, 1 Rep. Ch. 110.

The modern practice, in such cases, is only to require an inventory of the articles, specifying that they belong to the first taker for the particular period only, and afterwards to the person in remainder; and security is not required, unless there is danger that the articles may be wasted or otherwise lost to the remainderman. Foley v. Burnell, 1 Brown, Ch. 279; Slanning v. Style, 3 P. Wms. 336. Whether a gift for life of specific articles, as of hay, grain, etc., which must necessarily be consumed in the using, is to be considered

an absolute gift of the property, or whether they must be sold, and the interest or income, only, of the money applied to the use of the tenant for life, appears to be a question still unsettled in England. 3 Ves. 314; 3 Mer. 194. But none of these principles in relation to specific bequests of particular articles, whether capable of a separate use for life or otherwise, are applicable to this case. Where there is a general bequest of a residue for life, with a remainder over, although it includes articles of both descriptions, as well as other property, the whole must be sold and converted into money by the executor, and the proceeds must be invested in permanent securities, and the interest or income, only, is to be paid to the legatee for life. This distinction is recognized by the master of the rolls in Randall v. Russell, 3 Mer. 193. He says, if such articles are included in a residuary bequest for life, then they are to be sold, and the interest enjoyed by the tenant for life. This is also recognized by Roper and Preston as a settled principle of law in England. Prest. Leg. 96; Rop. Leg. 209. See, also, Howe v. Earl of Dartmouth, 7 Ves. 137, and cases in notes. The case of De Witt v. Schoonmaker, 2 Johns. 243, seems to be in collision with this principle. But Mr. Justice Tompkins, who delivered the opinion of the court there, does not appear to have noticed the distinction between the bequest of a general residue and the bequest of specified articles. He says, however, it was the duty of the executors, on the death of the widow, to have paid and delivered the personal estate to the residuary legatee. If such was their duty, they were not bound to deliver the principal of the estate into her hands without requiring security that it should be preserved and paid over to the residuary legatee after her death. That case was correctly decided, for it was manifestly the intention of the testator that the property should be delivered over to the son after the death of the widow, and that he should pay the legacy to his sister. The court presumed he had received the property agreeably to the directions of the will, and the executors were held not to be liable to the legatee in a court of law.

In the case before me, the widow was not entitled to the use or possession of any specific article of the personal estate, but only to one-third of the principal, and the interest or income of two-thirds of the remainder, of the general residue, after the debts of the testator and the legacy to Mrs. Cady were paid or satisfied. The complainants are therefore entitled to an account of all the personal estate of the testator, in value as it existed at the death of their father; and after deducting the legacy to Mrs. Cady, and the funeral charges and the expenses of administration, their share of the balance must be invested in permanent securities, and the income thereof paid to Lena Shuler during her life or widowhood; and the principal, after her death or marriage, must go to the complainants.

I have stated the rights of these parties in the hope that some arrangement may be made for the settlement of these family difficulties without the necessity of any further litigation; and I have formed no definite opinion as to the question of costs on either side. But no decree for an account can now be made, as all the proper parties are not before the court. It appears by the pleadings that the testator left other children besides those by Lena Shuler, who were the residuary devisees and legatees in remainder. Jeremiah, one of the children of Lena Shuler, died after his father; and under the provisions of the will he took a vested interest in remainder in the personal as well as the real estate. Sturgess v. Pearson, 4 Madd. 411; Benyon v. Maddison, 2 Brown, Ch. 75; Prest. Leg. 70; 1 Rop. Leg. 376; O'Driscoll v. Koger, 2 Desaus. Eq. 295. In that share of the estate, John Shuler and Mrs. Cady, and the other brothers and sisters of the half blood, if there are any, are equally entitled with those of the whole blood. The cause must therefore stand over, with leave to the complainants, or such of them as have not released their interest to their mother, to file a supplemental bill for the purpose of bringing the personal representative of Jeremiah Shuler before the court, or such other persons entitled to a distributive share of his estate as are not now parties. Those who have conveyed all their interest in the real and personal estate to their mother since the death of Jeremiah have no interest in the account to be taken, and need not be parties.

PEASLEE v. FLETCHER'S ESTATE.

(14 Atl. 1, 60 Vt. 188.)

Supreme Court of Vermont. Chittenden. May. 28, 1888.

Exceptions from Chittenden county court; Taft, Judge.

Hard & Cushing, for plaintiff. W. L. Burnap and Geo. W. Wales, for defendant.

TYLER, J. The only question presented by the bill of exceptions in this case arises in construing the following clause in the will of Mary M. Fletcher, late of the city of Burlington, deceased, or rather that part of the clause which relates to the bequest of the personal estate of the testatrix: "I give to my uncle, George L. Peaslee, of Auburn, Me., my home place on Prospect street, in said Burlington, with my household furniture and all my personal goods and chattels on said premises at the time of my decease." The plaintiff, who is the devisee mentioned in said clause, claims that the words "all my personal goods and chattels on said premises at the time of my decease" are operative to pass to him seven promissory notes of $1,000 each, which the testatrix held against one Manwell, and $1,100.18 in money, which were in the house or "home place" of the testatrix when she died. In giving construction to this clause, we must consider all the words contained in it, and also its relation to the other portions of the will, in order to ascertain, if possible, the testatrix's real intention. It appears by the bill of exceptions that she was accustomed to keep her promissory notes, and other like securities, in her house, and that, at the time of the execution of this will, which was during an illness from which she did not expect to recover, she had in her house, besides the notes in controversy, other promissory notes amounting to about $80,000; also that she was in the habit of having certain United States bonds brought from the banks in the city, where she usually kept them, to her house, where they would remain during the day, while she cut off the coupons. It is true that the word "chattels" has a broad enough signification to include promissory notes and bank-bills, and, in many locations in a written instrument, it would be construed to include them; but in this case, if it had been the intention of the testatrix to bequeath to the plaintiff so large an amount of money and personal securities as was often in her house, and liable to be there at her decease, it is hardly reasonable to suppose that she would have employed so general and inapt a term as "goods and chattels" for that purpose, when she obviously might have bequeathed them in unmistakable language. Had she intended to give her uncle all such promissory notes and money on hand, or any part thereof, it is fairly presumable that she would have said so plainly. Again, we must consider all the language of the clause in question,—the words "my household furniture" as well as "my personal goods and chattels,"—and determine, if we can, what relation the respective words bear to each other; whether or not the latter are restricted in their meaning by the former. The authorities on this point are numerous and somewhat conflicting, but we find that the general current of them, both in England and in this country, is that, except in residuary clauses, general words, such as "goods and chattels," when following after and coupled with words of a limited signification, are restricted to the same class as the former. 2 Williams, Ex'rs, 1015, 1017, and cases cited. Thus, where the testator bequeathed to his niece all his goods, chattels, household stuff, furniture, and other things which should be in his house at A., it was decreed that cash found at the testator's house did not pass; for by the words "other things" should be intended things of like nature and species with those before specified. Trafford v. Berrige, 1 Eq. Cas. Abr. 201. Jarman, in his work on Wills, cites the case of Lamphier v. Despard, 2 Dru. & War. 59, where a testator, after devising certain real estate to his wife, bequeathed to her all his household furniture, plate, house linen, and "all other chattel property that he might die seized or possessed of," and, after various legacies, he appointed A. his executor and residuary legatee. Sir Edward Sugden held that "all other chattel property" meant all ejusdem generis, relying partly on the subsequent residuary gift. He thought, however, that the words would clearly not pass money, so that the clause could not be a general bequest of the entire personal estate. In Rawlings v. Jennings, 13 Ves. 39, the bequest was: "Unto my wife, Alice Jennings, two hundred pounds per year, being part of the moneys I now have in bank security entirely for her own use and disposal, together with all my household furniture and effects, of what nature or kind soever, that I may be possessed of at the time of my decease." The master of the rolls said: "The second question arises upon the widow's claim of the whole residue of the personal estate as passing to her under the general word 'effects.' That claim cannot be sustained. Part of his property being particularly given to her afterwards, the word 'effects' must receive a more limited interpretation, and must be confined to articles ejusdem generis with those specified in the preceding part of the sentence, viz., household furniture." In Dole v. Johnson, 3 Allen, 364, the testator bequeathed to his widow all his household furniture, wearing apparel, and all the rest and residue of his personal property. Hoar, J., in construing this clause said: "We think the meaning of the whole will is made most consistent by restricting the word 'property' to chattels ejusdem generis with those enumerated. By this construction the widow will take absolutely the household furniture, wearing apparel, and other chattels in and about the house of the testator adapted

to personal use and convenience, such as books, pictures, provisions, watches, plate, carriages, domestic animals, and the like, but not including money, stocks, securities, or evidences of debt." In Johnson v. Goss, 128 Mass. 433, where the bequest was as follows: "I give to my wife all my personal property, my household effects, horses, carriages, life insurance, etc.,"—the court held that this general term, "all my personal property," was not used in its ordinary sense; that the language did not purport to bequeath the residuum of the testator's property, and, construing it in connection with the words immediately following, "my household effects," etc., that the testator's purpose was to describe property of the same kind, and that he used the adjective "personal" as descriptive of chattels of personal use and convenience, not including stocks, securities, or other productive property. In Benton v. Benton, 63 N. H. 289, the bequest was as follows: "I give my wife every article of household furniture, books, etc., and every other article of personal property in and about said homestead, or wherever found, belonging to my estate;" and under it the widow and the residuary legatees both claimed the bank shares, notes, and cash on hand. The court held that the words "every other article of personal property" were limited to the same class of things as those enumerated, and did not include the bank-stock, notes, and cash claimed by the widow.

Were there no residuary clause in this will, the words in question might and probably would be construed to pass this property to the plaintiff, for the reason that courts are always disposed to give the broadest meaning practicable to the words of a bequest when it is necessary to do so in order to prevent intestacy. The same is true when words of a general signification are found in the residuary clause itself, and for the same reason. Jarman, in commenting upon cases which indicate the disposition of judges of the present day to adhere to the rule which gives to words of a comprehensive import their full extent of operation, remarks, however, "that in all the preceding cases there was no other bequest capable of operating on the general residue of the testator's personal estate if the clause in question did not. Where there is such a bequest, it supplies an argument of no inconsiderable weight in favor of the restricted construction, which is then recommended by the anxiety always felt to give to a will such a construction as will render every part of it sensible, consistent, and effective." Many of the cases cited by the plaintiff's counsel are upon the construction of residuary clauses in wills. Such is the case of Parker v. Marchant, 20 Eng. Ch. 290, where it was held that the words "goods, chattels, and effects," after an enumeration of various articles, caried the residue of the testator's property. The vice-chancellor, in considering the point whether, by these words, the testator had disposed of the general residue of his personal estate, or had so far died intestate, said: "This turns upon the meaning to be attributed to the words 'goods, chattels, and effects,' having regard to the position in which they are found in the will, and having regard, also, to the whole contents of the will." Such, also, is the case of Browne v. Cogswell, 5 Allen, 556. The will under consideration contains a residuary clause. After the bequest to her uncle, the testatrix gave all the residue of her estate, except two small legacies, to the Mary Fletcher Hospital. Upon these well-recognized rules of construction, we hold that the words "goods and chattels," in the connection in which they are found, should be construed as having only a restricted and limited signification, and as not including said Manwell notes and cash on hand; that they are further restricted in their meaning by the word "personal," which indicates, when considered in its relation to the words "household furniture," that the testatrix intended by the words in question to bequeath only other articles of the same kind, belonging to the house,—"savoring of the locality,"—adapted and pertaining to her personal use. This view is sustained by the fact that no definite amount of money and notes was kept at the house. It often varied with varying circumstances, and the notes and money were carried away and brought back as the testatrix had occasion to go from or return to her home, and were being removed when she died. To give these words the broad meaning claimed for them by the plaintiff would be to invest them with power by which they might have defeated what seems to have been the main purpose of the will, namely, the endowment of said hospital; for at times nearly the entire personal estate of the testatrix was in her house.

In the view we have taken of this case, the testimony of the plaintiff received by the court below was wholly immaterial. The result is the judgment of that court is affirmed, and certified to the probate court.

DICKISON v. DICKISON.

(28 N. E. 792, 138 Ill. 541.)

Supreme Court of Illinois. Oct. 31, 1891.

Error to appellate court, second district. This was an application of John A. Dickison to the county court for an order allowing him to share in the estate of Griffith Dickison, deceased. The county court disallowed his application, which order was affirmed by the circuit and the appellate courts. He appeals. Affirmed.

McCulloch & McCulloch, for plaintiff in error. Arthur Keithley, for defendant in error.

SHOPE, J. April 9, 1874, Griffith Dickison, then in life, made his last will and testament. At that time, it is conceded for the purposes of this appeal, he had 10 children. In and by clauses 2 to 8, inclusive, and clause 10, of the will, he made specific devises to his wife and 8 of the children, severally. By clause 9 he made a specific devise to his two other children as follows: "*Ninth.* To my children John Abraham and Mary Ann I will, devise, and bequeath the west half of the north-west quarter of section twenty-seven, in township ten north, range seven east, in equal shares, to be in full of their portions of my estate, both real and personal, to be theirs, their heirs' and assigns' forever." The eleventh clause of the will is as follows: "*Eleventh.* All the rest of the real estate of which I may die possessed shall be by my executor sold, also all the personal property I may have at my death shall be sold, and from the proceeds of such sales he shall first pay all my debts, etc. The remainder he shall divide amongst my heirs as follows: To my wife, Sarah A. Dickison, one-third part thereof; and the remainder to my children in equal portions, share and share alike, to be theirs, their heirs' and assigns' forever absolute." On the 7th day of March, 1882, there was executed by the testator in due form of law, and attached to the original will, the following codicil: "Whereas, I, Griffith Dickison, did on the ninth day of April, 1874, make my last will and testament, in and by which will I made devises to all my children then born; and whereas, since that date a son has been born to me, whom I have named Fred, I make this codicil to my said will, to have the same force and effect as if it was a part of my original will: That is to say, I will, devise, and bequeath to my son Fred [certain described realty] in fee, and to my daughter Roxie J. Hitchcock [certain described realty] in fee." The testator died March 14, 1886, and shortly thereafter said will, with the codicil annexed, was duly admitted to probate. Subsequently the executor reported to the county court that after payment of all claims, etc., he had in his hands $9,214.05 for distribution under the residuary clause of the will, and asking an order of the court thereon. The question presented by this record is whether appellant, John A. Dickison, is entitled to participate in the distribution of that fund. That he was a child of the testator, and therefore fell within the designation of persons who were to take under the residuary clause of the will, is conceded It must, therefore, be held that he is a distributee thereunder of the residuum in the hands of the executor, unless that clause is controlled by other portions of the will, so as to exclude him from participation; and this must depend upon the intention of the testator as expressed in his will. The sole purpose of construction of the instrument is to find and declare the intention of the testator, that effect may be given to such intention, when not contrary to public policy, or in contravention of law or the rules of property. The construction depends upon the intention of the testator, to be ascertained from a full view of everything contained in the will, giving just weight and operation to each clause and word employed, unless there is some invincible repugnance, or some portion of it is absolutely unintelligible. 1 Redf. Wills, 334 et seq.; Caruthers v. McNeill, 97 Ill. 256; Kennedy v. Kennedy, 105 Ill. 350; Taubenhan v. Dunz, 125 Ill. 529, 17 N. E. Rep. 456, and cases cited. By the ninth clause of his will the testator devised to John A. (appellant) and Mary Ann, his son and daughter, as tenants in common, the tract of land therein described, "to be in full of their portion of my estate, both real and personal; to be theirs, their heirs' and assigns' forever." The language here employed is neither ambiguous nor unintelligible. If understood in their ordinary and popular significance, as they must be, except where technical terms are used, the words convey a definite and certain meaning. The word "portion" in its commonly accepted meaning is the equivalent of part, share, or division. Worcester. "To be in full of their part or share or division of an estate," means to be the complete measure of such share, part, or division. Worcester. The evident intention of the testator was that the land devised was to be the complete measure of what these devisees should take or receive as their part, share, division, or portion of his estate. Nor is the construction less satisfactory if it be considered that the testator used the word "portion" in its technical legal sense. Technically a "portion" is defined to be: "The part of a parent's estate, or of the estate of one standing in the place of a parent, which is given to a child." Bouvier. The devise would therefore be in full—i. e., the complete measure—of the part of the testator's estate given or devised, or the provision made by the testator for these devisees. The evident intention of the testator, as manifested by this clause of the will, was to limit the quantity of his estate to be taken or received by his son John A. and his daughter Mary A. to the specific devise of the land mentioned in clause 9. This intention is clearly and unambiguously expressed. The difficulty arises, however, not in respect of any uncertainty as to the intent expressed in this clause of the will, but because of the repugnancy existing between this and the eleventh, or residuary, clause. The latter clause provides, as we have seen, that all the rest and residue of the testator's real estate, not specifically devised, and all his personal estate, shall be sold by his executor, and,

after paying debts, etc., the remainder be divided among his heirs as follows: To his wife, one-third part thereof; "and the remainder to my children in equal portions, share and share alike, their heirs and assigns forever absolute." It will be observed that the testator here again uses the word "portion" as the equivalent of part or share.

It is apparent that if appellant and his sister Mary A. are held to be included in this general residuary clause, the provision of clause 9, that the land therein devised shall be in full of all they shall receive from the estate of the testator, is rendered nugatory. There is, therefore, it is said, repugnance between these two clauses, and that in such case the later provision must control. The rule is well established in this state, as elsewhere, that when the clauses of a will are irreconcilable, and the repugnance invincible, the later clause will generally prevail. Brownfield v. Wilson, 78 Ill. 470; Murfitt v. Jessop, 94 Ill. 158; 3 Jarm. Wills, 705; 1 Redf. Wills, 443–445. In matters of so great solemnity as making a testamentary disposition of property it cannot be presumed that a testator would purposely make inconsistent provisions, incapable of being carried into effect. Unlike conveyance by deed, in which the first complete grant leaves nothing in the grantor to be subsequently conveyed, a will remains ambulatory, and the latest expressed intention is to be given operation; and, as the testator might have changed his mind during the drafting of his will, there being no way of accounting for or removing the repugnancy, it will be presumed that he did, after writing the former clause, change his purpose, and that the subsequent clause gives expression to a later formed intention. The rule is adopted by the courts as an aid to finding the real intention of the testator, as finally expressed in his will, and arises out of the very necessity of the case, and rests upon the single presumption of fact of change of intention while writing the will. The fundamental rule of construction being, as we have seen, that the intention is to be found from a consideration of the whole will, and such construction given as will uphold all of its provisions, and give to each clause and part its just operation and effect, it follows that the presumption of the fact upon which the rule is predicated will never be indulged, or the rule applied, until it is found by the application of all other rules of construction that the difficulty is unsolved, and the clauses remain invincibly repugnant. Redf. Wills, 445–452, and cases cited; Morrall v. Sutton, 1 Phil. Ch. 532. The tendency—of modern American decisions at least—is towards reconciling the apparent repugnancy, if possible, without adopting unreasonable or absurd constructions; so much so, that it is stated by the learned author just cited "that it is now becoming very uncommon with us to hear a court declare a will, or any of its provisions, wholly inoperative by reason of repugnancy or uncertainty." Page 453. The rule, therefore, which sacrifices the former clause, because inconsistent with a later one, is never applied, except upon failure to give such construction as renders the whole will effective; and allows each provision to stand. Hence it has been held that to enable the court to uphold all the provisions of the will it is permissible to resort to every reasonable intendment; to reverse the relative order of the devises or bequests; and to transpose the different provisions of the will, if it be possible thereby to render them consistent and give effect to each. Mutter's Appeal, 38 Pa. St. 314; Covenhoven v. Shuler, 2 Paige, 122; Pruden v. Pruden, 14 Ohio St. 251; Langham v. Sanford, 19 Ves. 641; Brocklebank v. Johnson, 20 Beav. 205; Ridout v. Dowding, 1 Atk. 419; Hatfield v. Sneden, 42 Barb. 615; Crissman v. Crissman, 5 Ired. 498. And so repugnant words, in whatever portion of the will they occur, which contravene the evident general purpose and intention of the testator as clearly expressed, may be rejected or transposed or limited and controlled by other and prior provisions, and by the general purpose and intent thus clearly manifested. Holliday v. Dixon, 27 Ill. 33; Watlington v. Waldron, 4 De Gex. M. & G. 259; Boon v. Cornforth, 2 Ves. Sr. 277; Jones v. Price, 11 Sim. 557. Further discussion of the general rule will be unnecessary, as we are not required to go to so great length in the construction of this will as many of the cases have gone.

It is also a familiar rule in the construction of wills that general provisions in a will must give way to specific provisions; that where there is a general devise of property in one part of the will, and a specific disposition of the same property in another part, these are to be regarded, generally, as excepted out of the general devise. Redf. Wills, 446, and cases cited. Moreover, a general residuary clause, being ordinarily introduced by the testator to prevent intestacy as to any part of his estate, will generally be construed as intended for nothing more than a disposition of those portions of the estate not previously disposed of; and in such case the presumption of a change of purpose in the testator's mind while preparing his will cannot arise. Id. The specific directions in the will, where the mind of the testator has been directly and intelligently directed to them, are much safer guides to his intention than general provisions, which do, by virtue of their generality, contravene the specific provision, but which might or might not have been so intended; and especially is this so where, as in this case, the general provision is a residuary clause, which, as we have said, might, as it generally is, have been inserted with the sole view of the disposition of any residuum of estate not before devised. Here the testator made specific devises to all his children of land, and accompanied the devise to appellant and his sister Mary Ann with the express provision that the land devised was to be in full of their portion of his estate, both real and personal. Nothing can be clearer than the intention, thus expressed, that neither appellant nor Mary A. should participate in the estate of the testator further than the specific devise made to them. It was to be, as we have seen, the complete measure of all they should take out of the estate of the testator, "both real and per-

sonal," excluding them from further participation. Following this clause comes a specific devise of other lands, without limitation, to another son, Griffith A., and then follows the general clause before quoted. By that clause the residue of the testator's property, real and personal, is to be sold, and, after the payment of debts, to be divided, one-third to the testator's widow, Sarah A. Dickison, and the remainder to his children, share and share alike. It is apparent that in making this clause the testator intended especially to provide for his wife, giving her one-third of the residue, which she could not otherwise, as his widow, have taken, without renouncing the previous specific provision for her benefit. The care taken in naming her evinces the solicitude of the testator in her behalf, undoubtedly arising from the fact, as shown by the records, that no formal marriage had been solemnized between them, and at most a common-law marriage only existed, which might be contested. Beyond the naming of his then wife, no one else is named. The remainder of the residue is to be divided among his children without further designation. There are no other words indicating an intention to abrogate or destroy the limitation coupled with the devise to appellant. It is much more probable that the testator introduced the residuary clause primarily to protect his widow, and, secondly, to give effect to the limitation coupled with the devise in the ninth clause of the will by preventing any portion of his estate from becoming intestate estate, and distributable to his heirs, including appellant, than that he had changed his purpose after the writing of the second preceding clause. Especially is this so when we consider that all that portion of clause 9 repugnant to the residuary disposition could have been erased or expunged without in the least affecting the specific devise made.

The intention of the testator must control when it can be ascertained, and we are of the opinion that it is clearly manifest that the testator intended to exclude appellant from participation in his estate beyond the specific devise made to him; that the will, taken and considered as a whole, leaves no serious doubt of that intention. The testator had just previously excluded appellant from participation in any residue of his estate then existing or thereafter to be acquired, and undoubtedly, having in mind this provision, made the general provision subject to it. Nor is this rendered less certain by the codicil made by the testator. It is true that he therein says that he had, in and by his will, "made devises to all my children then born," but the purpose of the codicil, and to what devises the testator referred, is clearly apparent. Thereby he makes a specific devise to a son born subsequently to the making of the original will, and of the same kind as those specifically made to his other children. Indeed, he takes by the codicil the land specifically devised to his daughter Roxie by the will, and gives it to the after-born son, and in lieu thereof specifically devised another tract of land to the daughter. He had, as is said in the codicil, by his will made devises to all of his children. He had specifically devised to each a tract or tracts of land, as he was then doing for his younger son, born after the making of the will, and to such specific devises alone the language of the codicil may be referred. It was these he manifestly had in mind, and to which his attention was attracted, in making like provision for his other and after-born child. We are of opinion that the provisions of this will clearly evince an intention to exclude appellant from participation in any residue of his estate, and that the appellate court held correctly in excluding him from participating therein. The judgment of the appellate court affirming the decree of the circuit court is affirmed.

FORD v. FORD et al. (two cases).

(33 N. W. 188, 70 Wis. 19.)

Supreme Court of Wisconsin. June 1, 1887.

Appeals from circuit court, Dane county.

January 26, 1886, Francis F. Ford died, leaving a will bearing date January 25, 1884, which was admitted to probate in the county court of Dane county, Wisconsin, May 17, 1886, and which will and schedules annexed are to the following effect: "Know all men by these presents, that I, Francis F. Ford, of the city of Madison, county of Dane, and state of Wisconsin, being of sound disposing mind and memory, do make, publish, and declare this to be my last will and testament, in terms following, to-wit: (1) I direct that all my lawful debts, funeral expenses included, shall be paid as soon after my decease as practicable, out of moneys on hand, or, if need be, from the income of my estate. (2) It is my will, and I so direct, that the necessary expenses of carrying my estate from year to year be paid from the income thereof. (3) It is my will, and I so direct, that all indebtedness of any of my brothers to me shall be, and hereby is, canceled, and the legal evidences of such indebtedness shall be returned to the makers thereof. (4) I direct that all properties in Schedule A, attached to this instrument, and bearing my signature, shall be converted, as soon as practicable after my decease, into good rentable 'inside' property in Kansas City, Mo., at schedule prices, or as much better as may be. (5) I also direct that the several properties in Schedule B, attached to this instrument, and bearing my signature, shall, at the discretion of my executors, either be sold and the proceeds thereof be invested in more desirable rentable property in Kansas City, or said proceeds be used in improving some one or more of my Kansas City properties. (6) I also direct that all moneys, notes, bonds, mortgages, or other evidence of indebtedness to me from any and all parties, except my brothers, shall, as soon as practicable after my decease, be used either in the purchase of property in Kansas City, or for improving properties in said city then on hand. (7) It is my will, and I so direct, that my wife, Maggie, shall have the use of my homestead, furniture, and appurtenances located on Spaight street, Madison, Wis., so long as she may desire to live in it as her home. In case, at any time, she cease to desire it as her home, I direct that, as soon thereafter as practicable, it be sold at a price not less than ($10,000) ten thousand dollars, or as much more as the property will bring, and the proceeds thereof be invested in good rentable property in Kansas City, Mo., and the rentals of such property be added to the income of the estate. (8) It is my will, and I so direct, that, in addition to said homestead and furniture, my said wife, Maggie, shall have one-quarter of the net annual income of the remainder of my estate during her natural life, subject to modifications in article 12 of this instrument; and it is expressly stipulated that the above bequests to my said wife are in lieu of dower. (9) It is my will, and I so direct, that my son, Marcus C. Ford, shall have one-quarter of the net annual income of my estate, homestead not included, until such time as, in accordance with the provisions of this will hereinafter made, he shall come into the possession of the entire estate, but the expenditure and use of said income during his minority shall be under the control and direction of his guardian, and I appoint his mother his guardian during his minority, and, in event of her death, I appoint my brothers Edward I. and Henry T. in her place. (10) It is my will, and I so direct, that my brother Edward Irving shall have one-quarter of the net annual income of my estate, homestead not included, during his natural life. (11) It is my will, and I so direct, that my brothers Joseph C. and Henry T. shall each have one-eighth of the net annual income of my estate, homestead not included, during their natural lives. (12) It is my will, and I so direct, that when my son, Marcus C., reaches his majority, he shall become the owner in fee of ten thousand dollars' worth of my real estate, and at twenty-five (25) years of age he shall have an additional twenty thousand ($20,000) dollars' worth, and at thirty (30) years of age he shall have an additional twenty-five thousand ($25,000) dollars' worth, and at thirty-five (35) years of age he shall have an additional forty-five thousand ($45,000) dollars' worth, and at forty (40) years of age the remainder of my estate shall become his; and I also direct that the income of my said wife, Maggie, shall be kept up to fifteen hundred ($1,500) dollars, any deficit to be taken from the income of my son, Marcus C., and, as an offset thereto, my son, Marcus C., shall be entitled to any excess in said wife's income over and above twenty-five hundred ($2,500) dollars a year. (13) I also direct that in the event that my son, Marcus C., shall decease after reaching his majority, leaving one or more legitimate children of his body, that the income of forty thousand ($40,000) dollars' worth of my estate, or so much thereof as may in prudence be necessary, shall be used for the proper support of such child or children, until they shall severally become of legal age, when an equal part of the above-named principal, and accrued interest, shall become his or hers absolutely. (14) In the event that my son, Marcus C., shall survive all my other legatees, and then die before coming into possession of my whole estate, it is my will, and I so direct, that the remainder of my estate as of that date shall belong to Hamilton College, located at Clinton, New York, to be used in the endowment of some new professorship, and the remainder to be used, at the discretion of the trustees of said col-

lege, in the erection of some building for college uses, or in the endowment of additional professorships; such building or professorships to bear my name. (15) If either my wife, Maggie, or one of my brothers, shall become my only surviving legatee, it is my will in that event, and I so direct, that my estate, at that time, be divided as nearly as may be into two (2) equal parts as regards value and renting power, and said wife or brother shall then choose between the incomes of said two properties, and have and enjoy the same during his or her natural life; and it is my will that the other part of my estate shall at that date become the property of Hamilton College, to be used as directed in article 14 in this instrument. And I further direct that, at the death of said wife or brother, the remaining part of my estate shall become the property of Hamilton College, to be used as in article 14. I hereby appoint my two brothers Joseph C. and Henry T. Ford as executors of this, my last will and testament. In witness whereof, I, Francis F. Ford, have to this, my last will and testament, consisting of four sheets of paper, subscribed my name and affixed my seal at Madison, Wis., this twenty-fifth (25) day of January, 1884. [Signed] Francis F. Ford. [Seal.]"

The lands described in Schedule A were situated and therein priced as follows: Homestead, in Madison, Wis., priced at $10,000; lands in Kalamazoo, Mich., priced in the aggregate at $27,000; about 1,508 acres of land in the state of Kansas, priced in the aggregate at $38,500. The lands described in Schedule B were situated in Kansas City, Missouri, and therein priced in the aggregate at $19,200.

The plaintiff, as the qualified executor, commenced this action in the circuit court for Dane county for the construction[1] of said will so probated in the county court, whereupon the widow, Margaret G. Ford, and Marcus C. Ford, the only child of said testator, by his guardian ad litem, and Hamilton College, respectively, answered the complaint, which complaint and answers were severally amended by leave of the court.

Prior to the trial it was stipulated by the respective parties, in effect, "that the printed laws and decisions of the Revised Statutes" in our state law library, "for the states of Missouri, Kansas, Michigan, and Iowa, (and of the state of New York, for the purpose of proving the incorporation of the trustees of Hamilton College,)" might "be referred to by any and all of the parties herein to show what the law of any of said states" was "as to any of the legal points involved in or that" might "arise in said case, either in the circuit or supreme court of this state," and that it "should not be necessary to introduce in evidence any of said statutes, laws, or reported decisions; but that any of the parties herein" should "have the right to use or refer to same as evidence herein."

In addition to what has been stated, it appeared from the undisputed evidence, and was found as facts upon the trial, in effect: That the testator died testate at the age of 58 years, in Kansas City, Missouri, January 26, 1886, leaving said will. That, at the time of his death, he was a resident of and domiciled in the city of Madison, Dane county, Wisconsin, and had been for 10 years immediately prior thereto. That he left, him surviving, his widow, the said Margaret G., then aged 46 years; and one child, a son, the said Marcus C., then aged 12 years; and three brothers, Edward Irving Ford, then living at Asbury Park, New Jersey, and aged 60 years; Joseph C. Ford, then residing in Madison, Wisconsin, and aged 55 years; and Henry Thornton Ford, then living at Jersey City, New Jersey, and

[1] "The plaintiff prays the aid of this court, among other things, to determine: (1) Whether the said property, real and personal, of which the said Francis F. Ford died seized, is, by virtue of said will, vested in the plaintiff as executor or trustee, to be controlled and managed by him; whether he has power to receive the rents, incomes, and profits thereof, and disburse the same as in the said will provided; and, if the said plaintiff does not take the same as trustee, whether any trusts are created by said will, and whether the court has the power to appoint trustees, or whether the said real estate descends to the heirs of the said Francis F. Ford, or how and in whom the title to the said estate and property, real and personal, vests and descends. (2) Under the second clause of said will, who is invested with the power and has the authority to expend the sums of money to defray the necessary expenses of carrying on said testator's estate from year to year which are to be paid from the income thereof? (3) Whether, under fourth clause of said will, the plaintiff, as executor of said estate, is invested with the power and has the authority to convert and invest in good, rentable inside property in Kansas City all the properties set forth and described in Schedule A annexed to said will; and, if the plaintiff has the power to sell the said last-mentioned property, at what price he is authorized to sell the same. (4) Whether the plaintiff, as executor of said will, and, if not the plaintiff, who otherwise, has power to sell the property set forth and described in Schedule B annexed to said will, and to invest the proceeds thereof in more desirable rentable property in Kansas City, or to determine whether the same shall be used in improving some one or more of said Kansas City property. (5) Whether the plaintiff, as executor of said will, and, if not the plaintiff, who otherwise, has power and control of all moneys, notes, bonds, mortgages, or other evidence of indebtedness mentioned in the sixth clause of said will, and has authority and power to use the same in the purchase of property in Kansas City, or for improving properties in said city on hand. (6) The said plaintiff alleges, upon information and belief, that it is the intention of Margaret G. Ford, who claims to be the widow of the said Francis F. Ford, to renounce the benefits and provisions made in and by said will for her; and the plaintiff prays the aid of this court that if she shall so renounce said will, and take such part of the property of the said Francis F. Ford as the law may give to her, what power of sale he has over the furniture situated in the homestead in the city of Madison, and other property connected therewith, mentioned in clause seven of said will, and

aged 53 years; and that all of said persons were still living. That he left, him surviving, no sister, father, or mother. That said will was admitted to probate as stated. That thereupon letters testamentary were issued by said county court to Joseph C. Ford, the plaintiff, who thereupon qualified as executor, and has ever since acted and still acts as such. That, at the time of his death, the testator's estate was worth about $175,000, and located in the states of Wisconsin, Michigan, Iowa, Kansas, and Missouri. That the great bulk of said estate was located in the states of Kansas and Missouri. That the personal estate of said testator consisted of certain household goods and furniture, and other personal property, such as wagons, sleighs, etc., in Madison, Wisconsin, and certain rents due him on real estate. That, a short time prior to his death, the testator assigned, or attempted to assign, in writing to his brother Henry Thornton Ford certain notes and mortgages, amounting in value to about $30,000, to determine the title to which a suit was then [at the date of the findings] pending in Kansas City, Missouri, where said securities were at the time of the testator's death. That the only real estate belonging to the testator at the time of his death, within the state of Wisconsin, was his homestead in Madison, of the value of about $12,000, exclusive of any furniture therein. That the testator had about 200 acres of land in Iowa at the time of his death, or an interest therein. That the lands so described in said schedules in Michigan, Kansas, and Missouri were worth, at the time of his death, and were still worth, the value placed upon the same by him in said schedules as stated. That February 15, 1887, the said widow renounced and surrendered one and all the provisions of every kind made for her in said will, and, instead thereof, elected to take under the statutes of the several states named. That the trustees of Hamilton College were, and have been since May 6, 1812, a corporation duly organized and existing under and by virtue of the laws of the state of New York as a college, and entitled, by virtue of their charter, to take, hold, enjoy, and have lands and real estate, in fee-simple, or for a term of life or lives, or for years, or in any other manner, and also goods, chattels, books, moneys, annuities, and all other things of what kind or nature soever. That said corporation has exercised the usual powers of a college for over 40 years. That it is generally known and spoken of as Hamilton College, at Clinton, Oneida county, New York. That the testator graduated at said college in the class of 1851. That he meant and intended, by the words "Hamilton College," used in the will, the said "Trustees of Hamilton College." That, by the laws of Missouri and Kansas, the vesting of estates may be postponed, and a suspension of the power of alienation is permitted, for a period of any number of lives in being, and 21 years, and the period of gestation thereafter, according to the rule of the common law. That the same period is permitted by statute in Iowa. That the law of Michigan in this respect, both as to real and personal property, is substantially the same as in Wisconsin.

As conclusions of law the court found, in

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whether he has power and authority to sell and dispose of the same. (7) That if the said Margaret G. Ford shall so renounce under the said will, what disposition is to be made of the quarter of the net annual income of the remainder of testator's estate bequeathed to her by the eighth clause of said will, and whether the same shall go to increase the income of the other legatees of said will, or what other disposition shall be made of the same. (8) Whether the incomes severally given to the said Margaret G. Ford, Marcus C. Ford, Edward Irving Ford, Joseph C. and Henry T. Ford, by the eighth, ninth, tenth, and eleventh clauses of said will, are to be diminished by the estate of said testator, passing, under the twelfth clause of said will, to the said Marcus C. Ford,—that is to say, ten thousand dollars when he arrives at the age of twenty-one years, twenty thousand dollars when he arrives at the age of twenty-five years, twenty-five thousand dollars when he arrives at the age of thirty years, forty-five thousand dollars when he arrives at the age of thirty-five years, and the remainder of the estate when he arrives at the age of forty years,—or whether the said Marcus C. Ford takes the said several sums, parts of said estate, subject to the payment of said several legacies given for life to said Margaret G. Ford, Marcus C. Ford, Henry T. Ford, Joseph C. Ford, and Edward Irving Ford, or whether the said legacies are diminished by the devise of said sums to the said Marcus C. Ford as the same may become due and payable to him, and how long and to what extent said incomes respectively continue to said legatees. (9) In the event that Marcus C. Ford shall decease after reaching his majority, leaving one or more legitimate children of his body, how the sum of forty thousand dollars, mentioned in the thirteenth clause of said will, is to be ascertained and selected, by whom the same is to be done, and who is to hold the same in trust for the benefit of said children. (10) Whether the fourteenth clause of said will, so far as Hamilton College is concerned, makes a lawful and valid disposition of that portion of his estate described in said fourteenth clause. (11) Whether the provision in the fifteenth clause of said will, on the event happening therein specified, for the benefit of Hamilton College, is a lawful and valid provision for the benefit of said college. (12) How the portions of the estate which are to become Marcus' at the time when he arrives at the age of twenty-one, twenty-five, thirty-five, and forty years, respectively, are to be ascertained and selected, by whom the same are to be ascertained and selected, and whether to be paid over to him absolutely, or to be held in trust, subject to the legacies of the income for life to the several legatees hereinbefore mentioned. (13) If Marcus C. Ford dies under the age of twenty-one years, or any of the other legatees of the income of said estate shall die, what disposition is to be made of the income of such person or persons so dying? Is it to be added to the income of the surviving legatees? If not, how otherwise? (14) If Hamilton College takes a portion of the estate, under the fourteenth clause of said will, does it take the same subject to the payment of the legacies for life to the said several legatees?"

effect, that the will was valid in all its parts, and no part of it within the provisions of the statutes of this state against perpetuities, or the suspension of the power of alienation, and construed it accordingly. The plaintiff, said widow, the said guardian for said Marcus C., and said trustees of Hamilton College, severally filed exceptions to said conclusions of law and such construction of said will, and from the judgment entered upon said findings of act and conclusions of law they severally appeal to this court.

I. C. Sloan and John M. Olin, for executor. Stevens & Morris, for Mrs. Margaret G. Ford, the widow. Pinney & Sanborn, for Marcus C. Ford, the son. Gregory, Bird & Gregory, for trustees of Hamilton College.

CASSODAY, J. At the time of the testator's death, and for several years immediately prior thereto, his residence and domicile were in the city of Madison, Wisconsin. As stated, he left personal property, and large amounts of valuable lands in Wisconsin, Michigan, Iowa, Kansas, and Missouri. His widow and little boy, Marcus C., and his three brothers and Hamilton College, are the sole objects of his bounty. The will is unique. It is said to have been drawn by the testator himself. It may be doubtful whether it would have presented more intricate questions for solution had it been drawn by a skillful lawyer with that end in view. Its validity is challenged as a whole and in parts, and a construction is demanded. The language employed seems to be sufficiently clear to indicate the purposes intended. The difficulties arise in applying the law to such purposes. Before proceeding to make such application it may be well to state a few general rules of law applicable to the case, readily deducible from the authorities and virtually conceded by all.

1. The validity of every devise or disposition of real estate by will must be governed by the law of the place where the land is situated, and this includes not only the form and mode of the execution of the will, but also the lawful power and authority of the testator to make such disposition. Story, Confl. Laws, § 474, and note; 2 Greenl. Ev. § 670; 1 Redf. Wills, p. 398, sub. 8; Robertson v. Pickrell, 109 U. S. 608, 3 Sup. Ct. Rep. 407; White v. Howard, 46 N. Y. 144. The importance of this proposition in considering the validity of a will covering lands in so many different states will be appreciated by all.

2. On the contrary, although not as well defined, nor as extensively enforced, yet the authorities clearly support the proposition that the validity of a bequest or disposition of personal property by last will and testament must be governed by the law of the testator's domicile at the time of his death, and this includes, not only the form and mode of the execution of the will, but also the lawful power and authority of the testator to make such disposition; and especially is this true where, as here, the testator's domicile, at the time of making his will, continues to be the same until the time of his death. Story, Confl. Laws, §§ 467, 468; Stewart v. McMartin, 5 Barb. 438; Moultrie v. Hunt, 23 N. Y. 394; Nat v. Coons, 10 Mo. 543; Desesbats v. Berquier, 1 Bin. 336; Somerville v. Somerville, 5 Ves. 750–786; Anstruther v. Chalmer, 2 Sim. 1; Price v. Dewhurst, 8 Sim. 279; s. c. on appeal, 4 Mylne & C. 76; Enohin v. Wylie, 8 Jur. (N. S.) 897, H. L. Cas. 1; Crispin v. Doglioni, 9 Jur. (N. S.) 653; s. c. on appeal, L. R. 1 H. L. 301; Eames v. Hacon, 16 Ch. Div. 407; s. c. on appeal, 18 Ch. Div. 347. This is not shaken by the criticism of Lord Westbury's opinion in Enohin v. Wylie, supra; by the Earl of Selborne, L. C., in Ewing v. Orr, 9 App. Cas. 39.

3. The same rule, as to the law of the testator's domicile, governs in the interpretation or construction of wills. Story, Confl. Laws, §§ 479a–479c; Van Steenwyck v. Washburn, 59 Wis. 510, 17 N. W. Rep. 289. In the words of Mr. Justice Story: "The language of wills is not of universal interpretation, having the same precise import in all countries and under all circumstances. They are supposed to speak the sense of the testator, according to the received laws or usages of the country where he is domiciled, by a sort of tacit reference, unless there is something in the language which repels or controls such a conclusion." Harrison v. Nixon, 9 Pet. 504; Trotter v. Trotter, 4 Bligh, (N. S.) 502; Enohin v. Wylie, supra; Chamberlain v. Napier, 15 Ch. Div. 614. The general rule is the same respecting real estate, whenever the object is merely to ascertain the meaning and intent of the testator from the language employed in the will. Id.; 2 Greenl. Ev. § 671. With these general propositions in mind, we may, without infringing any rule of interstate comity, venture to ascertain, if we can, the intention of the testator as disclosed in this will, and also its validity, at least as to certain portions of the property.

4. The papers coming from the county court must be taken as the will of the testator. Thornton v. Curling, 8 Sim. 310; Price v. Dewhurst, supra. They consist in what has been called the will, with Schedules A and B therein mentioned and thereunto attached. In construing the will, we are to consider these three papers as one instrument in law, and together constituting the will of the testator. Ackerly v. Vernon, Com. 381; s. c. affirmed on appeal, 3 Brown, Parl. Cas. 91; Hill v. Chapman, 1 Ves. Jr. 407; Habergham v. Vincent, 2 Ves. Jr. 204; Jackson v. Babcock, 12 Johns. 394; Loring v. Sumner, 23 Pick. 102; Baker's Appeal, 107 Pa. St. 381; Fickle v. Snepp, 97 Ind. 289.

5. It is claimed on the part of the executor that, under the directions of the will, all the personal property and all the real estate outside of Missouri must, for the purpose of determining the validity of the will, or some

of its provisions, be regarded as converted and permanently invested in lands in Kansas City, Missouri, under the well-known doctrine of equitable conversion. That doctrine is firmly established; and if it applies, or in so far as it applies, it must be enforced. It may be well to restate it, with some of its limitations. As long ago as the time of Lord Chancellor Thurlow it was observed by him "that nothing was better established 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; and this, in whatever manner the direction is given,—whether by will" or otherwise. "The owner of the fund, or the contracting parties, may make land money, or money land. The cases established this rule universally. If any difficulty has arisen, it has arisen from special circumstances." Fletcher v. Ashburner, 1 Brown, Ch. 499. This was expressly sanctioned by the supreme court of the United States at an early day. Craig v. Leslie, 3 Wheat. 577. The reason for the rule is there stated by Mr. Justice Washington, speaking for the whole court, thus: "The principle upon which the whole of this doctrine is founded, is that a court of equity, regarding the substance, and not the mere form and circumstances of agreements and other instruments, considers things directed or agreed to be done as having been actually performed, where nothing has intervened which ought to prevent a performance." From that and other cases the late chief justice of this court deduced this general rule: "When a will contains a power of sale not mandatory in terms, but it is apparent from the general scope and tenor of the will that the testator intended all his realty to be sold, the power of sale will be held imperative, and the doctrine of equitable conversion applied." Dodge v. Williams, 46 Wis. 97, 1 N. W. Rep. 92; De Wolf v. Lawson, 61 Wis. 477–479, 21 N. W. Rep. 615.

In Pennsylvania it has been held "that the equitable conversion of realty into personalty, by force of a direction in a deed or will to sell, only takes place where the direction is positive and absolute; * * * that, if a proposed sale is contingent or eventual in a deed or will, equitable conversion does not follow." Neely v. Grantham, 58 Pa. St. 437. But the better opinion seems to be, as, in effect, held in Dodge v. Williams, supra, that whenever a direction to convert is apparent from the whole will, whether expressed or implied, then the duty and obligation to convert is imperative, and the doctrine of equitable conversion applies. Thus, in White v. Howard, 46 N. Y. 162, Grover, J., speaking for the court, said: "To constitute a conversion of real estate into personal, in the absence of an actual sale, it must be made the duty of, and obligatory upon, the trustees to sell it in any event. Such conversion rests upon the principle that equity considers that as done which ought to have been done. A mere discretionary power of selling produces no such result." Power v. Cassidy, 79 N. Y. 613, 614; Hobson v. Hale, 95 N. Y. 605. So it has been held that, "where the general scheme of the will requires a conversion, the power of sale, although not in terms imperative, operates as a conversion; and this will be deemed to be immediate, although the donee of the power is vested, for the benefit of the estate, with a discretion as to the time of sale." Lent v. Howard, 89 N. Y. 169; Ingrem v. Mackey, 5 Redf. 357. But the will must, in terms or by necessary implication, disclose an intent to convert, in order to sustain the theory of equitable conversion. Hobson v. Hale, supra.

6. Having thus stated some of the principles and some of the facts upon which the doctrine of equitable conversion rests, it becomes necessary to consider the application of those principles to some of the provisions of this will.

(a) The lands in Iowa are nowhere mentioned or referred to in the will or either of the schedules. This being so, it is manifest that the doctrine of equitable conversion has no application to them. They must therefore be regarded as lands in Iowa; and the validity of the will respecting such lands be determined by the laws of Iowa.

(b) The several pieces of land specifically described in Schedule B are all situated in Kansas City, Missouri. Considering that schedule in connection with subdivision 5 of the will, of which it forms a part, as we must, and the directions thereby given to the executors are that they "shall, at" their "discretion," "either" sell the several pieces of lands so described in Schedule B, and invest the proceeds thereof in more desirable rentable property in Kansas City, or use said proceeds in improving some of the testator's Kansas City properties. This mere discretionary authority can in no sense operate as an equitable conversion,—certainly not until an actual conversion should in fact occur. Besides, such conversion of the lands described, into other lands in the same city and state, could in no way affect or change their legal status. So they must be regarded as lands in Missouri, in determining the validity of the will respecting the same.

(c) By the sixth subdivision of the will, the testator expressly directs that all moneys, notes, bonds, mortgages, or other evidence of indebtedness to him from any and all parties, except his brothers, "shall, as soon as practicable after" his death, "be used either in the purchase of property in Kansas City, or for improving properties in said city then on hand." This clause of the will relates particularly to the $30,000 of personal property in dispute; and which, for the purposes of these appeals, is assumed to be the property of the estate. The direction to so convert is not prevented from being imperative

by adding "as soon as practicable after" his death, and thus giving some discretion as to the time or times of such conversion. If such permanent investment of such personal estate in lands in Kansas City can be lawfully made, and then lawfully held as lands in Kansas City during the time and for the purposes expressed in the will, then there can be no doubt but what, subject to the widow's rights therein, as hereinafter stated, the doctrine of equitable conversion is applicable to such personal estate, and in that event the same is accordingly to be regarded as lands in Missouri from the time of the testator's death; otherwise not. In other words, since the right to so convert is dependent upon the right to so invest and hold, the legality of such equitable conversion is dependent upon the same right to so invest and hold. Whether such investment and holding would be lawful or unlawful will be considered hereafter.

(d) The several pieces of land specifically described in Schedule A consist of the homestead in Madison, Wisconsin, and lands in Michigan and Kansas. As the directions in relation to the homestead differ from the directions in relation to the other lands, the homestead will be considered by itself hereafter. Considering Schedule A in connection with subdivision 4 of the will, of which it forms a part, as we must, and the directions thereby given as to the several pieces of land in Michigan and Kansas are to the effect that each and all of said pieces of land "shall be converted, as soon as practicable, after" the testator's death, "at schedule prices, or as much better as may be, * * * into good rentable 'inside' property in Kansas City, Mo." The testator manifestly had an exalted opinion of the present and future of Kansas City. The scheme of his will indicates an intention to have his lands in Michigan and Kansas sold as soon as practicable, and the proceeds thereof invested in real estate in Kansas City. He directs, in effect, that the several pieces of land mentioned shall be so converted as soon as practicable after his death. Is such purpose to be frustrated merely by adding "at schedule prices, or as much better as may be?" On the contrary, were not those words added as a guide to his executors, or for the purpose of stimulating purchasers to pay a larger price? It seems to us that such was his intent, for, apparently with the same view, he added to the schedule price of each piece a still larger estimated value. Of course, it may turn out to be impossible to ever sell some of the pieces at the schedule price; and yet there is nothing in the will indicating that he ever contemplated such a result, or any permanent holding of such lands as a part of the estate, as is plainly indicated as to the Missouri lands. There are no negative words indicating an intent not to have any of the lands in Michigan or Kansas sold at a less price. As indicated in another connection, some discretion may be given as to the time or times of making such sales and investments, without preventing the application of the doctrine of equitable conversion. The only purpose manifest in the will for selling any of the Michigan or Kansas lands is to invest the proceeds of such sales in real estate in Kansas City, and then to hold such lands in that city as a part of the estate during the time and for the purposes indicated in the will. If such permanent investment can be lawfully made, and such lands so lawfully held, then we discover no reason why the doctrine of equitable conversion should not apply to them. Nevertheless, the legality of such equitable conversion is necessarily dependent upon the right to so invest and hold. Whether such investment and holding would be lawful or unlawful will be further considered hereafter. What has been thus said is not by way of determining the validity of the title to any lands outside of Wisconsin, nor the validity of any investment or trust in or tenure of such lands, but merely to ascertain the meaning and intent of the testator from the language employed in the will, which, as we have seen, is a duty devolving upon this jurisdiction.

(e) In regard to the homestead, the directions are, in effect, that it shall be converted, as soon as practicable after his death, into good rentable "inside" property in Kansas City, Missouri, "at schedule price," which is $10,000, or as much better as may be; and then, by subdivision 7 of the will, the testator directs, in effect, that his wife shall have the use of his homestead, furniture, and appurtenances so long as she may desire to live in it as her home; and that in case she at any time ceases to desire it as her home, he directs that, as soon thereafter as practicable, it be sold "at a price not less" than $10,000, or as much more as the property will bring, and the proceeds thereof be invested in good rentable property in Kansas City, Missouri, and the rentals of such property be added to the income of the estate. Here are directions to sell and to invest the proceeds in real estate in Kansas City, it is true, but they are accompanied by other directions not to sell nor to so invest until after the concurrence of two events; one being that the widow shall cease to desire it as her home, and the other is that it be sold at a price not less than $10,000. The word "homestead," as used in the will, manifestly means the house and all the grounds where the testator lived, and is not restricted to the one-fourth of an acre mentioned in the statute. Section 2983, Rev. St. As stated, the widow has elected to take the provisions made for her by law, instead of the provisions made for her in the will, as required by the statutes. Section 2172. Upon making such selection, the widow at once became entitled to the same dower in the testator's lands, and the same rights to the homestead, and the same share of his personal estate, as if he had died intestate, ex-

cept that the share of personal estate which she so took was restricted to one-third part of his net personal estate. Sections 2172, 3935, Rev. St.; Leach v. Leach, 65 Wis. 291, 26 N. W. Rep. 754. Since the testator left a son as well as widow, her right to the homestead thus secured by such election is the right to such statutory homestead of one-fourth of an acre during her widowhood, and dower in the balance of the land connected therewith. Rev. St. subd. 2, § 2271. In other words, the extent and duration of her right in the homestead has been diminished by such election.

Can we hold that the direction in the will to sell the homestead, and invest the proceeds, as indicated, works an equitable conversion of the estate into Missouri lands? As observed, there is no such direction to convert until the widow ceases to desire it for a home. Presumably this will not occur during her widowhood, which may be regarded as an equivalent to a life-estate. But the sale is expressly forbidden, even after the termination of the widow's right, at any price less than that specified. To apply the doctrine of equitable conversion to lands which are directed not to be sold until the termination of such life-estate, nor then, except in an uncertain event which may never occur, would be to stretch that doctrine beyond anything authorized by or contemplated in the authorities. We must therefore hold that the homestead must be regarded as lands in Wisconsin, and accordingly the validity of the will respecting the same must be determined by the laws of Wisconsin.

7. Before determining such validity, and to aid such determination, it becomes necessary to ascertain, if we can, more fully the intention and meaning of the testator, as disclosed by the language employed in other parts of his will. Undoubtedly the legal title to the personal property belonging to the estate is vested in the executor. Scott v. West, 63 Wis. 555, 556, 24 N. W. Rep. 181, and 25 N. W. Rep. 18. Of course he holds the same for the benefit of the cestui que trust, including the rights of the widow, as indicated in the sections of the statute cited above. So far as the law will permit, the executor, by virtue of the will, has acquired all the rights therein given, and is charged with all the obligations therein imposed. Id. The several directions in the will are addressed to him, and his successors in office, and his subordinates, whether by ancillary administration or otherwise. He and they are to execute the will so far as the law will permit. He and they are to pay the testator's lawful debts and funeral expenses from moneys on hand at his death, and, if they are insufficient, then the balance from the income of the estate. He and they are to pay the necessary expenses of carrying the estate from year to year from the income thereof. The will impliedly excludes the whole of the homestead, while occupied by the widow as such, from being a source of income to the estate, but provides that in case of its conversion, as indicated, then the rentals of such newly-acquired property are to be added to the income of the estate.

By the election of the widow to take under the statute, instead of the will, the bequest to her in the eighth subdivision of the will of "one-quarter of the net annual income of the remainder" of the "estate during her natural life," which by the twelfth subdivision was to be kept up to $1,500 from the share of the income given to the son, becomes inoperative. By such election a portion of the home property not included in the statutory homestead, nor the widow's right of dower in the balance, might be the source of a trifling income to the estate; but this would be dependent upon the validity of the provision in the will for the future conversion of the homestead, of which we shall presently speak. By the direction in the ninth subdivision of the will the son is to have one-quarter of the net annual income of the estate (exclusive of the homestead) until, under the provisions of the will, he comes into the possession of the entire estate, except as the same may be sooner terminated by his death. By the direction in the tenth subdivision of the will the brother Edward Irving is to have one-quarter of the net annual income of the estate (exclusive of the homestead) during his natural life. By the direction in the eleventh subdivision of the will the brothers Joseph C. and Henry T. were "each" to have one-eighth of the net annual income of the estate (exclusive of the homestead) during their natural lives. Such bequests annually, from the "net annual income" of the estate, are clearly severable, as each is independent of the other, and almost necessarily must terminate at a different time than any of the others. Since the annual share of each such legatee is each year confined to such "one-quarter" or "one-eighth" of such net annual income of the estate, it manifestly cannot be increased by the one-quarter of such net annual income now undisposed of by reason of the election of the widow. As the undisposed-of one-fourth of such net annual income cannot arise from the rents, issues, or profits of lands in Wisconsin, but must arise from the rents, issues, and profits of lands outside of this state, or from the personal estate liable to be treated as converted into Missouri lands, as indicated, we reserve further consideration of the question whether the accumulation of such undisposed-of net annual income into the residuum of the estate would or would not be valid. Manifestly, it is the theory of the will that the several fractional shares of such net annual income thus bequeathed will from time to time be diminished, as portions of the corpus of the estate may pass to Marcus under the twelfth clause of the will; for, the moment he may become the absolute owner in fee of any portion of

the land thereby devised, that moment such portion will become segregated from the estate, and thereby relieved from every provision of the will. So, whatever property the widow, by reason of her election, takes under the statutes of the several states, becomes in like manner segregated from the estate. It is only the one-quarter or the one-eighth of the net annual income of the testator's estate that is thus bequeathed; not such fractional share of the net annual income of what may become the estate of Marcus or the widow.

By the will, Marcus is to have no portion of the corpus of the estate, except as he becomes entitled to it under the direction in the twelfth subdivision of the will, and by such direction he is only to become the owner in fee to a portion of the corpus of the estate when he "reaches his majority," and then additional installments of such corpus from time to time until he reaches the age of 40 years, when "the remainder" of the "estate" is to become his. But in the event of Marcus dying, "after reaching his majority, leaving one or more legitimate children of his body," then the direction of the thirteenth subdivision of the will is "that the income of forty thousand dollars' worth of" his "estate, or so much thereof as may in prudence be necessary, shall be used for the proper support of such child or children, until they shall severally become of legal age, when an equal part of the above-named principal and accrued interest shall become his or hers absolutely." That is to say, immediately upon the death of Marcus after so reaching his majority, and before becoming 40 years of age, leaving such child or children him surviving, the $40,000 "worth of" the "estate," if there shall be so much, is to be regarded as segregated from the rest, and held in trust for them, "until they shall severally become of legal age," as therein directed. "In the event" that Marcus "shall survive all" the "other legatees," that is to say, shall survive the widow and each of the three brothers, "and then die before coming into the possession" of the "whole estate," then the fourteenth subdivision of the will directs "that the remainder" of the "estate, as of that date, shall belong to Hamilton College." But the words "the remainder of my estate," as here used, cannot mean what will be the entire estate at the time of such death of Marcus, unless it so happens that upon such death he leaves no such child or children him surviving. But in case he does leave such child or children him surviving, then such "remainder" of the estate will only be what may remain of such estate after setting apart the $40,000 worth of the estate for the benefit of such child or children, as provided in the fourteenth subdivision of the will. Such must be the construction, for, unless the words "the remainder of my estate" be so limited, the fourteenth subdivision of the will would be clearly repugnant to the provisions made for such child or children in the thirteenth subdivision; for it could not have been the intention to give as a remainder of the estate, to Hamilton College, the $40,000 which might thus be set apart for such child or children. If either the wife or one of the brothers shall become the only surviving legatee, then "in that event" the fifteenth subdivision of the will directs that the "estate at that time be divided, as nearly as may be, into two equal parts, as regards value and renting power, and said wife or brother shall then choose between the incomes of said two properties, and have and enjoy the same during his or her natural life;" and "the other part" of the "estate shall at that date become the property of Hamilton College;" and "at the death of said wife or brother the remaining part" of the "estate shall become the property of Hamilton College."

The words "my only surviving legatee," as used in this last subdivision of the will, imply, at least, that all other legatees named in the will, and living at the time of the testator's death, including Marcus, shall, previous to the time of such sole survivorship, have died leaving some portion of the corpus of the estate which had not before passed to the widow, to Marcus, or for the benefit of such child or children by segregation, as indicated. It may occur that all three brothers die before Marcus, or that the widow and two of the brothers die before Marcus, and then, after reaching his majority, Marcus dies, leaving one or more such children him surviving. In that event, the words, "my estate at that time be divided as nearly as may be into two equal parts," as used in the last subdivision of the will, manifestly mean only so much of the estate as may then remain after setting apart the $40,000 worth of the estate for the benefit of such child or children, as provided in the thirteenth subdivision of the will. Such are the provisions of the will we are called upon to consider. Undoubtedly the will created in the executor an express trust, within the meaning of section 2081, Rev. St. In fact he is required to do much more than to merely sell or lease lands for the benefit of legatees. He is required to do much more than merely to receive the rents and profits of lands, and apply them to the use of a person, during the life of such person, or for any shorter term. He is required to do much more than merely to receive the rents and profits of lands, and to accumulate the same for any of the purposes and within the limits of chapter 95, Rev. St. He manifestly is to take, hold, and manage the estate for the beneficial interest of the several persons living and to be born as indicated. Such duties clearly imply that he is to take a legal title to the whole estate in trust for the purposes mentioned. Scott v. West, 63 Wis. 558–562, 24 N. W. Rep. 161, and 25 N. W. Rep. 18; section 2086, Rev. St.

The will throughout deals with the estate of the testator. It uses the words "my estate," or their equivalent, some 16 different times. It is such estate that the executor and his successor and subordinates are charged by the will with managing, converting, renting, improving, gathering, and dividing, and paying over the income annually, and from time to time segregating, and finally dividing, the corpus of the estate, and then giving up the residuum. Subject to such segregations from time to time, they are required to so hold and manage the corpus of such estate until the same finally passes wholly to the son, at the age of 40, (should he live so long,) 28 years after the testator's death. Should he die after reaching his majority, and before becoming 40, leaving one or more such children, then such executor, etc., is required to set apart the $40,000 worth of said estate, which may include the Wisconsin land, or even the whole of the remainder of the estate, and hold and manage the same until such children severally become of age. The time for such setting apart may commence soon after Marcus becomes 21, or not until just before he reaches 40, and then continue 21 years thereafter. No one can tell how many of such children may be born, or whether any or how many may reach their majority.

Thus, according to the will, the estate, including the Wisconsin land, is liable to be so tied up from 30 to 48 years after the testator's death. But even if Marcus does not so die leaving such children, still, by the fourteenth and fifteenth subdivisions of the will, the estate, including the Wisconsin land, is liable to be so tied up until Marcus and the widow and the three brothers are all dead save one, either the widow or one of the brothers, as the "only surviving legatee." In other words, at least four, if not all, of these five persons, living at the time of the testator's death, must die before either of those subdivisions of the will can become operative. During such periods, or large portions of them, it is impossible to tell where the corpus of the estate will finally go by the terms of the will. If Marcus lives long enough, then all is to go to him. If he dies during the next 19 years after he becomes of age, leaving children, then a large portion of it and possibly the whole may go to them. If he survives all the other legatees named, and then dies during that period, then a portion of it will probably go to Hamilton College; but no one can tell how much, nor, for certain, whether any. If he dies under 21, even though he leave children him surviving, yet neither he, nor such children, nor his heirs at law, are to have any of such corpus. But even then such corpus is, by the will, to remain tied up during the times and for the purposes named, and only go to Hamilton College upon the occurrence of the events mentioned.

The necessity of the corpus of the estate being held by a trustee during such several periods, and awaiting such several contingencies and possibilities, seems to be absolute. Scott v. West, supra. Such trustee or executor is directed to sell some lands and buy others, but he has no authority under the will to pervert or alienate any portion of the estate, in contravention of the trust. Section 2091, Rev. St.; De Wolf v. Lawson, 61 Wis. 475, 21 N. W. Rep. 615. In other words, the corpus of the estate is inalienable during the continuance of the trust. Should the trustee die, it would become necessary to appoint a successor; and, even while he lives, there may be a necessity for an ancillary administration.

Under this will and our statutes, can we hold that there is no unlawful suspension of the power of alienation as to this Wisconsin land? As indicated, upon the death of the testator the widow took, under the will, a present life-estate in that land; and she has now substantially the same under the statutes. According to the will, the executor, as trustee, took a future estate in trust in the same land, for it was "limited to commence in possession at a future day." Section 2034, Rev. St.; Scott v. West, 63 Wis. 570, 24 N. W. Rep. 161, and 25 N. W. Rep. 18. "Future estates," under our statute, "are either vested or contingent." Section 2037, Rev St. "They are vested when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate." Id. By the terms of the will, the trustee or executor was to take such future vested estate in the homestead. As to the other property he took a present vested estate. Coster v. Lorillard, 14 Wend. 302, 303. But neither Marcus nor Hamilton College had anything more than a contingent interest therein; for the statute expressly declares that such "future estates * * * are contingent while the person to whom, or the event upon which they are limited to take effect, remains uncertain." Section 2037. "These definitions of vested and contingent remainders," said Savage, C. J., "are very different from the common-law definitions of those estates." Coster v. Lorillard, 14 Wend. 301. They took no vested interest in the land, and could convey none. Sections 2086, 2089, Rev. St.; De Wolf v. Lawson, 61 Wis. 561, 562, 21 N. W. Rep. 615. Under our statute, "every future estate," whether vested or contingent, is "void in its creation," which "suspends the absolute power of alienation * * * for a longer period than during the continuance of two lives in being at the creation of the estate," etc. Sections 2038, 2039, Rev. St.; De Wolf v. Lawson, 61 Wis. 473, 21 N. W. Rep. 615. The only exception to this, which is in section 2040, is clearly not applicable here.

To avoid all uncertainty, one of the same sections declares that such "absolute power of alienation shall not be suspended by any limitation or condition whatever," and the other declares that "such power is suspend-

ed when there are no persons in being by whom an absolute fee in possession can be conveyed." Since the trustee cannot, under the will, relinquish the trust, which includes the "possession," until the purposes of the trust are fulfilled, as the several periods for such fulfillment transpire; and since persons are liable to be born who by the terms of the instrument will be entitled to a large portion, and possibly the whole, of what may then remain of the estate, including this homestead, —it is very obvious that "there are no persons in being by whom an absolute fee in possession can be conveyed," within the meaning of the statutes; and since this state of things must, under the will, continue for a longer period than two lives in being at the creation of the estate, such suspension, as to this homestead, must be adjudged contrary to the statute, and therefore absolutely void. Coster v. Lorillard, 14 Wend. 317–324; Hawley v. James, 16 Wend. 121, 122, 164, 165, 174, 179.

It is impossible to escape this conclusion by speculating as to the probabilities of Marcus and his unborn children eventually getting this Wisconsin land under the will. We have no authority to speculate upon the chances. The rule is universal that such suspension of the power of alienation must necessarily terminate, under any and all circumstances, within the period prescribed by the statute, or the disposition will be void. Schettler v. Smith, 41 N. Y. 328; Knox v. Jones, 47 N. Y. 397. Nor is it possible to escape such conclusion on the theory that the trustee or executor merely has a power in trust to sell such homestead; for, as indicated, neither the future estate of Marcus, nor Hamilton College, therein, is anything more than contingent under our statutes. We must therefore hold that the attempted disposition of the homestead by the will is void, and that, upon the death of the testator, the same descended to Marcus, subject to the widow's rights therein, as indicated under the statutes.

8. It is strenuously urged, in effect, that, as the testator's residence and domicile were in this state at the time of making his will and his death, he could thereby create no valid trust, except such as are sanctioned by the laws of this state. In other words, that he could not by such a will, under the doctrine of equitable conversion, cause his personal property, and his lands in Michigan and Kansas, to be converted into lands in Kansas City, Missouri, and there held as his estate, and the power of the alienation thereof suspended beyond the time authorized by our statutes, even though such suspension would be valid under the laws of Missouri; and that the question as to the validity of such suspension is properly determinable by this jurisdiction. I frankly confess that I was deeply impressed upon the hearing with the plausibility and force of this argument. The will was here admitted to probate. The executor here qualified, and received his commission from the county court. He is directly accountable to and subject to the orders of that court. There may, necessarily, be ancillary administrations in other states, but they will in law be subordinate to this, which must be regarded as the principal administration. But, in such intricate matters of title and jurisdiction, impressions are of no value unless supported by the logic of the law, if not by authority.

In Curtis v. Hutton, 14 Ves. 537, cited by counsel, the testator devised real estate in England in trust to be sold, and the proceeds of the sale, with the personal estate, upon trust to be laid out in lands for the maintenance of a charity in Scotland, and it was held void as to the real estate, but valid as to the personal property, by the effect of the option. The reason for holding such devise of such real estate in England void, as given by Sir William Grant, M. R., was that "the owners of such property are disabled from disposing of it to any charitable use, except by deed executed twelve months before the death of the owner," etc., "to take effect from the execution." Page 541. Such disability of otherwise disposing of such land was held, in effect, could not be frustrated by the doctrine of equitable conversion. That decision is the foundation of section 479d of Story's Conflict of Laws, which cannot be regarded as of any greater authority; nor does it squarely meet the question here presented. Nine years after that decision the same learned master of the rolls, in a case where the testator by his will directed his executors to dispose of all his real and personal property at Grenada, in the West Indies, and remit the proceeds to England to be laid out as a charitable fund in the best manner possible, held that such directions were not void, as the statute of mortmain did not extend to Grenada. Attorney General v. Stewart, 2 Mer. 143.

In Attorney General v. Mill, 2 Dow & C. 393, the testator by his will, made in England, where he was at the time domiciled, and so remained until his death, gave his personal and real estate (none of the latter being in England or Scotland, but in the West Indies) to trustees, to be laid out in the purchase of lands, or rents of inheritance, in fee-simple, for a charitable purpose, at Montrose, in Scotland; and it was held by the house of lords, affirming the decree of the chancellor, "that the bequest was void by the statute of mortmain, it not appearing from the will that the testator intended that the trustees should have the option to purchase lands in Scotland." The plain inference from the opinion is that had the will directed the purchase of the lands in Scotland, then it would have been valid, as the law there did not prevent such purchase.

In Fordyce v. Bridges, 2 Phil. 515, Lord Chancellor Cottenham, speaking of this subject, said: "An objection was made that the bequest of a fund to be invested in a regular

Scotch entail was void as a perpetuity. The rules acted upon by the courts in this country, with respect to testamentary dispositions tending to perpetuities, relate to this country only. What the law of Scotland may be upon such a subject, the courts of this country have no judicial knowledge, nor will they, I apprehend, inquire; the fund being to be administered in a foreign country is payable here, though the purpose to which it is to be applied would have been illegal if the administration of the fund had been to take place in this country. This is exemplified by the well-established rule in cases of bequests within the statutes of mortmain. A charity legacy void in this country under the statute of mortmain is good and payable here if for a charity in Scotland. * * * The objection raised upon the ground of perpetuity cannot be maintained." This seems to be peculiarly applicable to the personal estate here.

It is said that Freke v. Lord Carbery, L. R. 16 Eq. 461, is to the contrary. In that case the testator was a domiciled Irishman in Ireland, who, after disposing of personal estate in trust, "gave his leasehold house in Belgrave square, England, to the same trustees, upon trust to sell" as directed, and to apply the proceeds in discharge of any incumbrance on the same, and the residue to invest in government or real securities, and hold the same upon such trusts as declared. "The validity of the trusts for accumulation was not disputed, so far as they related to the testator's government stocks and funds and other pure personalty. But the question was raised whether these trusts was valid as to the proceeds of the sale of the house in Belgrave square," and it was held that "the Thellusson act applied to the English leasehold, and the proceeds of the sale thereof, and that the trust for accumulation of the investments of the proceeds of the sale in excess of the periods permitted by that act was invalid." This is clearly distinguishable from the other cases cited, and is an authority to the point that the law of the place where the land is situated governs as to the validity of its disposition by will, instead of the law of the testator's domicile, as here claimed.

In the celebrated case of Hawley v. James, 5 Paige, 337, 16 Wend. 74, 381, and 7 Paige, 213, the testator was domiciled in Albany, New York. By his will he directed all his lands outside of New York city, Albany, and Syracuse, including 40,000 acres in the state of Illinois, to be sold, and the proceeds thereof to be invested in lands in the three cities named, upon trusts which, under the statutes like ours cited, were held void. But in respect to any lands of the testator situated in the state of Illinois, or elsewhere outside of the state of New York, the decree, which was entered by the court of errors, stated that it was not to be deemed a decision upon the title of the said trustees to those lands, or their power over them, (16 Wend. 281,) which question was thereby remitted for further consideration to the court of chancery. Upon the cause being remitted to the chancellor, an application was made for further directions in pursuance of such decree. Upon a full hearing, the learned chancellor said: "This court has no jurisdiction to make a decree which will directly affect either the legal or equitable title to lands situated in another state. And if the legal title to the lands now in question was in any of the infant parties according to the laws of Illinois, or if those who had the legal title were out of the jurisdiction of this court, so that it would be impossible for it to operate upon them personally, to compel them to execute the trust or to convey the legal title according to the decree, I should consider it my duty to dismiss the application, and to refer the parties to the courts of the state where the trust property is situated." Then, after showing that the will had been executed in conformity to the laws of Illinois, so as to vest the legal title to the lands in that state in the trustees, and that as the object of the testator in directing a sale of the Illinois lands and a conversion of the same into money was to buy lands in the state of New York, and hold them upon trusts which were contrary to the statutes of that state, and therefore illegal, the trustees were deemed to hold the title to the Illinois lands in trust for the heirs; and, as the trustees were all within the jurisdiction of the court, they were accordingly directed to convey the same to the heirs. 7 Paige, 213.

In Burrill v. Sheil, 2 Barb. 457, the testator, domiciled in New York, directed lands in that state to be sold, and a portion of the proceeds invested in England; and, as no law was thereby violated, it was held that the courts of New York had no power to divert the investment from England, and direct the same to be made in New York, except with the consent of all the parties interested; and, as some were infants, such consent could not be obtained.

In Bascom v. Albertson, 34 N. Y. 584, a bequest by a New York testator was made to five such persons as the supreme court of Vermont should appoint to be trustees, to found, establish, and manage an institution for the education of females, to be located at Middlebury, Vermont, and it was held ineffectual for any purpose, since the object of the bequest was unlawful in the state of the testator's domicile. This is in harmony with the second proposition announced in this opinion.

In Chamberlain v. Chamberlain, 43 N. Y. 424, the testator was domiciled in the state of New York, and, among other things, he bequeathed a certain amount to the "Century Fund Society, a corporation created under the laws of Pennsylvania for charitable and benevolent purposes." In passing upon its validity, the court held that "the law of the

testator's domicile controls as to the formal requisites essential to the validity of the will, the capacity of the testator, and the construction of the instrument. When, by the lex domicilii, a will has all the formal requisites to pass title to personalty, the validity of particular bequests will depend upon the law of the domicile of the legatee, except in cases where the law of the domicile of the testator in terms forbids bequests for any particular purpose, or in any particular manner, in which latter case the bequest would be void everywhere." The learned justice giving the opinion said: "So far as the validity of bequests depends upon the general law and policy of the state affecting property and its acquisition generally, and relating to its accumulation and a suspension of ownership and the power of alienation, each state is sovereign as to all property within its territory, whether real or personal. It is no part of the policy of the state of New York to interdict perpetuities or gifts in mortmain in Pennsylvania or California. Each state determines those matters according to its own views of policy or right, and no other state has any interest in the question; and there is no reason why the courts of this state should follow the funds bequeathed to the Century Fund Society to Pennsylvania, to see whether they will there be administered in all respects in strict harmony with our policy and our laws." Page 434. To the same effect is Mapes v. American Home M. Soc., 33 Hun. 360; Bible Soc. v. Pendleton, 7 W. Va. 79.

This case of Chamberlain v. Chamberlain is in harmony with subsequent decisions in the same state, in which it has been held, in effect, that, in the absence of any equitable conversion, the question as to the unlawful suspension of the power of alienation of lands in New York must be governed by the laws of that state, notwithstanding the testator who attempted to dispose of the same was at the time of making his will and his death domiciled in some other state, as, for instance, in Connecticut, Massachusetts, or California, as will appear by White v. Howard, 46 N. Y. 144; Despard v. Churchill, 53 N. Y. 192; Hobson v. Hale, 95 N. Y. 588.

The only case cited which seems to be in conflict with the principles stated is Wood v. Wood, 5 Paige, 596. But that is expressly overruled in Chamberlain v. Chamberlain, 43 N. Y. 435, and impliedly so in other cases.

It is unnecessary to look further into the authorities. The difficulty in holding that the laws and courts of this state may interdict the conversion of personal property into lands in Missouri, or lands in Michigan or Kansas, or into lands in Kansas City, is apparent when we remember that the laws of this state have no extraterritorial force, and the courts of Wisconsin have no extrastate jurisdiction. The principles of law thus indicated are in strict harmony with the rulings of this court in Van Steenwyck v. Washburn, 59 Wis. 510, 511, 17 N. W. Rep. 289.

We must therefore disclaim jurisdiction to determine the title to any of the lands outside of Wisconsin, or the legality of accumulations of rents and profits therefrom. It follows that the validity of the proposed conversion of personal property into lands in Kansas City must be determined by the laws and courts of Missouri. So the question of the validity of the proposed conversion of lands in other states into lands in the same city would seem to be determinable by the same jurisdiction, but of this we have no authority to decide. Such questions of the validity of such conversions should be determined at an early day by instituting the proper suit in the proper jurisdiction.

The costs and disbursements of all parties in this court and the circuit court are payable out of the estate. The county court will make such allowance to the respective parties out of the estate for counsel fees as, in the exercise of a sound discretion, may be just.

The judgment of the circuit court is reversed on each of the four appeals, and the cause is remanded, with directions to enter judgment in accordance with, and to the extent indicated in, this opinion, but leaving open for further action the questions as to the validity of such conversions, suspensions, and accumulations, until authoritatively determined by the rightful jurisdiction.

Motions for a rehearing, made by each of the several parties, were denied November 22, 1887.

READ et al. v. WILLIAMS et al.

(26 N. E. 730, 125 N. Y. 560.)

Court of Appeals of New York. Feb. 24, 1891.

Appeal from supreme court, general term, first department.

J. Edward Swanstrom, P. H. Vernon, John E. Parsons, Fordham Morris, and *Manley A. Raymond,* for appellants. *Charles A. Jackson,* for respondents.

ANDREWS, J. The jurisdiction of a court of equity to entertain an action in behalf of the next of kin of a testator for the construction of a will disposing of personal estate, where the disposition made by the testator is claimed to be invalid or inoperative for any cause, was asserted by the chancellor in Bowers v. Smith, 10 Paige, 200, and was maintained in Wager v. Wager, 89 N. Y. 161, and in Holland v. Alcock, 108 N. Y. 312, 16 N. E. Rep. 305. It is true that in such cases the next of kin claim in hostility to the will, but the executors, in case the disposition made by the testator is invalid or cannot take effect, hold the personalty upon a resulting trust for those entitled under the statute of distributions; and thereby the jurisdiction to bring an equitable action for construction, and to have the resulting trust declared by the court, attaches as incident to the jurisdiction of equity over trusts. The Code of Civil Procedure (section 1866) has extended the remedy so as to include suits for construction of devises in behalf of heirs claiming adversely to the will, and it would not be consistent with the spirit of this legislation to narrow the jurisdiction in cases of bequests of personalty. The case of Chipman v. Montgomery, 63 N. Y. 221, contains expressions which, considered independently of the facts of the case, may seem adverse to this view; but, as was said by RAPALLO, J., in Wager v. Wager, supra, "the plaintiffs there had on their own showing no present interest in the property, and might never have any." The case of Horton v. Cantwell, 108 N. Y. 255, 15 N. E. Rep. 546, was one also where the plaintiff had no interest in the ultimate disposition of the estate there in question, whether the clauses challenged were valid or invalid, and the court decided that she could not maintain the action.

It is not really contended that the provision in the third paragraph of the will, and the modification thereof in the second paragraph of the third codicil, setting apart a trust fund, to be perpetually kept by the executors and trustees and their successors, and directing the application of the income for cemetery purposes, can be upheld. These provisions are manifestly void, as involving an unlawful suspension of the absolute ownership of personal property. The principal question in the case relates to the validity of the residuary clause in the second codicil. That clause is as follows: "*Eleventh.* After the payment and discharge of my just debts, (if any there be,) funeral expenses, and expenses of administration, and after all legacies and bequests mentioned in my last will and testament, as modified by my codicils, shall have been paid in full, if thereafter there shall be any residue and remainder of my estate and property, I give and bequeath such residue and remainder, after the same shall have been duly converted into money, as follows, viz., to such charitable institutions, and in such proportions, as my executors, by and with the advice of my friend, Rev. John Hall, D. D., shall choose and designate." Subsequent to the death of the testatrix, and prior to the commencement of this action, the executors, with the advice and approval of Dr. Hall, made a written choice and designation of certain incorporated charitable institutions organized or existing under the laws of this state, authorized to take real and personal property by devise and bequest, among whom they directed the residuary estate to be divided. It will be noticed that the particular donees of the gift are not designated in the will. They could not be known until the executors should select, in the manner pointed out, the particular charitable institutions which should take the bequest. The range of selection was unlimited, except that the appointees were to be institutions of charity, and perhaps, also, it is implied that they were to be incorporated charities, because a provision is made that the institutions selected shall be under no disability to accept the legacy; but beyond this there was no limitation whatever. The selection was not confined to charitable institutions in this state or in the United States. If the power was valid, the executors, with the approval of Dr. Hall, might appoint the gift to charitable institutions anywhere in this country or in foreign countries. The will did not vest the title to the property in any one pending the exercise of the power of appointment. It was not given to the executors, nor was it given to any particular charitable institution which could be pointed out or ascertained at the death of the testatrix. If the property, under the will, vested anywhere, it was in the whole aggregate incorporated institutions of the whole world capable of taking by devise or bequest, subject to being divested in favor of such particular charities as should thereafter be designated by the executors. The question presented is not an original one in this court. It was decided adversely to the defendants in the case of Prichard v. Thompson, 95 N. Y. 76. There is between that case and this no distinction in principle. In that case the legal title to the fund was vested in the executors in trust. In this case the executors were given simply a power in trust, without clothing them, in terms, with the legal title to the fund to be distributed. But this creates no legal distinction. The point of the decision in Prichard v. Thompson is that, while the law recognizes the right of a testator by will to create powers of appointment and selection, and will sustain dispositions of property made pursuant thereto, although the testator himself did not designate the particular individuals in whose favor the power should be exer-

cised, nevertheless that this right is subject to the limitation that the testator must himself designate the class of persons in whose favor the power may be exercised, with sufficient certainty so that the court can ascertain who were the objects of the power; and that a power to select the beneficiaries from among all the members of the community, or all corporations of a particular class, wherever they may exist, however numerous, is void for indefiniteness. Such a power is distinctly in contravention of the policy of the statute of wills. It substitutes for the will of the testator the will and discretion of the donees of the power, and makes the latter controlling in the disposition of the testator's property. That cannot fairly be said to be a disposition by the will of the testator, with which the testator had nothing to do, except to create an authority in another to dispose of the testator's property according to the will of the donee of the power, with no limitation except that the distribution shall be made among corporations to be selected from a large class of corporations, wherever existing, answering the description in the will. The statute of powers does not define all the purposes for which a power over property may be created. It recognizes the existence of powers of appointment and selection, which were well known to the common law. But, as pointed out in the opinion of VAN BRUNT, P. J., in the opinion of the general term, the statute presupposes that a power of selection must be so defined in respect of the objects that there are persons who can come into the court and say that they are embraced within the class, and demand the enforcement of the power; and the same principle is recognized in the provision that, "if the trustee of a power with a right of selection shall die leaving the power unexecuted, its execution shall be decreed in equity for the benefit of all persons designated as objects of the trust." 1 Rev. St. p. 734, § 100. It would be manifestly impracticable for the court to ascertain in respect of the will in question what corporations constituted the whole class of charitable institutions mentioned in the will, or to decree the execution of the power for the benefit of the numerous class embraced in the description. The difficulty in this case is not avoided because the power of selection has in fact been exercised, nor because it has been exercised in favor of corporations which, if they had been the direct objects of the testator's bounty, would have been entitled to take. The vice lies in the unauthorized power. What has been done under it is, in a legal sense, immaterial. The validity of the power depends upon its nature, and not upon its execution. The heirs and next of kin of the testatrix derive their title under the law of descent and distribution, and their rights attached, immediately on the death of the testatrix, to any part of the estate not validly disposed of by the will. If the power attempted to be created by the will was valid, their rights, whatever they were, were subject to it. If invalid, and there was no valid alternative disposition by the testator of the residue, they immediately became entitled. This question was considered by RAPALLO, J., in Holland v. Alcock, 118 N. Y. 323, 16 N. E. Rep. 309, 310, and it is unnecessary to further elaborate it.

We are of opinion that the court below erred in holding that the heirs of the testatrix are excluded, under the doctrine of equitable conversion, from any interest in the real estate of the testatrix remaining undisposed of. The testatrix intended to dispose of her whole estate, which consisted both of real and personal property. By the original will she gave the residue, after satisfying charges and legacies, to certain specified corporations, "after the same shall have been duly converted into money." By the seventh clause of the will she directed the executors to sell and convert into cash all her real estate, "and also to do all and other acts and things which may be proper and requisite in law for the purpose of and to accomplish the due payment of the bequests, and the carrying out all of the provisions in this, my last will and testament, contained." By her second codicil she revoked the residuary clause in the will, and substituted the power to the executors to dispose of the residue, to which reference has been made; and in the gift to the institutions to be designated she uses the same language as in the gift to the corporations in the will, viz., "after the same [her estate] shall have been converted into money." It seems to be quite clear that the conversion was directed for the purposes of the will. She may reasonably have supposed that it would be more convenient that the corporations should take their respective interests as money, and not as land. The personal estate was largely in excess of the sum required to pay charges and legacies outside of what was given by the residuary clause. The direction to sell the real estate apparently could have had no purpose except to accomplish an easy division of the residuary estate among the corporations to which it was to be given. The gift failing, the purpose of the conversion ceased, and the direction to sell the real estate was no longer imperative. The conversion was not directed for the purpose of distribution of the estate as money among the next of kin. The testatrix never intended that they should take it in any form. The case falls within the general principle declared in many cases, that a power of sale in a will, however peremptory in form, if it can be seen that it was inserted in aid of a particular purpose of the testator, or to accomplish his general scheme of distribution, does not *ipso facto* operate as a conversion where the scheme or purpose fails by reason of illegality, lapse, or other cause. In that case the property retains its original character, and it goes to the heir or next of kin as real estate or personalty, as the case may be. Nothing short of a clear intention, to be collected from the will, that the land shall be sold and converted into money before division, whether the par-

ticular purpose fail or not, will be sufficient in equity to change the character of the property. In England even this is not sufficient to exclude the heir, in the absence of an express gift of the proceeds away from him. Fitch v. Weber, 6 Hare, 145; Hopkinson v. Ellis, 10 Beav. 169; Taylor v. Taylor, 3 De Gex, M. & G. 190; 1 Williams, Ex'rs, 663 et seq. In this country the courts do not seem to hold so strict a doctrine. The result is that the judgment should be reversed on the appeal of the infant defendant, Kate Haddock, so far as it adjudges an equitable conversion, and in other respects it should be affirmed.

All concur. Judgment accordingly.

DAY et al. v. WALLACE.

(33 N. E. 185, 144 Ill. 256.)

Supreme Court of Illinois. Jan. 18, 1893.

Appeal from circuit court, Sangamon county; Jacob Fouke, Judge.

Cross bill by Mary Wallace against Edward Day and others. Decree for cross complainant. Defendants appeal. Reversed.

Patton & Hamilton, for appellants. Ricks & Creighton and Drennan & Hogan, for appellee.

WILKIN, J. By the eighth clause of the last will of George Gregory, deceased, he devised to appellants two tracts of land,—one of 20 acres, and the other of 80 acres. By the ninth clause of the same will he devised to appellee two tracts also,—one of 20 acres, and the other of 80 acres. The 80-acre tract in both clauses is the same. By her certain cross bill in the court below, appellee alleged that the two clauses, in so far as they attempt to devise the same land, are irreconcilably repugnant to each other, and therefore the last must prevail, and she asked the court to decree her the said 80-acre tract, to the exclusion of appellants, and the prayer of her bill was granted. From that decree this appeal is prosecuted.

Appellants do not deny that said 80-acre tract was devised twice, in the manner alleged in the bill, but they deny that the two clauses of said will are thereby rendered wholly and irreconcilably repugnant, within the meaning of the rule which gives effect to the latter clause, to the exclusion of the former; and insist that the rule of construction in such case is to give the land to the devisees in both clauses, concurrently as tenants in common. The authorities are not unfform on the subject, but the later and more generally approved rule seems to be as contended by appellants. In Jarman on Wills (volume 2, p. 44) it is said: "Sometimes it happens that the testator has, in several parts of his will, given the same lands to different persons in fee. At first sight this seems to be a case of incurable repugnancy, and, as such, calling for the application of the rule which sacrifices the prior of two irreconcilable clauses, as the only mode of escaping from the conclusion that both are void. Even here, however, a reconciling construction has been devised; the rule being in such cases, according to the better opinion, that the devisees take concurrently. The contrary, indeed, is laid down by Lord Coke and other early writers, who say that the last devise shall take effect; and a similar opinion seems to have been entertained by Lord Hardwicke, though he admitted that latterly a different construction had prevailed. The point underwent much discussion in Sherratt v. Bentley, 2 Mylne & K. 149, already stated; and Lord Brougham, after reviewing the authorities, and fully recognizing the general doctrine which upholds the latter part of a will, by the sacrifice of the former, to which it was repugnant, considered that, consistently with this rule, it might be held that, where there are two devisees in fee of the same property, the devisees take concurrently. 'If, in one part of a will,' he said, 'an estate is given to A., and afterwards the same testator gives the same estate to B., adding words of exclusion, as "not to A.," the repugnance would be complete, and the rule would apply; but if the same thing be given first to A., and then to B., unless it be some indivisible chattel, as in the case which Lord Hardwicke puts in Ulrich v. Litchfield, 2 Atk. 372, the two legatees may take together, without any violence to the construction.' It seems therefore by no means inconsistent with the rule, as laid down by Lord Coke, and recognized by the authorities, that a subsequent gift, entirely and irreconcilaby repugnant to a former gift, of the same thing, shall abrogate and revoke it, if it be also held that where the same thing is given to two different persons, in different parts of the same instrument, each may take a moiety; though, had the second gift been in a subsequent will, it would, I apprehend, work a revocation." Redfield, speaking on the same subject, says: "The more rational, and perhaps the general, opinion at the present day is that, where the same thing is given in the same will to two different persons, they shall take jointly, either as joint tenants or tenants in common, according to the terms of the devise or bequest." After referring to what was said by Lord Brougham in Sherratt v. Bentley, 2 Mylne & K. 149, quoted by Jarman, as above, he adds: "We fully concur in his lordship's suggestions here, as everyone must, we think, in regard to the reasonableness of the latter rule of construction, when it can be applied, as in the case of the devise of the same estate to different devisees; and we have no doubt it will generally be recognized as the true rule, and the one established by the authorities, for the government of cases of this character. But, as well observed by the learned chancellor, in an after portion of his opinion, that is not a case of clear and irreconcilable repugnancy; but, the testator having given the same estate to two persons, in different portions of his will, it is the same as if all the names had been united in one gift of the same estate." 1 Redf. Wills, 443. The case of McGuire v. Evans, 5 Ired. Eq. 269, goes to the full extent of holding this doctrine, even as applied to a double bequest of indivisible property. On the contrary, as said by Jarman, supra, authorities are not wanting holding the contrary construction. Hollins v. Coonan, 9 Gill, 62; Covert v. Sebern, (Iowa,) 35 N. W. Rep. 636.

The case is one of first impression in this state, and, in the conflict of authority on the

subject, we are left free to adopt that rule which to us seems most reasonable and best calculated to effectuate the intention of the testator. Taking into consideration all the facts of this case proper to be considered, it is manifest that whatever presumption might otherwise arise in favor of the latter clause expressing that intention, rather than the former, is rebutted. In the first place, it is clear from the two clauses that he intended to give appellants 100 acres of land, and a like quantity to appellee. He owned at the time of making his will, and when he died, some 240 acres of land not disposed of by the will. Eighty acres of this undisposed-of land was in the same section as the 80 in question. It is therefore clear that, instead of changing his mind after making the first devise of the 80-acre tract described in the will, either he or the person who wrote his will made a mistake in the description of one of the clauses. It is impossible to tell in which clause that mistake occurred. We know of no rule by which we are allowed to say it was made in the first, rather than in the last. We can conceive of no good reason why the consequences of such a mistake should be wholly visited upon appellants. While it is true that an application of the rule laid down by the above-named authors will not fully carry out the intention of the testator, it will come nearer accomplishing that purpose than the one insisted upon by appellee, and adopted by the court below. Certainly it does justice between the parties. Appellants and appellee should take said real estate as tenants in common, appellants taking one undivided half thereof, and appellee the other. We are of the opinion that the decree below is erroneous, and should be reversed, and the judgment of this court will be entered accordingly, and the cause will be remanded to the circuit court, with directions to enter another decree, conforming to the views herein expressed.

Reversed and remanded.

BISHOP v. McCLELLAND'S EX'RS.

(16 Atl. 1, 44 N. J. Eq. 450.)

Court of Chancery of New Jersey. November 13, 1888.

On final hearing on bill and answer.

Bill by Howard Bishop against the executors of Mary A. McClelland, deceased, for the construction of a will.

C. B. Harvey, for complainant. George C. Ludlow, for defendants.

VAN FLEET, V. C. This is a suit for a legacy. The case presents but a single question, and that is, what is the complainant entitled to, $12,000 or $6,000? The complainant is a great-grandson of Mrs. Mary A. McClelland, deceased. By her will, made in March, 1864, Mrs. McClelland gave her two grandchildren, Howard W. Bishop (the father of the complainant) and Alexander McC. Bishop, each the sum of $3,000. Howard W. Bishop died in September, 1866, leaving the complainant, his only child, surviving him. The testatrix, by a codicil made in December, 1868, revoked the gift made by her will of $3,000 each to her two grandchildren, and in lieu thereof gave to her executors the sum of $12,000, with direction to invest the same for the sole use and benefit of her grandson, Alexander McC. Bishop, and of her great-grandson, the son of her deceased grandson, Howard W. Bishop. The codicil then says: "And I hereby order and direct my executors to pay over one-half of the clear yearly income of said sum to Alexander, and the other half of said income to the guardian of my great-grandson, until my great-grandson shall become of lawful age; when my executors shall pay over the same, together with the principal thereof, to my great-grandson and my grandson Alexander, share and share alike. Should either of said descendants die, the survivor shall have the whole of the interest on said sum. Should both these die before the said great-grandchild comes of age, the whole, together with the principal thereof, shall revert to my estate, to be disposed of accordingly." By a further codicil, made in January, 1869, the testatrix said: "If my grandson Alexander McC. Bishop, and my great-grandson Howard Bishop, both die without children, then their and each of their shares shall revert to my estate." The testatrix died in February, 1870. Her grandson Alexander McC. Bishop died without issue, never having been married, in April, 1885. The complainant attained his majority in February, 1888. Shortly after that event he made demand on the defendants for the payment of the whole $12,000; claiming that, as he had survived his colegatee, he, on attaining his majority, became entitled, by the true construction of the will, to the whole fund. The defendants offered to pay him one-half of the whole fund, together with the interest on the whole up to the time he attained his majority; but this he declined, and thereupon brought this suit.

The court cannot in this suit, or on the present record, decide any question except this: Is the complainant entitled to the whole fund in question? If it is found that he is not, but is only entitled to half, the question where the other half goes, whether it falls into the residue of the testatrix's estate, or goes to the personal representatives of the deceased legatee, is one that the court cannot deal with in the present condition of the record. None of the persons having the highest beneficial interest in the decision of that question are before the court as parties, and they would not, therefore, be bound by any decision of that question which might be made in this suit. The gift over, or rather the direction contained in the last codicil, declaring that if both the grandson and great-grandson die without children, that then their and each of their shares shall revert, must, according to the prevailing rule in such cases, be held to mean that if both should die before the time fixed for the payment of the legacies, that is, before the great-grandson attained 21 years of age, that then, and in that case, the $12,000 should fall into the residue of the testatrix's estate. The settled rule of construction in such case is not to interpret the will as meaning death at any time, but death before the legacy or fund is, by the terms of the will, payable or distributable. Baldwin v. Taylor, 37 N. J. Eq. 78; on appeal, 38 N. J. Eq. 637.

The complainant puts his right to the whole fund in question on two grounds: First, that there is a gift made to him, by implication, of the whole fund; and, second, it is claimed that where a bequest is made to two persons of a particular sum, payable at a future time, with direction that the money shall, in the mean time, be invested, and the interest thereof be paid to the legatees, and there is also a gift of the interest of the whole fund to the survivor, in case one dies before the time for payment arrives, that the gift of the interest in such case carries with it the whole fund, both principal and interest. The claim is that by force of this rule the complainant is entitled to the whole fund. On neither ground can the complainant's claim, in my judgment, be sustained. A bequest may undoubtedly arise from implication, but, to warrant the court in so declaring, there must be something more than conjecture to support its declaration. The implication must be a necessary one. The probability of an intention to make the gift implied must appear to be so strong that an intention contrary to that which is imputed to the testator cannot be supposed to have existed in his mind. A construction in favor of a gift by implication should never be adopted, except in cases where, after a careful and full consideration of the whole will, the mind of the judge is convinced that the testator intended to make

the gift. Denise's Ex'rs v. Denise, 37 N. J. Eq. 163. Now, as I read the testatrix's will, there is not only nothing on its face which will support an implication that the testatrix meant that the complainant should, in any event or under any circumstances, take the whole fund, but, on the contrary, I think it quite clearly appears that such was not her intention. The gift to the complainant and his co-legatee is made by separate and distinct parts or shares. The principal is to be paid to them "share and share alike." They take equally in severalty. Under a gift in this form to two or more, the legatees take, not as joint tenants, but as tenants in common, without right of survivorship. 2 Williams, Ex'rs, 1463; Hawk. Wills, 112; Heathe v. Heathe, 2 Atk. 121; Vreeland v. Van Ryper, 17 N. J. Eq. 133. The same intention is made manifest again, when the testatrix makes provision as to what shall be done in case either of the legatees happen to die before the fund becomes payable. In that event she says: "The survivor shall have the whole of the interest on said sum;" thus, by express words, limiting the enlargement or increase of the right of the survivor to the interest, but leaving his right to the principal exactly as it stood before; and so, too, it will be observed that the testatrix, when she gives direction as to what shall be done in case both legatees die without children before the fund becomes payable, treats or speaks of their rights in the fund as several and distinct. Her language is that "their and each of their shares" shall revert to her estate. There is nothing in the testamentary provisions under consideration which will, in my judgment, support the claim of a gift by implication. The other claim of the complainant is, in my opinion, also groundless. There can be no doubt that a gift of the interest, income, or produce of a fund, without limitation as to continuance, or without limit as to time, will, according to a settled rule of construction, be held to pass the fund itself; and this will be the effect given to a gift made in this form, whether the gift be made directly to the legatee, or through the intervention of a trustee. 2 Williams, Ex'rs, 1193; Craft v. Snook, 13 N. J. Eq. 121; Gulick's Ex'rs v. Gulick, 25 N. J. Eq. 324, on appeal, 27 N. J. Eq. 498; Huston v. Read, 32 N. J. Eq. 591. But it is perfectly plain that the complainant cannot, by force of this rule, lay the slightest claim to that half of the fund in question which was given to his co-legatee. It is true that, in consequence of the death of his co-legatee before the fund became payable, he became entitled, under the will, to the interest of the whole fund from the date of the death of his co-legatee up to the time when the fund became payable, but the gift of the interest to him was not forever or without limit as to time. The natural and obvious meaning of the gift of "the whole of the interest on said sum" to the survivor is not that the survivor shall have a right to take the interest on the whole fund forever, or without limit as to time, but, on the contrary, that he shall have the right to take it merely for the period intervening between the time when his co-legatee died and the time when the fund became payable. As I construe the testamentary provisions on which the complainant rests his claim, he is entitled to one-half of the fund in question, together with the interest on the whole fund from the time of the death of his co-legatee up to the time the complainant attained his majority, but to nothing more.

SCOTT v. McNEAL et al.

(14 S. Ct. 1108, 154 U. S. 34.)

Supreme Court of the United States. May 14, 1894.

No. 890.

In error to the supreme court of the state of Washington.

This was an action of ejectment, brought January 14, 1892, in the superior court of Thurston county, in the state of Washington, by Moses H. Scott against John McNeal and Augustine McNeal to recover possession of a tract of land in that county.

At the trial, it was conceded that the title in this land was in the plaintiff until 1888; and he testified that he entered into possession thereof, and made improvements thereon, and had never parted with the possession, nor authorized any one to go upon the land; that he had demanded possession of the defendants, and they had withheld it from him; and that its rental value was $100 a year.

The defendants denied the plaintiff's title, and claimed title in themselves under a deed from an administrator of the plaintiff's estate, appointed in April, 1888; and in their answer alleged that in March, 1881, the plaintiff mysteriously disappeared from his place of abode, and without the knowledge of those with whom he had been accustomed to associate, and remained continuously away until July, 1891, and was generally believed by his former associates to be dead; and specifically alleged, and at the trial offered evidence tending to prove, the following facts:

On April 2, 1888, Mary Scott presented to the probate court of the county of Thurston, in the territory of Washington, a petition for the appointment of R. H. Milroy as administrator of the estate of the plaintiff, alleging "that one Moses H. Scott, heretofore a resident of the above-named county and territory, mysteriously disappeared some time during the month of March, 1881, and more than seven years ago; that careful inquiry made by relatives and friends of said Moses H. Scott, at different times since his said disappearance, has failed to give any trace or information of his whereabouts, or any evidence that he is still living; that your petitioner verily believes that said Moses H. Scott is dead, and has been dead from the time of his said disappearance;" that he was never married, and left no last will or testament yet heard of; that he left real estate in his own right in this county of the value of $600, more or less; that his heirs were three minor children of a deceased brother; and that the petitioner was a judgment creditor of Scott.

Notice of that petition was given by posting in three public places, as required by law, a notice, dated April 7, 1888, signed by the probate judge, and in these words: "In the Probate Court of Thurston County, W. T. Mary Scott having filed in this court a petition praying for the appointment of R. H. Milroy as administrator of the estate of Moses H. Scott, notice is hereby given that the hearing and consideration of said petition has been fixed for Friday, April 20, 1888, at 10 o'clock a. m., at the office of the undersigned."

At the time thus appointed, the probate court, after appointing a guardian ad litem for said minors, and hearing witnesses, made an order by which, "it duly appearing that said Moses H. Scott disappeared over seven years ago, and that since said time nothing has been heard or known of him by his relatives and acquaintances, and that said relatives and acquaintances believe him to be dead, and that his surroundings, when last seen (about eight years ago), and the circumstances of that time and immediately and shortly afterwards, were such as to give his relatives and acquaintances the belief that he was murdered at about that time; and it appearing that he has estate in this county: Now, therefore, the court find that the said Moses H. Scott is dead to all legal intents and purposes, having died on or about March 25, 1888; and no objections having been filed or made to the said petition of Mary Scott, and the guardian ad litem of the minor heirs herein consenting, it is ordered that said R. H. Milroy be appointed administrator of said estate, and that letters of guardianship issue to him upon his filing a good and sufficient bond in the sum of one thousand dollars." Letters of administration were issued to Milroy, and he gave bond accordingly.

On July 16, 1888, the probate court, on the petition of Milroy as administrator, and after the usual notice, and with the consent of the guardian ad litem of said minors, made an order, authorizing Milroy as administrator to sell all Scott's real estate. Pursuant to this order, he sold by public auction the land now in question, for the price of $301.50, to Samuel C. Ward. On November 26, 1888, the probate court confirmed the sale, the land was conveyed to Ward, and the purchase money was received by Milroy, and was afterwards applied by him to the payment of a debt of Scott, secured by mortgage of the land.

On November 26, 1889, Ward conveyed this land by warranty deed to the defendants, for a consideration paid of $800; and the defendants forthwith took and since retained possession of the land, and made valuable improvements thereon.

At the time of the offer of this evidence, the plaintiff objected to the admission of the proceedings in the probate court, upon the ground that they were absolutely void, because no administration on the estate of a live man could be valid, and the probate court had no jurisdiction to make the orders in question; and objected to the rest of the evidence as irrelevant and immaterial. But the court ruled that, the probate court having passed upon the sufficiency of the petition to give it jurisdiction, and having found that the law presumed Scott to be dead, its pro-

ceedings were not absolutely void; and therefore admitted the evidence objected to, and directed a verdict for the defendants, which was returned by the jury, and judgment rendered thereon. The plaintiff duly excepted to the rulings and instructions at the trial, and appealed to the supreme court of the state.

In that court, it was argued in his behalf "that to give effect to the probate proceedings under the circumstances would be to deprive him of his property without due process of law." But the court held the proceedings of the probate court to be valid, and therefore affirmed the judgment. 5 Wash. 309, 31 Pac. 873.

The plaintiff sued out this writ of error, and assigned for error that the probate proceedings, as regarded him and his estate, were without jurisdiction over the subject-matter, and absolutely void; and that the judgment of the superior court, and the judgment of the supreme court of the state affirming that judgment, deprived him of his property without due process of law, and were contrary to the fourteenth amendment of the constitution of the United States.

Nathan S. Porter, for plaintiff in error. Milo A. Root, for defendants in error.

Mr. Justice GRAY, after stating the case, delivered the opinion of the court.

The plaintiff formerly owned the land in question, and still owns it, unless he has been deprived of it by a sale and conveyance, under order of the probate court of the county of Thurston and territory of Washington, by an administrator of his estate, appointed by that court on April 20, upon a petition filed April 2, 1888.

The form of the order appointing the administrator is peculiar. By that order, after reciting that the plaintiff disappeared more than seven years before, and had not since been seen or heard of by his relatives and acquaintances, and that the circumstances at and immediately after the time when he was last seen, about eight years ago, were such as to give them the belief that he was murdered about that time, the probate court finds that he "is dead to all legal intents and purposes, having died on or about March 25, 1888;" that is to say, not at the time of his supposed murder, seven or eight years before, but within a month before the filing of the petition for administration. The order also, after directing that Milroy be appointed administrator, purports to direct that "letters of guardianship" issue to him upon his giving bond; but this was evidently a clerical error in the order or in the record, for it appears that he received letters of administration and qualified under them.

The fundamental question in the case is whether letters of administration upon the estate of a person who is in fact alive have any validity or effect as against him.

By the law of England and America, before the Declaration of Independence, and for almost a century afterwards, the absolute nullity of such letters was treated as beyond dispute.

In Allen v. Dundas, 3 Term R. 125, in 1789, in which the court of king's bench held that payment of a debt due to a deceased person to an executor who had obtained probate of a forged will discharged the debtor, notwithstanding the probate was afterwards declared null and void, and administration granted to the next of kin, the decision went upon the ground that the probate, being a judicial act of the ecclesiastical court within its jurisdiction, could not, so long as it remained unrepealed, be impeached in the temporal courts. It was argued for the plaintiff that the case stood as if the creditor had not been dead, and had himself brought the action, in which case it was assumed, on all hands, that payment to an executor would be no defense. But the court clearly stated the essential distinction between the two cases. Mr. Justice Ashurst said: "The case of a probate of a supposed will during the life of the party may be distinguished from the present, because during his life the ecclesiastical court has no jurisdiction, nor can they inquire who is his representative; but, when the party is dead, it is within their jurisdiction." And Mr. Justice Buller said: "Then this case was compared to a probate of a supposed will of a living person; but in such a case the ecclesiastical court have no jurisdiction, and the probate can have no effect: their jurisdiction is only to grant probates of the wills of dead persons. The distinction in this respect is this: if they have jurisdiction, their sentence, as long as it stands unrepealed, shall avail in all other places; but where they have no jurisdiction, their whole proceedings are a nullity." Id. 130. And such is the law of England to this day. Williams, Ex'rs (9th Ed.), 478, 1795; Taylor, Ev. (8th Ed.) §§ 1677, 1714.

In Griffith v. Frazier, 8 Cranch, 9, 23, in 1814, this court, speaking by Chief Justice Marshall, said: "To give the ordinary jurisdiction, a case in which, by law, letters of administration may issue, must be brought before him. In the common case of intestacy, it is clear that letters of administration must be granted to some person by the ordinary; and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority, because he had power to grant letters of administration in the case. But suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet the ordinary must always inquire and decide whether the person, whose estate is to be committed to the care of others, be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the

character or powers of an administrator. The case, in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by the law. And although one of the points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction." See also Insurance Co. v. Tisdale, 91 U. S. 238, 243; Hegler v. Faulkner, 153 U. S. 109, 118, 14 Sup. Ct. 779.

The same doctrine has been affirmed by the supreme court of Pennsylvania in a series of cases beginning 70 years ago. McPherson v. Cunliff (1824) 11 Serg. & R. 422, 430; Peebles' Appeal (1826) 15 Serg. & R. 39, 42; Devlin v. Com. (1882) 101 Pa. St. 273. In the last of those cases, it was held that a grant of letters of administration upon the estate of a person who, having been absent and unheard from for 15 years, was presumed to be dead, but who, as it afterwards appeared, was in fact alive, was absolutely void, and might be impeached collaterally.

The supreme judicial court of Massachusetts, in 1861, upon full consideration, held that an appointment of an administrator of a man who was in fact alive, but had been absent and not heard from for more than seven years, was void, and that payment to such an administrator was no bar to an action brought by the man on his return; and, in answer to the suggestion of counsel, that "seven years' absence, upon leaving one's usual home or place of business, without being heard of, authorizes the judge of probate to treat the case as though the party were dead," the court said: "The error consists in this, that those facts are only presumptive evidence of death, and may always be controlled by other evidence showing that the fact was otherwise. The only jurisdiction is over the estate of the dead man. When the presumption arising from the absence of seven years is overthrown by the actual personal presence of the supposed dead man, it leaves no ground for sustaining the jurisdiction." Jochamsen v. Bank, 3 Allen, 87, 96. See, also, Waters v. Stickney, 12 Allen, 1, 13; Day v. Floyd, 130 Mass. 488, 489.

The Civil Code of Louisiana, in title 3, "Of Absentees," contains provisions for the appointment of a curator to take care of the property of any person who is absent from or resides out of the state, without having left an attorney therein; and for the putting of his presumptive heirs into provisional possession after he has been absent and not heard from for five, or, if he has left an attorney, seven, years, or sooner if there be strong presumption of his death; and for judicial sale, if necessary, of his movable or personal property, and safe investment of the proceeds; and, upon proof that he has not been heard from for 10 years, and has left no known heirs, for sale of his whole property, and payment of the proceeds into the treasury of the state, as in the case of vacant successions; but neither the curator nor those in provisional possession can alienate or mortgage his immovables or real estate; and, if he returns at any time, he recovers his whole property, or the proceeds thereof, and a certain proportion of the annual revenues, depending upon the length of his absence. The main object of those provisions, as their careful regulations show, is to take possession of and preserve the property for the absent owner, not to deprive him of it upon an assumption that he is dead. Accordingly, the supreme court of Louisiana held that the appointment, by a court having jurisdiction of successions, of an administrator of the estate of a man represented to be dead, but who was in fact alive at the time of the appointment, was void; and that persons claiming land of his, under a sale by such administrator under order of the court, followed by long possession, could not hold the land against his heirs; and, speaking by Chief Justice Manning, said: "The title of Hotchkiss as administrator is null, because he had no authority to make it, and the prescription pleaded does not validate it. It was not a sale, the informalities of which are cured by a certain lapse of time, and which becomes perfect through prescription; but it was void, because the court was without authority to order it. * * * It is urged, on the part of the defendants, that the decree of the court ordering the sale of the succession property should protect them, and, as the court which thus ordered the sale had jurisdiction of successions, it was not for them to look beyond it. But that is assuming as true that which we know was not true. The owner was not dead. There was no succession." And the court added that Chief Justice Marshall, in Griffith v. Frazier, above cited, disposed of that position. Burns v. Van Loan (1877) 29 La. Ann. 560, 563.

The absolute nullity of administration granted upon the estate of a living person has been directly adjudged or distinctly recognized in the courts of many other states. French v. Frazier's Adm'r (1832) 7 J. J. Marsh. 425, 427; State v. White (1846) 7 Ired. 116; Duncan v. Stewart (1854) 25 Ala. 408; Andrews v. Avory (1858) 14 Grat. 229, 236; Moore v. Smith (1858) 11 Rich. Law, 569; Morgan v. Dodge (1862) 44 N. H. 255, 259; Withers v. Patterson (1864) 27 Tex. 491, 497; Johnson v. Beazley (1877) 65 Mo. 250, 264; Melia v. Simmons (1878) 45 Wis. 334; D'Arusment v. Jones (1880) 4 Lea, 251; Stevenson v. Superior Court (1882) 62 Cal. 60; Perry v. Railroad (1882) 29 Kan. 420, 423; Thomas v. People (1883) 107 Ill. 517, in which the subject is fully and ably treated.

The only judicial opinions cited at the bar (except the judgment below in the present case) which tend to support the validity of letters of administration upon the estate of a living person were delivered in the courts of New York and New Jersey within the last 20 years.

In Roderigas v. Institution, 63 N. Y. 460, in 1875, a bare majority of the court of appeals of New York decided that payment of a

deposit in a savings institution to an administrator under letters of administration issued in the lifetime of the depositor was a good defense to an action by an administrator appointed after his death, upon the ground that the statutes of the state of New York made it the duty of the surrogate, when applied to for administration on the estate of any person, to try and determine the question whether he was alive or dead, and therefore his determination of that question was conclusive. That decision was much criticised as soon as it appeared, notably by Chief Justice Redfield in 15 Am. Law Reg. (N. S.) 212. And in a subsequent case between the same parties in 1879 the same court unanimously reached a different conclusion, because evidence was produced that the surrogate never in fact considered the question of death, or had any evidence thereof,—thus making the validity of the letters of administration to depend, not upon the question whether the man was dead, but upon the question whether the surrogate thought so. Roderigas v. Institution, 76 N. Y. 316.

In Plume v. Institution, 46 N. J. Law, 211, 230, in 1884, which was likewise an action to recover the amount of a deposit in a savings institution, the plaintiff had been appointed by the surrogate administrator of a man who, as the evidence tended to show, had neither drawn out any part of the deposit, nor been heard from, for more than 20 years; an inferior court certified to the supreme court of New Jersey the questions whether payment of the amount to the plaintiff would bar a recovery thereof by the depositor, and whether the plaintiff was entitled to recover; and that court, in giving judgment for the plaintiff, observed, by way of distinguishing the case from the authorities cited for the defendant, that "in most, if not all, of such cases, it was affirmatively shown that the alleged decedent was actually alive at the time of the issuance of letters of administration, while in the present case there is no reason for even surmising such to have been the fact."

The grounds of the judgment of the supreme court of the state of Washington in the case at bar, as stated in its opinion, were that the equities of the case appeared to be with the defendants; that the court was inclined to follow the case of Roderigas v. Institution, 63 N. Y. 460; and that, under the laws of the territory, the probate court, on an application for letters of administration, had authority to find the fact as to the death of the intestate, the court saying: "Our statutes only authorize administration of the estates of deceased persons, and before granting letters of administration the court must be satisfied by proof of the death of the intestate. The proceeding is substantially in rem, and all parties must be held to have received notice of the institution and pendency of such proceedings, where notice is given as required by law. Section 1299 of the 1881 Code gave the probate court exclusive original jurisdiction in such matters, and authorized such court to summon parties and witnesses, and examine them touching any matter in controversy before said court or in the exercise of its jurisdiction." Such were the grounds upon which it was held that the plaintiff had not been deprived of his property without due process of law. 5 Wash. 309, 317, 318, 31 Pac. 873.

After giving to the opinion of the supreme court of the state the respectful consideration to which it is entitled, we are unable to concur in its conclusion or in the reasons on which it is founded.

The fourteenth article of amendment of the constitution of the United States, after other provisions which do not touch this case, ordains: "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These prohibitions extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities. Virginia v. Rives, 100 U. S. 313, 318, 319; Ex parte Virginia, Id. 339, 346; Neal v. Delaware, 103 U. S. 370, 397. And the first one, as said by Chief Justice Waite in U. S. v. Cruikshank, 92 U. S. 542, 554, repeating the words of Mr. Justice Johnson in Bank v. Okely, 4 Wheat. 235, 244, was intended "to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the constitution of the United States, this court is no more bound by that court's construction of a statute of the territory or of the state, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. In every such case, this court must decide for itself the true construction of the statute. Huntington v. Attrill, 146 U. S. 657, 683, 684, 13 Sup. Ct. 224; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 492–495, 14 Sup. Ct. 968.

No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.

The words "due process of law," when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, "mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law

of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance." Pennoyer v. Neff, 95 U. S. 714, 733.

Even a judgment in proceedings strictly in rem binds only those who could have made themselves parties to the proceedings, and who had notice, either actually or by the thing condemned being first seized into the custody of the court. The Mary, 9 Cranch, 126, 144; Hollingsworth v. Barbour, 4 Pet. 466, 475; Pennoyer v. Neff, 95 U. S. 714, 727. And such a judgment is wholly void if a fact essential to the jurisdiction of the court did not exist. The jurisdiction of a foreign court of admiralty, for instance, in some cases, as observed by Chief Justice Marshall, "unquestionably depends as well on the state of the thing as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property." Rose v. Himely, 4 Cranch, 241, 269. Upon the same principle, a decree condemning a vessel for unlawfully taking clams, in violation of a statute which authorized proceedings for her forfeiture in the county in which the seizure was made, was held by this court to be void, and not to protect the officer making the seizure from a suit by the owner of the vessel, in which it was proved that the seizure was not made in the same county, although the decree of condemnation recited that it was. Thompson v. Whitman, 18 Wall. 457.

The estate of a person supposed to be dead is not seized or taken into the custody of the court of probate upon the filing of a petition for administration, but only after and under the order granting that petition; and the adjudication of that court is not upon the question whether he is living or dead, but only upon the question whether and to whom letters of administration shall issue. Insurance Co. v. Tisdale, 91 U. S. 238, 243.

The local law on the subject, contained in the Code of 1881 of the territory of Washington, in force at the time of the proceedings now in question, and since continued in force by article 27, § 2, of the constitution of the state, does not appear to us to warrant the conclusion that the probate court is authorized to conclusively decide, as against a living person, that he is dead, and his estate therefore subject to be administered and disposed of by the probate court.

On the contrary, that law, in its very terms, appears to us to recognize and assume the death of the owner to be a fundamental condition and prerequisite to the exercise by the probate court of jurisdiction to grant letters testamentary or of administration upon his estate, or to license any one to sell his lands for the payment of his debts. By section 1, the common law of England, so far as not inconsistent with the constitution and laws of the United States, or with the local law, is made the rule of decision. In the light of the common law, the exclusive original jurisdiction conferred by section 1299 upon the probate court in the probate of wills and the granting of letters testamentary or of administration is limited to the estates of persons deceased; and the power conferred by that section to summon and examine on oath, as parties or witnesses, executors and administrators or other persons intrusted with or accountable for the "estate of any deceased person," and "any person touching any matter of controversy before said court or in the exercise of its jurisdiction," is equally limited. By section 1340, wills are to be proved and letters testamentary or of administration are to be granted in the county of "which deceased was a resident," or in which "he may have died," or in which any part of his estate may be, "he having died out of the territory." By section 1388, administration of the estate of "a person dying intestate" is to be granted to relatives, next of kin, or creditors, in a certain order, with a proviso in case the person so entitled or interested neglect "for more than forty days after the death of the intestate" to apply for administration. By section 1389, an application for administration must "set forth the facts essential to giving the court jurisdiction of the case," and state "the names and places of residence of the heirs of the deceased, and that the deceased died without a will;" and, by section 1391, notice of such application is to be given by posting in three public places in the county where the court is held a notice "containing the name of the decedent," the name of the applicant, and the time of hearing. And, by sections 1493 and 1494, a petition by an executor or administrator for the sale of real estate for the payment of debts must set forth "the amount of the personal estate that has come to his hands, and how much, if any, remains undisposed of, a list and the amounts of the debts outstanding against the deceased, as far as the same can be ascertained, a description of all the real estate of which the testator or intestate died seized, the condition and value of the respective lots and portions, the names and ages of the devisees, if any, and of the heirs of the deceased;" and must show that it is necessary to sell real estate "to pay the allowance to the family, the debts outstanding against the deceased, and the expenses of administration."

Under such a statute, according to the overwhelming weight of authority, as shown by the cases cited in the earlier part of this opinion, the jurisdiction of the court to which is committed the control and management of the estates of deceased persons, by whatever name it is called,—ecclesiastical court, probate court, orphans' court, or court of the ordinary or the surrogate,—does not exist or take effect before death. All proceedings of

such courts in the probate of wills and the granting of administrations depend upon the fact that a person is dead, and are null and void if he is alive. Their jurisdiction in this respect being limited to the estates of deceased persons, they have no jurisdiction whatever to administer and dispose of the estates of living persons of full age and sound mind, or to determine that a living man is dead, and thereupon undertake to dispose of his estate.

A court of probate must, indeed, inquire into and be satisfied of the fact of the death of the person whose will is sought to be proved or whose estate is sought to be administered, because, without that fact, the court has no jurisdiction over his estate; and not because its decision upon the question, whether he is living or dead, can in any wise bind or estop him, or deprive him, while alive, of the title or control of his property.

As the jurisdiction to issue letters of administration upon his estate rests upon the fact of his death, so the notice given before issuing such letters assumes that fact, and is addressed, not to him, but to those who after his death may be interested in his estate, as next of kin, legatees, creditors, or otherwise. Notice to them cannot be notice to him, because all their interests are adverse to his. The whole thing, so far as he is concerned, is res inter alios acta.

Next of kin or legatees have no rights in the estate of a living person. His creditors, indeed, may, upon proper proceedings, and due notice to him, in a court of law or of equity, have specific portions of his property applied in satisfaction of their debts. But neither creditors nor purchasers can acquire any rights in his property through the action of a court of probate, or of an administrator appointed by that court, dealing, without any notice to him, with his whole estate as if he were dead.

The appointment by the probate court of an administrator of the estate of a living person, without notice to him, being without jurisdiction, and wholly void as against him, all acts of the administrator, whether approved by that court or not, are equally void. The receipt of money by the administrator is no discharge of a debt, and a conveyance of property by the administrator passes no title.

The fact that a person has been absent and not heard from for seven years may create such a presumption of his death as, if not overcome by other proof, is such prima facie evidence of his death that the probate court may assume him to be dead, and appoint an administrator of his estate, and that such administrator may sue upon a debt due to him. But proof, under proper pleadings, even in a collateral suit, that he was alive at the time of the appointment of the administrator, controls and overthrows the prima facie evidence of his death, and establishes that the court had no jurisdiction and the administrator no authority; and he is not bound, either by the order appointing the administrator or by a judgment in any suit brought by the administrator against a third person, because he was not a party to and had no notice of either.

In a case decided in the circuit court of the United States for the southern district of New York in 1880, substantially like Roderigas v. Institution, as reported in 63 N. Y. 460, above cited, Judge Choate, in a learned and able opinion, held that letters of administration upon the estate of a living man, issued by the surrogate after judicially determining that he was dead, were null and void as against him; that payment of a debt to an administrator so appointed was no defense to an action by him against the debtor; and that to hold such administration to be valid against him would deprive him of his property without due process of law, within the meaning of the fourteenth amendment of the constitution of the United States. This court concurs in the proposition there announced "that it is not competent for a state, by a law declaring a judicial determination that a man is dead, made in his absence, and without any notice to or process issued against him, conclusive for the purpose of divesting him of his property and vesting it in an administrator, for the benefit of his creditors and next of kin, either absolutely or in favor of those only who innocently deal with such administrator. The immediate and necessary effect of such a law is to deprive him of his property without any process of law whatever, as against him, although it is done by process of law against other people, his next of kin, to whom notice is given. Such a statutory declaration of estoppel by a judgment to which he is neither party nor privy, which has the immediate effect of divesting him of his property, is a direct violation of this constitutional guaranty." Lavin v. Bank, 18 Blatchf. 1, 24, 1 Fed. 641.

The defendants did not rely upon any statute of limitations, nor upon any statute allowing them for improvements made in good faith; but their sole reliance was upon a deed from an administrator, acting under the orders of a court which had no jurisdiction to appoint him or to confer any authority upon him, as against the plaintiff.

Judgment reversed, and case remanded to the supreme court of the state of Washington for further proceedings not inconsistent with this opinion.

HADDOCK v. BOSTON & M. R.

(15 N. E. 495, 146 Mass. 155.)

Supreme Judicial Court of Massachusetts. Essex. Feb. 29, 1888.

Report from supreme judicial court; Morton, Chief Justice.

Appeal by the Boston & Maine Railroad from a decree of the probate court for Essex county, (entered November 16, 1885,) admitting to probate the will of Sarah Pendergast. The appeal was claimed by the Boston & Maine Railroad Company, at the hearing before the probate court, and was allowed by the judge of that court, it appearing that said railroad owned real estate in Haverhill, devised by the will, the title to which might be affected by the establishment of rights under said will. The will was dated October 31, 1807. At the hearing in the supreme judicial court, the chief justice made certain rulings, the nature of which, with other facts, sufficiently appear in the opinion, and reported the case to the full court.

S. Lincoln, for appellant. B. F. Butler and P. Webster, for appellee.

DEVENS, J. The first question discussed by the appellant is whether the probate court has authority, as matter of law, to admit a will to probate 63 years after the death of the testator; and, incidentally, whether there is any limit of time after the death of the testator, subsequent to which the court has no such authority. In Shumway v. Holbrook, 1 Pick. 117, the question was whether a will not admitted to probate was admissible in evidence. It was held that it was not; but it is said: "If a will can be found, it may be proved in the probate court at any time, in order to establish a title to real estate. It differs from an administration of personal property, which cannot be originally granted upon the estate of any person after twenty years from his decease." In the course of the argument, Mr. Justice Jackson alluded to a case in Essex county, perhaps 30 years before, where it was found that a widow must hold land under the will which had not been proved. The will having been offered for probate, the judge of probate declined to allow it, as more than 20 years had elapsed since the death of the testator, and, on appeal, his decision was reversed, and the will admitted to probate. The research of the counsel for the defendant has established that the case thus alluded to was that of Dennis v. Bearse, (Essex,) and has supplied us with as satisfactory an account of it, drawn from the papers on file, as they will afford. It is a case to which some weight must be attached, as it brought into question, directly, the authority of the court of probate, and the appeal was to the full bench of the supreme court, which reversed the original decree. While no opinion appears to have been written, it could not but have been a carefully considered case, as it reversed the opinion of the judge of probate as to the extent of his jurisdiction. The will thus admitted to probate was so admitted 36 or 37 years after its date. How long after the death of the testator does not clearly appear, although some of the papers found indicate that it was more than 30 years after. In Marcy v. Marcy, 6 Metc. (Mass.) 360, the question was whether there was sufficient evidence that a will, which became operative 43 years before, had been admitted to probate, so that it could be read in evidence. The court held that there was such evidence; adding: "On evidence like the present, it would be the duty of the probate court to establish the will, if, for want of form, the probate should have been considered so defective that the will had been rejected as evidence in its present state." In Waters v. Stickney, 12 Allen, 1, where it was held that the probate court, 14 years after admitting a will to probate, might admit to probate a codicil, written upon the same leaf, which had escaped attention, and was not passed upon at the time of the probate of the original will, it is said by Mr. Justice Gray, citing the above cases: "It has been directly adjudged by this court that a will may be proved even thirty years after the death of the testator, although original administration could not, by statute, be granted after twenty years;" and again, "if no will had been proved, the lapse of time would not prevent both will and codicil from being proved now." While it is true that in neither of these cases has it been decided that a will disposing of lands can be admitted to probate after 60 years, yet there is no suggestion in any of them that there is any limitation of time to such proof, and the language used is quite explicit to the contrary. In view of the decisions made, and the repeated expressions directly relevant to the cases considered, used in argument by judges of this court, we cannot treat this inquiry as the defendant desires we should,—as practically a new question. We must deem it one that has been fairly passed upon and decided. It may be that the inconveniences which might arise from the probate of a will many years after the death of the testator are such that a statute limiting the period might be properly enacted. That course has, in some states, been adopted. Conn. Revision, 1875, c. 11, §§ 21–23; Rev. St. Me. c. 64, § 1. But statutes of limitation are arbitrary, and the considerations which apply to positive laws of this character are legislative, rather than judicial. In every instance, where a great length of time has elapsed after the death of a testator, possessory titles may have been acquired which will prevail against the record. What is due to the just rights of the devisees is to be considered with reference to other rights of property, or to the repose

of the community; but such considerations belong to the domain of legislation. So long as one can produce the evidence necessary to obtain the probate of a will, we can see no legal reason why one who relies upon it should not be allowed to prove it as he would be permitted to prove a deed, however ancient, under which he claimed title. The fact that he could not offer in evidence a will not admitted to probate, as he might an ancient deed, would certainly afford no reason why its authenticity should not be established in the probate court by its regular course of procedure.

The appellant further contended that the jury ought not to have been allowed (in determining the question whether the testatrix was a widow, and thus competent to make a will as the law stood in 1807) to consider the fact that she actually executed a paper, purporting to be a will devising land, as any evidence that she had legal capacity so to do. This fact, in connection with the other facts proved, was competent to be considered. There was no ruling that, alone, it would have been sufficient to establish her legal capacity; that is, that she was, at the time, a widow. There was evidence of reputation that the husband of the testatrix died soon after their marriage; that a deed was made to her on December 21, 1801, of the very land which she undertook to dispose of by will, in which she was described as "Sarah Pendergrass, widow," which deed was found among her papers; and that she executed the will by the same name as that recited in the deed, in which she was described as widow, although that word is not appended to her name in the will. The act done by her, of disposing, or assuming to dispose, of her property, which she could only lawfully do if a widow, was an assertion of her status, and thus of her legal capacity, made in an important transaction which might properly have been considered in connection with the other evidence.

The conclusion we have reached renders it unnecessary to decide whether the appellant was lawfully entitled to appeal. Other exceptions taken by it were waived in this court. Cause to stand for further proceedings.

SCHLUTER v. BOWERY SAV. BANK.[1]

(22 N. E. 572, 117 N. Y. 125.)

Court of Appeals of New York. Nov. 1, 1889.

Appeal from supreme court, general term, first department.

This action was brought by Eliza Schluter, as administratrix of Antoinette Knittel, against the Bowery Savings Bank. The grounds of the action are as follows: In October, 1872, Margaret Knittel, then a married woman, deposited in the Bowery Savings Bank the money claimed in this action, in trust for Antoinette Knittel, which was entered upon the books of the bank, and the pass-book belonging to Mrs. Knittel, as follows: "Bowery Savings Bank, in account with Margaret Knittel, in trust for Antoinette Knittel." Antoinette was then an infant about six years old, and lived with her parents in this state. Subsequently, they moved to the state of New Jersey, where they lived until June, 1875, when Mrs. Knittel died. Her husband took out letters of administration on her estate in the state of New Jersey; and on October 22, 1875, the defendant paid to him, as such administrator, the deposit, with the interest thereon, then amounting to $629.40. Mrs. Knittel, in fact, left a last will and testament, which was subsequently, on the 17th day of November, 1875, admitted to probate by the surrogate of the county of New York, and letters testamentary were issued to Louis Sier, the executor named in the will. Soon thereafter, he demanded payment of the deposit to him, which was refused. On the 18th day of December, 1885, Antoinette, who continued to reside in the state of New Jersey, died, and the plaintiff was, on the 14th day of May thereafter, appointed by the surrogate of New York administratrix of her estate. She then demanded payment of the deposit, and the interest thereon, which was refused, and then this action was commenced. The action was brought to trial at a circuit, and at the close of the evidence the court directed a verdict in favor of the defendant on the ground that the payment to the administrator of Mrs. Knittel discharged the defendant. From the judgment entered upon the verdict the plaintiff appealed to the general term, and then to this court.

John McCrone, for appellant. *Carlisle Norwood, Jr.*, for respondent.

EARL, J., (*after stating the facts substantially as above.*) The defendant was incorporated by the act, chapter 229 of the Laws of 1834; and by section 6 of that act it was provided that deposits therein should be repaid to each depositor when required, and at such time, and with such interest, and under such regulations, as the board of managers from time to time prescribed. One of the by-laws of the defendant, printed in the pass-book which was delivered to the depositor, provided that on the decease of any depositor the amount standing to the credit of the deceased should be paid to his or her legal representatives. We have several times held that by such a deposit the depositor constituted himself or herself a trustee, and that the title to the fund was thereby transferred from the depositor individually to the depositor as trustee; and in Boone v. Bank, 84 N. Y. 83, a case entirely similar to this, we held that payment of the deposit to the administrator of the depositor, in the absence of any notice from the beneficiary, was good and effectual to discharge the savings bank; and it is unnecessary now to repeat the reasoning of the opinion in that case. Here there was no notice to the bank from the beneficiary, and the payment to the administrator of Mrs. Knittel was made in entire good faith.

But the claim is made that because Mr. Knittel was a foreign administrator, deriving his authority from administration granted in the state of New Jersey, he was not the personal representative of the deceased, and that therefore payment could not legally be made to him. Payment to the personal representative is good, because at the death of the intestate he becomes entitled to all his personal property wherever situated, and, having the legal title thereto, he can demand payment of choses in action; and a payment to him made anywhere, in the absence of any conflicting claim existing at the time, is valid. It is true that, if the defendant had declined payment, the foreign administrator could not have brought action in this state to enforce it. But a voluntary payment to such an administrator has always been held valid. Therefore, in receiving this payment, Mr. Knittel was the representative of the deceased, and able to give an effectual discharge to the defendant. Parsons v. Lyman, 20 N. Y. 103; Petersen v. Bank, 32 N. Y. 21; In re Butler, 38 N. Y. 397; Wilkins v. Ellett, 9 Wall. 740.

Mrs. Knittel, however, actually left a will, which was subsequently admitted to probate. But the letters of administration were not therefore void, the court having jurisdiction to grant them; and, until they were revoked, all persons acting in good faith were protected in dealing with the administrator thus appointed. And so it has always been held. Rodgerigas v. Institution, 63 N. Y. 460, 76 N. Y. 316; Kittredge v. Folsom, 8 N. H. 98; Patton's Appeal, 31 Pa. St. 465. Here the payment was made before the will was admitted to probate, and at the time of such payment Mr. Knittel was the legal representative of the deceased, and authorized to administer upon her estate. Our attention has been called to no case, and we are confident that none can be found, holding that the subsequent discovery of a will, and its admission to probate, renders the prior appointment of an administrator absolutely void so as to give no protection to persons who, in dealing with the administrator, have acted on

[1] Affirming 47 Hun, 633, *mem.*

the faith thereof. Woerner, Adm'n, 568, 571, 588.

Under the act, chapter 782 of the Laws of 1867, Mrs. Knittel, although a married woman, was capable of being a trustee. She constituted herself a trustee here, and here the trust fund remained; and therefore, although by the law of New Jersey a married woman could not be appointed a trustee, yet the trust could be enforced here. Her removal to that state did not divest her of the title to the fund she thus had; and that title remained in her, as no one was appointed to take it from her.

The statutes of New Jersey were proved, showing that the surrogate of the county of which Mrs. Knittel was an inhabitant and resident at the time of her death had jurisdiction to grant letters of administration upon her estate. While he had no authority to grant letters of administration unless she died intestate, intestacy, like inhabitancy, was one of the facts which he was to determine. He had general jurisdiction of the subject of administration; and, having determined that she died intestate, he was authorized to grant administration upon her estate. The proceedings in the surrogate's court were properly exemplified and proved.

But the further claim is made that the answer was insufficient to permit the laws of New Jersey to be read in evidence, for the reason that they were not therein alleged. It is there alleged "that Margaret Knittel died an inhabitant of, and domiciled in, and a resident of, Hoboken, Hudson county, N. J.; that thereafter, and on the 19th of October, 1875, letters of administration on the goods, chattels, rights, and credits of Margaret Knittel, deceased, were duly issued to one Louis Knittel, the husband of the said Margaret Knittel, by the surrogate of the county of Hudson, state of New Jersey; that said surrogate had jurisdiction, and was duly authorized and empowered, by the laws of the state of New Jersey, to issue said letters as aforesaid." We think these allegations were sufficient to authorize proof of the laws of New Jersey, and of the jurisdiction of the surrogate in issuing letters. If the plaintiff desired more specific allegations, and was fairly entitled to them, he should have moved to make the answer more specific and definite. The answer gave him every information to which he was entitled; and he might, if he could, have shown that the surrogate had no jurisdiction, and that the laws did not authorize him to grant administration of the estate of Mrs. Knittel. So far as the case of Throop v. Hatch, 3 Abb. Pr. 23, may seem to hold the contrary doctrine, it does not receive our approval. We are therefore of opinion that the judgment should be affirmed, with costs. All concur.

READ'S CASE.

(5 Coke, 67.)

Common Pleas. 2 Jac. I.

Read brought an action of debt against Carter, executor of Yong, which plea began in the common pleas, Hilt. 44 Eliz. Rot. 401. The jurors found, that the said Yong made his testament and last will, and made one A. his executor; and the day of his death was possessed of goods above the value of the debt in demand, and died; and before the will was proved the defendant took the testator's goods into his possession, and intermeddled with them; and afterwards, and before the writ purchased, the will was proved; and if on this matter the defendant should be charged as executor of his own wrong was the question. And on great deliberation judgment was given for the plaintiff. And in this case these points were resolved.

1. When a man dies intestate, and a stranger takes the intestate's goods and uses them, or sells them, in that case it makes him executor of his own wrong. For although the pleading in such case be, that he was never executor, nor ever administered as executor; and therefore it was objected, that he ought to pay debt or legacy, or do something as executor: yet it was resolved, and well agreed, that when no one takes upon him to be executor nor any hath taken letters of administration there, the using of the goods of the deceased by any one, or the taking of them into his possession, which is the office of an executor or administrator, is a good administration to charge them as executors of their wrong; for those to whom the deceased was indebted in such case have not any other against whom they can have an action for recovery of their debts.

2. When an executor is made, and he proves the will, or takes upon him the charge of the will, and administers in that case, if a stranger takes any of the goods, and, claiming them for his proper goods, uses and disposes of them as his own goods, that doth not make him in construction of law an executor of his wrong, because there is another executor of right whom he may charge, and these goods which are in such case taken out of his possession after that he hath administered, are assets in his hand: but although there be an executor who administers yet if the stranger takes the goods, and claiming to be executor, pays debts, and receives debts, or pays legacies, and intermeddles as executor, there, for such express administration as executor, he may be charged as executor of his own wrong, although there be another executor of right; and therewith agreeth 9 E. 4, 13.

3. In the case at bar, when the defendant takes the goods before the rightful executor hath taken upon him, or proved the will, in this case he may be charged as executor of his own wrong, for the rightful executor shall not be charged but with the goods which come to his hands after he takes upon him the charge of the will. Note, reader, these resolutions, and the reason of them, and by them you will better understand your books, which otherwise seem prima facie to disagree. 41 E. 3, 13b; 50 Edw. 3, 9; 6 H. 4, 3a; 11 H. 4, 83b, 84a; 13 H. 4, 4b; 8 H. 6, 35b; 19 H. 6, 14b; 21 H. 6, 26 & 27; 32 H. 6, 7a; 33 H. 6, 21; 21 E. 4, 5a; 20 H. 7, 5a; 26 H. 8, 7b, 8a; 1 Eliz. 2 Dyer, 166; 9 Eliz. 3 Dyer, 255. And so the quaere in 1 Mariae, 1 Dyer, 105, 203, well resolved.

HATCH v. PROCTOR et al.

(102 Mass. 351.)

Supreme Judicial Court of Massachusetts. Worcester. Oct. Term, 1869.

Contract by an administrator of the estate of Frank J. Hatch to recover of George L. Lawrence for goods belonging to the estate, and sold and delivered. From an order directing a verdict for the defendant, plaintiff excepted.

H. B. Staples and F. P. Goulding, for plaintiff. C. H. B. Snow and G. A. Torrey, for defendants.

COLT, J. The case presented in the offer of evidence is this: The plaintiff, acting, with the knowledge of the defendants, as executor in his own wrong of his deceased brother's estate, delivered certain personal property, with a bill of sale and warranty of title, to one Lawrence, in consideration of the verbal promise of the defendants to pay the plaintiff $1700 towards the price thereof. At the time of the sale and delivery, the defendants took a mortgage from Lawrence to secure them the amount to be paid, and no credit appears to have been given to him by the plaintiff. The property passed into the possession of Lawrence, and it does not appear that his title, or the title of the defendants, claiming under the mortgage, has ever been questioned by anybody else, or possession under it disturbed. After this, the plaintiff was regularly appointed administrator of his brother's estate, and notified the defendants that he ratified and confirmed as administrator, all his acts and contracts with them in the sale of said property. And thereupon they told him, by the defendant Proctor, their agent in the premises, that the agreement for the payment of said sum was fair, and the money should be paid; though shortly after, while the property still remained with Lawrence, they notified the plaintiff that they claimed no title to the same under the mortgage, which they thought invalid.

In the opinion of the court, the evidence offered should not have been rejected. The facts, if proved, would entitle the plaintiff to maintain his action.

The defendants do not now insist that the contract cannot be enforced as against the statute of frauds. It was an original promise made by the defendants to pay for property delivered to another. Stone v. Walker, 13 Gray, 613; Swift v. Pierce, 13 Allen, 136.

The personal estate of a deceased intestate, when an administrator is appointed, vests in him by relation from the time of the death. Until then the title may be considered to be in abeyance. Lawrence v. Wright, 23 Pick. 128. He may have an action of trespass or trover for goods of the intestate taken before letters granted. When the wrongdoer has sold the property taken, the administrator may waive the tort and recover in assumpsit for money had and received. And, in a case very like the one at bar, it was held that, where the sale was made avowedly on account of the estate, by one who had been agent of the intestate, the administrator afterwards appointed might recover from the vendee in assumpsit for goods sold and delivered. Foster v. Bates, 12 Mees. & W. 226, 233. It is said that, if an executor de son tort obtains letters of administration pendente lite, it legalizes his previous tortious acts. 1 Williams, Ex'rs (6th Ed.) 598, and cases cited. By the law of this state, as laid down by Hoar, J., in Alvord v. Marsh, 12 Allen, 603, the letters of administration, by operation of law, make valid all acts of the administrator in settlement of the estate from the time of the death. They become by relation lawful acts of administration for which he must account. And this liability to account involves a validity in his acts which is a protection to those who have dealt with him.

The case here presents no question as to the peculiar liability of an executor in his own wrong, to creditors, to the rightful administrator, or to others who have suffered by his unlawful acts. As to the defendants, the sale here was not tortious. It was made legal, and the title of the vendee confirmed, by the retroactive effect of the subsequent letters of administration. Nor is it to be overlooked that the defendants knew, when the property was delivered and the warranty of title given, that the vendor had no legal right to sell. There was no ignorance or mistake on their part, and no fraud or false affirmation of title on the part of the plaintiff. The property still remains undisturbed in the hands of the purchaser. The plaintiff's express confirmation of the sale was agreed to, and payment of the price promised. These last considerations alone would, under the circumstances, seem to be a sufficient answer to the defence set up. Story, Sales, § 367b, note; Id. § 423.

Exceptions sustained.

ROZELLE v. HARMON.

(15 S. W. 432, 103 Mo. 339.)

Supreme Court of Missouri, Division No. 2. Feb. 24, 1891.

Appeal from circuit court, Holt county; C. A. ANTHONY, Judge.

L. R. Knowles, John Edwards, and *H. S. Kelley,* for appellant. *E. Van Buskirk* and *T. C. Dungan,* for respondent.

MACFARLANE, J. This suit was commenced in the circuit court of Holt county. Plaintiff was a creditor of one B. W. Ross, deceased. The suit was for the purpose of recovering the amount of the debt from defendant on the ground that he had wrongfully appropriated and converted the assets belonging to Ross' estate to his own use. Plaintiff recovered judgment in the circuit court, and defendant appealed to the Kansas City court of appeals, where the judgment was reversed. The case was certified to this court by the court of appeals on the ground that the decision rendered therein was in conflict with the decision of this court in the cases of Foster v. Nowlin, 4 Mo. 18, and Magner v. Ryan, 19 Mo. 196. The question presented by the record in this case is sufficiently stated by Judge PHILIPS (29 Mo. App. 578) to be "whether there can be, under the probate system of this state, an executor *de son tort,* in so far as to authorize a single creditor of the intestate to maintain an action of trover against him, as here sought, and thereby appropriate the whole assets to the payment of plaintiff's debt." The system provided by the laws of our state for the settlement of the estates of deceased persons was evidently intended to be exclusive of all others. The constitution provides for the establishment of a probate court in each county, which shall have jurisdiction in all matters pertaining to probate business. The laws of the state governing the procedure in the management and settlement of estates are ample and sufficient to meet any emergency that may possibly arise during administration. They provide for the appointment of executors and administrators, for the preservation of the property, and the collection of the debts of the estate. They also provide summary and efficient proceedings for the discovery of assets, and for their recovery from the possession of one who intermeddles with them. Under them any creditor can have an administrator appointed. Each county is provided with a public administrator, already qualified, whose duty requires him summarily to take charge of all estates in which the property is left in a situation exposed to loss or damage; and the court is given power to require him to take charge of any other estates in case of necessity. Ample provision is made for the allowance and classification of debts, converting the assets into money, and paying the debts of all creditors *pro rata* according to classification. Executors and administrators alone, under these laws, can recover the assets or damages for its conversion. All these provisions of the law are wholly inconsistent with the idea of executors *de son tort* as at common law. The administration laws of the state do not recognize the right to wrongfully administer, nor the right of one creditor to secure payment of his debt to the exclusion of others. It is insisted by plaintiff that this state has adopted the common law, that under the rules of the common law his action is authorized, and that the rules of the common law on this subject have not been abrogated by the statutes. It is contended that under proper rules of construction a statute in derogation of the common law must be strictly construed, and that none of its rules can be changed, except by express terms of the statute, or by necessary implication therefrom. That rule of construction is not of universal application. It depends much on the character of the law to be affected. In case of statutes penal in their character, or in derogation of common right, a strict construction is required; but in regard to statutes merely remedial in their character a fair, if not liberal, construction should be given. Oster v. Rabeneau, 46 Mo. 595; Putnam v. Ross, Id. 337; Chamberlain v. Transfer Co., 44 N. Y. 305; Buchanan v. Smith, 43 Miss. 90. The statute of this state, adopting the common law, itself limits or modifies the rule of construction insisted upon. Section 3117, St. 1879, provides that the common law, which is not repugnant to or inconsistent with the constitution of this state or the statute laws in force for the time being, shall be the rule of action and decision in this state. The examination we have given shows conclusively that the statute laws of this state on the subject of administration, taken together as forming one entire system, are wholly repugnant to and inconsistent with the common law in respect to administrators *de son tort.* We must therefore conclude that the intention of the legislature was to supersede the common law on that subject altogether. The early cases of this court referred to by the court of appeals do seem to have recognized and acted under the common-law doctrine invoked by plaintiff in this case, but since that early day the administration laws of the state have been greatly enlarged, the jurisdiction of the probate courts extended, and the powers and duties of administrators and executors increased until there is no longer a place in the system for the inequitable, expensive, and tedious proceedings required by the rules of the common law in bringing intermeddlers to settlement. The opinion of PHILIPS, P. J., in this case when before the court of appeals, and which is reported in 29 Mo. App. 570, with the authorities cited by him, is convincing and conclusive, and is adopted as the opinion of this court. The judgment of the court of appeals is affirmed, and that of the circuit court of Holt county reversed. All the judges of this division concur.

VAUGHN v. BARRET.

(5 Vt. 333.)

Supreme Court of Vermont. Rutland, Jan., 1833.

This was an action of debt on judgement brought by Wm. Vaughn, administrator upon the estate of John W. Mott, deceased, late of the city, county and state of New York. The writ in this case was dated and served on the first of September, A. D. 1831. It was alleged in the declaration that the judgement was recovered by John W. Mott, aforesaid, against the defendant, by the consideration of the Rutland county court, at their term, began and holden at said Rutland on the 2d Monday of Sept. A. D. 1826, for the sum of four hundred and fifty-seven dollars and nine cents, for damages and costs, and that no part of said judgement has been paid except $309.88, being part of the damages which had been allowed against the estate of Erastus Barker, leaving the sum of one hundred and thirty-six dollars and two cents damages, and the further sum of twelve dollars and nine cents costs, making in whole $148.11, being the residue of said judgement. The defendant pleaded that after the recovery of said judgement and before the commencement of this suit, to wit, on the 20th of October 1827, Henry Mott, of the said city of New York, was regularly appointed administrator by James Campbell, surrogate of the said city of New York, upon the estate of the said John W. Mott; and that afterwards, to wit, on the 24th day of November, A. D. 1830, the said Henry Mott as administrator as aforesaid, for a valuable consideration executed to the said Jaazaniah a discharge of said judgement in favor of said John W. Mott. To this plea, the plaintiff replied that prior to the said 24th day of November, A. D. 1830, the time at which the said Henry Mott discharged the judgement, to wit, on the third of April, A. D. 1830, the said William Vaughn was regularly appointed administrator upon the estate of the said John W. Mott, by the probate court for the district of Rutland, but there was no protert of the records of said probate court. And that the defendant at the time of the recovery of the said judgement against him in favor of the said John W. Mott, and long before and ever since, has been and still is an inhabitant of the state of Vermont, residing in said probate district, and not a citizen or inhabitant of the state of New York. To which replication there was a general demurrer and joinder in the demurrer. The county court rendered judgement for the plaintiff, and the defendant excepted; whereupon the case comes here for reconsideration.

J. Clark, for plaintiff. Moses M. Strong, for defendant.

PHELPS, J. It appears that John W. Mott, being a citizen and resident of New York, obtained a judgement against the defendant, and afterwards died in New York. Administration of his effects was there committed, by the surrogate, to Henry Mott, and administration of the effects of J. W. Mott in this state, was granted to the plaintiff, by the probate court, for the district of Rutland within which the defendant resided. Subsequently the defendant obtained a discharge from Henry Mott, and, the plaintiff having brought this action, the defendant pleads that discharge in bar. The question is, will the discharge avail him? The disposition of effects left vacant by the decease of the owner, has ever been regarded as a matter strictly of local jurisdiction. It is indeed a proceeding in rem; and in every country, is considered as falling within the jurisdiction of the particular state, province or district, in which the effects are situate.

In England, where this subject is committed to the ordinary, if there are effects in two dioceses, administration must be taken in the provincial court; and if there are effects in two provinces, i. e. within the jurisdiction of two arch-bishops, administration must be taken in both. The reason given is, that they are each supreme jurisdictions, and neither can act in the other. Bac. Abr. tit. "Executors," E; Hardress, 216; 1 Salk. 39-40; 3 Bl. Comm. 509. So no notice is taken there, of administration granted abroad, nor does a grant of administration in England extend to the colonies. The same view of the subject has ever been taken in the United States. Hence, an administrator appointed in a foreign state, has no authority in the United States. Graeme v. Harris, 1 Dall. 456; Dixon v. Ramsay, 3 Cranch, 319; Lewis v. McFarland, 9 Cranch, 151; Selectmen of Boston v. Boylston, 2 Mass. 384. So letters of administration granted in one of the states are of no authority in another. This point has been repeatedly decided by the courts of the United States. See Fenwick v. Sears, 1 Cranch, 259; Dixon v. Ramsay, 3 Cranch, 319; Champlin v. Tilley, 3 Day, 304, Fed. Cas. No. 2,586. It has been so held in Maine, (see Stearns v. Burnham, 5 Greenl. 261;) in New Hampshire, (see Sabin v. Gilman, 1 N. H. 198;) in Massachusetts, (see Goodwin v. Jones, 3 Mass. 514; Selectmen of Boston v. Boylston, 2 Mass. 384; Borden v. Borden, 5 Mass. 67; Richards v. Dutch, 8 Mass. 506; Stevens v. Gaylord, 11 Mass. 256;) in Connecticut, (see Riley v. Riley, 3 Day, 74; Stanton v. Holmes, 4 Day, 87;) and similar decisions have been had in Virginia, Kentucky, Ohio, and North Carolina. So far indeed has this doctrine been carried, that in some states, they do not hold an administrator appointed abroad responsible within their jurisdiction, nor an administrator appointed within the state, responsible for effects received out of their

jurisdiction. See 2, 5 and 8 Mass., cited above.

This subject has also been before our courts, and similar decisions had. See Dodge v. Wetmore, Brayt. 92; also, Lee v. Havens, Id. 93. The case of Lee v. Havens, is strictly in point with the present. In that case an administrator appointed in Massachusetts, had attempted to evade our jurisdiction, by indorsing a note due from a citizen of this state to his intestate there. A suit was brought by the endorser, but the court held the indorsement nugatory as the administrator had no interest in, or control over, the note in question. In short, if the courts of this state have jurisdiction, it follows that the courts of no other state can have. The idea of a concurrent jurisdiction, in such a case, is absurd and impracticable. If any reason be necessary to show the propriety of the decisions on this subject, it is found in the obvious propriety, not to say necessity, of protecting the rights of our own citizens who may be creditors of the intestate. To suffer the effects of the intestate to be eloined, without attending to these rights, is an act of comity to other jurisdictions which no state does, or will exercise. An idea seems to have been entertained, that the jurisdiction over the debt in this case, followed the person of the creditor. But it is to be observed, that jurisdiction, or the right of administration in respect to debts due a deceased person, never follows the residence of the creditor. They are always bona notabilia, unless they happen to fall within the jurisdiction where he resided. See Bac. Abr. "Executors," E; Cro. Eliz. 472. Judgements are bona notabilia where the record is, (Ld. Raym. 855; Carth. 149; 8 Mod. 244; Anon., 6 Geo. II., cited by Selw.;) specialties, where they are at the time of the creditor's decease, (Lum v. Dodson, cited in Selw. N. P.; Byron v. Byron, Cro. Eliz. 472;) and simple contracts where the debtor resides, (Carth. 373; Salk. 37; Ld. Raym. 562.)

An attempt is also made to support this defence upon the rule of lex loci contractus. This rule in most cases is founded upon the supposed intent of the parties. Further than this it is a matter of comity merely, as no independent state is bound to execute, or be governed by, the laws of another. To apply the rule however to a case like the present, and permit the interference of another state with subjects falling within our jurisdiction, would be an abandonment of our sovreignty. All transactions taking place in New York, upon matters subject to their jurisdiction, if regular by their laws, would be properly regarded here. A judgement rendered there if the parties and subject matter are within their jurisdiction, would be held conclusive; and even the act of a sheriff executed there, would, under like circumstances be esteemed valid, if called in question here. But we should hardly concede to their courts, the power of acting upon the title of our lands, or to their sheriffs that of disposing of them at auction.

The judgement of the county court is therefore affirmed.

NELSON v. POTTER.

(15 Atl. 375, 50 N. J. Law, 324.)

Supreme Court of New Jersey. Feb. Term, 1888.

On certificate upon a felgned issue out of the court of chancery.

Argued, November term, 1887, before DEPUE, VAN SYCKEL, and KNAPP, Justices.

John S. Voorhees, for plaintiff. A. Q. Keasbey, for defendant.

DEPUE, J. This suit involves title to certain lands situate in the county of Middlesex, in this state, of which Isaac J. Potter died seized. The deceased, whose domicile was in California, died May 19, 1885. By his last will, dated November 19, 1884, he devised the residue of his estate, in which the lands in question were included, to two incorporated societies. The plaintiff derived title by conveyance from these societies. The defendant makes title as an heir at law of the deceased. The testator's will was in writing, and signed by him, but not executed by him in the presence of subscribing witnesses. It is admitted that the will was made and executed in compliance with the laws of California, and that under the laws of that state it would be a valid testamentary disposition of lands. It was not made and executed in conformity with the law of this state, which requires all wills to be executed in the presence of two witnesses, present at the same time, who shall subscribe their names thereto as witnesses in the presence of the testator. Revision, p. 1247, § 22. The certificate presents the question whether a will, made and executed by a non-resident testator, in such a manner as by the law of his domicile would be a valid devise of lands, can operate to devise lands in this state, the will not having been executed in conformity with the law of this state.

The incidents of real estate, its disposition, and the right of succession, depend upon the lex rei sitae. The validity of bequests of personal property depends upon the law of the testator's domicile, and the validity of devises of real property upon the law of the state where the lands lie. Hence a will executed according to the law of the testator's domicile will pass personal property wherever situate; but, with respect to devises of lands, the will must be executed according to the formalities prescribed by the law of the state in which the land is situated. 4 Kent, Comm. 91, 93; Story, Confl. Law, § 474; Whart. Confl. Law, § 585; Jones v. Habersham, 107 U. S. 174–179, 2 Sup. Ct. 336; Robertson v. Pickrell, 109 U. S. 608, 3 Sup. Ct. 407; Pratt v. Douglas, 38 N. J. Eq. 516; 1 Jarm. Wills, (Rand. Ed.) 1, note b.

The courts of one state are without jurisdiction over title to lands in another state. The clause of the federal constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state applies to the records and proceedings of courts only so far as they have jurisdiction. Public Works v. College, 17 Wall. 521; Davis v. Headley, 22 N. J. Eq. 115–121. Hence the probate of a will in one state, though conclusive as to title to personalty if the probate be made at the domicile of the testator, is of no force in establishing the sufficiency or validity of a devise of land in another state. It can obtain such force only in virtue of some law of the state in which the lands are situate. McCormick v. Sullivant, 10 Wheat. 192; Darby v. Mayer, Id. 465; Watts v. Waddle, 6 Pet. 389; Robertson v. Pickrell, 109 U. S. 608, 3 Sup. Ct. 407; Brine v. Insurance Co., 96 U. S. 627, 635. The state legislature might provide that lands within the state should pass by a devise in a will executed according to the law of the state or country in which the testator was domiciled. But an act of legislation of that import would be so extraordinary and impolitic, in its tendency to introduce doubt and uncertainty in the title to lands, that a statute of that similitude would not be allowed that effect, unless such intent was expressed in clear and unequivocal language.

The testator's will was duly probated in the office of the clerk of Tuolumna county, Cal., May 27, 1885, and an exemplified copy thereof filed and recorded in the surrogate's office of Middlesex county, in this state, May 2, 1887, in compliance with the act of the legislature of May 11, 1886, (Supp. Revision, 775.) It is contended by the plaintiff that, by force of this statute, a will, not executed in the manner prescribed by the law of this state, is nevertheless operative to devise lands in this state, if it be executed according to the formalities required for a devise of lands by the law of the state or country where the testator was domiciled. The act in question provides that when any will shall have been admitted to probate in any state or territory of the United States, or the District of Columbia, or in any foreign state or kingdom, and any person shall desire to have the same recorded in this state, for the purpose of making title to lands or real estate in this state, it should be lawful for the surrogate of any county in this state, upon an exemplified copy of such will and of the certificate of probate thereof and of the letters testamentary, exemplified and attested as mentioned in the act, being filed in his office, to record such will, certificate, and letters, and file the said copy in his office. The act further provides that any such will, certificate, and letters, being so recorded, should have the same force and effect, in respect to all lands and real estate whereof the testator died seized, as if the said will had been admitted to probate, and letters testamentary had been issued in this state. It also provides that all conveyances

theretofore or thereafter made by any executor, or by any devisee, should be as valid as if said will had been admitted to probate, and letters testamentary, etc., had been issued in this state, and that such record or certified copies thereof should be received in evidence in all courts of this state. This statute was originally passed March 28, 1866, (Nixon, Dig. p. 1035, § 40.) It was repealed in 1872, (P. L. 1872, p. 58,) and restored in 1873, (P. L. 1873, p. 168,) and was included in the orphans' court act in the Revision of 1874. Revision, p. 757, § 26. It was re-enacted with some amendments in 1882, (P. L. 1882, p. 112,) and again in 1886, with some other amendments, (Supp. Revision, 775;) but the act as it now stands is, so far as concerns this suit, substantially the same as it was when it was passed in 1866. The act, as passed in 1866, was entitled "A supplement to the act relative to the probate of wills from other or foreign states," which was an act passed April 15, 1846, (Nixon, Dig. p. 1032, § 31.) The act of 1846, to which the act of 1866 was a supplement, was originally passed March 6, 1828, under the title of "An act relative to the probate of wills," (Har. Comp. 195;) and with some additions, of no importance in this case, was included in the Revision of 1846, under the title above mentioned.

When the act of 1828, providing for the record of foreign wills, was passed, statutes were in force making the record of wills originally proved under the laws of this state, either in the prerogative court or before the surrogate, or transcripts thereof, competent evidence of the same validity and effect as if the original will were produced and proved. The germ of this legislation was the act of March 17, 1713–14, (Nixon, Dig. 1034; Revision, 1249;) which in the second section provided that wills thereafter made in writing, signed and published by the testator in the presence of three subscribing witnesses, and regularly proved and entered upon the books of records or registers, should be sufficient to devise and convey lands, tenements, hereditaments, or other estates, as effectually, to all intents and purposes, as if the testator had conveyed the same away in his life-time; and that the books in which they were registered or recorded should be accepted, and be sufficient evidence at all times and places. The fourth section declared that the copy of any will, made in any of his majesty's colonies, by which any real estate within this colony is devised, being proved according to the custom of such colony, and certified under the great seal of such colony, should be received in evidence in any of the courts within this province, and be esteemed as valid and sufficient as if the original will or testament was then and there produced and proved. This act is still in force, (the word "colony" being taken to include "state,") except as modified by the act concerning wills, of March 12, 1851, (Revision, 1247,) with respect to the number of witnesses required, and the mode of executing and attesting wills. Graham v. Whitely, 26 N. J. Law, 254–259; 4 Griff. Law Reg. 1241, § 72. Mr. Griffith, in commenting on the act of 1713–14, and other provisions for authenticating wills made in other states, as furnishing evidence of the existence and of the probate of such a will in another state, containing a devise of lands in this state, adds that: "Still it [the will] must appear to be executed in such manner as our law requires for the devising of real estate lying here." 4 Griff. Law Reg. 1241, § 72, note 1.

None of these acts, which made the record of probate or transcripts thereof evidence, was designed to change the law with respect to the manner in which wills were required to be executed to make a valid devise of lands. When these acts were passed, and down to the act of 1851, a will of personalty was valid, and therefore entitled to probate, though it was executed without any subscribing witnesses; and at the same time a will was inoperative to devise lands, unless executed in the presence of subscribing witnesses, and with certain formalities provided by statutes regulating that subject. The object of these acts was simply to provide instruments of evidence to dispense with the production of the subscribing witnesses in support of title by devise. As was said by Chief Justice Beasley, the intention was to make them prima facie evidence for the sake of convenience. Otterson v. Hofford, 36 N. J. Law, 129–133. If the will, as probated, showed a will executed in such a manner as was required for a valid devise of lands, the record of the probate, or a transcript thereof, was prima facie evidence of the title of the devisee. If the record did not exhibit a will so executed, the record or transcript went for naught. Den. v. Allen, 2 N. J. Law, 35, 38, 42, 43; Allaire v. Allaire, 37 N. J. Law, 312, 318, 319, 39 N. J. Law, 113. The act of 1846, which applies to foreign wills, must receive the same construction; for by the third section of that act it is declared that such record, or certified copies thereof, should be evidence in the same manner, and have the same force and effect, as if such will had been proved in the usual manner, under the existing laws of this state. It was so decided in Allaire v. Allaire, supra.

It was contended by the plaintiff, to sustain this devise, that the act of 1886, (Supp. Revision, 775,) requires a broader construction. The argument was based upon the phrase, "shall desire to have the same recorded in this state for the purpose of making title to lands or real estate in this state," and the fact that conveyances theretofore or thereafter made by executors or devisees were validated. The reason for the introduction of the words above quoted, with respect to the purpose for which such will was

recorded, is apparent. The act of 1846 contemplated letters testamentary, or of administration upon the recording of the will, and required a bond, with security from nonresidents for the faithful administration of the testator's estate. In some instances the record of a foreign will in this state was needed exclusively as a muniment of title, without any administration on the testator's estate. The supplements of 1866 and 1886 were designed to meet this situation of affairs. Provision was therein made for recording the will for the sole purpose of making title to lands or real estate in this state without letters testamentary or of administration thereon, and consequently without any bond for the administration of the testator's estate. And it will be observed that in every instance in these statutes, in which the effect of such a record is declared, it is declared that such will, upon being recorded, "shall have the same force and effect, in respect to all lands and real estate whereof the testator died seized, as if said will had been admitted to probate, and letters testamentary or of administration with the will annexed had been issued in this state;" and that conveyances of such real estate by the executor or devisee, "shall be as valid as if said will had been admitted to probate, and letters testamentary or of administration with the will annexed had been issued in this state." In this language the legislature expressed a purpose to put such a will, when recorded, on the same footing, with respect to lands, as wills recorded under the act of 1866. The language in which these statutes are expressed gives no countenance to the supposition that the legislature intended to suspend the statute concerning wills, with respect to lands in this state, in favor of foreign testators; or to give the record of foreign wills an effect which it has not given to domestic wills, duly probated in our courts. The whole of the legislation with respect to the force and effect of the probate and recording of wills,—domestic or foreign,—upon the title to lands, is of the same character. The record of probate, or a transcript thereof, is made competent evidence dispensing with proof by the subscribing witnesses; leaving the legal effect of the will, as a devise of lands, to be determined as it would be if the original will was produced and proved. The testator's will, if produced and proved, would be inoperative to devise lands in this state. It acquired no additional force from the recording. A certificate will be made that the title to the lands in question did not pass under the testator's will, but descended to his heirs at law.

In preparing this opinion, I have not overlooked the fact that upon the testator's death, in 1885, the lands in question descended to his heirs at law, and that their title was vested before the act of 1886 was passed. But inasmuch as the act of 1882, which was in force when the testator died, is, in all respects material to this controversy, identical with the act of 1886, I preferred to consider the case as if controlled by the latest act on this subject.

NOTE. According to the uniform course of the decisions of this court, the validity of these devises, as against the heirs at law, depends upon the law of the state in which the lands lie, and the validity of the bequests, as against the next of kin, upon the law of the state in which the testatrix had her domicile. Vidal v. Girard, 2 How. 127; Wheeler v. Smith, 9 How. 55; McDonogh v. Murdoch, 15 How. 367; Fontain v. Ravenel, 17 How. 369, 384, 394; Perin v. Carey, 24 How. 465; Lorings v. Marsh, 6 Wall. 337; U. S. v. Fox, 94 U. S. 315; Kain v. Gibboney, 101 U. S. 362; Russell v. Allen, 107 U. S. 163, 2 Sup. Ct. 327.

JOHNSON et al. v. WALLIS et al.

(19 N. E. 653, 112 N. Y. 230.)

Court of Appeals of New York. Jan. 15, 1889.

Appeal from supreme court, general term, Second department.

Action for specific performance, brought by William S. Johnson et al. against Hamilton Wallis et al., executors of A. H. Wallis. Judgment for plaintiff was affirmed by the general term, and defendants appeal.

William G. Wilson, for appellants. Frank C. Lown, for respondents.

FINCH, J. This is an action in equity to compel the specific performance by the vendors of a contract to sell and assign a judgment recovered by John McAnerney and others in the supreme court of this state against a corporation known as the "Hudson River Iron Company." The judgment was assigned to one Alexander H. Wallis, who was a resident of New Jersey, and died, leaving a last will and testament, which has been duly proved in that state, and by which the defendants were appointed executors. They have qualified, and entered upon the performance of their trust. They thereafter made a written contract with one Jacob Russell, all whose rights have passed to the present plaintiff, to sell and assign to him such judgment for a price to be fixed as follows: The judgment was a lien, or supposed to be a lien, upon certain lands under the waters of the Hudson river, near Poughkeepsie, in this state, and had no value beyond such lien. Arbitrators were chosen to fix the value of one acre of the upland, and that value, multiplied by the number of acres subject to the lien, was to be the purchase price of the judgment. That value was ascertained, the price tendered, and a deed duly demanded, which was refused, and thereupon this action was brought. The plaintiff had judgment, which the general term affirmed, and the defendants appealed to this court.

They rely mainly upon the proposition that as foreign executors they could not sue or be sued in this state, and acquire all their rights from and owe their responsibilities to another jurisdiction. That is the general rule, but in this state, at least, is confined to claims and liabilities resting wholly upon the representative character. In Lawrence v. Lawrence, 3 Barb. Ch. 74, the rule was declared to be applicable only to suits brought upon debts due to the testator in his life-time, or based upon some transaction with him, and does not prevent a foreign executor from suing in our courts upon a contract made with him as such executor. Of course, where he can sue upon such a contract, he may be sued upon it. The remedy must run to each party, or neither. In the present case the action is not founded upon any transaction with the deceased, but upon a contract which the defendants themselves made. By force of the will and their appointment they became owners of the judgment. Their title, although acquired under the foreign law, was good. In Petersen v. Bank, 32 N. Y. 21, the foreign executor sold an obligation of the estate, and his assignee sued upon it. The action was sustained on the grounds that the title of the foreign executor was good, and he could transfer it, and while he could not have sued upon it his assignee was not prevented. In this case, therefore, the defendants were owners of the judgment, and could lawfully contract for its sale. Having done so, they were liable upon that contract, which could be enforced against them because they made it, and it did not derive its existence from any act or dealing of their testator. We agree, therefore, with the courts below that the action could be maintained.

Objection is made that the arbitrators valued the land under water, and not the upland. The arbitrators certify that they valued the land per acre lying between the railroad and the river. That was upland, and not land under water. While they describe it as 11 8-10 acres, that may be rejected as an immaterial element of the description, and does not establish that their valuation extended to anything but the upland. Taking their whole report together, its fair meaning is that they valued one acre of upland at $25, and so the value of the 11 8-10 was $295.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

FUGATE v. MOORE et al.

(11 S. E. 1063, 86 Va. 1045.)

Supreme Court of Appeals of Virginia. Sept. 17, 1890.

Appeal from decree of circuit court of Lee county, rendered June 21, 1887, in a suit wherein Nathan H. Moore and others were complainants and the appellant, Peter P. Fugate, executor of M. B. Overton, deceased, was the defendant. Opinion states the case.

Duncan & Sewell, for appellant. A. L. Pridemore, for appellees.

LEWIS, P. The testator at his death, in 1880, was domiciled in Tennessee, and there the will was proved, and the executor qualified. No administration upon the estate has ever been granted in Virginia. The legacy sued for is claimed under the second clause of the will, which is as follows: "(2) I give and bequeath to Martha J. Combs, daughter of Virginia A. Combs, deceased, five hundred dollars out of the G. B. Short debt, when collected and put at interest, including the amount due her in my hands from the estate of Virginia A. Combs, deceased; and, if the above Martha J. Combs should die leaving no heirs of her body, the said amount to be divided equally between my heirs." The bill alleges that the complainant, Moore, after the testator's death, intermarried with the said Martha, since deceased, and had issue by her, who survived her about three months, leaving the complainant its sole distributee; that both the complainant and the defendant, the executor, reside in Lee county, in this state; that the Short debt "was owing" in that county; that the same has been "collected by the said executor;" and that the money remains undisbursed in his hands. The object of the bill, therefore, as averred, is "to enforce said trust, and to compel the defendant to pay said legacy." There was a demurrer to the bill, on the ground—First, of want of jurisdiction, inasmuch as the bill shows on its face that the defendant has never been appointed or qualified as the personal representative of the testator in this state, but in Tennessee only, where the testator was domiciled; and secondly, because the complainant, not being the personal representative either of his deceased wife or of their deceased infant child, had no right to sue. The defendant also answered the bill, denying, among other things, that the Short debt was payable in this state, and averring that Short, the debtor, resided in Hancock county, in Tennessee, and that the debt had there been collected. Afterwards an amended bill was filed, in which it was charged that the Short debt was secured by a lien on certain real estate in Tennessee, which had been sold to enforce the lien; that at the sale the defendant purchased the land for a sum sufficient to pay the debt, and now owes the purchase-money. To this the defendant answered that he had not bought the land for himself, individually, but for the estate, and that he owed nothing on account thereof. He admitted, however, that the debt had been collected. He also demurred to the amended bill. Afterwards Reese D. Flanary, administrator of the deceased wife, and also of her deceased child, was by consent made a party plaintiff to the suit; and, when the cause came on to be heard, a decree was entered directing the legacy to be paid to him, which is the decree appealed from.

It does not appear from the record what disposition was made of the demurrers to the original and amended bills; but, as the decree adjudicates the principles of the cause, we must assume that they were overruled. Matthews v. Jenkins, 80 Va. 463.

A number of questions were discussed in the argument at the bar, of which one of the principal was whether the legacy is a vested or contingent one; but, in the view we take of the case, it will not be necessary to pass upon that question. We think the objection to the jurisdiction must be sustained, and therefore that the case must go off on that ground.

It is an established general rule that a grant of administration has no legal operation outside of the estate from whose jurisdiction it was derived. Hence, ordinarily, no suit can be maintained by any executor or administrator, or against any executor or administrator, in his official capacity, in the courts of any other state. Story, Confl. Laws (7th Ed.) § 513; 1 Barb. Ch. Pr. 153; Andrews v. Avory, 14 Grat. 229; Harvey v. Richards, 1 Mason, 381. If, however, an executor or administrator should go into another state, and there, without taking out new letters of administration, should collect debts or other assets of his decedent, found there, he would be liable to be sued in the courts of that country by any creditor there, and held liable to the extent of the assets so collected. And in Tunstall v. Pollard, 11 Leigh, 1, it was decided that an executor who has qualified and received assets in a foreign country, and has brought them into this state, is liable to be sued and to be compelled to account here, although he has never qualified here, and although he may have received no assets here. The present case however, is not within the principle of that decision, for here no assets have been collected in this state, nor have any been brought hither, by the defendant. The charge in the amended bill that the land upon which the Short debt was secured was purchased by the defendant, and that he now owes the purchase money out of which the legacy is payable, is denied in the answer; and the agreed statement of facts in the record, upon which the case was decided, is in conformity with the averments of the answer on that point. According to those

averments, the land was purchased by the executor, not for himself, but for the estate; and it is neither alleged nor proven that, under the laws of Tennessee the purchase for the estate was not a valid one. It is admitted, however, that the debt has been collected, so that the case stands upon the same footing as if the land had been sold to a stranger for cash. The fact that the executor resides in this state does not affect the case. He is none the less a foreign executor on that account. The testator at his death was an inhabitant of Tennessee; the executor qualified there; administration has never been granted here; and no assets of the testator are, or at any time have been, in this state; and that is decisive of the case, so far as the question of jurisdiction is concerned. The jurisdiction is sought to be maintained on the ground of a personal trust in the executor, which, it is insisted, may be enforced in the courts of this state; and Governor v. Williams, 3 Ired. 152, cited in 1 Rob. Pr. (New,) 179, is relied upon. In that case, it is true, Chief Justice Ruffin expressed the opinion that an administrator may be compelled to account in a court of equity where he may be found to those entitled to the estate, wherever it may be situate, on the ground of a personal trust, no matter where it may have been assumed; but the remark was purely obiter, (the case being an action at law, and consequently no such question being before the court,) and is, therefore, not authority, even in the courts of North Carolina. The doctrine is strongly combated by Mr. Justice Story in his treatise on the Conflict of Laws, (section 514,) where numerous authorities are cited, including Doolittle v. Lewis, 7 Johns. Ch. 45, in which case Chancellor Kent said: "It is well settled that a party cannot sue or defend in our courts as executor or administrator under the authority of a foreign court of probate. Our courts take no notice of a foreign administration, and, before we can recognize the personal representative of the deceased and his representative character, he must be clothed with authority derived from our law. Administration only extends to the assets of the intestate within the state where it was granted. If it were otherwise, the assets might be drawn out of the state, to the great inconvenience of domestic creditors, and be distributed, perhaps, on very different terms, according to the laws of another jurisdiction." See, also, Vaughan v. Northup, 15 Pet. 1; 1 Lomax, Ex'rs, marg. page 142. This doctrine, it is true, has been modified in Virginia, to the extent of holding, as we have seen, that where a foreign executor comes into this state, bringing assets with him, he may be sued here; but that, as we have also seen, does not affect the present case, nor are we aware of any principle upon which the unqualified doctrine enunciated by Chief Justice Ruffin, and contended for here, can be supported. The decree must therefore be reversed and the bill dismissed for want of jurisdiction.

Decree reversed.

HOOVER v. HOOVER.

(5 Pa. St. 351.)

Supreme Court of Pennsylvania. June 9, 1847.

Appeal from the orphans' court of Cumberland.

The petition (or bill) stated that John Hoover devised a tract of land to his son David, yielding and paying out of the same $7,250, in instalments of $700; the first payable in six months after testator's decease, the second in eighteen months thereafter, and the remaining instalments yearly. Out of the first instalment a legacy of $500 was given to the petitioner. Of the residue, portions were given to the testator's other children, and the amount undisposed of, with the residue of the estate, was given equally among all the children. The petition then averred the acceptance of the land devised, prayed an order of sale, etc.

The answer of the devisee admitted the will, of which he and another were executors, and averred a settlement of an administration account, by which it appeared he had paid debts of the estate beyond the assets $1,683.63, and that debts yet remained unpaid, which, with that sum, amounted to $4,453. It further averred there were no assets nor any annual payment due out of the land which respondent could apply to the payment of legacies. That testator had made no provision by his will for payment of his debts, and that the estate would not be sufficient to pay all the legacies when the assets came to hand, but that they must abate ratably.

The complainant demurred, and the court dismissed the bill.

Graham and Reed, for appellants. Biddle and Watts, contra.

BELL, J. It is admitted by the defendant's answer, as indeed it could not, with any show of reason, have been denied, that the sum of $7,250, bequeathed by the testator to be paid to his children in the proportions and at the time mentioned in his will, is a charge upon the lands devised to David. It is also admitted that the latter, in pursuance of the will, took possession of the lands devised, and still continues in the seisin and occupation of them. Upon these facts alone, it is not to be disputed that, having taken the land cum onere, he is bound to pay to his brothers and sisters their several legacies as they respectively fall due, and this liability may be enforced by a proceeding in the orphans' court, such as has been instituted here, under the statute giving the specific remedy. By the terms of this will, not only is a lien created on the land devised, but the devisee, immediately upon his acceptance of it, became personally responsible to the legatees for the amount of their respective legacies. As is said in Glenn v. Fisher, 6 Johns. Ch. 33, a case which cannot, in this particular, be distinguished from the present, by acceptance, the devisee becomes absolutely bound for the legacies, and cannot set up any condition precedent to it, for the law makes none. He who accepts a benefit under a will, must conform to all its provisions, and renounce every right inconsistent with them. To the same effect is the doctrine of our own case of Zobach's Case, 6 Watts, 167, which, in its leading features, is also very similar to the present. The testator, said Mr. Justice Kennedy, in delivering the opinion of the court, not only intended to charge the land, but to make it a personal charge on the devisee, and he became personally liable on taking possession under the will. These distinct liabilities are illustrated by the consideration that the estate given to David may be treated as an estate on condition. In a will, no precise form of words is necessary to create a condition. Any expressions denoting such an intention will have that effect. Thus a devise to A., "he paying," or "he to pay £500 in one year after my decease," would, it is said, be a condition for the breach of which the heir might enter. 2 Pow. Dev. 251; Barnardiston v. Fane, 2 Vern. 366; 1 Eq. Cas. Abr. 109, pl. 8. But in such a case equity would afford relief against the forfeiture, on payment of principal, interest and costs, (1 Pow. Dev. 195, note 7;) and it is not to be doubted that, on application of the party entitled to payment out of the land devised, the devisee would be compelled to perform the condition, on the principle that no man shall be allowed to disappoint a will under which he takes a benefit. Per Eyre, Chief Baron, in Blake v. Bunbury, 1 Ves. Jr. 523. But the defendant, David Hoover, endeavours to excape from the responsibility he has thus assumed, by showing that, although five instalments of $700 each were due, and payable under the will of the testator, at the time the plaintiff filed his bill in the orphans' court, these were not sufficient in amount to cover a balance of debts remaining due from the testator's estate, after exhausting the personal estate and other lands not devised; and, therefore, he avers "there are no assets of the estate of the said John Hoover, deceased, in his hands, which he could apply to the payment of the legacy of Michael Hoover, nor is there any annual payment due and payable out of the land so as aforesaid devised to him, which he can legally and safely apply to the payment of the said legacy or any part thereof." This averment proceeds upon the notion that, although the aggregate sum charged on the land, and which, as we have seen, has become the personal debt of the devisee, is directed to be paid in ascertained legacies and by way of residuary bequest to the other children of the testator, yet that is subject to be first appropriated in payment of the debts due from his estate, leaving only any balance that may remain, applicable in satisfaction

of the legacies, pro rata. This view seems to have been adopted by the orphans' court, and to have led it to the support of the defendant's answer by a dismissal of the plaintiff's bill with costs. But in this, we are of opinion the court was clearly wrong. Viewed as a personal liability attaching upon the devisee, there can be no pretence whatever to say the plaintiff's legacy is liable to be defeated by the fact that the testator died indebted in a larger amount than his personal estate was sufficient to discharge. This legacy is made directly payable by the devisee to the legatee, without the intervention of the executor, who alone, has to do with the payment of his testator's debts. That the devisee was also executor can make no difference, for the land devised did not pass to him in that character, but as devisee, and his acceptance of it immediately raised a promise to pay the sums charged upon it, irrespective of the testator's debts. It may be true the latter acted upon a mistake as to the amount of these debts, and that a consequence will be a diminution of the benefit intended to be conferred by him on his devisee; still this acceptance by the latter of the thing devised, subject to the burden expressly imposed on it, closes his mouth from averring, as a defence to the plaintiff's claim, that there are no assets of the estate of the deceased in his hands applicable to the payment of the legacy. The right of the legatees to claim payment at the hands of the devisee does not rest upon assets, as such, in his possession, but upon his liability as devisee, holding under the same will that gives birth to their interests.

But if we put out of view the personal responsibilities of the devisee, and treat this as a case in which a chancellor would marshal assets as between creditors, devisees, and legatees, it will be found the defence set up here is equally unavailing. In this aspect, the legacies must be regarded as demonstrative, and, in some sort, partaking of the nature of specific legacies, as charged upon a particular fund specially appropriated to their payment. Ward, Leg. 21. This fund is the devised land which, it is not denied, is sufficient for the payment of the balance of the testator's debts, and the legacies bequeathed. The established order of the application of the several funds liable to the payment of debts is definitively settled by adjudged cases, and is thus generally stated by text writers upon this subject. 1. The general personal estate not expressly, or by implication, exempted. 2. Lands expressly devised to pay debts. 3. Estates descended to the heir. 4. Devised lands, charged with the payment of debts generally, whether devised in terms general or specific, (every devise of land being in its nature specific.) 5. General pecuniary legacies, pro rata. 6. Specific legacies, pro rata. 7. Real estate devised, whether in terms general or specific. 2 Pow. Dev. 667, 668, and cases there cited. In this instance the first and third class of assets have been exhausted, without fully satisfying the debts; and this testator did not expressly devise any lands for their payment. Nor did he charge any of his lands with the payment of his debts generally, so far as we are enabled to ascertain from the paper-book, which, however, does not set out the whole of his will. But with us, all the lands of a decedent, whether descended or devised, are, by law, charged with the payment of his debts, and, as is intimated in Manning v. Spooner, 3 Ves. 118, and expressly said by Mr. Justice Rogers, in Walker's Estate, 3 Rawle, 241, a case also turning upon the mode of marshalling assets in payment of debts; every testator is presumed to know the law of the country in which he lives, and to make his will in reference to it; and he adds, that though a clause in wills, charging the testator's estate with the payment of his debts, is usual, it is by no means necessary, for the estate is equally bound without such direction, and in the order indicated. Accordingly, in that case, personal property bequeathed to the widow of the testator was decreed to be subject to the payment of debts, before descended real estate could be called on. It does not, however, follow from this, that when no other fund than the personal estate is provided for the payment of legacies, and this is swept away by the creditors of the testator, the legatees are entitled to call upon the lands devised to replace the amount abstracted from the personalty, for this would be in contravention of the order of application I have already stated. The right to do so seems to depend upon an expression of intention by the testator to charge the devised lands with his debts, in which case the assets will be marshalled in favour of pecuniary and specific legatees; lands so charged being applicable before pecuniary or specific legacies. But the case is very different where the burden of paying the legacies is specifically imposed on the devised land. The devisee then takes it so subject, and, in Pennsylvania, on failure of the prior funds, also onerated with the debts. The testator says he shall pay the legacies, and the law says he shall pay the debts. It is, in this respect, like a devise of mortgaged lands, charged by the testator with the payment of a sum certain, partly applicable to the discharge of legacies given to other children of the testator. When construing such a devise, C. J. McKean, as the organ of the court, observed: "It appears to have been the intention of the testator that the legacies, specific and pecuniary, should be paid, as well as that the devise of the real estate should take effect; and, if practicable, the assets should be so marshalled that the testator's intention in the whole should be carried into execution;" and it was, accordingly, decided that the specific and pecuniary legacies bequeathed to the children, ought not to be

brought in case of the particular lands mortgaged, for the devisee of the real estate must take it cum onere, that is, subject to the mortgage, unless the residue of the personal estate be sufficient to discharge it. In this case, too, it was apparent the testator had miscalculated the amount of his debts, a circumstance which is never allowed to defeat legatees, where a sufficient fund still remains. Ruston's Ex'rs v. Ruston, 2 Dall. 243. A similar principle was announced in the case of Davies v. Topp, 1 Brown, Ch. 455, in note, where one seised in fee of considerable real estate, subject to a mortgage, by his will gave to his sister an annuity, during her life, to be paid by the person who should be seised of his real estate, under his will, and also several pecuniary legacies, the payment of which, together with his debts, he charged upon all his real and personal estate, which he devised, subject thereto, to his nephew in tail male; and to the same nephew he gave all the rest of his personal estate, subject to his debts, legacies, and funeral expenses, and appointed him executor of the will. Upon a bill brought for an account and application of the personal estate, not specifically bequeathed, in payment of debts and legacies, and in case the personal estate should not be sufficient, to have the deficiency raised by a sale or mortgage of a competent part of the real estate, the master of the rolls decreed, and this decree was afterwards affirmed by Lord Thurlow on appeal, that the personal estate not specifically bequeathed should be first applied in payment of debts, funeral expenses, and legacies, but in case the personal estate should be insufficient for the payment of debts, the balance due the mortgagee and other specialty creditors to be raised by mortgage or sale of certain freehold estates, acquired of the testator after making his will, and which had descended to his heirs at law; and in case these funds should not be sufficient for the payment of debts and legacies, the deficiency to be made good out of the real estate devised by the will, charged with the payment of the testator's debts and legacies. In these, and similar instances, a demonstrative legacy is not suffered to fail while the fund charged with its payment holds good for the purpose. After debts, these have the primary claim upon the fund, and where that fund is land devised, the devisee is, if necessary, to be postponed. But here the devisee claims to apply the legacies in case of the land upon which they are charged, which, as we have seen, cannot be done. It follows that, under the facts disclosed, the orphans' court erred in dismissing the bill of Michael Hoover, the legatee, and its decree must, therefore, be reversed.

Decree reversed, and it is ordered that the record be remitted to the orphans' court, with directions to proceed.

HAYS et al. v. JACKSON et al.

(6 Mass. 149.)

Supreme Judicial Court of Massachusetts. Nov. Term, 1809.

The petitioners alleged, and proved by the requisite documents from the probate office, that the personal estate of the testator was insufficient, by the sum of 66,000 dollars, for the payment of his just debts and legacies, and thereupon prayed that they might be licensed to convey so much of the real estate, of which he died seized, as should be sufficient to pay those debts and legacies, with the charges of sale.

Upon notice ordered, the heirs at law appeared, and sundry questions arose, all of which are discussed in the following opinion of the court.

Otis and Sullivan, for petitioners. Prescott and Jackson, for respondents.

PARSONS, C. J. Henry Jackson made his last will on the 13th of January, 1805, in which he makes the following disposition of his estate.

First. After all his just debts and funeral charges are paid, he gives to such of his nephews and nieces as may survive him, fifty dollars each. Also, he gives to his sister Susanna Gray in fee, certain specifick real estate, on condition that she does not demand against his estate her portion of her father's estate remaining in his hands; and his executors are to hold the real estate, thus devised her, upon the same trusts as he held her said portion.

Also, he gives to Mrs. Hepzibah C. Swan in fee, all the remaining part of his estate, real and personal, of which he might die seized, or which might afterwards descend to him by gift, grant, as heir at law, or otherwise, to be held in trust by his executors, for her sole use and disposal.

And he appoints Judah Hays and Elisha Sigourney his executors.

Mrs. Swan, the residuary legatee, and also the heirs at law are before us.

The testator was seized of other real estate, than that specifically devised to Mrs. Gray, when he made his will; and he afterwards acquired other real estate, which on his death, without a republication of his will, descended to his heirs.

It appears that the personal estate, left by the deceased, is insufficient to pay all his debts. The heirs contend that the lands, which would pass by the residuary devise to Mrs. Swan, shall first be applied to the payment of the debts, before the descended lands can be called for. On the other side, Mrs. Swan and the executors, who are her trustees, insist that the descended lands are first to be appropriated to the payment of the debts.

Whether we are authorized, on this petition, to marshal the assets; and if we are, in what manner they are to be marshalled, are the questions before the court.

The case may first be considered as at common law, and according to the equitable rules established for marshalling assets, where there is a will.

At common law, the lands of a testator are not assets in the hands of the heirs, for the payment of any but specialty debts, where the heir is bound expressly by the contract. And his lands are not bound for the payment of any of his debts in the hands of a devisee, unless charged by the testator, either generally or specially, in his will. To prevent the injustice of the testator, in devising his lands without charging them with the payment of his debts, the statute of 3 & 4 W. & M. c. 14, was passed, by which the lands in the hands of a devisee are made assets for the payment of debts due on specialties. Since that statute all the lands of the testator, whether they descend or are devised, are charged by law with the payment of the creditors by specialty; who may also resort to the personal estate. But creditors by simple contract can avail themselves only of the personal estate, and of such of the lands as are charged in the will with the payment of debts; unless when they take the place of creditors, who have been paid out of the personal estate. These rights of the creditors remain uncontrouled by any provisions, which a testator can make.

But as between legatees and devisees who claim under the will, and the heirs who can take only what the testator has not given away, he may regulate the funds, out of which his debts shall be paid; by which regulations they will be bound.

And the general rule in equity for marshalling assets is thus settled. 1. The personal estate excepting specific bequests, or such of it as is exempted from the payment of debts. 2. The real estate which is appropriated in the will as a fund for the payment. 3. The descended estate, whether the testator was seized of it when the will was made, or it was afterwards acquired. 4. The rents and profits of it, received by the heir after the testator's death. And 5. The lands specifically devised, although they may be generally charged with the payment of the debts, but not specially appropriated for that purpose. And this rule is executed by a decree in chancery, according to the rights of the parties respectively interested.

The laws of this commonwealth, applicable to this subject, may next be considered. And here all the personal estate of the testator, and all the real estate, of which he died seized, whether devised or not, are assets for the payment of all his debts, whether due by simple contract, or by specialty. Also by the statute of 1783, c. 24, § 10, all estate real or personal, undevised in any will, shall be distributed as if

it were intestate, and the executor shall administer upon it as such.

A question has been made, whether the executor must take out administration on such undevised estate, or whether he shall administer it ex officio as executor. The usage has been to administer it without a letter of administration: and we are satisfied that this usage is correct. There can be no benefit to any person, from having two accounts opened by the executor in the probate office; and the natural construction of this section supports the usage. For the executor, by the probate of the will, has the administration of the testate estate, according to the will, and on undevised estate he is also directed to administer agreeably to the provisions respecting intestate estate.

According to the strict rules of law, there can be no undevised personal estate in a will, where an executor is appointed: for he has all the personal estate, whether acquired before or after the will, in trust,—first to pay the debts and then the legacies; and if any remained, it was his own, unless the testator by his provision for the executor, had excluded him from it; in which case he was trustee of the remainder for the next of kin.

As questions frequently arose, whether the executor was excluded from the residue or not, the section of the statute above cited removed all doubt: and the executor is now in all cases trustee of the undisposed residue for the next of kin.

As to the distribution of undevised lands, this section is merely affirmative of the common law, which gives to the heir all undevised estate. But by the obligation imposed on the executor to administer it as intestate estate, it becomes assets in his hands for the payment of the testator's debts; and it may be sold by the executor, on license for that purpose, or a creditor may take it in execution.

There is another provision, applicable to this subject, in the 18th section of this statute; where it is enacted, that whenever a testator in his will shall give any chattels or real estate to any person or persons, and the same shall be applied to satisfy the debts of the testator, all the other legatees, devisees or heirs, shall refund their proportionable part of such loss, and contribution may be compelled by suit.

From this view of our statute provisions, it is manifest that a testator cannot, by any dispositions in his will, affect the rights of creditors, who may, if their debts are not discharged, enforce satisfaction by the levy of their executions on any estate, which was the testator's at his decease; the whole of it being assets in the hands of the executor. But it is also manifest that the testator may bind, by his dispositions, his legatees, devisees and heirs.

Hence results the right and duty of the court, in the due exercise of its jurisdiction, so to marshal the assets, that as little interruption be given to the interests of the claimants under the will, and of the heirs, as may consist with the more perfect rights of creditors. This can be done only by a designation in the license of the estate, which the executor may sell for the payment of debts. And when the testator, or the law has appropriated an adequate fund for the payment of the debts, it would be unreasonable for the court to permit that fund to lie by, and to license an executor to sell a specifick devise, and thus drive the specifick devisee to his action at law, for relief out of the appropriate fund.

In what manner the assets are in this case to be marshalled, is the next question. And in our opinion, the rule established in equity, in cases where all the debts are due by specialty, is applicable in this case, except as it relates to the rents and profits of the descended estate, received after the testator's death, which we cannot come at. For in those cases, the whole estate personal and real, as well the devised as the descended lands, are assets for the payment of all the debts. So here the whole estate of Jackson, the testator, including the descended real estate, is assets for the payment of all his debts, in the hands of his executors. And in both cases the charge on the estate is by operation of law.

In this will there is no specifick bequest of any chattel, and no exemption of any part of the personal estate, from the payment of debts. Therefore the whole of the personal estate, after the payment of the expenses of the last sickness, funeral charges, and of the debts due to the government, (if any,) is first to be applied to discharge the debts. It is also very clear, that the devise of lands to Susanna Gray is a specifick devise, not liable, by the terms of it, to any deduction. The descended estate must then be applied to the payment of the debts, before the specifick devise can be resorted to. And the same rule must apply to the lands, which Mrs. Swan can claim as residuary legatee, if the devise of those lands can be considered as specifick within the intention of the rule.

Jackson first provides that his debts and funeral charges be paid: He next bequeaths legacies to his nephews and nieces, and makes a specifick devise to his sister Susanna Gray. Then he gives to Mrs. Swan in fee all the remaining part of his estate real and personal. The just construction of which is, "when my debts and funeral charges, and the legacies are paid, and the specifick devise to my sister is deducted, then what remains, whether real or personal, I devise in fee to Mrs. Swan." If nothing should remain, then nothing is devised to her.

We cannot therefore consider this devise of the remainder as specifick. It is rather creating a fund for the payment of the debts and legacies, with a devise of what remains,

if any, to the residuary devisee. If after the personal estate was exhausted by the debts, the unsatisfied creditors should levy their executions on all the devised lands, excepting those specifically devised to Mrs. Gray, Mrs. Swan could not compel contribution by Mrs. Gray and the heirs, under the statute; because a general residuary legatee cannot have contribution, if nothing remains. For in that case nothing is given to him, but on a contingency that some estate may remain; and if no estate shall remain, then nothing devised to him is taken from him, to satisfy a creditor of the testator. The debts and legacies, being first to be paid, are to be considered as a deduction from the property contemplated to be given: and if after the deduction, there is no remainder, the contemplated bounty has wholly failed, there being in fact, no object, on which it could operate.

Thus when the testator, after mortgaging lands, devised them, with a clause, that the devisee pay off the mortgage, he can resort to no other part of the estate for relief: but the money secured is considered as a deduction from the property devised. But the case of King v. King, 3 P. Wms. 358, is in point. There the testator being seized of freehold lands, and of a copyhold, which last he had mortgaged, devised and copyhold to his nephew; and after all his debts were paid, he devised the rest of his estate real and personal to his son, who was his heir. And it was holden that the import of this devise was, that until all the debts were paid, nothing was devised to the son; or that when the debts should be paid, then and then only, he should be entitled to the residue. We cannot therefore consider this residuary devise to Mrs. Swan as specifick, within the rule of marshalling assets, so that the descended lands shall first be sold.

It has been argued by the counsel for the petitioners, admitting the rule to be generally correct, yet that in this case it ought not to apply, because in the residuary devise the testator gives, not only all his real and personal estate, of which he was then seized and possessed; but all of which he might afterwards die seized; and therefore that he contemplated after acquired estate; which although it could not pass by his will, yet was evidently intended to pass: and that this intent ought to be so far executed, as to cause it to be sold for the payment of debts, before the residuary devise should be applied for that purpose.

This argument, however ingenious, is not solid. For the testator cannot, in his will charge with the payment of his debts after-purchased lands, any more than he can devise them. And if in this case he intended it, the intent was void. And an intent against law cannot affect this rule or principle of law. Otherwise the rights of the heirs would be implicated by a testamentary disposition, made before the lands were acquired by the testator. If this case should be allowed as an exception, it would involve most residuary devises: for it is common for the scrivener to include expressly all the residue of the estate, of which the testator may die seized or possessed. We think therefore that the rule should be applied in this case, without admitting the exception.

The order of the court was entered as follows.

Ordered that the said executors be, and they hereby are empowered and licenced to raise the sum of —— by sale at publick auction of the houses, lands, or tenements, of which the said Henry Jackson died seized in fee, being devised by him by his last will and testament: excepting such part thereof as is therein devised in trust for his sister Susanna Gray, and such as may have been held by said Jackson to the use of, or in trust for any other person or persons; the said sum when raised, to be applied to the payment of the debts aforesaid, with the incidental charges of sale: and if the said sum cannot be raised by such sale, it is further ordered, that the said executors may raise by sale at publick auction of so much of the real estate of which the said Jackson died seized, not having devised the same in and by his last will and testament, such further sum of money, as with the money raised by the sale first above ordered, will amount in the whole to the said sum of —— to be applied as aforesaid, giving bond, &c.

BRILL v. WRIGHT et al.[1]

(19 N. E. 628, 112 N. Y. 129.)

Court of Appeals of New York. January 15, 1889.

Appeal from supreme court, general term, Second department.

Action by Job Seaman Benjamin against William H. Wright, executor, etc., of Job Seaman, deceased, and James O. Cronk and Matilda Cronk, for a legacy given to the plaintiff by said will, to require an account by the executor, and, in case of a deficiency of the personalty, to charge plaintiff's legacy on the real estate. The latter two defendants were residuary legatees. Pending the action the plaintiff died, and it was revived in the name of Rowland Brill, his administrator. The special term adjudged the legacy a charge on the realty, which was affirmed on appeal to the general term, (44 Hun, 628, mem.,) and the defendants again appeal.

C. B. Herrick, for appellants. O. D. M. Baker, for respondent.

ANDREWS, J. Where in a will general legacies are given, followed by a gift of all the rest and residue of the real and personal property of the testator by a residuary clause in the usual form, and nothing more, it must now, we think, be regarded as the established rule in this state that the language of the will alone, unaided by extrinsic circumstances, is insufficient to charge the legacies upon the lands included in the residuary devise. This was clearly the opinion of Chancellor Kent in the leading case of Lupton v. Lupton, 2 Johns. Ch. 614, as appears by his comment on the case of Brudenell v. Boughton, 2 Atk. 268; although his judgment in that case rested in part upon the circumstance that, in the will then under consideration, there was a prior devise which easily permitted an interpretation reddendo singula singulis of the residuary clause. In Hoyt v. Hoyt, 85 N. Y. 142, Folger, C. J., referring to Lupton v. Lupton, and other cases, justly stated that they asserted the doctrine that, "unaided and alone, the words that make up the usual residuary clause of a will are not enough to evince an intention in the testator to charge a general legacy upon real estate," but the question was not passed upon in that case.

The courts, however, have held that a gift of general legacies, followed by a general residuary clause, is not inconsistent with an intention on the part of a testator to charge the legacies on the land. They have therefore permitted extrinsic circumstances to be considered for the purpose of ascertaining the actual intention of the testator, and in some cases, by reading the langauge of the will in the light of the circumstances, have inferred an intention to charge legacies on the land, and given effect to such intention, although the language, considered independently of the circumstances, would not alone justify such an inference.

The cases of Wiltsie v. Shaw, 100 N. Y. 191, 3 N. E. 331, and McCorn v. McCorn, 100 N. Y. 511, 3 N. E. 480, illustrate very clearly the attitude of this court upon the subject. Both were cases substantially of wills giving general legacies, followed by the usual residuary clause. In each the question was whether the legacies were charged on the land. In Wiltsie v. Shaw it appeared that the testator left a large personal estate, ample for the payment of debts and legacies; and, no other circumstance appearing, it was held that a legacy given by the testator in his will, in trust for a son, was not a charge on the lands which passed to the testator's daughter under the residuary clause. In McCorn v. McCorn the legatees were the wife and son of the testator, and the gift of the legacies was followed by the usual residuary clause, under which all the testator's real estate passed to four other children. It appeared that the will was made the day before the testator's death, and that his personal estate was insufficient to pay his funeral expenses. The legacies to the testator's wife and son were mere pretenses, "unless meant to be a charge on the real estate." Under these circumstances, the court held that the legacies were intended to be charged on the realty, and sustained the claim of the legatees.

We think the cases in this state establish these two propositions: First, that general language in a will giving legacies, followed by the usual residuary clause, is alone insufficient to charge the legacies on the realty; and, second, that such language will justify such charge if it is made to appear by extrinsic circumstances, such as may under the rules of law be resorted to, to aid in the interpretation of written instruments, that it was the testator's intention that the legacies should be charged on the land. The rule in England, and in some of the states in this country, and in the United States supreme court, is different from the rule in this state. The cases are cited in Hoyt v. Hoyt, supra. In Greville v. Browne, 7 H. L. Cas. 689, it was regarded as having been long settled in England that where legacies are given generally and the rest and residue of the real and personal estate is afterwards given in one mass, the legacies are a charge on the residuary real, as well as the personal, estate. But some of the judges were of the opinion that, if the question was res nova, the natural construction of the language would lead to the opposite conclusion.

Under the rule in this state, we think the legacy of $2,000 given by the will of Job Seaman to his nephew Job S. Benjamin was not charged on the real estate which passed under the residuary clause to James O. Cronk and Matilda Cronk. The will is very simple,

[1] Reversing 44 Hun, 628, mem.

and is partly printed and partly written. After the usual introductory clause, the will proceeds as follows: "First, after all my lawful debts are paid and discharged, I give and bequeath to Job S. Benjamin the sum of two thousand dollars, to be paid to him within three months after my decease; secondly, I give and bequeath all the rest and residue of all my real and personal estate, of whatsoever name or nature, to James O. Cronk and Matilda Cronk, to each the one-half part thereof. Likewise I make, constitute, and appoint William H. Wright" executor, etc.

It is claimed that the words in the first clause, viz., "after all my lawful debts are paid and discharged, I give," etc., (which were printed,) indicate an intention to constitute the whole estate, real and personal, a fund for the payment in the first instance of the debt and legacy. The direction as to the payment of debts was formal and conventional merely. The law charges the debts of a decedent upon his real estate, if the personal estate is insufficient to pay them. The debts owing to the testator amounted only to $114.11, and his personal property was appraised at $2,643.07, and produced $3,553.36. Similar language was in the will considered in the case In re Rochester, 110 N. Y. 159, 17 N. E. 740, and was held insufficient to create a charge on the realty.

The extrinsic circumstances do not tend to show an intention on the part of the testator to charge the legacy on his real estate. Except for the expenses allowed against the estate, growing out of a contest on the probate of the will, instituted by the legatee and a niece of the testator, and in subsequent proceedings on an accounting by the executor, the personal estate left by the testator would have been ample to have paid the legacy and the ordinary expenses of administration. The legatee was of kindred to the testator, and the residuary devisees and legatees were strangers in blood; but they became members of his family when they were children and lived with him until his death, one for the period of 20 and the other for 25 years. The testator's wife was infirm and crippled, and died a short time before the testator, and they had no children or direct descendants living. We perceive no circumstance which takes the case out of the general rule. The condition of the testator's property when the will was made, in 1879, four years before his death, is not shown. He was a small farmer, and it is quite probable that his circumstances had not materially changed during that time. It may be assumed that the testator intended that the legacy to his nephew should be paid. But there is no presumption that when the will was made his personal estate was not adequate for that purpose. If it was not, and the fact was material, the burden of establishing it was upon the legatee, who in this proceeding is seeking to charge the real estate in a case where the language of the will does not affirmatively show that this was the intention of the testator. It is quite significant of his actual intention that he directs the legacy to be paid within three months after his death, and gives no power of sale to his executor.

We think the judgments below should be reversed, and a new trial granted, with costs to the executor appellant in all courts against the respondent, but without costs to the other defendants.

All concur.

In re ROOT'S WILL.

HINER v. ROOT'S HEIRS.

(51 N. W. 435, 81 Wis. 263.)

Supreme Court of Wisconsin. Feb. 2, 1892.

Appeal from circuit court, Fond du Lac county; NORMAN S. GILSON, Judge.

Petition by the administrator with the will annexed of Truman Root, deceased, for leave to sell real estate for the payment of legacies. From an order of the circuit court affirming a judgment of the county court of Fond du Lac county, denying the prayer of the petition, the administrator appeals. Reversed.

The other facts fully appear in the following statement by LYON, C. J.:

Truman A. Root, late of Fond du Lac county, died seised of a farm in that county; of a parcel of land in the city of Fond du Lac, on which were two dwelling-houses, (one of which was his homestead;) and of some personal property. He left a will, which has been duly probated, in which he directed a sale of his farm, the payment to his widow of $1,000 of the proceeds, the investment of another $1,000 thereof in a house and lot or other productive property in that city, and the payment to his widow of the rents, issues, and profits of such property during her life. He also devised to his widow the other city property above mentioned, for her life. He made general money bequests, amounting to $2,600, to 15 or more persons other than his widow, 8 of whom were not his heirs at law. The others were such heirs. He left two heirs at law to whom no bequests were made. The residuary clause of the will is as follows: "After the sale of said farm, and the payment of said debts, legacies, bequests, and devises as aforesaid, the rest, residue, and remainder of my property shall go to my wife for life, remainder over to my heirs at law." The testator left no lineal descendants. In due course of administration the farm was sold; the $1,000 bequeathed to the widow paid to her; another $1,000 of the proceeds invested in building another house on the city lot, under the order of the county court; the personal property was sold, and the debts of the estate paid; and a balance remained in the hands of the administrator, applicable to the payment of the general legacies, of about $500. None of these legacies have been paid. Thereupon the administrator presented a petition to the county court, setting forth the above facts, and praying license to sell the reversion of the Fond du Lac city property, so that he might pay the unpaid legacies, and close the estate. The heirs at law of the testator interposed objections in the nature of a demurrer to the petition, and the matter was determined on the petition and objections thereto, without testimony. The county court denied the petition, and the circuit court, on appeal, affirmed the order of the county court denying the same. The administrator now appeals to this court from the judgment of affirmance.

J. W. Hiner, (*George Gary*, of counsel,) for appellant. *David Babcock*, for respondents.

LYON, C. J., (after stating the facts.) For the purposes of this appeal, the objections interposed by the heirs of the testator to the petition of the administrator for leave to sell the reversion in the Fond du Lac city property must be treated as a demurrer thereto, and hence the averments in such petition must be taken to be true. Indeed, we do not understand there is, or will be, any controversy concerning the facts of the case. Some question was made in the argument as to whether the interest of the heirs of the testator in the Fond du Lac real estate is a remainder or reversion. If they take under the will, undoubtedly they take an estate in remainder; but if by descent, they take an estate in reversion. And whether it be one or the other, it is a vested estate. Rev. St. §§ 2033–2037, inclusive. For reasons which will presently appear, the question is not important. It may be observed, however, that at common law the rule seems to have been well settled in England, and in many, perhaps most, of the United States, that a devise to the heir at law of precisely the same estate he would take by descent, were there no devise, is void, and the heir takes by descent in such case, and not by purchase. 4 Kent, Comm. 507. The rule was changed in England by statute 3 & 4 Wm. IV. c. 106. Were it necessary to decide the question, we should probably be constrained to hold that, notwithstanding the residuary clause in the will, the heirs of the testator in this case take their estate in the city property by descent, because they would take the same estate therein had the will contained no residuary clause; and hence, that their estate is a reversion. But whether their estate be a remainder or a reversion, the will itself contains indisputable evidence that the testator intended to charge his real estate not specifically devised with the payment of legacies, if the personal estate proved insufficient to pay them. Such evidence is found in the residuary clause, which expressly limits the residue of his estate, both real and personal, to such of it as shall remain after all debts, legacies, bequests, and devises have been paid. Language could not more plainly express the intention of the testator to charge both his real and personal estate with the payment of the legacies in his will. Such intention of the testator is controlling in the distribution of his estate. It may be observed here that there is abundance of authority to the effect that when, as in this case, legacies are given generally, and the residue of the real and personal estate is afterwards given in one mass, such legacies are a charge on the residuary real as well as personal estate, unless such construction is opposed to other provisions in the will. In Turner v. Gibb, (N. J. Ch.) 22 Atl. Rep. 580, numerous cases are cited which sustain this doctrine. Under this rule, the residuary estate would be charged with the payment of legacies in this case, even though the residuary clause did not contain the limitation above mentioned. It follows that the heirs took the reversion or remainder (whichever it may be) subject to the payment of legacies. The personal estate has been exhausted, and

it has proved insufficient to pay all the legacies. Hence, the contingency has arisen which renders necessary a resort to the residuary real estate to make up the deficiency. A reversion or vested remainder may be sold on execution before the expiration of the precedent estate. 1 Freem. Ex'ns, § 178, and cases there cited. No valid reason has been suggested why the same interest may not also be sold to enable an administrator to pay legacies which are a charge upon such interest.

We think the power and duty of the court to order the residuary estate sold to pay legacies is not impaired or affected by the circumstance that a portion of such estate was the homestead of the testator at his decease. The testator had the right, while living, to convey to a stranger, without the signature of his wife to the conveyance, the reversion in the homestead after it should cease to be such. Ferguson v. Mason, 60 Wis. 377, 19 N. W. Rep. 420. He may also devise it to a stranger, (Rev. St. §§ 2271, 2277, 2280,) and his widow can preserve a homestead right therein only by electing to take the provision made for her by law, instead of that contained in the will of her deceased husband. Id. §§ 2171, 2172. Here the husband specifically devised to the wife an estate in the homestead which may endure longer than that she would have taken under the statute, for under the statute her estate would terminate upon her marriage, as well as at her death, while under the will it only terminates at her death. She elected to take under the will, and holds the property by virtue of the devise thereof to her. The fact that it was once the homestead of her husband and herself does not affect the tenure upon which she holds, one way or the other, and there remains attached to the property no quality of a homestead which interferes with the sale of the reversionary interest therein to complete the payment of legacies. It is urged that, inasmuch as the widow is only about 45 years of age and liable to live many years, the reversion in the property dependent upon her life-estate would sell for but little, and hence that it would be a hardship on the heirs to force a sale thereof. The answer to this is the same that would be made were the property about to be sold on execution, or foreclosure of a mortgage, or mechanic's or laborer's lien; that is, the heirs must protect themselves by bidding, or procuring bidders at the sale. The legatees must protect themselves in like manner. The courts cannot always, or usually, save the parties interested in property about to be sold under judicial process from the peril that it may be sold below its value. The remedy against such peril is, in a large measure, in the hands of such parties themselves. It seems to us that in this case some amicable arrangement might be made between the heirs and legatees who are not heirs, by which the property may be made to sell for its value, or a sale thereof be avoided by a satisfaction of the legacies, the assignment of the residuary estate to the heirs by the proper court, and the discharge of the administrator. But, however that may be, we think the petition of the administrator for leave to sell the residuary estate should have been granted. It is scarcely necessary to add that the specific life-estate in the property devised to the widow is not chargeable with the payment of legacies. The judgment of the circuit court is reversed, and the cause will be remanded, with directions to that court to reverse the order and judgment of the county court, denying the petition of the administrator, and for further proceedings according to law."

DAVIDSON et al. v. COON.

(25 N. E. 601, 125 Ind. 497.)

Supreme Court of Indiana. Oct. 28, 1890.

Appeal from circuit court, Hancock county; M. E. FORKNER, Judge.

T. B. Redding, M. Marsh, and W. W. Cook, for appellants. D. S. Gooding, M. B. Gooding, and J. A. New, for appellee.

ELLIOTT, J. The appellee's complaint contains these allegations: That Conrad Coon died the owner of real estate of the value of $5,000. That he died testate, having executed a will, and that his will was probated in due course of law. That the will contains this provision: "After the death of my wife, I direct that my estate shall be divided in the following manner: *First*, I give to my son Joseph Coon the sum of eight hundred dollars in money, to be made out of my estate, and I also direct that my son Joshua shall have three hundred dollars, also to be made out of my estate, after the death or marriage of my wife. When the above amounts of money shall have been paid, I direct that the remainder of my whole estate shall be equally divided among my heirs." The legacy bequeathed to the appellee, Joseph Coon, is wholly unpaid. That since the testator's death the real estate has been conveyed to the appellants. That all of the debts of the testator's estate have been paid except the legacies bequeathed by him to the legatees named in the will. That "the estate has been finally settled, and that there was not then, nor is there now, any personal property with which the legacy could or can be paid."

The general rule is that the personal estate supplies the fund out of which legacies are to be paid. Duncan v. Wallace, 114 Ind. 169, 16 N. E. Rep. 137. Where a specific devise of land is made, and a general legacy is bequeathed, without charging the legacy upon the land devised, then it is incumbent upon the legatee who seeks to charge the land to show that the testator had no personal estate at the time the will was executed out of which the legacy could be paid. The reason for this rule is that where there is a specific devise of land to one, and the bequest of a general legacy to another, but no express words charging the land, there must be such facts as authorize the implication that the testator intended to charge the land. Where there is no personal property out of which the legacy can be paid, there is reason for inferring that the testator meant to charge the land specifically devised, otherwise the bequest would be a mere mockery. Duncan v. Wallace, supra; Hoyt v. Hoyt, 85 N. Y. 142; McCorn v. McCorn, 100 N. Y. 511, 3 N. E. Rep. 480; Corwine v. Corwine, 24 N. J. Eq. 579; Lypet v. Carter, 1 Ves. Sr. 499; Cross v. Kennington, 9 Beav. 150; Elliot v. Hancock, 2 Vern. 143. But where there is personal property at the time of the execution of the will, although it may be afterwards wasted, there is no ground for implying an intention on the part of the testator to charge the land specifically devised. The general rule is that, where the provisions of the will can be given effect without burdening the land specifically devised, it will be done, and this implies that where there is a specific devise of land, and a general bequest of money, and no express charge upon the land, the land is not burdened unless it appears that the testator impliedly intended that the land should be charged; and where he has personal estate no such intention can be implied, as against the specific devisee. If the will before us is to be regarded as specifically devising land without charging it by implication with the general legacy, then the complaint is fatally defective, because it does not show that the testator did not have personal estate out of which the legacies could be paid. The question hinges upon the construction to be given to the peculiar provisions of the will. The will does not specifically devise the real estate to the heirs of the testator, but the devise is a residuary one. The general rule respecting such devises is that "nothing is given by residuary clause except upon the condition that something remains after all paramount claims upon the testator's estate are satisfied." Tomlinson v. Bury, 145 Mass. 346, 14 N. E. Rep. 137. The will we are considering does, by its terms, make the legacies a paramount claim, inasmuch as there is no specific devise of the land, and there is manifested a clear intention to devise only what remains after the payment of the legacies. This intention is exhibited in the provision that the legacies shall be made out of the estate, and by the use of the words that follow the bequests, which are: "I direct that the remainder of my whole estate shall be divided among my heirs." These words clearly evince an intention to vest in the heirs the estate remaining after the payment of the legacies; and the antecedent provisions, taken in connection with this language, express an intention to charge the whole estate with the payment of the legacies. Wilson v. Piper, 77 Ind. 437; Lofton v. Moore, 83 Ind. 112; Castor v. Jones, 86 Ind. 289; Porter v. Jackson, 95 Ind. 210. As the will does not specifically devise the land, and does, by its terms, bequeath a legacy to the appellee, and make it a charge upon the land, it was not necessary, in order to have the lien of the charge established, that the complaint should allege that the testator had not sufficient personal estate to satisfy the legacy at the time he executed the will.

The authority of Reynolds v. Bond, 83 Ind. 36, and McCoy v. Payne, 68 Ind. 327, is invoked to sustain the proposition that, as the estate has been finally settled, the action will not lie. These cases are not influential, for the reason that the heirs took by a residuary clause of the will, and acquired their interest subject to the legacies charged upon the land; and, as there was no personal estate upon final settlement, the legatees had a right to establish against the land the equitable lien created by the will. As we understand the cases of Reynolds v. Bond, supra, and Gound v. Steyer, 75 Ind. 50, they assert that the lien created by a legacy charged upon the land may be established after final settlement. No other rule can be sound, for if, after final settlement, there is no personal estate, the charge fixes upon the land, and the

equitable lien may be established. The executor, to be sure, is the person primarily bound to pay a general legacy, but he is only bound where there are personal assets in his hands, and no charge upon the land. The cases of Lovering v. King, 97 Ind. 130, and Carr v. Huette, 73 Ind. 378, are not relevant to the point here in dispute. The point in dispute in those cases concerned the rights of creditors, while here the point in dispute concerns the right of a legatee whose legacy is a charge upon land. While the complaint is lacking in symmetry and precision it is good as against a demurrer, for it states, although somewhat vaguely and obscurely, facts constituting a *prima facie* case.

The facts contained in the special finding shortly stated are these: Conrad Coon executed the will filed with the complaint. He died the owner of the land in controversy, and the will was probated on the 11th of November, 1861. The personal property of which Conrad Coon died the owner was taken by his widow and applied to the payment of the debts of his estate. Numerous conveyances were made by the heirs: some from one to another, and some to third persons. The conveyances to which Joseph Coon was a party are these: One executed on the 30th of May, 1862, in which he appears as a grantee; three executed on the 9th of April, 1862, in two of which he was one of the grantors, and in one of which he was a grantee; one on the 16th day of February, 1866, in which he was a grantee; one on the 26th day of February, 1876, in which he was one of the grantors; and one on the 13th day of January, 1876, in which he was of the grantors. All of the deeds referred to, except that of February 26, 1876, executed to Washington Jackson, were quitclaim deeds. The deeds of April 9, 1864, were executed simply to partition the lands described among the parties. In executing those deeds, the appellee's legacy was not considered, nor has he ever been paid any part of it. The appellant Davidson purchased the land from the grantees of the heirs of Conrad Coon, as appears from the deeds referred to in the special finding. The rule established by the decisions of the American courts is that a voluntary partition of lands made by tenants in common, although evidenced by quitclaim deeds, does not imply a warranty. Weiser v. Weiser, 5 Watts, 280; Picot v. Page, 26 Mo. 422; Dawson v. Lawrence, 13 Ohio, 546; Carpenter v. Schermerhorn, 2 Barb. Ch. 322; Beardsley v. Knight, 10 Vt. 185; Rountree v. Denson, 59 Wis. 522, 18 N. W. Rep. 518. This rule has been asserted in cases where there has been a failure of title, and one of the co-tenants has demanded compensation from another, or where there has been an attempt to estop one of the co-tenants from asserting an after-acquired title. It is very evident that no such case is before us. Here no warranty is invoked, no failure of title is asserted, nor any effort made to defeat an after-acquired title. In this instance, all the title and interest the appellee had existed when the partition was made, and the deeds executed. He united in the partition, accepted grants, and executed conveyances. He was treated as a co-tenant, and, for aught that appears, he reaped all the benefits of that position. He acquiesced in the partition for almost 20 years. In our judgment, he is not now in a situation to assert that the legacy bequeathed to him by the ancestor, who was the source of title, is a charge upon the land. The reason of the rule that there is no warranty in case of voluntary partition completely fails in such a case as this. Ordinarily, a quitclaim deed conveys all the existing interest of the grantor in the land described, but does not affect an after-acquired title. Title passes as effectually by a quitclaim deed as by any other. Hastings v. Brooker, 98 Ind. 158; Rowe v. Beckett, 30 Ind. 154; McConnel v. Reed, 4 Scam. 117; Fash v. Blake, 38 Ill. 363; Graff v. Middleton, 43 Cal. 341; Hall v. Ashby, 9 Ohio, 96; Hunt v. Hunt, 14 Pick. 374; Smith v. Pendell, 19 Conn. 107. Our statute sets this question at rest, for it declares that "a deed of release or quitclaim shall pass all the estate which the grantor could convey by a deed of bargain and sale." Rev. St. § 2924. If the appellee was not a tenant in common, his deed would, beyond controversy, convey all the estate he had in the land at the time of its execution. If the legal effect of the deed is changed, it is solely because it was executed by him, in the capacity of a tenant in common, in order to effect a partition of the land. We are not inclined to rule that the position he occupied completely changed the effect which the law so emphatically affixes to his deed; but, if we were inclined to so rule, it would give the appellee no comfort. The appellee is in this dilemma: If his deed is to have its usual effect, it conveys his interest in the land, and releases his lien; if it is not to have its usual effect, it is because it was executed by him as one of several owners in common; but, if it was executed by him as one of several owners, he cannot assert his lien, since that was buried or merged in his character of an owner. We are not unmindful of the doctrine that equity will not suffer a merger to take place where injustice would result, but that doctrine the appellee, after having voluntarily assumed the position of a tenant in common, is in no plight to invoke. Equity almost imperiously demands that his lien shall be merged, for no other course will promote justice. At law, where the estate of a lienor meets that of the owner in one person, the lien is merged. That rule must govern here, for there is no equity to break its force. The appellee having by unequivocal acts asserted that he was one of several tenants in common, claiming under the same ancestor, and having for so many years deported himself as an owner, is in no situation to cast aside that character, and enforce a lien by taking upon himself the character of a lienholder. Upon the facts contained in the special finding, the law is with the appellants. Judgment reversed, with instructions to restate conclusions of law, and enter judgment in favor of the appellants.

COOCH'S EX'R v. COOCH'S ADM'R.

(5 Houst. 540.)

Court of Errors and Appeal of Delaware.
June, 1879.

Mr. Patterson, for appellant. Mr. Gray, for respondents.

COMEGYS, C. J. The controversy between the parties in this case arose out of the will of William Cooch (the husband of the appellant's testatrix), which is in these words:

"In the name of God, amen. I, William Cooch, of Pencador Hundred, New Castle county, and state of Delaware, being of sound and disposing mind and memory, do make and declare this to be my last will and testament, hereby revoking all former wills heretofore made by me. Item 1. It is my desire and wish that my executor, hereafter named, shall pay all my just debts and funeral expenses as soon after my decease as possible. Item 2. I give, devise, and bequeath to my beloved wife, Tamar, all my personal property, and three thousand five hundred dollars in cash out of my real estate, as soon as sold by my executor. Item 3. I devise, give, and bequeath to Dillon Hutchison the sum of five hundred dollars. Item 4. I devise, give, and bequeath to my brothers Zebulon H. Cooch and Levi G. Cooch the balance of my estate, to be divided between them, share and share alike. It is my desire and wish that my executor, hereinafter named, shall sell all my real estate at public sale within one year after my decease, and convey to the purchaser or purchasers thereof a good and lawful deed or deeds for the same. I do hereby nominate and appoint my brother Levi G. Cooch to be my executor of this my last will and testament. In witness whereof," etc.

The appellant conceived his testatrix to be entitled under this will to all the personal estate of her husband, without any deduction therefrom whatsoever; and, the respondents not admitting such claim, the bill which forms part of the record before us was brought to determine that question. The case presented by it having been so conducted on both sides as to require of the chancellor a decision of the matter in controversy, he made it on the 21st day of February last, denying the claim of the complainant in his court. From that decision this appeal was taken, and we have been favored by the chancellor, in the opinion expressed by him in the cause, and now read to us, with the reason or grounds upon which he based his decree. Such reasons are full and lucid; and we proceed to give our views of the law by which this court is to decide whether they are sufficient or not in our judgment.

There are certain well-established and reasonable rules which serve as a sure guide to courts in the decision of such questions as that presented by the record in this case, and which are by no means new, but are so old as to have become venerable landmarks of equity decisions in cases of this nature under wills. They are those for the administration of the estates of all testators, and have so long prevailed as to be entitled to the appellation of maxims. They are as follows: 1. The personal estate of a testator is the primary fund for the payment of his debts, and of such legacies as he may choose to give. 2. In the payment of legacies, those of a specific nature are to be paid before general ones. 3. The real estate is not liable for the payment of either debts or legacies, unless the testator has unequivocally so declared in his will.

With respect to this rule we may now say, as we shall repeat hereafter, that in this state all the property of a testator is subject to the payment of his debts, but the real is only to be resorted to for that purpose, even in the case of liens upon it, after and not until the personal estate has been exhausted, which still preserves the rule that the personal estate is the primary fund for the payment of a testator's debts. Of course, we are not to be understood as speaking of liens which the creditor proceeds to enforce.

We did not understand the learned solicitor for Tamar Cooch's executor to make any contention with the respondents upon this view of the law, but he did insist, and exhibited his usual industry in collecting and citing authorities to sustain his view, that according to the true legal construction of the will of her husband, her executor is entitled to the whole personal estate of the testator, and that, by force of the terms used by him, all his debts, funeral charges, and expenses of administration are thrown upon the proceeds of the sale of the real estate, which is substituted in lieu of the personal for the payment and discharge of them; and he founds or places his argument or contention upon the express words of the second item of the testator's will: "I give, devise, and bequeath to my beloved wife, Tamar, all my personal property, and three thousand five hundred dollars in cash out of my real estate as soon as sold by my executor."

If the question presented by the solicitor for the appellant had never been decided, we might possibly take the view of it submitted by him, and conclude that the chancellor erred, and that the appellant could claim the whole personalty of the testator, and that such claim should be allowed; but such question has been passed upon and determined over and over again by courts of equity, whose concern it is chiefly to interpret wills; and never, in cases having no special features more than this case has, has it been decided otherwise than that the personal estate must first be applied to the payment of debts before resort can be had to

the real estate. The very words used in this case, "all my personal estate," have, in the numerous instances produced by the learned solicitor for the appellees in his forcible argument in their behalf, undergone the most critical and exhaustive examination that minds of the highest order of legal acumen could give to them, and they have always (where there were no expressions in the will that required a different construction) been held to mean simply the balance of the personal estate that should be left after the payment of the debts of the testator and the other legal charges, such as those of burial and of administration. We are not aware of any cases in contravention of this view, or that would justify us, as a court of review, in departing from the old accustomed pathway of the law. In looking through this whole case, with the will of William Cooch and all its provisions or clauses in our mind, we do not see how we can do otherwise than confirm and establish the chancellor's decree.

A case in some respects similar to the present (though there were many different circumstances or facts in it) came before this court, and was decided at the June term, 1872. It was that of Morris v. Morris's Ex'r, 4 Houst. 414, involving the construction of Elijah Morris's will. While the expression in it is not the same exactly as that in Cooch's will, yet the question was so much the same that the court felt called upon, and properly, to express its opinion in language involving the very considerations this case requires. His honer, Judge Wootten, in the judgment of the court then declared, and speaking the sense of all its members, said the import of the words "balance of my whole estate, after deducting the aforesaid legacies," being in question, "this cannot mean the whole original estate, but it is the residue remaining after the payment of the debts; that residue is what constitutes a man's estate; and, when we speak of our own or another's estate, we mean that which remains clear for distribution after the payment of debts. Whatever is necessary for the payment of a deceased man's debts belongs to his creditors, and cannot properly be considered any part of his estate for distribution, and especially when we apply the act of distribution; for no matter how much property he may have in possession, if it is not more than sufficient to pay his debts, he has no distributive estate. This is true, not only in a common-sense view, but in legal contemplation." We not only feel ourselves bound by the words of the court, spoken by its organ for that case, but independently we decide that there is nothing in the will of William Cooch that would justify us in reversing the decree of the chancellor, which, to say nothing of its sufficient reasoning, is strictly in accord with the law as we take it to be.

In this case there is no question between legatees; it is simply one between the devisees, in effect, of the real estate, and the legatee of the personal; and we have been unable to find any case, nor has the learned solicitor for the appellant furnished us with any, which decides that the words, "all my personal estate," in a will like that before us, have been held to cast the payment of debts, expenses of administration, and legacies upon the realty. Much stress was laid by him upon the fact (which he assumed) that the bequest to the widow was specific; but we do not agree with him that it was specific in any legal sense, although it was of all, etc. A legacy is only specific when it designates a particular thing or things by specific description, as my bay mare, my gold watch, my shares of stock in such a bank, or the like; or mentions some place where the thing itself can be found, as my bank notes in a certain drawer; or indicated some part of the personal estate consisting of various articles which can be easily distinguished and set apart from the residue, as all my personal property in a certain room, house, hundred, county, etc. Cases of a similar kind will be found referred to in part 2 of Redfield on Wills, 475, where will also be found authority for the principle that a bequest of all a man's personal property is not a specific legacy. Where it is of all merely, indicating no locality or more particular specification, it is general, the same as is imported by the words "rest" and "residue," because such word means what every testator must be taken to know,—the balance after payment of debts, etc.,—the law being that the personal estate must first be exhausted before resort can be had for such payment to the realty. Every testator is presumed to know the law with respect to the liability of his estate for his debts, and consequently to make disposition of it in accordance with such knowledge. Therefore it is that, where a testator even uses such sweeping and apparently conclusive words in disposing of his personalty as "all my personal estate," the law still holds that he only meant such portion of it as should be left after taking from it all that it was liable to, either as matter of legal responsibility for debts, funeral expenses, and charges of administration, or on account of some further deduction which the provisions of his will require,—for example, a specific legacy. The authorities are abundant upon this point, and were fully laid before us in the argument in June last; it is unnecessary to recite them here. And, further, there is, in our opinion, no warrant for the position assumed by the learned solicitor for the appellant that this bequest is specific. We have before given examples of specific legacies; we now refer to authorities in like cases of specification. Sayer v. Sayer, 2 Vern. 688; Prec. Ch. 392; Gilb. Ex'ns, 87; Green v. Symonds, 1 Brown, Ch. 129, in

notes; Moore v. Moore, Id. 127; Gayre v. Gayre, 2 Vern. 538; Shaftsbury v. Shaftsbury, Id. 747; Land v. Devayanes, 4 Brown, Ch. 537; Clarke v. Butler, 1 Mer. 304. The principle is the severance of the particular property from the great body of the estate, and the specific gift of it to the legatee. 1 Rop. Leg. 243. Where there are no such restrictive expressions, a legacy of personal estate generally will be general, and not specific; and even the circumstance that the real and personal estates are blended together will make no difference, although as to the former the devise must necessarily be specific. Id.; 2 Williams, Ex'rs, 849.

But of course the case is different when a testator exonerates his personal estate from the payment of his debts, and casts that burden upon his realty. Whenever that occurs, the primary liability is transferred from the personal and thrown upon the real, and the latter is the source to which the executor must first apply. There is no doubt of that. When the intention of a testator to create a new fund for the payment of his debts appears plain, that fund must first be resorted to if he has so expressed himself. But, before that is taken as a fact, there must be no doubt left upon the face of the will; it must plainly appear by it that the testator so meant. This is not to be settled by conjecture or mere inference, but is to be shown by unequivocal language or expressions contained in the paper itself. There must be something the courts will recognize as sufficient for that purpose to justify them in departing from the old, established, certain rule, that the primary fund for payment of debts is a testator's personal estate. And our system of settlement of estates, under which all a man's property, as well real as personal, is responsible for his debts, does not affect the rule; for the primary liability is still on the latter, and there remains until it is exhausted. In England, the real estate was not liable for simple contract debts at all unless made so by a testator; but here it has always been otherwise, and the law as uniform as it is now. But, notwithstanding the difference, the first fund to be taken has always been the personal, the real being merely auxiliary or secondary.

Now, in looking through the will that forms part of the record before us, we do not find any clause, word, or expression that would allow us to depart (if we were inclined to do so) from the established line of decisions upon questions such as are by that record presented to us. There is certainly nothing said about exempting the personal estate from the payment of the testator's debts, nor is any language used that can fairly be construed as favoring the notion of such an intent. There is not even any charge of the real estate with them, though that by itself would mean nothing more than that they should be paid at all events. Nor does the testator direct that, to insure the payment of his debts, his real estate should be turned into money, and made part of the personal. If he had gone as far as that even, still the first fund to be taken would be personalty; as, by a well-known rule, the residue of such real estate, after such charge upon or with respect to it had been liquidated, would descend to the heir or pass to the devisee qua realty, he having the right to redeem it from sale, and take it as heir or devisee, according as it may have been undevised or devised.

But, in reality, the will itself negatives the idea that the land of William Cooch was devoted by him as the first fund for the payment of his debts. The language of the first item is that the executor shall pay all the just debts and funeral expenses of the testator as soon after his decease as possible; and in the second paragraph of the fourth item he expresses his desire and wish that his real estate shall be sold within a year from the time of his death, thus allowing the executor a full year to find an advantageous period to offer his land for sale. If anything could be wanting to furnish us with assurance that the conclusion we are about to announce is the correct one, these clauses would be sufficient to do it. The testator evidently contemplated that his personal estate should be at once, in the usual course, converted into money to satisfy his creditors, and his land in a reasonable time to raise the money to be paid out of it.

The question is, did William Cooch, by his will, intend that his real estate should be resorted to before his personal in the settlement of his estate? As we do not find in that will any language that requires of us to say that he did, the bequest to his wife being a general and not a specific legacy, and that bequest alone being the source to which we have been referred and must resort for such a conclusion, and the two clauses of the will we have just referred to being, as we think, at variance with the idea of substitution, we are of opinion and decide that the decree of the chancellor in the court below was right, and should be affirmed.

WALES, J. The general rule is well settled that, in the absence of express words or manifest intent of the testator, his personal estate is primarily liable for the payment of his debts: Duke of Ancaster v. Mayer, 1 Brown, Ch. 454; Samwell v. Wake, Id. 145; Dickens, 597; Walker v. Jackson, 2 Atk. 625; Tait v. Lord Northwick, 4 Ves. 824. The doctrine is clearly stated by Sir William Grant, in Hancox v. Abbey, 11 Ves. 186, as being perfectly established, that in order to exonerate the personal estate there must be either express words or a plain intention. Precise and specific words of exemption are not necessary, but it is sufficient if the intention can be collected from the whole will to

give the personal estate exemption from the debts. Mr. Jarman, in his treatise on Wills, after a full discussion of the authorities, remarks: "These cases seem to authorize the proposition that whenever the personal estate is bequeathed in terms as a whole, and not as a residue, and the debts, funeral, and testamentary charges are thrown on the real estate, this constitutes the primary fund for their liquidation." 2 Jarm. Wills, 586. This rule, and the principles on which it is founded, have been fully recognized and accepted by the courts in this country. 1 Story, Eq. Jur. §§ 572, 573; Lupton v. Lupton, 2 Johns. Ch. 623; In re Walker's Estate, 3 Rawle, 229. In England, real estate is not liable for the payment of simple contract debts. Here that estate is subject to the demands of all the creditors of the deceased, but not until the personal estate has been exhausted, when it becomes the auxiliary fund for the payment of debts. Hence the doctrine of the English courts of equity has been adopted, that not only must the testator charge his lands with the payment of his debts, but must also show his intention to exempt the personalty. If the personal estate has been specifically bequeathed, and the lands directed to be sold for the payment of debts, the personal is held to be exempted by necessary implication. But the testator is always presumed to act upon the legal doctrine that the personal estate is the natural and primary fund for the payment of all debts until he shows some other distinct or unequivocal intention. In Lupton v. Lupton, 2 Johns. Ch. 623, Chancellor Kent states the rule broadly, and as not admitting of dispute, that the real estate is not as of course charged with payment of legacies. It is never charged unless the testator intended it should be, and that intention must be either expressly declared or fairly and satisfactorily inferred from the language and dispositions of the will. It is not sufficient that debts or legacies are directed to be paid,—that alone does not create the charge,—but they must be directed to be first or previously paid, or the devise declared to be made after they are paid. Where there is an express bequest of all the testator's personal estate (with or without an enumeration of particular articles), and the will also contains a charge of debts upon the real estate, these facts have sometimes been held to favor the exemption of the personalty. But the position is nowhere sustained that a specific bequest of the personal estate, without a charge on the lands for the payment of debts, will exonerate the former. Hill, Trustees, 352; Duke of Ancaster v. Mayer, 1 White & T. Lead. Cas. Eq. 918.

Applying these rules of construction to the interpretation of Mr. Cooch's will, in which are no express words of exemption, resort must be had to the intention of the testator in order to ascertain what was his wish in respect to the payment of his debts. The first item contains the general and usual direction to his executor to pay his debts and funeral expenses. By the second, he bequeaths to his wife "all my personal property, and three thousand five hundred dollars in cash out of my real estate as soon as sold by my executor." By the third, he gives to D. Hutchison five hundred dollars. By the fourth, he gives to his brothers "the balance of my estate, to be divided between them share and share alike." Finally, he empowers his executor to sell his real estate at public sale within one year after his decease. Th question is, what does the testator mean by "balance of my estate?" Do these words signify what may remain or be left after all the personal property has been given to the wife, and the debts and legacy to Hutchison have been paid out of the proceeds of the sale of the land? And is the inference plain from the context of the whole will that the intention is to cast the burden of the debts upon the real estate? It would be begging the question to say that the inquiry suggests a doubt, and there is therefore no plain declaration or manifest intent to change the legal order of payment.

It cannot be denied that in the expressions and terms of this will there is room for conjecture that the testator may have desired to leave to his wife all his personal property free and discharged from the payment of his debts, but there is no plain declaration or manifest intent to that effect. He neither discharges the personal nor charges the real estate, and he is, in the language of Judge Story, presumed to act upon the legal doctrine that his personal estate is the natural and primary fund for the payment of his debts until some other distinct and unequivocal intention be shown. The object in selling the real estate appears to have been to secure the cash payment of thirty-five hundred dollars to his wife, and the division of "the balance" of the proceeds of such sale between his two brothers. This was the purpose of the conversion of the real estate, and in this respect it differs from the case of Sharpley v. Forwood's Ex'r, 4 Har. (Del.) 336, where the court held that if there be no direction as to the object of the conversion, and the land is directed to be sold, it is a change, out and out, of the realty. Here there is a special direction to pay the wife three thousand five hundred dollars out of the real fund, and to divide the balance between the brothers. There is, then, no fair or satisfactory inference to be drawn from the context that Mr. Cooch intended to exonerate his personal estate. As was said by the master of the rolls in Brydges v. Phillips, 6 Ves. 570, it is only a probable conjecture. There is no certainty, no clear, unambiguous intention to be collected from the whole will, that he meant that. There is no ground upon which to judicially collect a settled intention. The word "all" prefixed to "my personal estate"

is not sufficient to make a specific legacy, which is of a particular and individual character, precisely described and limited as to its nature, value, or the place where it may be found. But, admitting the legacy to the wife to be a specific one, the debts must still be paid out of the personalty, unless there is at the same time an express charge on the realty for that purpose, or an evident intention to make the charge. A testator must comply with the rules of construction and the settled principles of law, which have been established, as well to carry out his intention, where it is consistent with them, as to administer the estates of deceased persons, according to a fixed and regular order. Looking at the will alone, and extracting its meaning by intrinsic evidence, there is wanting that clear, unequivocal, and manifest intent which is required to exempt the natural and primary fund, and throw the burden upon the real estate.

WELCH et al. v. ADAMS et al.

(25 N. E. 34, 152 Mass. 74.)

Supreme Judicial Court of Massachusetts. Suffolk. June 23, 1890.

Reserved case from supreme judicial court, Suffolk county.

Chas. A. Welch, for plaintiff. *W. Gaston* and *F. E. Snow*, for Adams. *J. L. Thorndike* and *M. Storey*, for residuary legatees.

DEVENS, J. The plaintiffs, who bring this bill for instructions, are the executors of the will of Isaac Adams, which is dated the 13th of May, A. D. 1879. Mr. Adams had his legal domicile in the state of New Hampshire, and died on July 19, 1883. His will having been admitted to probate in New Hampshire, the present plaintiffs have there received letters testamentary, under which they have duly qualified; the decree of the appropriate probate court having been finally affirmed by the supreme court of that state on August 6, 1885. All of the testator's personal estate except household effects, farming implements, etc., was in Massachusetts, and on November 26, 1883, by reason of the necessary delay in granting letters testamentary in respect to the testator's personal estate in this commonwealth, which was large, the plaintiffs had been duly appointed special administrators thereof, with authority to take charge of his real estate, and had given bond for the faithful performance of their duties as such. On March 7, 1887, upon the petition of the plaintiffs, after due notice it was ordered by a decree of the probate court for the county of Suffolk that a copy of the said will and the probate thereof in New Hampshire, duly authenticated and presented to that court, should be filed and recorded, and letters testamentary be granted to the plaintiffs. Pub. St. c. 127, §§ 15–17. From this decree an appeal having been taken, it was affirmed on the 5th of October, 1887, by this court; and the plaintiffs, having here received letters testamentary, have qualified, and proceeded to act thereunder. By this bill the plaintiffs seek instructions as to the payment of two legacies given by the will, or rather of the interest claimed to be due thereon, one being a legacy of $64,000 to Mrs. Anna R. Adams, wife of the testator, and the other of $5,000 to Julius Adams, his son. Mrs. Adams having deceased since the death of the testator, Julius Adams has been appointed her administrator with the will annexed. It is found that the personal estate in the hands of the executors is more than sufficient, after paying all debts and other legacies, to pay all sums which are claimed on account of these legacies.

Under Pub. St. c. 127, § 34, and chapter 156, §§ 5, 6, the supreme judicial court and the probate court have concurrent jurisdiction of a petition by the executor for instructions as to the construction of a will, and from the decree of the probate court any party aggrieved may appeal to this court. Assuming for the moment that the subjects on which the bill requests instructions present inquiries such as in ordinary cases where the testator has been domiciled here and original administration has been here granted could properly be addressed to this court, it is to be considered whether the matter is in any way affected by the fact that the testator was domiciled in New Hampshire, and that the original probate of his will was in that state. In dealing with personal property here found the executors are accountable to the probate court in this commonwealth, and there is no duty imposed upon them to transfer it or its proceeds to New Hampshire, to be there administered, even after the payment of the debts in this state. On the contrary, it would be irregular so to do unless an order to that effect was made by the probate court. The Public Statutes (chapter 138, § 1,) provide, in the case of administration taken in this state on the estate of an inhabitant of any other state or country, that "his estate found here shall, after payment of his debts, be disposed of according to his last will, if he left any duly executed according to law;" otherwise his real estate is to descend according to the laws of this commonwealth, and his personal estate to be distributed and disposed of according to the law of the state or country of which he was an inhabitant. Section 2 provides that after payment of the debts in this commonwealth "the residue of the personal estate may be distributed and disposed of in the manner aforesaid by the probate court, or, in the discretion of the court, it may be transmitted to the executor or administrator, if any, in the state or country where the deceased had his domicile, to be there disposed of according to the laws thereof." Sections 3, 4, and 5 provide for the settlement of the estate in this commonwealth if it is insolvent, and are intended to enable creditors here to obtain an equal share, in proportion to their respective claims, of the whole property, whether within or without the commonwealth. This statute certainly gives the right to the probate court here to dispose of the estate according to the will as originally proved in another state. In leaving it in its discretion to determine whether, after the payment of debts here, the residue of the personal property shall be transmitted to another jurisdiction, the statute is only declaratory of a general principle often acted on. Stevens v. Gaylord, 11 Mass. 256, 264; Harvey v. Richards, 1 Mason, 381; Ewing v. Ewing, L. R. 9 App. Cas. 34, 39, L. R. 10 App. Cas. 453, 502. It is said by Mr. Justice STORY, in discussing the question whether a court in which ancillary administration had been granted ought to entertain a decree for final distribution of the assets among the various claimants having equities or rights in the fund, that such court is not incompetent to act upon the matter, and that whether it will do so, or whether it will transmit the property to the forum of the domicile of the deceased, is a matter of judicial discretion, dependent on the circumstances of the case. "There can be," he adds, "and ought to be, no universal rule on the subject. But every nation is bound to lend the aid of its judicial tribunals for the purpose of enforcing the rights of all persons having a title to the fund, when such interference will not be productive of injustice, or in-

convenience, or conflicting equities, which may call upon such tribunals for abstinence in the exercise of the jurisdiction." Story, Eq. Jur. § 589. If the property had been transmitted to another jurisdiction, this court would not undertake to construe the will or determine how the estate should be distributed, or how interest should be computed on the legacies. Emery v. Batchelder, 132 Mass. 452. But the personal property is here, and was so when the testator deceased. It is ample for the payment of the legacies immediately in question, as well as all other legacies or debts, whatever may be the interest thereon. The legatees are also here, as well as the residuary legatees, who are the only persons who can be affected by any determination as to these legacies, and no such case is presented as might be if the marshaling and distribution of the whole estate were now to be considered. Under such circumstances, it does not constitute a valid objection to the giving of instructions that the testator was domiciled in another state, or that his will was originally proved there.

If it be urged that the probate court may yet, in the exercise of its discretion, order the personal property transmitted to New Hampshire, and thus that any instructions we might give would become inoperative, it is sufficient to say that it is not to be presumed that it would do so when all the circumstances exist which render the disposition of the property, so far as the legatees are concerned, more appropriate here than elsewhere, and when important rights of opposing parties have here been settled upon full notice; especially so when any order for this transfer of the funds would be subject to review by this court, sitting as the supreme court of probate.

The first question presented by the executors, according to the report, is whether the legacy by Mr. Isaac Adams to his wife carries interest from the date of the testator's death, or from the end of one year thereafter. This bequest was of "the sum of sixty-four thousand dollars in money, to be paid her as soon as convenient after my decease," and was accompanied by a devise to her of five pieces of productive real estate in Massachusetts, of which she was dowable. These provisions by the devise and bequest in behalf of his wife are declared to be in full satisfaction "of her dower and homestead rights in my estate, and of all distributive share or rights whatsoever therein." In Pollard v. Pollard, 1 Allen, 490, it was held that a widow to whom a legacy was given in lieu of dower was entitled to be paid in full, in case of a deficiency of assets, in preference to legatees who were mere volunteers, and also to receive interest thereon from the death of the testator, if he had provided no other means for her support during the first year after his death; and this upon the ground that she is to be regarded as a purchaser for value, by reason of her relinquishment of her important rights in her husband's estate. The question here presented is, however, to be decided according to the law of New Hampshire. It is not merely a question of how property shall be here administered, but what is the construction and effect of the will, and what was the intent of the testator by its provisions. The construction of the will, and the distribution thereby made of the testator's personal estate, are to be governed by the law of his domicile. Sewall v. Wilmer, 132 Mass. 136; Pub. St. c. 138, § 1. By the law of New Hampshire, as of Massachusetts, the wife is treated, in accepting a provision by will, as a purchaser for value, and the general rule which applies in the case of creditors who receive a legacy in satisfaction of a debt, and who are held entitled to interest from the death of the testator, would apply where no different intent is shown. Towle v. Swasey, 106 Mass. 100; Williamson v. Williamson, 6 Paige, 298. But by the law of New Hampshire, as of Massachusetts, while the widow is a purchaser for value she also has a right to determine whether she will accept the provision made, and to accept or reject it as she may choose. Gen. Laws N. H. c. 202, §§ 9, 18; c. 193, § 13. If she accepts it, she must accept upon the terms and conditions on which it is made. She can have only what the will gives her, and in the mode in which it gives the property bequeathed to her. The precise point decided in Pollard v. Pollard, ubi supra, does not appear to have been decided in New Hampshire. In Loring v. Woodward, 41 N. H. 391, it is said that to the general rule there laid down, that a pecuniary legacy, payable generally, without designation of any time of payment, is payable at the end of a year from the death of the testator, without interest, and, if not then paid, with interest after the end of the year, there is one exception, which is in favor of minor children of the testator, who are entitled, unless other provision is made for their support, to interest upon their legacies from the date of the testator's decease. It is argued therefore by the residuary legatees, that in New Hampshire no such exception exists in favor of the testator's widow as has been held to exist in Massachusetts, as otherwise the learned chief justice of New Hampshire who delivered the opinion would not have failed to state it. We shall not have occasion to consider this contention, or whether the language used is fairly to be construed as holding that no other exception to the general rule than that specified actually exists in New Hampshire. We are of opinion that upon other grounds the position taken by the residuary legatees is correct. In Pollard v. Pollard, ubi supra, it is clearly implied that if other provision is made by the testator for the support of the wife, which will avail her during the year following her husband's decease, she would not be entitled to interest from that time. The legacy to Mrs. Adams was accompanied by a devise to her of five pieces of productive real estate, to the considerable income of which she became at once entitled, and the case is not presented of a widow left without other means of support than her legacy. In Loring v. Woodward it is said that minors are entitled to interest upon their legacies from the decease of the testator only in those cases where no other provision was made. If, therefore, it can be held that in New Hampshire the same ex-

ception exists in favor of the widow as to the allowance of interest that exists in this commonwealth, it cannot be reasonably doubted that it applies only in those cases where other provision is not made for her support. Again, it is said in Loring v. Woodward, ubi supra, that the general rules there laid down on the subject of interest and income do not apply where specific directions are given by the will, or where a different intention is to be inferred from its provisions. The inference is fairly to be drawn from the provisions of Mr. Adams' will that he did not intend that the payment of the legacy should be immediate. If a will is silent as to the time when a legacy is to be paid, one to whom such a legacy is bequeathed, and who stands in the position of a purchaser for value, is entitled to have the time of payment determined by the legal presumption of the intent of the testator. If a time were specified for its payment, he could make no claim for any delay in its payment except after the expiration of the time specified. By the terms in which the legacy to Mrs. Adams was given, no time for its payment was specifically stated; but the provision that "it shall be paid as soon as convenient after my decease" distinctly shows that the legacy would not be paid at once, but that its payment would be governed by the convenience of the estate. The rule that legacies draw interest only after the expiration of a year contemplates that such a time is a reasonable one for the collection of assets and reducing them to money. By accepting her legacy to be paid at the convenience of the estate, for that is its fair interpretation, the widow consented to wait for the expiration of the usual time for its payment. It follows that she would not be entitled to interest until the end of a year, and such instruction is given accordingly.

The next question reserved for our consideration by the report, and on which the bill requests instructions, is whether the interest upon both the legacies of $64,000 to the widow and $5,000 to Julius Adams, is affected by a deposit made on August 8, 1887, with the New England Trust Company, to the credit of Julius Adams, of an amount equal to these sums; and also in what manner, and at what rate, interest on these sums shall be computed. The inquiry thus presented does not involve the construction of the will, but concerns the duty of the executors under it, and the effect of the acts which they have already done. It is well established that trustees may ask the instruction of the court, not merely as to the construction of the instrument under which they act, but also as to their duties under it. Hyde v. Wason, 131 Mass. 450. Nor is there any reason why executors and administrators might not do the same, except where the matter is one which can be more appropriately dealt with in the probate court, especially in the settlement of their accounts. Treadwell v. Cordis, 5 Gray, 341, 348. Whenever a trustee doubts as to his safety and security in complying with a claim of the *cestui que trust*, his only prudent and safe course is to wait for the directions of a court of equity. Dimmock v. Bixby, 20 Pick. 368. While our statutes have established an elaborate system of procedure for the administration of the estates of deceased persons, in the settlement of the accounts of executors, the jurisdiction of the probate court is limited to these, and it cannot, upon a hearing of that character, give directions as to how future accounts shall be rendered, or the duties of executors performed. Lincoln v. Aldrich, 141 Mass. 342, 5 N. E. Rep. 517; Trust Co. v. Eaton, 140 Mass. 532, 4 N. E. Rep. 69. The probate court may indeed, upon proper petition, concurrently with this court determine all questions arising under wills or relating to their construction, any party aggrieved by the decision of that court having a right of appeal to this. Pub. St. c. 127, § 34; c. 156, §§ 5, 6–11; Swasey v. Jaques, 144 Mass. 135, 10 N. E. Rep. 758. It may be that the inquiry which the executors seek now to have determined could be passed upon and decided in the probate court on the final settlement of their account by the order for the payment of debts and legacies, and of distribution to be passed thereon, from which order an appeal could be taken by any party aggrieved to this, as the supreme court of probate. Yet, in the situation in which the executors find themselves by the delays and embarrassments of the case, and by the accumulations of interest on the funds they have collected, a majority of the court are of opinion that the executors may properly ask instructions upon the matter thus in question. Whether such a bill shall be entertained, or whether the parties interested shall be left to the other remedies provided, is, to some extent, a matter of discretion. The inquiries submitted have been fully argued by the legatees and the residuary legatees, who are the only persons interested, and both parties have desired that they should be definitely passed upon.

On August 8, 1887, the plaintiffs, after some correspondence with Julius Adams, who had become the administrator with the will annexed of the estate of his mother, who had then deceased, deposited with the New England Trust Company the amount of the two legacies of $64,000 and $5,000 (together with another sum for rents collected, not necessary to be here considered) to the credit of Julius Adams. These sums were deposited without any interest being included, the matter of interest having been the matter in dispute between Adams and the executors. Adams never authorized or ratified this deposit with the trust company, refused to receive the deposit book, and has in no way recognized the deposit, which bore interest at the rate of 2½ per cent. He had been informed before the deposit was made, he having declined to receive these sums without interest, that they would be thus deposited unless he should receive them, or designate some other place for their deposit. On behalf of the residuary legatees it is contended that the executors had a right to require Julius Adams to receive, on account of the legacies, the principal of the amounts due; that he was not at liberty to refuse to receive any portion unless the whole sum due was paid; and that the deposit of

these sums with the trust company was a valid appropriation in part satisfaction of the legacies. It is conceded by them that the legacies carried interest from the end of a year after the testator's death, and therefore that the sums deposited on account of the legacies were less than the amounts due at that time.

The first inquiry which we consider in this transaction is whether the plaintiffs, as executors, were then in a position rightfully to make appropriations for the payment of legacies. If they were not, Adams could not be called upon to deal with them, nor be bound to assent to their acts. On August 8, 1887, their situation was a somewhat peculiar one. The will of Isaac Adams had been finally admitted to probate in New Hampshire, and they were lawfully appointed executors in that state on August 6, 1885. Previous to this time the same gentlemen had been appointed special administrators in this commonwealth, on November 26, 1883. On March 7, 1887, the probate court of Suffolk county had admitted to probate a copy of the will proved in New Hampshire, and from this decree Julius Adams had appealed. This appeal was pending until October 5, 1887, when the decree of the probate court was affirmed, but letters testamentary were not issued to the plaintiffs until September 17, 1888. On the 8th of August, 1887, the plaintiffs were not executors in this commonwealth. As executors of a foreign will, they had no right to act here, and to dispose of the estate here. In order that they should have this authority, it was necessary that the will should have been here admitted to probate, and letters testamentary issued to them. Campbell v. Sheldon, 13 Pick. 8; Pub. St. c. 127, § 7. As special administrators, whose duty is only to take care of and preserve property until it can be regularly administered, they certainly had no authority to pay legacies. While the plaintiffs acted apparently as executors appointed in the state of New Hampshire, describing themselves as "co-executors" before any appointment of them as such in this commonwealth, the two sums deposited "were paid out of the personal estate of the testator in Massachusetts, which had come to the hands of the plaintiffs as special administrators." The probate court had never authorized or directed the transfer of any part of the property held by the plaintiffs as special administrators to themselves as executors in New Hampshire. In the account subsequently filed by the plaintiffs on November 23, 1888, as executors in this commonwealth, they claim to be allowed for the payment of these sums. Adams was not called upon to deal with the plaintiffs while occupying so ambiguous a position, or to recognize them as having authority as executors under the laws of New Hampshire to deal with property here without having been authorized to do so by this commonwealth. Until, in its discretion, the probate court directed the personal estate here found to be transferred to the foreign jurisdiction, executors there could not rightfully deal with it. Many acts may without doubt be done by one as executor previous to his appointment, as such, which, if in themselves not illegal, and such as an executor may properly do, might be validated by his subsequent appointment relating back to the time of doing the acts. No person, however, is required to deal with one who may thereafter be appointed as executor, trusting to the chance that he will be appointed, or to consent to appropriations made by him in the anticipation that they may thereafter be lawfully made. The case as here presented has also this peculiarity: that if the appropriation made by the plaintiffs while executors in New Hampshire is to be treated as authorized, so as to bind Julius Adams, in whose favor the deposit was made, it is so because of their subsequent appointment in Massachusetts. Acts done in one capacity are thus treated as authorized by a subsequent appointment of the actors to another capacity. The plaintiffs are now attempting to administer the estate in Massachusetts. This is the foundation of their bill for instructions, yet the act concerning which instruction is asked was done while they were executors in New Hampshire only. At the time when the plaintiffs undertook to offer payment of the legacies, to appropriate a sum therefor, and to make a deposit thereof, they had no authority to do so in such manner that the rights of the legatees would be affected.

Nor, irrespective of this matter of the plaintiffs' authority, are we of opinion that legatees are bound to accept a payment by installments which should operate *pro tanto* to diminish their claims. That it is an exceedingly convenient mode often of administering an estate to make partial payments to creditors or legatees when the rights of creditors are satisfied may be admitted. Orders to this effect are often made by courts, independently of statute authority, for the more convenient distribution of the estate, as the funds accumulated in administration by the collection of debts or the reduction of securities into possession would otherwise be substantially idle. In this commonwealth, the practice is recognized by statute, and the probate courts are authorized to order partial distribution of the funds of estates in the course of administration. Pub. St. c. 136, § 21. If such an order is obtained, there would be much force in contending that interest should not, after such an order, or proper information of such an order, be allowed except on the balance of the debt or legacy which would remain after the application of the partial payment was, or might have been, made. No such order was passed or applied for, and the legatee or creditor ought not to be expected to receive payment of his legacy or debt in such installments as the executor may, in his own discretion, see fit to apportion to him. The existence of the power in the court to order partial payments, and its frequent exercise, do not indicate that the executors have any such power, but rather otherwise. If the legatee or creditor should consent to receive partial payments, which no doubt are often made without any order of court, it certainly would be right that interest on his claim should be diminished. In the case we are considering the two

sums offered to Adams, and deposited to his credit, were refused by him, and it is conceded that they did not equal, interest included, the amount of the legacies to which, in his own right and that of his mother, he was entitled. Even if the offer was made that Adams should receive these sums for the legacies, leaving the question of interest upon them open for further consideration or litigation, he was under no obligation thus to accept them.

These views render it unnecessary to consider several points which have been quite fully discussed, viz., what was the true construction of the correspondence between the executors in some other respects, and whether Julius Adams might safely have accepted the offer of the executors without waiving his right to oppose the probate of his father's will in this commonwealth, which he was then contesting, and certain other claims made by him.

It is urged in connection with the claim for interest on these legacies that the conduct of Julius Adams in opposing the probate of his father's will in New Hampshire and in this commonwealth was litigious and unreasonable. So far as the legacy to Mrs. Adams is concerned, her estate should certainly not be diminished by any acts done by her son in his individual capacity. The facts are not before us upon which we could decide whether his conduct was litigious and his resistance to the probate of the will unwarrantable, even if we could hold that his claim for interest should be affected thereby. It is without doubt true that, where the settlement of an estate is delayed by legal controversy, and where funds are accumulated under such circumstances that they cannot be permanently invested, loss may be occasioned to the residuum of the estate. The contestant who disputes a will is still, however, in the exercise of his legal rights. It was held, therefore, in Kent v. Dunham, 106 Mass. 586, that the fact that legatees had caused delay by unjustifiable proceedings, embarrassing the executors in the settlement of the estate, was inadmissible for the purpose of defeating their claim to interest. On the other hand, we can perceive no ground for the claim on behalf of Julius Adams that interest should be computed on these legacies after the expiration of one year from the death of the testator, with annual rests, and thus that the legatees should receive compound interest.

The question remains to be determined at what rate interest shall be computed. It is urged on behalf of the residuary legatees that it should be something less than the legal rate, and that certainly this should be so after the deposit made by the plaintiffs, upon which only 2½ per cent. was to be allowed. In the view we have taken, the matter of interest is not affected by the deposit. That interest at the legal rate is payable after one year from the testator's death, is well established as a general rule in Massachusetts and New Hampshire. Loring v. Woodward, Kent v. Dunham, ubi supra; Ogden v. Pattee, 149 Mass. 82, 21 N. E. Rep. 227. Even where the estate could not have been reduced to money within that time, or where the administration had not been taken for a considerable time after the death of the testator, it would still be allowed to the legatee as an incident and accretion to the legacy. Ogden v. Pattee, ubi supra; Lamb v. Lamb, 11 Pick. 371; Martin v. Martin, 6 Watts, 67. This allowance is made, not merely because it will be presumed that the estate will, after the year has expired, have actually made this sum, but also because, as it would be difficult, if not impossible, to investigate how much interest had been made in such cases, it is a reasonable rule to adopt that rate of interest which the law has fixed where none other is stipulated for. It is urged that it is a matter of public knowledge that no interest can now be obtained as high as 6 per cent. on any safe investment; that such an allowance should no longer prevail; that the court should determine, either directly or with the aid of a master, what could reasonably have been obtained, and that this only should now be allowed. It is probable that the rate of interest does not so nearly represent now what can be earned by a safely invested fund as it did when it was originally established by statute as the legal rate, and that it would be difficult now to obtain it. But, as it is inferred that where no time is specified for the payment of a legacy it is not to be paid until the end of a year from the death of a testator, so it is a reasonable inference that the testator intended, if the legatee did not receive it until some time after that period, that he should then receive it with the interest allowed by law. His gift fairly imports this, because that is the rate where a debt or payment which is due *in præsenti* is deferred. This view is not in conflict with Williamson v. Williamson, 6 Paige, 298, and Healey v. Toppan, 45 N. H. 243. The question in these cases was not between legatees of specified sums and the estate, but between those who were the legatees, one class of whom were entitled to an estate for life in the legacy, and the other to the remainder. As between them, there was no doubt that the tenant for life, after the fund was actually formed, was entitled only to the interest or income which it produced. In determining what should be the basis of apportionment between them before the settlement of the estate and before it was actually formed and productive, it was determined that 5 per cent. upon it as ultimately ascertained would be right, as it represented the income which might have been obtained. It by no means follows that what is right as between legatees interested in different proportions in the same fund is a proper rule between a legatee of a definite sum and the estate of the testator. It is urged that by the English rule less than the usual or legal rate of interest is often allowed, and that the amount of interest which legatees are entitled to recover is regulated by the court of chancery with reference to the amount which executors could have made, and that this rate has been diminished from time to time by reason of the change in the value of the interest upon money. Beckford v. Tobin, 1 Ves. Sr. 308, 311; Guillam v. Holland, 2 Atk. 343; Wood v. Briant, Id. 523; Sitwell v. Bernard, 6 Ves. 526.

The rule of the court of chancery appears from these cases to have been that it could determine, at its own discretion, how much interest should be allowed, and even without inquiry into the circumstances of any particular case. Sitwell v. Bernard, ubi supra. No action could have been brought at common law to recover the amount of a legacy which was treated only as a direction to the executor. The remedy of the legatee was only in the ecclesiastical courts or the court of chancery. These courts have always assumed the right to determine the terms on which the beneficiary should receive it. This is given as one of the reasons why an action at law should not be maintained for it. Deeks v. Strutt, 5 Term R. 690; Allen v. Edwards, 136 Mass. 138. In this commonwealth an action at law has long been the remedy to recover the amount of such a legacy. Allen v. Edwards, 136 Mass. 138, and authorities cited. Such is the rule, we believe, in most, if not all, of the states of the Union. While in many cases interest has been recovered, none has been cited or is known to us where it has been at less than the legal rate. It has been recovered upon the same principle that it is awarded in any case where the payment of a debt due has been deferred. We have no reason to believe that the law of New Hampshire in this respect differs from that which prevails in this commonwealth, and we do not feel authorized to change the rule so long as the statute remains unchanged which fixes a rate of interest. Kent v. Dunham, ubi supra; Ogden v. Pattee, ubi supra; Pub. St. c. 77, § 3; Wood v. Corl, 4 Metc. 203; Loring v. Woodward, ubi supra; Gen. Laws N. H. c. 232, § 2. The executors are therefore instructed that the legacies of $5,000 and $64,000 are payable, with legal interest, in a year from the death of the testator. Instructions accordingly.

PARKER v. PROVIDENCE & S. STEAMBOAT CO.

(23 Atl. 102, 17 R. I. 376.)

Supreme Court of Rhode Island. Nov. 21, 1891.

Action on the case by Arabella T. Parker against the Providence & Stonington Steam-Boat Company for personal injuries to plaintiff's testator resulting in death. Defendant pleaded in bar a settlement and receipt of plaintiff in full of all demands by reason of the injury complained of, to which plaintiff demurred. Demurrer overruled.

Stephen A. Cooke, Jr., Louis L. Angell, W. C. Parker, and *W. M. Butler,* for plaintiff. *Walter B. Vincent,* for defendant.

TILLINGHAST, J. After the overruling of the defendant's demurrer to the plaintiff's declaration in this case, (Index II. 24,)[1] the defendant pleaded the following release in bar of said action: "New Bedford, Mass., July 16, 1889. Received from the Providence & Stonington Steam-Ship Co. the sum of one (1) thousand dollars, the same being in full settlement of all claims and demands which I, as executrix of the last will and testament of Charles W. Parker, deceased, and as legatee named in said will, may have against the Providence & Stonington Steam-Ship Co., its agents and servants, for loss of life in consequence of the collision on the 14th day of May, 1889, between the schooner Nelson Harvey and the steamer Nashua, owned by the said Providence & Stonington Steam-Ship Co.; and I do hereby covenant and agree, to and with said company, that no suit shall at any time be brought or prosecuted against said company therefor. ARABELLA T. PARKER, Executrix. Witness: FRANK N. HOWES." To this plea the plaintiff has demurred, as follows: "And the said plaintiff, as to the first plea, or plea of settlement of said cause of action, comes," etc., "when," etc., "and says that the said plea, and the matter therein contained, in manner and form as therein set forth, are not sufficient in law for a bar to said action, and the said plaintiff is not bound by law to answer the same, because said right of action is given to said plaintiff in her said capacity as a representative of her children as well as herself, and is not included in the powers given by statute to administrators to compromise claims such as appear in favor of ordinary estates, and is such a claim as cannot be compromised or settled by her as administratrix without concurrence of her children, if of age, or their duly-qualified guardians of such of them as are minors, and this she is ready to verify. Wherefore, for want of a sufficient plea in this behalf, she prays judgment of this court, and that said defendant may further answer the said declaration."

The only question raised by the demurrer is whether an executrix has the power to compromise and settle such a cause of action as is set out in the plaintiff's declaration without the assent of the next of kin. Pub. St. R. I. c. 184, § 32, provides as follows: "Executors and administrators may submit to arbitration or may adjust by compromise any claims in favor of or against the estates by them represented, in the same manner and with the same effect as the testator or intestate might have done." The defendant contends that this statute authorizes the plaintiff in her said capacity to compromise and settle a claim like the one in suit, and that, having done so, as set up in the plea in bar, she is precluded from maintaining her action. The defendant further contends that said statute is simply intended to afford executors and administrators additional protection, and not in any manner to take away or abridge their common-law powers, among which is that of compromising and adjusting disputed claims in favor of or against the estates which they represent. The plaintiff, on the other hand, contends that said statute does not confer any authority upon her to make said compromise, and also that it has no bearing upon the case at bar, because she is merely a representative of the widow and next of kin, and sues exclusively for their benefit, the damages to be recovered not being assets in her hands, with which to pay the debts or liabilities of the testator, but to go to the widow and next of kin under the statute. She further contends that the action is brought under the provisions of Pub. St. R. I. c. 204, § 15, and that section 20 of said chapter has no application. Said sections are as follows: "Sec. 15. If the life of any person, being a passenger in any stage-coach or other conveyance, when used by common carriers, or the life of any person, whether a passenger or not, in the care of proprietors of, or common carriers by means of, railroads or steam-boats, or the life of any person crossing upon a public highway with reasonable care, shall be lost by reason of the negligence or carelessness of such common carriers, proprietor, or proprietors, or by the unfitness or negligence or carelessness of their servants or agents, in this state, such common carriers, proprietor, or proprietors shall be liable to damages for the injury caused by the loss of life of such person, to be recovered by action of the case, for the benefit of the husband or widow and next of kin of the deceased person, one-half thereof to go to the husband or widow, and one-half thereof to the children of the deceased." "Sec. 20. In all cases in which the death of any person ensues from injury inflicted by the wrongful act of another, and in which an action for damages might have been maintained at the common law had death not ensued, the person inflicting such injury shall be liable to an action for damages for the injury caused by the death of such person, to be recovered by action of the case for the use of the husband, widow, children, or next of kin, in like manner and with like effect as in the preceding five sections provided."

The power of an executor or administrator at common law to compromise or submit to arbitration disputed claims in favor of or against the estate which he represents is undoubted. Chadbourn v. Chadbourn, 9 Allen, 173; Bean v. Far-

[1] 22 Atl. Rep. 284.

nam, 6 Pick. 269; Chase v. Bradley, 26 Me. 531; Chouteau v. Suydam, 21 N. Y. 179, 184; Wood v. Tunnicliff, 74 N. Y. 38; Murray v. Blatchford, 1 Wend. 583, 616; Rogers v. Hand, 39 N. J. Eq. 270, 271, and note. Pub. St. R. I. c. 204, §§ 15–20, are printed in Index II, pp. 115, 116. It is also well settled that a statute like the one under consideration does not change the power of the executor or administrator existing at common law, but simply reinforces and affirms the same. If, in the exercise of this power, the executor or administrator, by reason of negligence or any serious error in judgment, obtains a less sum than he would clearly be entitled to recover at law, he may be held to be guilty of a *devastavit*, and be required to make up the loss out of his own estate; but still the compromise, if made in good faith, would be binding upon the parties thereto. In Rogers v. Hand, 39 N. J. Eq. 270, 275, which was a case in which the executors compromised and settled a claim against the estate, without suit, the court says: "When they act in good faith, those who would impeach their conduct must show fraud or mistake, or that they have acted without authority or contrary to law." "They may compromise a lawsuit, may buy the peace of the estate, and extinguish even doubtful claims against it, provided they act discreetly and in good faith." See, also, Meeker v. Vanderveer's Ex'rs, 15 N. J. Law, 392.

It will be seen that what we have said thus far relates to the power of executors and administrators generally to compromise claims in favor of and against the "estates" which they represent, as that term is ordinarily understood; and the question which now presents itself is whether the law, as above stated, is applicable to a case like the one before us, in which the cause of action is purely statutory, and where the damages do not accrue to the "estate" of the deceased, properly so called, but to the widow and next of kin. We fail to see, upon principle, that any distinction can properly be made between the two classes referred to. The reasons which underlie and support the law above laid down, in its application to executors and administrators, generally, are equally applicable and cogent in a case in which the claim arises by statute. The plaintiff, in her capacity as executrix, had a claim against the defendant corporation growing out of its alleged negligence and wrongful acts in causing the death of her husband. She could prosecute this claim or not, at her option. No one else had any power to prosecute it. Goodwin v. Nickerson, (R. I.) Index II, 115.[1] If suit is brought upon said claim, it is her suit, and she may discontinue, compromise, or settle the same at her pleasure. And if she has power to compromise the suit after it is brought, why should she not also have power to compromise the claim upon which it is based without bringing a suit? We cannot see that any reason can be urged in support of the existence of the power in the former case which does not also apply with equal, if not added, force to the existence thereof in the latter. In Greenlee v. Railroad Co., 5 Lea, 418, which was a case brought by a widow, under a statute quite similar to the one under which this suit is brought, it was held that she had power to control the suit by compromise or otherwise. The court says: "The question is, can the widow, under the statutes authorizing the suit, dismiss it against or without the consent of the children? * * * It is true, as argued, that the suit is for the benefit of the widow and children. It is also true, the widow alone has the right to sue in the first instance. The children have the right only when there is no widow. The widow may sue or not, at her option. We have holden that, if she fail to sue for the period of 12 months, the suit is barred even as to minors. Having, then, the right to sue, to be exercised at her own election, it follows, as a necessary incident to that right, that she may control the suit by compromise, abandonment, prosecution, or dismissal." In Stephens v. Railroad Co., 10 Lea, 448, which was a suit for the benefit of the widow and children of deceased, it was held that she had the right to compromise or settle the suit as she saw fit, without the consent of the guardian of the child of the deceased, and against the consent of her own attorney who managed the case.

As to the contention of the plaintiff that the action is brought under the provisions of Pub. St. R. I. c. 204, § 15, and hence that section 20 of said chapter has no application, two answers suggest themselves: *First*, the second count in the declaration is evidently framed upon both of said sections, as it not only charges that the deceased came to his death by reason of the carelessness and negligence of the defendant, but also by the wrongful acts of said defendant; and, *second*, that, even though the declaration were framed solely upon section 15, as contended, yet so long as the two sections give but one remedy, and the declaration might as well have been framed under the one section as under the other, or even under both together, we think they should clearly be construed together in determining the question whether the plaintiff had power to compromise the claim upon which this suit is based before any suit was brought. If the injury had not resulted in the death of the plaintiff's testator, he would undoubtedly have had power to compromise and adjust the claim against the defendant. Furthermore, the injury here complained of was not occasioned by the mere passive neglect of the defendant, as was the case in Bradbury v. Furlong, 13 R. I. 15, cited by the plaintiff, but might properly be described as an injury "inflicted by a wrongful act." See, also, Chase v. Steam-Boat Co., 10 R. I. 79, and McCaughey v. Tripp, 12 R. I. 449. Furthermore, the law favors the compromise of disputed claims, (1 Bouv. Law Dict., 15th Ed., tit. "Compromise," and cases cited,) and will sustain the same as far as possible, when fairly made. But the plaintiff argues that the settlement in question, if allowed to stand, will have the effect to bind living parties, who are competent to act for themselves, which

[1] 23 Atl. Rep. 12.

is very different from the settlement of claims in favor of or against the estate of a person who is dead, and which are necessarily represented by the executor or administrator as the only one who can represent them. We do not think that this is so. There are no parties to this suit, excepting the plaintiff and defendant. The next of kin are not and cannot be made parties thereto. And while the settlement made, if allowed to stand, will doubtless incidentally affect their interest, still it is not a proceeding in which they have any right as parties thereto. Nor is the case materially different in this respect from that of an ordinary claim in favor of an estate in the hands of an executor or administrator; for, as we have already seen, they have power to compromise claims, and by so doing they incidentally affect the interest of the heirs or devisees, as the case may be, in the estate. If a large amount is realized it inures to their benefit, assuming, of course, that the estate is solvent, while if only a small amount is realized they will suffer the loss, if such it may properly be called. In other words, the executor or administrator has full power to settle the estate in conformity to law, and, this being done, the heirs or devisees have no legal cause of complaint, whether they receive much or little therefrom. But no one would contend that because of their interest they either are, or have the right to be made, parties to a suit, or a proceeding of compromise. In conclusion, we think that the statute in question, being evidently intended to facilitate the settlement of disputed claims growing out of or appertaining to the estates of deceased persons, should be liberally construed in favor of the object sought to be attained, and that, thus construed, it may fairly be held to include such a compromise as the one under consideration. The demurrer to the defendant's said plea in bar must therefore be overruled. Demurrer overruled.

BARRY v. LAMBERT.

(98 N. Y. 300.)

Court of Appeals of New York. March 3, 1885.

Appeal from supreme court, general term, second department.

Action by one Barry against one Lambert, executrix of the will of Thomas Lambert, deceased, to establish a trust in a certain loan made by said executrix. From a judgment in favor of plaintiff, defendant appeals.

William E. Osborn, for appellant. N. C. Moak and J. S. Stearns, for respondent.

RUGER, C. J. The evidence in this case, outside of the admissions of the defendant's deceased co-executrix, tended strongly to show that the plaintiff, immediately previous to January 31, 1882, delivered to Maria Lambert, defendant's co-executrix, the sum of $2,000 in bills of the denomination of $100 each, and on that day the defendant with his co-executrix of the estate of Thomas Lambert, loaned $1,800 of this identical money, together with $6,000 belonging to the estate, and about $200 belonging to Mrs. Lambert, in one aggregate sum of $8,000 to Margaret Lawrence, taking back a bond and mortgage as security therefor to themselves as executors.

Outside of such declarations, however, the evidence was not entirely clear as to the particular understanding and agreement with reference to the disposition of these moneys entered into, between Mrs. Lambert and the plaintiff, when the money was delivered to her. This evidence was attempted to be supplied by proof of certain declarations, made by the deceased co-executrix, Maria Lambert, soon after the loan was made, in the presence of the plaintiff and other parties. Mrs. Lambert was at that time in feeble health, and her early death was then anticipated. The declarations were offered to be proved by the witnesses who were present at the time they were made, but their admission was objected to by the defendant upon the ground that the declarations of one executor were not admissible as against his associate. The objection was overruled by the court, and the evidence was received, to which ruling the defendant excepted. This exception presents the only serious question in the case.

The proof showed that Mrs. Lambert then made statements to the effect that she had received $2,000 from the plaintiff, to make up the sum of $8,000 loaned to Mrs. Lawrence, and that plaintiff was to have an interest in the mortgage taken as security for the loan, and to receive her share of the interest as it was paid by the mortgagor; that she intended to make an acknowledgment to that effect, either by her will, or in a separate instrument, before she died. She also stated that she expected to live until September. She in fact died in June, soon after this conversation. These declarations were made by Mrs. Lambert in reply to a request on behalf of, and in the presence of, the plaintiff, that she should make such a declaration or acknowledgment, as, in the event of her death, would render the interest of the plaintiff in the Lawrence mortgage secure to her. Mrs. Lambert then promised to attend to it as soon as she got a little stronger, but death intervened before she was able to perform her undertaking.

Assuming, for the purpose of the argument, that this evidence was admissible, there can be no doubt that these facts raised a valid implied trust in invitum (Haddow v. Lundy, 59 N. Y. 320; Newton v. Porter, 69 N. Y. 137), and that the express acknowledgment made by Mrs. Lambert operated as a full and perfect declaration of trust, sufficient, within the authorities, to charge the property then in the hands of the executors with the obligations of the trust.

While there is no proof of any express stipulation made between the parties, at the time the money was delivered, that the security for the loan was to be taken in such form as to disclose the plaintiff's interest therein, yet an understanding to the effect that the plaintiff was the owner of one fourth of the mortgage, and of the interest accruing thereon, must be implied from the absence of any agreement transferring the title of the money advanced to the executors. A trust by implication arises from the use of the money according to such understanding and agreement, and notwithstanding the security was taken in the name of the executors, equity will protect the interest of the beneficiary, and follow the property in which the money was invested, and impose a lien thereon in favor of the plaintiff to the extent of the sum belonging to her thus advanced and invested. Price v. Blakemore, 6 Beav. 507; Perry, Trusts, § 842; In re Frazer, 92 N. Y. 240; In re European Bank, 5 Ch. App. 358; Pennell v. Deffell, 4 De Gex, M. & G. 372.

No difficulty arises from the blending of the money of the estate with that of another person in the same loan, for, the units of which it is composed being of equal value, it is clearly severable and distinguishable, and sufficient data are given to enable such severance to be made. The cases above cited show numerous instances in which such a separation has been decreed. Conceding for the present that the admissions of Mrs. Lambert were incompetent to establish the facts upon which a trust in invitum can be decreed, it is nevertheless true that her statement also operated as a valid declaration of trust. It is well settled that a trust in personal property may be created by parol, and that no particular form of words is necessary for its creation, but the words or acts relied on to effect that object should be unequivocal, and plainly imply that the party mak-

ing them intended to divest himself of his interest in the property, and to hold it thereafter for the use and benefit of another. Hill, Trustees, 130; Martin v. Funk, 75 N. Y. 140; Young v. Young, 80 N. Y. 438; Willis v. Smyth, 91 N. Y. 297. This is all that is required to create a trust even as against the owner, and although he continues to retain possession of the property devoted to the trust. But when the legal title is in one party, and the equitable ownership in another, it is only necessary for those facts to appear, in order to constitute the holder a trustee for the benefit of the other. Pye's Case, 18 Ves. 140.

The evidence, aside from the declarations in question, tended strongly to establish these facts, and a strong presumption of an intended trust might fairly be implied from the nature and surroundings of the transaction.

By the will of Thomas Lambert, his wife, Maria Lambert, was given a life estate in all of his property, both real and personal, and his executors were directed to keep it invested during her life, and pay to her the income thereof as long as she should live. The duties of their office required the executors to seek for advantageous investments, and keep the moneys of the estate employed. It was entirely within their power, if it was not their duty, in case a profitable investment offered itself larger in amount than the available assets of the estate, to supplement them with other funds, if they could be legitimately obtained from other parties. These moneys were received by Mrs. Lambert under such a contingency, and she was engaged in the lawful and legitimate performance of her duties as an executrix when she received and invested them.

There is nothing in the office or obligations of executors that precludes them from acting as trustees upon other trusts, and for other beneficiaries, if the transaction is not inconsistent with the duties which they owe as executors. Neither will that fact subject property, thus held by them in trust, to the hazard of a loss on account of their dual character, so long as such property can be separated and distinguished from the funds held by them under their trust as executors.

The transaction between the plaintiff and Mrs. Lambert was, so far as here appears, a beneficial one for both of the funds intrusted to her, and in receiving the plaintiff's money she was acting in the performance of her legitimate duty as an executrix. It was clearly the duty of Mrs. Lambert, when she used the plaintiff's money in acquiring this mortgage, to have caused a recognition of the plaintiff's interest to appear in the instrument itself (Price v. Blakemore, supra), and it was evidently her intention to repair this omission before her death, by making such a declaration of trust as would protect the interest of the plaintiff, and the question in this case is whether legal proof has been given, from which a court of equity will find the existence of the trust.

Co-executors, however numerous, constitute an equity, and are regarded in law as an individual person. Consequently the acts of any one of them in respect to the administration of estates are deemed to be the acts of all, for they have all a joint and entire authority over the whole property. Williams, Ex'rs. 810; Wheeler v. Wheeler, 9 Cow. 34. Thus one of two executors may assign a note belonging to the estate of the testator (Wheeler v. Wheeler, supra), or make sales and transfers of any personal property of the estate (Bogert v. Hertell, 4 Hill, 492). He may release or pay a debt, assent to a legacy, surrender a term, or make an attornment without the consent or sanction of the others. Williams, Ex'rs, 812; Jackson v. Shaffer, 11 Johns. 513; Douglass v. Satterlee, Id. 16; Murray v. Blatchford, 1 Wend. 583. It was said in Wheeler v. Wheeler, supra, "that, if a man appoint several executors, they are esteemed in law as but one person representing the testator, and that acts done by any one of them, which relate to the delivery, gift, sale or release of the testator's goods, are deemed the acts of all." It would seem to follow from this principle that they have the power of joint and several agents of one principal, and that any act done or performed by one, within the scope and authority of his agency, is a valid exercise of power, and binds his associates.

It is quite true, however, that neither executors nor administrators, whether acting separately or jointly, have authority to create an original liability on the part of the estate, or enter into an executory contract binding upon or enforceable against it. McLaren v. McMartin, 36 N. Y. 88; Ferrin v. Myrick, 41 N. Y. 315; Austin v. Munro, 47 N. Y. 366.

It would seem to follow, as the result of the authorities, that the powers of executors, in the administration of estates confided to them, are commensurate with those expressly granted, or necessarily implied, from the nature of the duties imposed upon them, and their power to bind their associates by their acts is limited only by the nature of the transactions they are called upon to perform. Thus having no power to bind the estate by a new contract, or to revive a demand which has once expired, neither their contracts nor admissions can have the effect of creating one or reviving the other; but having the original power to transfer the property of the estate for the purposes of their trust, any act, whether performed by one or all, which has this effect, is within their authority, and binds the estate. It must be assumed, however, that such a transfer is made for a lawful purpose, and in form sufficient to operate as a transfer of property between individuals.

We are, therefore, of the opinion that the

acknowledgments of Mrs. Lambert constituted a good declaration of trust, and that the making thereof was an act done in the performance of her duty as an executrix of the estate of Thomas Lambert, which operated upon and was enforceable against it. It would hardly be contended, under the circumstances of this case, that a declaration made by Mrs. Lambert, at the time these moneys were received by her, as to the purpose for which they were received, would have been incompetent to prove her trust character, even as against her co-executor; and it is difficult to see why a similar declaration made by her at a subsequent time would not be equally competent. Such a declaration could in no just sense be said to create any liability against the estate represented by her, or subject it to any action on account of the statement made, for such an action could arise only by a wrongful refusal on the part of the executors to recognize the plaintiff's equitable rights of property. The arrangement shown by such a declaration, instead of creating a liability against the estate, would simply have the effect of protecting the party advancing the money from an unjust claim of ownership on the part of the executors, by reason of the form in which the securities for the loan were taken.

The establishment of this trust works no injury to the estate, for the evidence, aside from the declaration, shows quite conclusively that the plaintiff's moneys, to the extent of the lien claimed, and to which the estate had no title, went to make up the value of the property now in possession of the defendant.

Some objections were made by the appellant to remarks that fell from the plaintiff while giving her evidence, that tended to show personal communications and transactions between herself and Mrs. Lambert. The witness was admonished by the court not to relate such transactions, and no ruling was made by the court, or exception taken by the appellant, on the subject of such evidence on the trial. After the close of the trial the appellant asked to have these expressions struck out. This motion was denied by the court, and we think correctly disposed of.

The expressions referred to were inadvertently used by the witness, were ruled as incompetent by the court at the time they were made, and were not relied upon in deciding the case.

The conclusion arrived at on the main point of the case renders it unnecessary for us to consider the question as to the admissibility of the declarations of one executor against his associate, when offered as evidence to prove the facts stated in such declarations.

The judgment should be affirmed.

All concur.

Judgment affirmed.

CARTER v. MANUFACTURERS' NAT. BANK OF LEWISTON.

(71 Me. 448.)

Supreme Judicial Court of Maine. Nov., 1880.

An action by an administrator de bonis non against the Manufacturers' National Bank of Lewiston for the conversion of shares belonging to the decedent, transferred on the books of the bank to "John G. Cook, Executor." The executor borrowed from the bank on his note, giving the stock as security. The money was loaned by the bank on the statement of the executor that it was required in the settlement of the estate.

Wm. P. Frye, John B. Cotton, Wallace H. White, and Seth M. Carter, for plaintiff. Ludden & Drew, for defendants.

VIRGIN, J. The main question is whether the bank obtained a valid title to the shares of stock pledged to it by the executor as collateral security for the payment of his note.

The interest which an executor as such has in the personal estate of his testator is not the absolute title of an owner, else it might be levied on for his personal debts; but he holds in autre droit, as the minister and dispenser of the goods of the dead. Went. Off. Ex'r (14th Ed.) 196; Pinchon's Case, 9 Coke, 86b; Dalton v. Dalton, 51 Me. 171; Weeks v. Gibbs, 9 Mass. 76; Hutchins v. State Bank, 12 Metc. (Mass.) 423. As soon as he is clothed with a commission from the probate court, the executor is vested with the title to all the personal effects which the testator possessed at the instant of his decease; but the title is fiduciary and not beneficial (Petersen v. Chemical Bank, 32 N. Y. 21), and his office is not that of an agent, but of a trustee (Dalton v. Dalton, supra; Sumner v. Williams, 8 Mass. 198; Shirley v. Healds, 34 N. H. 407).

As a necessary incident to the execution of the will and the administration of the estate, the power to dispose of the personal estate is given to the executor. And no general proposition of law is better established than that an executor has an absolute control over all the personal effects of his testator. Petersen v. Chemical Bank, supra; 1 Williams, Ex'rs (6th Am. Ed.) 709; 2 Williams, Ex'rs, 998; 1 Perry, Trusts, § 225, and cases in notes. And this rule prevails where no statute intervenes. Rev. St. c. 64, § 49.

While it is the duty of an executor to use reasonable diligence in converting assets into money for the general purposes of the will, the law permits him to exercise a sound discretion as to the time, within a limited period, when he will sell. And high authority has declared that circumstances may exist in which it is certainly not wrong in him, although it may not be a positive duty, to make advances for the benefit of the estate and reimburse himself therefrom. Munroe v. Holmes, 13 Allen, 110. If he may advance his own money for the general purposes of the will, and may sell the personal effects for the like object, it is difficult to see why, in the absence of any prohibitory provision in the will, he may not mortgage or pledge the assets for the same purpose; and the great weight of authority so holds. 2 Williams, Ex'rs, 1001, and cases cited; McLeod v. Drummond, 17 Ves. 154; Andrew v. Wrigley, 4 Brown, Ch. 125. In Earl Vane v. Rigden, 5 Ch. App. 663, Lord Hatherly said: "Lord Thurlow expressed his opinion clearly to be that the executor is at liberty either to sell or pledge the assets of the testator. Scott v. Tyler, 2 Dickens, 712, 725. In fact, he has complete and absolute control over the property, and it is for the safety of mankind that it should be so; and nothing which he does can be disputed, except on the ground of fraud or collusion between him and the creditor." And Sir W. M. James, in the same case, said: "It seems to be settled on principle, as well as by authority, that an executor has full right to mortgage as well as sell; and it would be inconvenient and very disastrous if the executor were obliged immediately to convert into money by sale every part of the assets. It is a very common practice for an executor to obtain an advance from a banker for the immediate wants of the estate by depositing securities. It would be a strange thing if that could not be done." See, also, 3 Redf. Wills, c. 8, § 32, pl. 4 et seq.

In considering the question whether an executor had followed a specific power in a will, Chancellor Buchner made the general remark: "It is certain that an executor, as such, has no power to pledge the estate of his testator for a loan of money." Ford v. Russell, 1 Freem. Ch. (Miss.) 42. If the learned chancellor meant that an executor has no authority to pledge the assets of his testator for a contemporaneous advance of money for the use of the estate,—for a purpose connected with the administration of the assets,—he is not sustained by the great current of modern authority. 1 Perry, Trusts, 270, and cases there cited, and cases supra.

Although the general proposition mentioned is so well established, nevertheless, like most others, it is not without an exception; for while it is of the greatest importance that the disposal of a testator's effects should be made reasonably safe to the purchaser, still it is the bounden duty of the executor to faithfully appropriate the assets to the due execution of the will; and a misapplication thereof is a breach of duty for which he is liable. And all the authorities concur in holding that, if the purchaser, mortgagee, or pledgee know or have notice that the transfer to him is made for the purpose of misapplying the assets, his title cannot be upheld, and he thereby becomes involved, and is made liable to all persons beneficially interested in the will, except the executor. 2 Williams, Ex'rs, 1002,

and cases in note x; 1 Perry, Trusts, 270, and cases in note 1; 1 Story, Eq. Jur. §§ 400, 402, and cases; McLeod v. Drummond, 17 Ves. 153, where the cases are critically reviewed by Lord Elden; Collinson v. Lister, 7 De Gex, M. & G. 633; Yerger v. Jones, 16 How. 30, 37, 38; Hutchins v. State Bank, supra.

It also now seems to be well settled, in equity at least, that an executor can make no valid sale or pledge of his testator's effects for the payment or security of his own private debt (2 Sugd. Vend. 372, and cases in note o; 1 Perry, Trusts, 270, and cases in note 3; 2 Williams, Ex'rs, 1004, and cases in note d), on the ground res ipsa loquitur, giving the purchaser, mortgagee, or pledgee such notice of the misapplication as necessarily to involve him in the breach of duty.

Chancellor Kent concludes a critical examination of the cases which had then been decided as follows: "I have thus looked pretty fully into the decisions of a purchaser from an executor of the testator's assets, and they all agree in this: that the purchaser is safe if he is no party to any fraud in the executor, and has no knowledge or proof that the executor intended to misapply the proceeds, or was in fact by the very transaction applying them to the extinguishment of his own private debt. The great difficulty has been to determine how far the purchaser dealt at his peril, when he knew from the very face of the proceeding that the executor was applying the assets to his own private purposes, as the payment of his own debt. The later and better doctrine is that in such a case he does buy at his peril, but that, if he has no such proof or knowledge, he is not bound to inquire into the state of the trust, because he has no means to support the inquiry, and he may safely repose on the general presumption that the executor is in the due execution of his trust." Field v. Schieffelin, 7 Johns. Ch. 150, 160.

So Chief Judge Taney said: "An executor may sell or raise money on the property of the deceased, in the regular execution of his duty; and the party dealing with him is not bound to inquire into his object, nor liable for his misapplication of the money. * * * But it is equally clear that if a party dealing with an executor has at the time reasonable ground for believing that he intends to misapply the money, or is, in the very transaction, applying it to his own private use, the party so dealing is responsible to the persons injured." Lowry v. Commercial & Farmers' Bank, Taney, 310, 330, Fed. Cas. 8,581.

The law recognizes a distinction between an ordinary trustee and an executor. The former has possession for custody, and the latter for administration. The latter has a necessary incidental power of disposal which the former does not; and, as a consequence, when one purchases of the latter stocks or other securities bearing on their face the revelation of a trust, he may do so safely in the absence of notice or knowledge of any intended breach of trust on the part of the executor; but, if he purchases like trust property of an ordinary trustee, the law imposes upon him the duty of inquiring into the right of the trustee to change the securities. Duncan v. Jaudon, 15 Wall. 165, 175; Shaw v. Spencer, 100 Mass. 388; Pendleton v. Fay, 2 Paige, 205; Atkinson v. Atkinson, 8 Allen, 15; 1 Perry, Trusts, § 225, p. 271.

In the case at bar the certificate of stock was changed by the corporation, and issued to Cook, executor, thus revealing to the bank the trust. But this alone would not imperil the bank in the transaction, for the executor had the presumptive right to sell or pledge the stock. But the executor gave to the bank his note, for the security of which the pledge was made. The note could not be collected against the estate, for it was the personal note of the executor. Davis v. French, 20 Me. 21. He could not create a debt in that manner against the estate. And if the money was thereby procured for his own private use, and the bank knew it at the time, the transfer of the stock would be a devastavit, and could not be upheld. If the note had been given to the bank for a private debt due to the bank from the executor, created before or during his executorship, but independent thereof, it would come within the principle of the numerous cases before cited, where the transaction itself would speak, and conclude the bank. But, if given as a voucher for money obtained for a legitimate purpose connected with a bona fide administration of the will, then, though the executor alone was made liable for its payment, the transaction would be legitimate, and the estate would have no reason for complaint. The case finds "that the money was loaned in good faith by the bank, and upon the statement made by Cook that the same was wanted in the settlement of the estate." The presumption is that he was acting faithfully. There is no evidence to the contrary, and the presumption must stand. The doctrine of this case is recognized in Pettingill v. Pettingill, 60 Me. 412, 425.

Plaintiff nonsuit.

APPLETON, C. J., and WALTON, BARROWS, LIBBEY, and SYMONDS, JJ., concurred.

RICH et al. v. SOWLES.

(23 Atl. 723, 64 Vt. 408.)

Supreme Court of Vermont. Franklin. Feb. 15, 1892.

Exceptions from Franklin county court; TYLER, Judge.

Assumpsit by L. H. & J. P. Rich, administrators, against Albert Sowles, administrator, to recover the price of a pair of horses. Judgment for plaintiffs. Defendant excepts. Affirmed.

At the time of the sale the defendant was the administrator of one W. L. Sowles, and was carrying on a farm belonging to the estate of his intestate. The horses were bought for use on this farm. The sale was by letter. The plaintiff's intestate addressed the defendant as "A. Sowles, Adm'r," and the defendant signed, "A. Sowles, Adm'r." The writ and declaration ran against "Albert Sowles, administrator of W. L. Sowles' estate," and the court rendered judgment against the defendant "as administrator."

S. E. Royce, for plaintiff. *E. A. Sowles* and *H. A. Burt*, for defendant.

ROSS, C. J. The declaration sets forth a good cause of action, and was properly adjudged sufficient against the causes alleged in the demurrer. It commands the attachment of the goods, chattels, or estate of Albert Sowles, administrator of William L. Sowles' estate, and not of the estate of William L. Sowles, of which Albert Sowles is administrator. The words, "administrator of William L. Sowles' estate," are descriptive of the person named as the defendant in the suit. If, by chance, there were two persons of that name in that locality, these descriptive words would direct the officer serving the writ to the person intended. The common counts in general *assumpsit* constitute the declaration. Those declare that the defendant, viz., Albert Sowles, and that one who holds the office of administrator of the estate of William L. Sowles, is indebted, and made the promises, to the testator whose will the plaintiffs are executing. The plaintiffs do not declare, nor seek to recover, upon a promise or undertaking of William L. Sowles, the intestate, of whose estate Albert Sowles is administrator. Inasmuch as the defendant is the legal representative of the estate of William L. Sowles, if the declaration sought a recovery upon the promise or undertaking of the intestate it would be necessary to describe him as such representative. Then the recovery would be against the estate, or the defendant as the representative of the estate. The judgment, in such a case, would be against and to be satisfied out of the estate, and not out of the property of Albert Sowles. The words, "administrator of Wm. L. Sowles' estate," in such an action, would be descriptive of the capacity in which Albert Sowles was sued, and that he stood as the representative of the estate of William L. Sowles. Hence, when these words in the declaration follow the name of the party, whether they will be deemed descriptive of his person or descriptive of the character or capacity in which he is sued, is determined by the allegations of the declaration. If the declaration is against him personally, they will be held to be descriptive of his person. That is the only office they can serve in such a declaration. They may be rejected as surplusage. If the declaration is against the estate which he represents, and the promises declared upon are not his promises, but the promises of the person he represents, then they will be held to be words properly used, necessary to set forth the representative character in which he is sued. The allegations of the declaration and the facts found show a personal promise by the defendant, and these words are only descriptive of the person intended to be named as defendant. The writ might be amended by striking them out. Johnson v. Nash, 20 Vt. 40; Waterman v. Railroad, 30 Vt. 614; Myers v. Lyon, 51 Vt. 272; Jones v. Tuttle, 54 Vt. 488.

As contended by the defendant, an administrator has no authority, as such representative, to create any debts against the estate. He only has authority, by virtue of his office, to administer upon the estate; that is, to ascertain both its assets and debts, and to put the former in condition to pay the latter, if sufficient, and the surplus, if any, in a condition to be distributed to those legally entitled thereto. Whatever proper expenditures he may make in accomplishing this will be allowed him by the probate court out of the estate, on the settlement of his administration account. But if, in caring for and administering upon the estate, it becomes necessary to incur an indebtedness, he can bind himself, and not the estate, for its payment. He cannot incur a debt in the administration of the estate, and bind the estate for its payment. He can bind himself only for such payment. Upon his becoming insolvent, equity will not enforce the payment of such a debt out of the estate. Lovell v. Field, 5 Vt. 218; Bank v. Weeks, 53 Vt. 115.

Whether, when trust or other property not owned by the estate has become mingled with it, a suit may be maintained for its recovery out of the estate against the administrator in his representative capacity, as was held in De Valengin v. Duffy, 14 Pet. 289, is not involved in this suit, and need not be considered.

The execution for the enforcement of the judgment follows the writ. Rider v. Alexander, 1 D. Chip. 267; Perry v. Whipple, 38 Vt. 278; Wright v. Hazen, 24 Vt. 143. As the writ is against the defendant, not representatively but personally, so must the judgment and execution be. Rendering judgment against the defendant, "as administrator," did not make it a judgment to be enforced out of the property of the estate of which the defendant is administrator, but to be enforced against the defendant's own property. Adding "administrator" to his name when the defendant purchased the horses did not bind the estate for their payment, but bound the defendant. No more does such addition to

his name in the judgment affect the nature of the judgment, or change it from a judgment to be satisfied out of the defendant's property to one to be satisfied out of the property of the estate. Such addition in making the contract and rendering the judgment might indicate that the debt was contracted by the defendant in administering upon the estate, and that he claimed that it constituted an item in his administration account. It might be rejected as surplusage, or by way of amendment, without changing the legal nature of the contract or judgment. This disposes of all the contentions insisted upon in this court. Judgment affirmed.

LUSCOMB v. BALLARD.

(5 Gray, 403.)

Supreme Judicial Court of Massachusetts. Nov. Term, 1855.

Action of contract against the executor of Nathan Cook for services in taking care of the house and furniture of said Cook after his decease. There was evidence that one Osborn, named as executor in the will, but who declined to accept the trust, employed plaintiff to take care of the house; that a special administrator, afterwards appointed, did not discharge plaintiff, but permitted him to remain. The jury returned a verdict for the plaintiff, and defendant excepted.

S. H. Phillips, for plaintiff. J. W. Perry, for defendant.

THOMAS, J. The jury have found that the defendant neither caused, nor in any way assented to, the employment of the plaintiff for the services for which this suit is brought. He cannot therefore be charged de bonis propriis.

If not liable as of his own goods, has the estate in his hands been charged by the acts of Osborn, or the special administrator, so that there may be a judgment de bonis testatoris? We think not; but that the law is, that by a promise, the consideration of which arises after the death of the testator or intestate, the estate cannot be charged, but that the executor or administrator is personally liable on his contract. And whether the amount is to be repaid from the estate is a question for the court of probate, in the settlement of his account.

The old doctrine seems to have been, that, upon any promise made after the death of the testator or intestate, the executor or administrator was chargeable, if at all, as of his own goods, and not in his representative capacity. Trewinian v. Howell, Cro. Eliz. 91; Hawkes v. Saunders, 1 Cowp. 289; Jennings v. Newman, 4 Term R. 348; Brigden v. Parkes, 2 Bos. & P. 424.

The more recent authorities, however, have settled that an executor may, in some cases, be sued in his representative capacity on a promise made by him as executor; and a judgment had de bonis testatoris. But it will be found that, in these cases, that which constituted the consideration of the promise or the cause of action arose in the lifetime of the testator. Dowse v. Coxe, 3 Bing. 26; Powell v. Graham, 7 Taunt. 581; Ashby v. Ashby, 7 Barn. & C. 444. And an action for goods sold and delivered to one as executor, or for work done for one as executor, charges the defendant personally, and not in his representative character. Corner v. Shew, 3 Mees. & W. 350. See, also, Forster v. Fuller, 6 Mass. 58; Sumner v. Williams, 8 Mass. 162; Davis v. French, 20 Me. 21; Myer v. Cole, 12 Johns. 349.

In this commonwealth, an exception is made in the case of funeral expenses of the deceased. For these, the executor or administrator may be charged in his representative character, and judgment be rendered de bonis testatoris. But the case stands on its peculiar ground, and is to be limited to it. Hapgood v. Houghton, 10 Pick. 154.

The modern English doctrine on this point is, that if the executor or administrator gives orders for the funeral, or ratifies or adopts the acts of another party who has given orders, he makes himself liable personally, and not in his representative capacity. Brice v. Wilson, 8 Adol. & E. 349, note; Corner v. Shew, 3 Mees. & W. 350; 2 Williams, Ex'rs, 1522.

If the contract of Osborn, or of the special administrator, did not charge the estate, of course the defendant can in no form be liable.

In this view of the case, it is unnecessary to consider how far the contract of Osborn, who was named executor in the will, but declined the trust, could bind the estate. If the executor could not so charge the estate, a fortiori one who never accepted the trust could not.

Exceptions sustained.

NANZ v. OAKLEY.

(24 N. E. 306, 120 N. Y. 84.)

Court of Appeals of New York, Second Division. April 15, 1890.

Appeal from supreme court, general term, first department.

William H. Arnoux, for appellant. *David Thornton*, for respondent.

HAIGHT, J. One Eliza Mundy, as the present owner of the claim in suit, joins with the plaintiff in this appeal. The action was brought against the defendant, as surety upon an administrator's bond, to recover the amount adjudged by the surrogate to be due and owing by the administrator, and which he was ordered to pay to Cornelius W. Depew as administrator of Rachel Depew, deceased. It appears that one Mary Ann Schultz died in the city of New York intestate, and that Rachel Depew was her only heir at law and next of kin; that, on her petition, Bornt P. Winant and herself were appointed administrator and administratrix of the estate, and the defendant and one Peter Cortelyou executed the usual bond, which was joint and several, as sureties. It further appears that Winant alone administered the estate, and that, on a final accounting before the surrogate, it was adjudged and decreed that there was in his hands as such administrator the sum of $1,930, which, with the interest, costs, and disbursements of the proceedings to compel him to account, amounted in the aggregate to $4,017.57, which sum he was ordered to pay over to Cornelius W. Depew as administrator of Rachel Depew, she having died in the mean time. Winant, having converted the money to his own use, failed to make payment, and the decree was duly docketed, execution issued and returned unsatisfied; and thereupon this action was brought against the defendant, the sole surviving surety upon the administrator's bond, Depew, as such administrator, having assigned the claim to the plaintiff.

The trial court held that the plaintiff was not entitled to recover, for the reason that Rachel Depew was a co-administratrix with Winant, that she was one of the principals in the bond of which the defendant was surety, and that she could not maintain an action against her own surety for the wrongful acts of her co-principal. This would be so if, by executing the bond, she became liable as surety for the *devastavit* of Winant, her co-principal. This question has received attention in numerous reported cases in the different states, in some of which it has been held that one executing a bond is liable for the default of his co-principal. Brazer v. Clark, 5 Pick. 96; Towne v. Ammidown, 20 Pick. 535; Newton v. Newton, 53 N. H. 537; Ames v. Armstrong, 106 Mass. 15; Boyd v. Boyd, 1 Watts, 365; Bostick v. Elliott, 3 Head, 507; Babcock v. Hubbard, 2 Conn. 536; Caskie v. Harrison, 76 Va. 85; Jeffries v. Lawson, 39 Miss. 791; Braxton v. State, 25 Ind. 82; Moore v. State, 49 Ind. 558; Eckert v. Myers, (Ohio,) 15 N. E. Rep. 862. In several of these cases the question appears to have received but slight attention. Some have cited as authority the case of Brazer v. Clark, supra, of which we shall speak later on, whilst others have been overruled by later decisions. In the case of Boyd v. Boyd the administrators filed a joint inventory, and it was held that they were jointly and severally liable for the whole amount of the personal property described in the inventory upon the joint and several bond which they had given. In the case of Ames v. Armstrong, it was held that the bond was binding upon both of the executors as to all the assets included in their inventory which had come into their joint possession. In the case of Brazer v. Clark, two executors gave a joint and several bond with sureties. One died, and afterwards the survivor committed waste, which the sureties upon the bond had to pay. It was held that they had no right of action for indemnity or contribution against the heirs or representatives of the deceased executor; and to the same effect is the case of Towne v. Ammidown. It will be observed that these cases have chiefly been disposed of upon questions of liability outside of the bond; and in the last two cases the decision was, in fact, against the right to recover. The Indiana cases to which we have referred have been expressly overruled in the case of State v. Wyant, 67 Ind. 25, in which case it was held that where two persons, as administrators, executed a single bond with sureties, such bond must be construed as if each of the principal obligors therein had executed a separate bond with the same sureties, subject to the same conditions; and in such a case, after the resignation of one of the administrators, the other may maintain an action against him and his sureties upon the bond for breaches committed by him alone. In our own state but one case has been found in which the question appears to have been considered; and that was the case of Kirby v. Taylor, first reported in 6 Johns. Ch. 242–253, wherein Chancellor KENT remarks that "it was probably not the intention of the bond that Thompson should himself be considered as a surety for his co-guardian." The same case was again reported in Hopk. Ch. 309–331, in which Chancellor SANDFORD considers the question in an elaborate opinion, reaching the conclusion that a principal in a guardian's bond is not liable to the sureties for the default of his co-principal. This question was not considered in the case of Tighe v. Morrison, 116 N. Y. 263, 22 N. E. Rep. 164; and in the case of Sperb v. McCoun, 110 N. Y. 605, 18 N. E. Rep. 441, the question was as to whether one administrator could maintain an action upon the bond against the sureties to recover the amount of the *devastavit* of a co-administrator, and it was held that such action could be maintained even upon its assumption that the plaintiff individually was liable to the sureties upon the bond. But it was expressly stated by the court, in its opinion, that it did not deem it important to determine the relation which the plaintiff, individually, as one of the principals in the bond, bears to the sureties in reference to the default.

The question in reference to the liability

of executors and administrators for the default of each other, independent of any bond, is well settled by the authorities. Each of several executors or administrators has the power to reduce to possession the assets, and collect all the debts due the estate, and is responsible for all that he receives. The payment of money or delivery of assets to a co-executor or co-administrator will not discharge him from liability; for, having received the assets in his official capacity, he can discharge himself only by a due administration thereof in accordance with the requirements of the law. Consequently, one joint executor or administrator is not liable for the assets which come into the hands of the other, nor for the laches, waste, *devastavit*, or mismanagement of his co-executor or co-administrator, unless he consents to or joins in an act resulting in loss to the estate, in which event he will become liable. In other words, co-executors and co-administrators may act either separately or in conjunction. They are jointly responsible for joint acts, and each is separately answerable for his separate acts and defaults. Bruen v. Gillett, 115 N. Y. 10, 21 N. E. Rep. 676; Croft v. Williams, 88 N. Y. 384; Ormiston v. Olcott, 84 N. Y. 339; Adair v. Brimmer, 74 N. Y. 539; 2 Woerner, Adm'n, § 348; Brandt, Sur. § 490.

It is not claimed that any of the estate came into the hands of Rachel Depew as administratrix, or that she, as such, committed any act or default that would make her liable for the *devastavit* of Winant, unless she may be liable therefor upon the bond executed by her. The bond thus executed was in the form required by the statute, conditioned that they should faithfully execute the trust reposed in them as such administratrix and administrator, and that they shall obey all orders of the surrogate touching the administration of the estate committed to them. The statute provides that every person appointed administrator shall, before receiving letters, execute a bond to the people of the state, with two or more competent sureties, to be approved by the surrogate, and to be jointly and severally bound. 3 Rev. St. (6th Ed.) p. 82, § 56. So that, before receiving letters, she was required to execute the statutory bond; and, having been associated with Winant as co-administratrix, she joined with him in executing the bond, in which they each undertook to faithfully execute the trust reposed in them as administratrix and administrator. What was the trust reposed in her as administratrix? It was to administer upon the money and assets coming into her hands, and for which she became personally liable, and for such assets as came into their joint possession in which they became jointly liable to administer and account, and not to execute the trust as to money and assets which came into the exclusive control and management of her co-principal, over which she had no jurisdiction or control. They were to obey all orders of the surrogate touching the administration of the estate committed to them. What orders was she to obey? Those that were addressed to her, not those that were addressed to her co-administrator. The object of an administrator's bond is to enforce or insure the discharge of the duty reposed in the persons appointed. It was not intended, in requiring such a bond to be executed, to change the liability or duties of the persons appointed from that which existed under the provisions of the statute independent of the bond. The bond was not intended to vary their obligation or their rights and duties as are defined by law. Their duties were the same after the bond had been given as they would have been had no bond been required or executed. They were, consequently, jointly liable for joint acts, and severally liable for their own acts. Rachel Depew and Winant each signed the bond as principal. Neither signed it as surety. The defendant signed as surety, and as such she became liable for the joint acts of the principals, and for the individual defaults of each. It is true they joined in executing a single bond jointly with sureties. They doubtless had the right to execute and file separate bonds; but this was unnecessary, for their act in executing the one instrument should be construed as if they had executed separate bonds. Joint administrators may be willing to undertake the trust reposed in them when each knows that he is responsible only for his own acts and those in which he joins with his associate, when he would not be willing to become surety for the separate acts of his colleague. The claim that joint liability for the acts of each other under the bond will promote diligence on the part of the principals does not appear to us to be well founded. It may be true that sureties are at times without power, by timely intervention, to prevent waste by one of several administrators; but such want of power may be equally true in reference to the other joint administrators. As we have seen, one may collect a debt or take into his possession an asset; and, having reduced it to possession, he must be responsible for the proper administration of it. His associate cannot demand or recover it from him; and, should he see fit to abscond or commit waste without the knowledge of his associate, such associate would have no other, further, or greater power to prevent it than the surety.

Other questions were raised upon the argument in reference to the transfer of this claim to the plaintiff, but none which we deem it necessary here to discuss. As to the appeal of Eliza Mundy, we have not thought it necessary to consider at this time. It has done no harm. No motion was made to dismiss in this court. Such motions have been made in the court below, one of which is said to be still pending. For the reasons already stated the judgment should be reversed, and a new trial granted, with costs to abide the event. All concur, except FOLLETT, C. J., and VANN, J., dissenting.

Judgment reversed.

McKIM, Judge of Probate, v. AULBACH et al.

(130 Mass. 481.)

Supreme Judicial Court of Massachusetts. Suffolk. March 4, 1881.

J. J. Abbott and B. Dean, for plaintiff. A. Russ and D. A. Dorr, for defendant.

COLT, J. The defendant is sued upon a probate bond, given by him as one of two executors. A judgment having been ordered for the penalty of the bond, the question before us is how much of the penalty is due in equity and good conscience, for which an execution should be awarded. Several breaches of the bond are assigned. Upon two of these, namely, the failure to file an inventory, and the failure to render an account within a year, the defendant is liable for nominal damages.

The principal question arises on an alleged breach by the defendant, in negligently permitting his co-executor Wellbrock to appropriate the personal estate of the testator to his own use, whereby it was lost. The bonds given by the two executors were several and not joint, and neither is liable for losses caused exclusively by the default of the other. In order to charge the defendant, the burden is on the plaintiff to show that, in the administration of the estate, the defendant was negligent in the performance of some duty which the law devolves upon him personally. Austin v. Moore, 7 Metc. (Mass.) 116, 124.

A mortgage due to the testator, in the state of Ohio, which by his will the executors were authorized to collect and invest as they might judge to be for the interest of the estate, was collected upon a joint release and discharge, signed by both executors, which was forwarded to the mortgagor through an express company. The money when returned by the express company was received by the co-executor Wellbrock without the defendant's knowledge, and deposited by him in a savings bank in good standing, partly in his own name and partly in his name as trustee. He afterwards took the money from the bank without the knowledge of the defendant, and it was lost to the estate by his misappropriation of it. It is sought to charge the defendant for the loss of this money.

The report finds that Wellbrock had almost exclusive management of the estate; that he was a neighbor and friend of the testator, and had relations more intimate than the defendant with parties interested under the will; and that the defendant was not familiar with laws and forms of business, or with the English language, and was content to leave the business in the hands of his co-executor. It appears that the defendant accounted for all the estate which actually came into his individual possession. In their first account, which was filed, assented to by the parties in interest, and allowed, after the mortgage was collected, the executors charged themselves with the amount paid thereon; and in a few days after it was allowed, the defendant resigned his trust. Two other accounts were afterwards filed by Wellbrock, the remaining executor, which were assented to by the parties in interest, by which he charged himself with the amount collected on the Ohio mortgage.

It was the right of each executor to receive and hold the funds of the estate. Edmonds v. Crenshaw, 14 Pet. 166. Neither can be held responsible for the waste or misconduct of the other, unless there be some act or agreement, on the part of the one sought to be charged, by which the estate has gone into, or has been negligently suffered to remain in, the exclusive possession and control of the one by whose misconduct the loss occurs. Thus both were held liable in a case where money was delivered to one executor, and immediately handed over to the other, who appropriated it to his own use. Langford v. Gascoyne, 11 Ves. 333. But an executor is not held any farther than he is shown to have participated in the misappropriation. "Merely permitting his co-executor to possess the assets, without going farther and concurring in the application of them, does not render him answerable for the receipts of his co-executor. Each executor is liable only for his own acts, and what he receives and applies, unless he joins in the direction and misapplication of the assets." Peter v. Beverly, 10 Pet. 532, 562; Brazer v. Clark, 5 Pick. 96, 104; Sterrett's Appeal, 2 Pen. & W. 419.

It is contended that the defendant is liable in this case, because he must be treated as having concurred in the wrong, by joining in the release by which his co-executor was enabled to obtain possession of the money due on the mortgage and to mingle it with his own property. The rules which govern the liability of co-executors follow in most respects the rules which prevail as to co-trustees. But, while the latter are not liable for the money which they have not received, although they join in receipts given for the same, it was at one time held that the former were liable in such cases. The reason given for this distinction was that co-executors, unlike co-trustees, have each an independent power over the personal property of the testator, and may dispose of it, receive, pay and give receipts in their own names, and therefore, that, if one joins with his co-executor in giving a receipt, he does an unmeaning act, unless he intends to render himself jointly answerable for the money. But this rule, which does not seem to have been maintained with entire uniformity, is declared in Williams, Ex'rs, (6th Am. Ed.) 1938, to have been greatly relaxed in favor

of executors; and Lord Eldon, in Shipbrook v. Hinchinbrook, 16 Ves. 478, declares it to have been broken down.

In Joy v. Campbell, 1 Schoales & L. 328, 341, Lord Redesdale states the distinction thus: "If a receipt be given for the mere purposes of form, then the signing will not charge the person not receiving." "The true question in all those cases seems to have been, whether the money was under the control of both executors. If it was so considered by the person paying the money, then the joining in the receipt by the executor who did not actually receive it, amounted to a direction to pay his co-executor;" "he became responsible for the application of the money just as if he had received it." In Hovey v. Blakeman, 4 Ves. 596, 608, Lord Alvanley, the master of the rolls, referring to the earlier rule, declared that he would not consider the fact that an executor joins in the receipt as absolutely conclusive; and in Scurfield v. Howes, 3 Brown, Ch. 91, he stated his dissent from the rule, when an executor joins in signing a receipt, if it appears that he joined for conformity only. In McNair's Appeal, 4 Rawle, 148, 157, the supreme court of Pennsylvania declares that "there is no good reason for making executors or administrators liable more than trustees for moneys which they have never actually received, merely because they have joined in a receipt with the co-executor or co-administrator who did receive it. The receipt when proved must always be considered prima facie evidence against each of the signers that he received the money; and if he wishes to avoid the consequent liability, it will lie upon him to prove that it was not received by him." The weight of modern authority, both English and American, is that a joint receipt is only presumptive evidence that the money came into the possession or under the control of both. Monell v. Monell, 5 Johns. Ch. 283. And this presumption may be rebutted by proof that the money was in fact received by one, and that the other joined only as matter of form and for the sake of conformity. See also Manahan v. Gibbons, 19 Johns. 427; Ochiltree v. Wright, 1 Dev. & B. Eq. 336; Perry, Trusts, §§ 421–426.

It is further contended that, even if the defendant cannot be charged upon the ground of his having joined in the release of the mortgage, and having allowed the money due thereon to be collected and deposited by Wellbrock alone, yet that the finding of the master in favor of the plaintiff is supported by the facts stated in the report, that, in April 1873, within a month after Wellbrock received and deposited the money, and before the greater part of it had been drawn out again by him, "either the defendant was warned and put on his guard, as testified to by one of the parties in interest, or his suspicions were aroused;" and that "since that, whereas before that time receipts for rent had been given in the name of Wellbrock alone, he insisted that thereafter they should be signed by both of the executors."

But this statement of the master is too meagre and ambiguous to enable us to come to a satisfactory conclusion on this branch of the case; and, for the purpose of a fuller and clearer ascertaining and statement of the facts and circumstances relied on to charge the defendant by reason of negligence and breach of duty on his part since the original receipt and deposit of the money by Wellbrock, the case must be

Recommitted to the master.

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