AN ESSAY

ON THE

LEARNING OF PARTIAL, AND OF FUTURE INTERESTS

IN

CHATTELS PERSONAL.

BY WADE KEYES,

OF THE MONTGOMERY BAR.

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This Essay is dedicated

TO

George P. Keyes, Esq.

With that affection which a brother knows,

When it is heightened by admiration for talents and high moral cou

and warmed and strengthened

BY THE LESSER VIRTUES OF SOCIAL LIFE.

PREFACE.

The subject of this Essay is of great and increasing importance: it presents many difficult questions, and yet there is no work *devoted* to it. I have undertaken to supply the deficiency, and I am satisfied that the result, notwithstanding its imperfections, will be useful to the Profession. No apology, however, is necessary for writing and publishing a book, though the manner of its execution may require remark. It may be well, therefore, to say, that, in quoting largely from judicial opinions, and in drawing many cases, at times, from the reports, I believe that I have pursued the better plan; though it is true, when principles are well settled, clearly defined, and of easy application, such a course is burthensome and unnecessary.

It is not unusual for an author to throw himself upon the indulgence of his readers, but of what avail is it in a Profession, where the universal sentiment is, *palmam qui meruit ferat?* Even if it were of avail, no one within the outer pale of the "Sanctuary" would accept from Favor that which Justice alone can rightfully render.

And here I beg leave to tender my warmest thanks to those "Members of the Southern Bar," who had the kindness to encourage me in this publication.

WADE KEYES

MONTGOMERY, (Ala.,) August, 1853.

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OF CHATTELS PERSONAL.

CHAPTER THE FIRST.

§ 1. Of the Nature of Chattels Personal. § 2. Of the Different Kinds. § 3. Of the Reason Why they are so called. § 4. Of the Title to them. § 5. Of their Position in our Jurisprudence. § 6. Of the Sources of this Branch of the Law.

§ 1. The Common Law divides all property into two great classes: 1. Real Property: 2. Personal Property.

Land, and interests issuing out of, or annexed to land, constitute the subjects of real property. Interests, in the subjects of real property, which are of the measure of freehold, belong to the first class.

Personal property is subdivided into two great classes:— 1. Chattels Real: 2. Chattels Personal.

Chattels Real include all interests, in the subjects of real property, which are not of the measure of freehold.

All property, therefore, which does not belong to the class of real property, nor to that of chattels real, falls within the class of chattels personal.

Chattels personal consist, therefore, in part, of things, as Lord Coke says, *quæ se movent*, and things *quæ ab aliis moventur*. Thus, slaves, cattle, furniture, books, victuals, money and the like, are chattels personal. They consist, also, in part, of things which exist only in contemplation of law; as *choses* in action, patents, copy-rights, and the like.

When things of a personal character are annexed to land, they become a part of the realty, and pass with it by descent or alienation; for the maxim is, *quicquid plantatur solo, solo cedit.* This is the general rule, "yet are there numerous cases in which the contrary is true, and in which the fixture retains, after its annexation, the quality, in some respects, of a personal chattel; being in truth exceptions gradually established by the course of judicial decision, as incident to the ordinary rule which merges the fixture in the freehold, because reason and convenience seemed evidently to require that rule to be so qualified."[1]

But we need not go into the subject of fixtures; since it is sufficient for our purpose, that no chattel personal can be so fixed to the freehold, that it will not upon severance resume its original character: and this severance may be either actual or constructive. Actual severance needs no comment. Of constructive severance it may be said, that whenever there is a transfer of a fixture, and the fixture is to be severed, and not used as a fixture, the thing is severed in contemplation of law. Thus, mill-stones fixed for grinding, that are to be removed, and houses that are to be taken down or carried away, are examples of constructive severance.[2]

There is an apparent conflict of judicial decisions under the statute of frauds, in regard to things growing upon land. Thus, in Littlewood v. Smith, Treby, Ch. J., reported to the other Justices, that it was a question before him at a trial at *nisi prius* at *Guildhall*, whether the sale of timber growing upon the land ought to be in writing by the statute of frauds, or might be by parol? And he was of opinion, and gave the rule accordingly, that it might be by *parol*, because it is but a bare chattel. And to this opinion Powell, J. agreed.[3]

In Crosby v. Wadsworth the facts were, that the plaintiff

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[1] 2 Steph. Com. 261. [2] Bostwick v. Leach, 3 Day, 484. Foster v. Mabe, 4 Ala. 402. [3] Ld. Ray. 182.

agreed with the defendant by *parol* for the purchase of a standing crop of mowing grass; the grass was to be mowed and made into hay by the plaintiff, but no time was fixed when it should be done. Lord Ellenborough, Ch. J., held that the subject matter of the agreement could not be considered as falling within the terms, goods, wares or merchandize; but that the agreement was a contract or sale of an interest in, or, at least, an interest concerning land.[1] So in Waddington v. Bristow,[2] it was held that growing hops were not goods, wares, or merchandise; and in Emmerson v. Heelis[3] it was held that a sale of growing turnips was not distinguishable from the preceding one, and was a sale of an interest in land.

In the next case, however, which came before the King's Bench, the facts were, that A sold to B a crop of potatoes on the 21st of November, and B was to get them out of the ground immediately. Lord Ellenborough said: It does not follow that because the potatoes were not, at the time of the contract, in the shape of personal chattels, as not being severed from the land, so that larceny might be committed of them, therefore the contract for the purchase of them passed an interest in the land within the 4th section of the statute of frauds. * * * * It is probable that in the course of nature the vegetation was at an end: but be that as it may, they were to be taken by the defendant *immediately*, and it was quite accidental if they derived any further advantage from being in the land. * * * I am not disposed to extend the case of Crosby v. Wadsworth further, so as to bring such a contract as this within the statute of frauds as passing an interest in land.[4]

During the argument of Emmerson v. Heelis before cited, Mansfield, Ch. J. observed, that if a tenant in tail, or ecclesiastical person, sells timber standing and dies, the purchaser shall

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[1]6 East. 602. [2]2 Bos. & Pul. 452. [3]2 Taunt. 38. [4]Parker v. Staniland, 11 East. 362.

not cut it in the time of the issue in tail, or successor. In that case, replied the counsel, it ceases to be a mere chattel, because the vendor cannot give license to enter after his death to cut it. It is not a fruit fallen during his estate, but remains fixed to the inheritance. And he added, that even in the case put, as between the vendor and the vendee, the timber can only be considered as a mere chattel.

In this country, growing crops have been held not to be within the 4th section of the statute of frauds, though it seems rather inconsistent to say that a purchaser of a crop has no interest concerning land, and at the same time to assert that by virtue of such purchase he may, at any time during the growth and maturity of the crop, maintain trespass *quare clausum fregit.*[1]

The true distinction between things growing upon land, so far as a sale of them is affected by the 4th section of the statute of frauds, seems to be, that if they are to be severed immediately, they pass as mere chattels; if they are to remain for growth, nourishment, or for use, an interest concerning the land is involved in the contract. In Bostwick v. Leach, however, the Court disregarded such a distinction in laying down the rule to be: When there is a sale of property, which would pass by a deed of land, as such, without any other description, if it can be separated from the freehold, and by the contract is to be separated, such contract is not within the statute.[2] But how can it be said that there is no contract concerning an interest in land, when a party by contract has the right to the use of land for the growth and maturity of the crop, or of trees? But be this as it may, it is true, apart from the statute of frauds, that *growing* crops are chattels personal. Thus in the old case of Cox v. Godsalve, Thomas Godsalve devised a farm to his mother for life, remainder to John Godsalve, the defendant, in

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[1] See Newcomb, Agave & Randall v. Ramer, 2 Johns. Rep. 421, n (a); Stewart v. Doughty, 9 Johns. 113. [2] 3 Day, 484.

tail, with remainder over, &c.; and he bequeathed to his mother all his goods and chattels, stock of his farm, bonds, &c., during the full term of her natural life. Thomas Godsalve died before the corn which he had sowed upon the land was severed, and his mother also died soon after him, and whilst the corn was still unsevered. After the death of the mother, John Godsalve, the defendant, reaped the corn, and converted it to his own use. Cox, the plaintiff, took out letters of administration to the mother, and brought an action of trover against John Godsalve. The question was, whether the corn growing did pass to the defendant John Godsalve, by the devise of the land sown, to him? The case of Spencer, Winch. 51, was urged, where it was resolved that the devisee of the land sown should have the corn, and not the executor of the devisor. To which it was answered: That is true, if the intention of the testator doth not appear to be otherwise, as in this case is most manifest, for that he gives all his goods, chattels, plate, and household stuff, stock of his farms, debts, ready money, and all other his moveables, &c., to his mother. If the devisee of the land hath the corn growing at the time of the testator's death, it is only against the executor, but not against a legatee of his goods; and it is hard to give it to the devisee by implication against an express bequest. This case, says Holt, Ch. J., being afterwards referred to me for further consideration, I was of opinion that the corn did belong to the mother as devisee, and not to the devisee of the land.[1]

So, in other cases in which they have been held liable to levy and sale as the personal goods of the defendant.[2]

There is evidently a distinction, however, between crops and trees. Crops are to be severed, but trees are permanent things; and it depends therefore upon the question of severance, wheth-

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[1] 6 East, 604, n (d).

[2] Whipple v. Foot, 2 Johns. 448.

er the latter will be regarded as chattels personal. Thus, if trees be conveyed to A for life, or to A and his heirs, a freehold and not a chattel passes. But if they are to be cut down, then they fall within the general rule which governs fixtures.

Parts of the soil itself may become chattels personal by actual or constructive severance; as clay, gravel, stones, and the like. Thus, in Carpenter *et al* v. Lewis *et al*, where A made bricks out of the soil belonging to the Government, and afterwards the land was sold by the Government to B, and B converted the bricks which were still upon the land, it was held that A might maintain trover for them against B—at least, as B showed no connection between himself and the Government in respect to them.[1]

There is one point of view in which none of these things, which savor of the realty by reason of their connection with it, are regarded as chattels personal, and that is larceny. If, however, any of them be actually severed from the land, then they become chattels personal, and may afterwards be the subject of larceny.[2]

It is said that there is diversity of judicial opinion in regard to shares in companies acting exclusively on land, as rail-road, canal, and turn-pike companies—that in England, and in some of the States, they are held to be real estate, unless declared by statute to be personal property; whilst in other States, they are held to be chattels personal at the common law. Stephens Sergt. in his commentaries, under the head of "Shares in Public Undertakings connected with Land," says: The property in public undertakings of this description (such as mines, canals and rail-roads, to which the public are subscribers) is in the nature of realty, so far as regards the land itself, or the right of using it; and is, for some purposes, of the same nature, as regards the fixtures connected with the concern. But where the

[1] 6 Ala. 682. [2] 2 Russel on Crimes, 136-7.

property is vested, by charter or act of Parliament, in a body corporate, the shares of the individual corporators in the concern itself are personal, and not real estate; for such shares are merely the rights which each individual possesses, as a partner, to a share in the surplus profit derived from the employment of the capital, which is always a mixed fund, consisting, in part at least, of personal chattels, as well as land and fixtures.[1] Another English writer says: Shares in public companies have sometimes been held to be real, but more generally personal property. He lays down a principle which he says seems to be recognized by the courts, upon which the result will always turn as to the shares being real or personal estate. That principle is, that if the land be vested in the company as a corporation, and not in the individual share-holders, then the shares are chattels personal; but if the land be vested in the share-holders, and the management of the company merely in the corporation, then the shares are real property.[2]

In Equity, land purchased for partnership purposes is held to be mere personal property. The same principle applies to unincorporated joint-stock companies, which are but partnerships of a larger growth. And even in the case of a corporation, real property held for the purposes of a trading company will be deemed personal estate.[3]

So also in Equity is real property, when directed to be turned into money, held to be a personal chattel, so far as the testator's representatives are concerned. And so when a valid sale of land has been made, the vendor has in Equity but a chattel personal.[4]

There are some chattels personal which descend like real estate, as personal annuities to A and his heirs; but notwithstand-

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[1] 2 Steph. Com. 263.

[2] Wordsworth's J. S. Co. (288). [3] Ib. 293.

[4] 2 Story's Eq. Jur. § 790.

ing this quality of descent, which constitutes them hereditaments, they are still chattels personal.[1]

§ 2. Chattels personal are divided into two general classes: 1. Corporeal chattels personal, consisting of such as may be touched; as books, horses, and the like: 2. Incorporeal chattels personal, consisting of those which have no existence but in *gremio legis*; as patents, personal annuities, shares in railroads, future interests in chattels personal, &c.

There is another division of them, viz: 1. Those in possession, or enjoyment: 2. Those in action. Thus, if A be entitled to a corporeal chattel personal, and have it in possession, actual or constructive, it is a *chose* in possession; and if he be entitled to an incorporeal chattel personal, and be in the enjoyment of it, it is a *chose* in enjoyment; but if either the corporeal or the incorporeal chattel personal be held adversely to him, it is a *chose* in action. But a *chose* in action is a still more comprehensive phrase, for it includes not only a right to maintain an action for a specific thing, but also a right to maintain an action for a debt, and a right to maintain an action for damages *ex contractu* or *ex delicto*. And it matters not in this respect whether the specific thing be a chattel personal, a chattel real, or a freehold.

It may be true that all *choses* in action are incorporeal chattels personal, but it seems not to be true, that all incorporeal chattels personal are *choses* in action; unless the distinction be, that all *choses* not in the actual or constructive *possession* of the owner, whether adversely held or not, or whether capable or incapable of possession, are *choses* in action. It is true, that a debt not due is a *chose* in action, though no present right of action exists; but, an action may be necessary for its recovery, and therefore it is said to be in action. No action can be ne-

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[1] But see Code (Ala.)

cessary for an incorporeal *chose* in enjoyment, any more than it can be for a corporeal *chose* in possession. A share in an incorporated company, for example, is not, as was said by counsel in Humble v. Mitchell,[1] a mere "right to participate in the partnership profits," but it is a *chose* as distinguishable from the profits which it yields, as a horse is distinguishable from the hire that he yields. It was said, however, by Lord Denman Ch. J., in that case, that "shares in a joint-stock company like this, are mere *choses* in action, incapable of delivery, and not within the scope of the seventeenth section" of the statute of frauds. But it is apparent that the distinction between incorporeal chattels in enjoyment, and *choses* in action, was not involved in that case.

The truth is, that the Common Law had no such *choses* in contemplation as incorporeal chattels, when the distinction was made between *choses* in possession, and *choses* in action. They are the creations of a later day, and seem to partake of the nature of both their predecessors.

There is another division of chattels personal which it is necessary that we should state, viz: those which are consummable by use, as corn; and those which are not consumable by use, as plate.

§ 3. These chattels are called personal, says Lord Coke, because, for the most part, they belong to the person of a man, or else for that they are to be recovered by personal actions.

Mr. Williams submits that the latter is the better reason, because, when chattels began to be called personal, they had become too numerous and important to accompany the persons of their owners; and because the nomenclature of the law is most likely to have been derived from the different natures of actions. But notwithstanding Mr. Williams's opinion, the most

[1] 11 Ad. & El. 205.

satisfactory supposition seems to be that they were called *personal*, because they *might* be carried by their owners from one part of the world to another, and were thus distinguished from chattels real, which had the immobility of real estate. And this supposition has the sanction of Blackstone.

§ 4. Chattels personal are the subjects of absolute and of qualified title. The only chattels, however, which are the subjects of qualified title alone, are creatures that are *feræ naturæ*.

The municipal title to chattels personal, like the municipal title to every other species of property, is derived from the municipal law. The natural title is generally derived from occupancy; but whence this right of occupancy? Without, however, venturing into a discussion of the matter, it may be suggested, that the source of man's natural title to an inferior *genus*, is equally the source of his natural title to an inferior species of his own *genus*.

§ 5. Under the feudal system, real property was the great source of political power, and the foundation of feudal grandeur. Chattels were rarely an object of notice, either in the treatises or reports of the times prior to the reign of Henry VI. They continued in a state of insignificance, until the decline of feudal tenures, and the increase of industry, wealth and refinement had rendered them an object of growing solicitude. Real property, however, lost none of its value as an element of individual and national wealth, but, on the contrary, it greatly advanced in value; still chattels personal have obtained a paramount place in our jurisprudence, by reason of their varied and interminable number, and by reason of the natural necessities which civilization developed, and of the artificial necessities which it created.

§ 6. The ancient law books contain but little in regard to this species of property, and nothing in regard to partial and

future limitations of it. The rules by which limitations of it are governed are derived from the doctrines of real property, sometimes from the civil law, and sometimes doubtless from reason and convenienience.[1] The doctrines of real property are sometimes wholly inapplicable, sometimes partially inapplicable, and that is a source of difficulty and error.

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[1] 2 Steph. Com. 67.

CHAPTER THE SECOND.

OF THE CREATION AND CONSTRUCTION OF PARTIAL AND OF FUTURE INTERESTS IN CHATTELS PERSONAL; AND OF THE POLICY OF ALLOWING SUCH INTERESTS.

§ 7. The title to chattels personal was held by the ancient common law to be indivisible into successive interests, by reason of the liability of such property to be lost and destroyed. The transfer of the title of a chattel to A for his life—or even for a moment—passed, therefore, to him the title forever.

§ 8. Courts of Equity, it is said, first departed from the doctrine of the ancient common law, by taking a distinction between the use of a personal thing, and the personal thing itself; and holding, where the use of a chattel personal was given to A for life, and after his death to B, that the gift over was good. Lord Ch. J. Brooke is said to have approved so much of this distinction, as to call it *valde bone diversitie*.

§ 9. Subsequently the Courts of Equity held that there was nothing in the distinction, and they allowed, therefore, a gift over of a chattel personal after a gift of it for a limited period to be as good as when the use of it only was given to the first taker. Still they did not hold that a gift of a chattel personal to A for life gave to A the title to the chattel, but they held that the use of it alone passed to A. Thus, in Hyde v. Parrat, *et al*, where A bequeathed household goods to his wife for life, and after her death to his son, the Lord Keeper Somers, upon argument, took time to consider it; and afterwards, on the strength and authority of the late precedents, which had followed the civil and canon laws, in construing the *use* of the thing, and not the thing itself, to pass, when the bequest is for a limit-

ed time, in order the better to comply with the intention of the testator, allowed the bequest over to be good.[1] So in Tissen v. Tissen, the Lord Chancellor said: Anciently the notions were that a personal thing given to one for life, or even for a day, was a gift forever, and would not bear a limitation over; but this construction has since been that such devise passes only the use and profits and not the thing itself; and so it is made good in that way.[2]

§ 10. The first cases in which these partial and subsequent interests were allowed in Equity, were cases arising under wills. The limitations were made without the intervention of trustees. There seems to be no reason why such interests by way of trust might not always have been made in Equity, since Courts of Equity have ever compelled trustees to execute the confidence reposed in them. Such limitations by way of trust, at any rate, are now good, whether the trusts be declared by will, by deed, or by parol.[3]

§ 11. They cannot be created in equity by *parol* without the intervention of a trust, and it seems doubtful even to this day whether a Court of Equity in England would acknowledge their validity when created directly by deed. It is well settled that such limitations of chattels real, by deed, are good without the intervention of a trust. Principle, as now established, would certainly require the Courts of Equity to acknowledge the validity of such limitations of chattels personal; and the only reasons that could be given for a refusal so to lay the rule, are that such was the ancient doctrine: precedent does not bind us to depart from it in this particular, and we are disinclined to a further departure. There is, however, a *dictum*[4] cited by Blackstone in support of the validity of such limitations by deed; and there is the case of Drakeford v. Wilks *et als*, in

[1] 1 P. Wms. 1. [2] 1 P. Wms. 502. [3] Lewin on Trusts & Trus. (28) (142). [4] 2 Freem. 206.

which Lord Hardwicke held that a gift by deed to take effect after the death of the donor, was good,[1] and that case seems to cover the ground.

§ 12. The English Courts of Law have followed the Courts of Equity in departing from the ancient doctrine of the common law; and they allow legal interests in chattels personal to be created by will. But they do not seem to have gone any farther. It is true that some text writers[2] assert that such limitations by deed are good in England, but no case is cited which sustains the position; and other text writers[3] assert that such limitations by deed are invalid.

§ 13. In this country, all the courts agree that such limitations of chattels personal by will are good both at law and in equity. They all agree that such limitations by way of trust are good in equity, whether the trust, if otherwise valid, be declared by will, by deed, or by parol.[4] They all agree that future interests in chattels personal cannot be created by parol declaration without a trust with the exception perhaps of one court.[5] They all agree in regard to the validity of such limitations, when made by deed without the intervention of a trust, except in North Carolina, where they have now long been allowed by statute; and except in one case, at an early day (1810) in South Carolina, which was never followed, and which has long been over-ruled.

One court seems to have gone a little farther, and to have so laid down the rule as to admit such limitations to be created not only by will or deed, but also by "other writing."[6]

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[1] 3 Atk. (540); see also Ramsden v. Jackson, 1 Atk. (292).

[2] 2 Black. Com. (398); 2 Steph. Com. 76.

[3] 1 Coleridge's Blackstone, 398); Fearne's Rem. 3 n (e); 2 Fearne's Rem. § 168-168 b; Wms. on Per. Prop. (188); Lewin on Trusts, 142.

[4] Williams et als v. Conrad et als, 11 Humph, 412, &c.

[5] See Jaggers v. Estes, 2 Strobh. Equity, 343.

[6] Payne v. Lassiter, 10 Yerg. 310; see also 1 Hump. 66.

§ 14. Notwithstanding the language of the authorities, it seems difficult to deny that a present and future interest in a chattel personal can, in effect, be created by parol declaration, since it cannot be denied, that such a chattel may be irrevocably bailed for years or for life; nor that the bailor may at the time of bailment, or afterwards during the continuance of the bailment, make a valid transfer of the chattel subject to the bailment. Such cases, however, belong to the doctrines of bailments and of the alienation of chattels personal, and depend upon them for their validity.

§ 15. It is said that these limitations of chattels personal are good as to every species, and that there is no difference in this respect between money and other chattels.[1] This, as was intended, is but a statement of the general doctrine, and as a general rule is sustained by the authorities. Thus, in regard to money, which in itself seems as unsusceptible of limitation over as "a bird of passage," it was held in Smith v. Oliver,[2] as early as 1688, that it might be limited over by will, after a bequest of it for life, and the same point was admitted in Pleydell v. Pleydell.[3] So choses *in action ex contractu* may be limited in succession at law, or in equity, according to the assignability of the title. Possibilities, even, are subject to such limitations in equity. But there are exceptions to the general rule.

§ 16. One exception is in regard to heir looms. So inherent are the heir looms in the freehold, that Blackstone says, they cannot be devised away from the heir by will; and that such a devise is void even when by a tenant of the fee simple; though the owner might during his life have sold or disposed of them, as he might the timber of the estate; for the custom intercepts

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[1] 2 Kent's Com. (352.) [2] 2 Vern. 59. [3] 1 P. W. 948; see also Westcott v. Cady, 5 John. Ch. Rep. 347.

the title in the heir loom, for the benefit of the heir, before it can vest in the devisee.[1]

§ 17. Another exception is in regard to deeds and other evidences of the land, together with the chests in which they are contained; deer in a real authorized park in England, fishes in a pond, doves in a dove-house, &c., which, though in themselves personal chattels, yet are so annexed to and so necessary to the well-being of the inheritance, that they shall accompany the land wherever it vests, by either descent or purchase.[2] But where deeds are deposited by the owner as a security for money lent, they are chattels personal in the hands of the lender.[3] And in order to bring the chests in which the title deeds are contained, within the exception, "they must have their very creation to be the houses or habitations of deeds."[4]

§ 18. Another exception exists in regard to *choses* in action *ex delicto*, as a mere right of action for a *tort*, or a bare right to file a bill in equity for a fraud committed upon the party. Indeed, says Judge Story, it has been laid down as a general rule, that where an equitable interest is assigned, in order to give the assignee a *locus standi in judicio* in a Court of Equity, the party assigning such right must have some substantial possession, and some capability of personal enjoyment, and not a mere naked right to overset a legal instrument, or to maintain a suit.[5]

§ 19. Other exceptions are said to exist in regard to the full pay and half pay of officers in the army or navy, and also in regard to the profits of a public office.[6] But this ground of exception does not extend to pensions granted merely as a compensation for past services. The correct distinction made in

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[1] 1 Lomax Ex. & Admrs. 255. [2] Ib. 255. [3] 2 Steph. Com. 264. [4] Wms. on Per. Prop. (13). [5] 2 Eq. Com. § 1040. g. [6] Id. § 1040 d.

the cases on this subject, said Mr. Baron Parke, is, that a man may always assign a pension given to him entirely as a compensation for past services, whether granted to him for life, or merely during the pleasure of others. But when the pension is granted not exclusively for past services, but as a consideration for some continuing duty or service, although the account of it may be influenced by the length of the service, which the party has already performed, it is against the policy of the law that it should be assignable.[1]

§ 20. There is still another important exception which is said to exist, and that is in regard to things *quæ ipso usu consumuntur;* as corn, hay, fruits, liquors, and the like. It is said that if such things be given *specifically* for life, (or other limited period) it is, in most cases, of necessity, a gift of the absolute property; for the reason that the use and the property cannot exist separately.[2]

One of the earliest cases in which the point is mentioned, though it was not necessary then to decide it, is that of Porter v. Tournay. The counsel for the plaintiff *arguendo* asserted that: It is inconsistent to give an interest for life in articles of which the use is the consumption; and Lord Alvanley, then Master of the Rolls, said: There has been great doubt among Judges, what a person having a limited use of such articles must do. Some learned Judges have thought they must be sold, and that a person so entitled is to have only the interest of the money—that, added he, is a very rigid construction.[3]

In Randall v. Russell, the Master of the Rolls, Sir William Grant, after stating the opinion of Lord Alvanley, in the preceding case, said: My conception is, that a gift for life, if specific, of things *quæ ipso usu consumuntur*, is a gift of the property; and that there cannot be a limitation over after a life

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[1] Wells v. Foster, 8 Mees. & Wells, 149. [2] 2 Kent's Com. (353.)
[3] 3 Ves. 110.

interest in such articles. If included in a residuary bequest for life, then they are to be sold, and the interest enjoyed by the tenant for life. Originally we know that, by our law, there could be no limitation over of a chattel, but that a gift for life carried the absolute interest. Then a distinction was taken between the use and the property. The use might be given to one for life, and the property afterward to another. A gift for life of a chattel is now construed to be a gift of the usufruct only. But, when the use and the property can have no separate existence, it should seem that the old rule must still prevail, and that a limitation over, after a life interest, must be held to be ineffectual.[1]

The question was presented to the Court of Appeals of Maryland in the case of Evans *et al.* v. Iglehart *et al.* and the Court said: It is conceded in all the authorities which touch upon the subject, that where any article of personalty of such a nature that its use is its consumption is specifically given to a legatee for life, with remainder over, the legatee for life takes the absolute property in the thing bequeathed.[2]

In Covenhoven v. Shuler, the Chancellor said, it seemed to be still an unsettled question in England, whether the gift for life, of specific articles which must be necessarily consumed in using, was a gift of the absolute property, or whether they must be sold and the income only of the money applied to the use of the tenant for life.[3]

In Madden v. Madden's Ex'rs, Judge Green, after stating the opinion of the Master of Rolls, in Randall v. Russell, says: But I must be permitted to say that my opinion, made up on great consideration and given judicially in an important case, with this opinion of the Master of the Rolls before me, was, and is, that even in the case of a specific bequest of such articles for life, with a limitation over, the limitation is good; that the inten-

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[1] 3 Mer. Ch. Rep 190. [2] 6 Gill & Johnson. 147. [3] 2 Paige, 132.

tion of the testator being in such case most obvious, that the legatee in remainder shall have the benefit of the subject after the death of the first taker, it ought to be carried into effect, if possible. And it may be effectuated by requiring the representative of the first taker to deliver articles of the same kind and quality, or to pay their value to the remainderman. This is clearly the civil law, from which the principle of the common law now prevailing was taken, and is entirely just and no way inconsistent in its execution.[1] But the opinion in that case is a *dictum*.

In Harrison *et al.* v. Foster *et al.*, the Supreme Court of Alabama say: When we find decisions declaring there can be no remainder created of a chattel which is ordinarily consumable in its use, we are constrained to consider them as applying chiefly, if not entirely, to the particular cases then examined. If the intention is clearly expressed to create such a remainder, there seems to be no legal impediment to doing so. The case of Hayle v. Burrodale, 1 Eq. Ca. Ab. 361, is illustrative of the legality of such a bequest, and shows also what inferences arise when the bequest is general, instead of special.[2] They hold, therefore, that it is a question of intention, and deny that a gift over in such case is *per se* void when an intention to create such limitation over is clearly expressed. They admit, however, that the first taker is entitled to use the articles according to the custom of the country, or the provisions of the gift, and that the representatives of such taker are not liable for any that have been so used.

In Patterson v. Devlin *et al.*, Ex'rs, Johnson, J., in delivering the opinion of the Court, said: The old rule was, that there could be no limitation over, of a personal chattel, after a life estate; but this was founded on trite and illiberal notions, which readily gave way to more enlarged and liberal views of the subject; and it is now no longer a question, that a personal chattel

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[1] 2 Leigh. 389. [2] 9 Ala. Rep. 957.

may be limited over after a bequest for life; and I may add, without regard to description, quantity, or quality. I know that an exception to the general rule prevails in regard to things *quæ ipso usu consumuntur*, but that is founded on the manner of the bequest, and not on the incapacity of the testator to limit over, even these articles. Let us suppose, that A bequeaths to his friend B specifically, *inter alia*, one dozen of London Particular Madeira, with a limitation over after his death, to C. Now here, the limitation over is absolutely inconsistent with the gift, for it is impossible that there can be any remainder, after the only use which B, the tenant for life, could have made of it. But if he had added in the bequest, "I know B and C cannot enjoy the use, and that B shall sell it, and receive and enjoy the interest, arising from the value of his life, leaving the principal for the use of C after his death," I cannot conceive why such a limitation should not prevail in regard to this article as well as to any other of a perishable nature. It is, in this way, as capable of enjoyment as any other chattel personal. It is, in effect, money itself, which is neither consumed nor worn out, in the use, but, on the contrary, more novel than the Phœnix, it not only renovates itself, but produces issue. It is not then the incapacity of the testator to make any disposition of his chattels, of whatever they consist, that creates the difficulty, but in judging from the expressions contained in his will what he intended; so that all these questions are resolved into questions of intention.[1]

In Smith v. Barham, Ruffin, Ch. J., says: When there is such a specific gift of what we commonly call and what the Master here calls "perishable articles," or of what are embraced under the description in the books, of "articles *quæ ipso usu consumuntur*," it is difficult to say what is meant. I rather think testators seldom do mean to give such things for life only,

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[1] 1 McMullan's Eq. 462.

and those words are annexed by mistake to that gift, by inadvertently inserting it in the clause giving other things of a different kind, and which are meant to be for life only. But if the testator really intends such a gift to be for life, we can hardly imagine what rights of enjoyment he meant for the objects of his bounty respectively. For, to give wine, corn, sheep, or cattle for life, is to give the whole, if the legatee is to have any use of it, since the property, nay, the consumption is inseparable from the use: unless the testator has this further meaning, that the tenant for life may consume and sell, as he would himself, if he were living, and that whatever is left, both of the original stock and the increase, shall be taken as the estate of the testator, and go to the remainderman. I rather suppose that this is the meaning, for such dispositions are generally found in the provisions for wives, to whom children are to succeed, and the testator supposes that the mother would wish them to take all, whether it be his or her estate. This notion may have grown up from the rule of our law respecting the increase of slaves given for life, all the articles being given together in the same clause. But to the admission of such a construction there is the insuperable objection that it is against the positive and ancient rule of the common law, that the inerease is the use and profit, and therefore belongs to the tenant for life in whose time it accrued; to which slaves constitute the only admitted exception. We would not feel authorized, upon bare conjecture as to the testator's intention, to carry it farther. Then, what are the respective interests of the tenant for life and the remainderman in consumable chattels specifically bequeathed? From the decisions, it is far from clear. We do not know of any in our own courts upon the point. In England, it is apparently unsettled.[1] The question, however, was not directly before the court in that case.

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[1] 2 Dev. Eq. 426.

The point was presented to the Vice-Chancellor of Egland, in the late case of Andrew v. Andrew, and he said: Upon the propriety of the rule, that the gift of the use and enjoyment of consumable articles for life is the gift of the absolute interest, I do not know that I have ever thought, because I have considered it as settled in this court for many years. That such is the rule, appears to me clear, and I must act upon it.[1]

The point seems to have been so decided in the State v. Warrington[2]; and the general exception was asserted in Merrill v. Emery.[3] In the later case, however, of Dorr v. Wainwright, it is said: If the property be such as must be necessarily consumed in the enjoyment, as wine or provisions, the gift over may be void, unless a portion of the property should happen to remain, and be in a condition to be distinguished and identified, at the death of the first taker.[4] This latter is but a *dictum*, and yet it seems to commend itself to a sense of plain justice.

§ 21. The reason of the exception precludes the idea that there is any distinction between a gift of the use of such articles, and a gift of the articles themselves; for that reason, as already stated, is, that the use and the property cannot exist separately.

§ 22. But, admitting the exception, let us inquire into its extent. In Dunbar's Ex'rs v. Woodcock, Scott, J., in delivering the opinion of the Court, says, That the rule which gives to a legatee for life the absolute property in articles consumable in the use, is applicable only to such as the testator intended for consumption, not to such as in the ordinary course of business are for sale.[5] So, in Patterson v. Devlin *et al.*, ex'rs, Colcock, J., says: I can well imagine a case in which articles, which are

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[1] 1 Collier, 691. [2] 4 Harrington, 55. [3] 10 Pick. 512. [4] Ib. 330. See, in regard to the general exception, Gentry v. Jones, 6 J. J. Mar. 154, and case reported, 10 Yerger, 30.

[5] 10 Leigh, 653.

consumable in the use, may be required to be sold for the benefit of the remainderman; as if, for instance, a huckster, who deals in such articles, should leave his whole stock to one for life, with remainder to another, in such a case it would not be expected that he intended the articles to be used by the tenant for life, for they would perish before he could consume them all, and thus be of no value or use to either of the parties in interest.'

It might seem from some of the books, that there is a distinction in regard to this exception, between a specific gift of articles consumable by use, and a general gift of such articles—that in the first case, a gift of them for a limited period is an absolute gift; whilst in the second case, a limitation over after a partial gift of them is valid. It will appear, however, from an examination of the cases, that there is no distinction in principle, but merely in intention; and that, therefore, where the same intention is held to exist, the same principle is applied, whether the gift be general or specific. The distinction is, that when an intention appears that consumable articles shall be enjoyed specifically by the first taker, the gift is absolute; and that intention is held to appear from a gift of them specifically, unless it be controlled; but that when an intention appears that consumable articles shall not be enjoyed specifically by the first taker, then the gift of them for a limited period, is not an absolute gift; and this intention is held to appear from a general gift, though the presumption may be controlled by small indications to the contrary.

In Covenhoven v. Shuler, the Chancellor said: When there is a general bequest of a residue for life with remainder over, although it includes articles of both descriptions, (consumable and unconsumable,) as well as other property, the whole must be sold and converted into money, and the proceeds must be invested in permanent securities, and the interest or income only

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[1] 1 McMullan's Eq. 470.

is to be paid to the legatee for life. The case of De Witt v. Schoonmaker[1] 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 specific articles.[2]

In Patterson v. Devlin *et al.* Exrs, Johnson J., after asserting that a gift specifically of consumable articles, for life, is an absolute gift, proceeds: This case then, it will be perceived, turns upon the question, whether a different rule is to be applied to cases, when the bequest is by a general residuary clause of articles of this description. Let us, then, examine how far a course of reasoning, deduced from the nature and reason of things, will aid us in this enquiry; and let us suppose, by way of illustration, that the testator, having an only child, for whom alone, it was apparent, he was anxious to provide, and that, by one general, sweeping clause, he gave to him his whole estate, which turned out to consist of lands, slaves, live-stock, implements of husbandry, and of household furniture, provisions, &c.; but in the event of his death without issue living, all should go over to another. Now, if I were left without any other clue to his intention, and permitted to judge from my own knowledge of the motives to human actions, I should conclude that the testator intended that his child, the devisee or legatee, should enjoy this legacy as a whole, and that he intended that only so much as was left, after he had enjoyed it, should go over to the remainder-man, without any accountability on the part of the child, further than that he should use the whole in a husband-like manner. In such a case, the use of the destructible articles would be necessary to the enjoyment of the whole, and by their unity they are identified with those that are indestructible. But let us take the case under consideration to illustrate the

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[1] 2 Johns. Rep. 243.

[2] 2 Paige, 132; see also Cairns v. Chaubert, 9 Paige, 163.

opposite view. Here, the testator had provided most amply for his son, Robert Smyth, Jr., by a specific bequest of land and negroes, things capable of use and enjoyment of themselves, and so he had done for all others for whom it was his duty and inclination to provide; but knowing that there were many little odds and ends, which it would be difficult, if not impracticable, to enumerate, he sums them all up in the expression of "the remainder of my personal estate," and directs its distribution; and in the event of the death of his son, without leaving issue, he directs that it shall go over to the hands of the plaintiff. The question, then, arises, What did he intend with regard to this limitation over, which consisted of a commixture of things in some degree indestructible, of those that would be deteriorated, and others consumable in the use? Why, I should say that there was nothing inconsistent with the limitation over, and the bequest for life; for, without the addition of something else, they might be useless even to the tenant for life. What benefit would he derive from a stock of provisions which must necessarily perish before he could use them himself? It cannot, then, be concluded, that the testator intended they should be used only in this way. By converting such articles into money, the tenant for life might have all the enjoyment of which the thing was capable, preserving the principal for the remainder-man, and thus fully effectuating the intention of the testator. The distinction between a specific bequest of a chattel, consumable in the use, and a bequest in a general residuary clause, consists, according to this course of reasoning, in the inconsistency of a limitation over, in the first case, and the consistency and practicability in the last. Thus much for my own reasoning. Let us now examine whether this conclusion is supported by the rules drawn from decided cases. He then cites Howe v. Earl of Dartmouth, 7 Ves. 137; Fearns v. Young, 9 Ves. 551; Porter v. Tournay, 3 Ves. 310; Randall v. Russell, 3 Mer. 190; and Walcott v. Cady, 5 Johns. C. R. 334; and adds:

In all my researches on this subject, I have not been able to find the principle of these decisions in any manner called in question, or controverted, in any book, case, or record; as authority, they are, to a certain degree, binding; and, as founded in reason and justice, they are imperative.[1]

In Smith v. Barham, the Court say: It seems clear that when a residue is given, as such, it is to be sold by the executor. The several things are not given, the testator supposing them not worth giving as *corpora*, not knowing how much, or which of them it may be absolutely necessary to sell for the payment of debts and pecuniary legacies. The gift is then of the nett balance of the proceeds after the debts are paid, which implies a sale. And if this were not the case, when there is an immediate gift of the residue after the debts are paid, it must be when there is a limited use given in the surplus to one for life, and then to another; for then there is nothing to shew that as to the consumable articles the testator meant to give the particular legatee that use which consists in consumption; and as they are complicated in the same clause with the others of a different nature, the whole must go together; and as a part must be sold, the whole must, and the first taker have the profit only. For upon the intention it is taken that the benefit is to be divided between the legatees in the whole subject, which cannot otherwise be, for if the tenant for life does not use the perishable articles, he gets no benefit; and if he does use them, the legatee over gets none.[2]

In Robertson *et al.* v. Collier & Wife *et al.*, the Court say: In the case before us, the devise was not strictly of a residue, but of an *estate*. There was no bequest of corn, ploughs, carts, horses or mules, but of an estate comprehending all these particulars, as well as land and slaves; and it seems to me to come within the reason of the rule which has been applied to the be-

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[1] 1 McMullan Eq. 463. [2] 2 Dev. Eq. 428.

quest of a residue.[1] And accordingly it was adjudged that the limitation over was good as to every species of the chattels.

In Harrison *et al.* v. Foster *et al.*, Goldthwaite J., in delivering the opinion of the Court, says: A bequest of perishable chattels to one for life, with remainder to another, without some direction as to the mode of enjoyment shows the intention of the testator that each taker shall have the same mode of enjoyment, and this can only be by a sale of the chattel, or by charging the first taker with the value. This, in effect, is the general rule, stated in Porter v. Tournay, 3 Ves. 311, and Randall v. Russell, 3 Mer. 190, though the qualification of the rule by the intention of the testator is not stated, nor was it necessary to be stated, as in neither case was the point presented for decision.

The decision in Robertson v. Collier (1 Hill Eq. 370) certainly seems irreconcileable with the principle as stated by Lord Eldon; for, in our judgment, the testator there seems to have disregarded the manner in which the estate for life should be enjoyed; but the decision turns upon the supposed distinction between a *specific* bequest and the bequest of *a general estate* or *a general residuum*. The distinction seems not on the *obiter dicta* of Lord Alvanley and Sir William Grant, in the cases of Porter v. Tournay and Randall v. Russell previously cited; but it is denied in Madden v. Madden's ex'rs, (2 Leigh, 277) and in Evans v. Iglehart, 6 G. & J. 171. For ourselves, we are entirely satisfied the true principle is stated by Lord Eldon in Howe v. Dartmouth, and that when the intention is otherwise clear, it makes no difference whether the bequest is specific, or general, or of a residuum.[2]

It seems that, in the opinion just stated, there is a misconception of the distinction between what is called a *specific* and a *general* bequest. The truth of this proposition appears from the opinion of Lord Eldon,[3] a part of which is relied on by the Court;

[1] 1 Hill Ch. Rep. 374. [2] 9 Ala. 958.

[3] In Howe v. The Earl of Dartmouth, 7 Ves. (147.)

but still more clearly from the case of Pickering v. Pickering, which will be presently quoted. And there seems to be another misconception in the case, for the decision in Robertson *et al.* v. Collier and Wife *et al.* does not, as stated, turn upon the supposed distinction between a *specific* bequest and the bequest of *general* estate, or a *general residuum*, as understood by our Court: but it turns upon the supposed intention of the testator. It is true that the distinction is denied by Judge Green in Madden v. Madden's Exrs., but that which is contended for in regard to general bequests is admitted by the learned Judge, and specific bequests are placed by him on the same footing.

In Patterson v. Devlin *et al.* Exrs., Colcock J. said: But it is said that there is a distinction between a specific gift of articles, the use of which consists in the consumption, and a gift of them in the residuary clause; that in the first case it is admitted they are not to be accounted for by the tenant for life. But in the latter they are not intended for his benefit alone, and therefore are to be sold and the interest to be enjoyed during his life, and the principal to go over at his death. In the first place, I deny that any such decision was ever made, though I admit such *dicta* are to be found. And in the second place, if such a decision could be found, I should not be disposed to subscribe to its authority, though I should like to see the reasoning on which it would be attempted to support it. Where there is no doubt of the intention of the testator to give the thing, it is admitted on all hands that it depends on the nature of it, whether the tenant for life is to be answerable over to the remainderman for it. Now, if it depends on the nature of the article, how can the manner or mode of giving it affect the question? A testator gives to one of his sons, among other things, fifty bushels of corn; it is admitted he means him to use it. He gives to two others the rest and residue of his property, among which, there are one hundred bushels of corn, so that each takes fifty bushels; the estate is limited over; can any reason be

given why it should be determined that the first should eat his corn, that would not apply to the other two? The nature of the article is not changed by the mode of giving, and I cannot see anything in the mode of giving to create a difference in the intention of the testator as to the sons. Each is to get fifty bushels of corn; why not the latter to use that which is left to him, as well as the former?[1]

In Evans *et al.* v. Iglehart *et al.* Judge Dorsey, in delivering the opinion of the Court, says in relation to this point:— In Prest. Leg. 95, 96, it is stated "that a specific bequest of things which are consumed by their use vests in their legatees absolutely, though given for life; if they pass as a residue, then they must be sold, and the produce vested, and the interest paid to the tenant for life." In 2 Wms. Ex'rs, 858, the same position is asserted, but both these writers by referring as their authority to Randall v. Russell, 3 Meriv. 190, do nothing more than repeat a loose *dictum* of Sir William Grant, in a case in which he made no decision, and where no question arose on a disposition of a residue; the controversy relating to a specific legacy. And the distinction between specific bequests and the bequests of a residue, receives no sanction from the doubt expressed by Lord Alvanley in Porter v. Tournay, 3 Ves. 310, adverted to by Sir Wm. Grant; and in Ross. Leg. 209, it is said that "the point, however, still suspends in doubt, as at the time when Lord Alvanley determined the case of Porter v. Tournay. But admit the distinction to have been solemnly adjudicated in England, although in point of fact no such adjudication can be found, upon what is it founded? Why, as the aforementioned chancery rule converts the entire residue into money, there is no objection to limiting over such consumable articles; they are not to be specifically enjoyed or consumed by the legatee for life. The only reason assigned why a specific bequest

[1] McMullan's Eq. 471.

of that which is consumed by the use, vests the absolute property in the legatee for life, is the absurdity of limiting over that to another, which is wholly consumed by the first legatee, and of which, therefore, there is nothing left that could be limited over. But as in Maryland the articles composing a general residue are to be specifically enjoyed, the same principle that would vest the absolute property of a specific bequest of consumable articles in the legatee for life, would vest a like estate in a similar legatee in things consumable, part of a general residue. Nay, the reason is stronger in the latter case than in the former, for if the Court cannot in the case of such specific bequest, in order to avoid the total rejection of the words of limitation over, infer an intention of the testator, that the thing bequeathed should be sold and invested; *a fortiori*, they cannot infer such intention, when, as regards a bequest of a residue, no part of the limitation over is rejected as wholly inoperative, but its operation embraces all those parts of the residue not consumed in the use.[1]

In Pickering v. Pickering the Master of the Rolls said: No doubt the general rule is this: that if the residue of an estate be given to one for life, with remainder to another, then it being clearly the intention of the testator that the person in remainder should have something, the Court, in order to arrange the rights of the two parties, adopts the rule so often referred to and not disputed; but if the Court finds in the will sufficient to show an intention of the testator, that the legatee for life should enjoy the property in the state in which it stood at the time of the testator's death, then that intention must be carried into effect. And he added: There is an obscurity which frequently arises in these cases from the use that is made of the term "specific legacy:" when the word "specific" is used on such an occasion as this, I do not think it is used in the ordinary sense in which

[1] 6 Gill & Johns 197.

"specific" is applied to a legacy—it is used to this extent only, that the property is to be specifically enjoyed. That is the meaning of the term, and is the view taken by Sir John Leach, and which has since been acted on by the Lord Chancellor.[1]

And upon this point Judge Nott, in delivering his opinion in the case of Patterson v. Devlin *et al.* Ex'rs, says: The distinction appears to me to be a reasonable one. If a person should give a demijohn of wine, or a hundred bushels of corn, it would be presumed to be for immediate use and consumption, and a limitation over would be inconsistent with the nature of the gift. But when it consists of the residue of an estate, no such inference would be drawn from it, though that residue might consist partly of consumable articles. And he adds: I do not consider it as depending upon the employment of the word residue. If a person should give a hundred bushels of corn to one, and a hundred to another, and the residue to a third, the latter would be equally specific with the former. A residuary bequest is that which consists of the residue of an estate, and not of a particular article.[2]

In re Kendall, a testator bequeathed to his mother "all and everything I die possessed of, namely, money at my bankers', Messrs. C. & Co., as contained in my letter of credit of 2000*l.*, now here, and bills of Messrs. C. & Co.; my carriage, now here; my plate, books, clothes, harness and sundries, as existing here, and in custody of Messrs. McCracken of Old Jewry, London, for her sole use and benefit. And lest there should be any dispute, I declare again, that I leave everything I die possessed of to my dearest mother, for her entire and sole use and benefit, as stated above. The testator was in Italy at the date of his will, and there died. He was possessed of considerable sums of stock in the public funds at his death. It was held that the gift to the mother was a general residuary bequest.[3]

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[1] 2 Beavan, (57.) [2] 1 McMullan's Eq. 468.
[3] 9 Eng. L. & Eq. Rep. 196.

But without looking further into the cases, we may submit these propositions as containing the better doctrine in regard to the extent of the exception that consumable articles cannot be subjected to partial and subsequent interests:

First. That chattels personal which are consumable by use may be limited over after a partial limitation of them; provided they are not to be specifically enjoyed. Second. That when they are to be specifically enjoyed by the first taker, they may still be limited over; provided an intention appears to charge him with the value.

And this seems to be sufficient of this matter here; for the cases in regard to the intention of the donor as to the mode of enjoyment, together with the rights of the respective limitees, will come up for examination in another place.

§ 23. Chattels personal are subject to the same modifications of title that real property is, with two exceptions.

§ 24. The first exception is that an estate tail cannot be created in them; and the reason is that the statute *de donis* does not include them, but extends only to "tenements."

§ 25. The second exception is that generally an interest similar to a fee conditional cannot be created in them; and the reason is, that anciently a gift of chattels personal to a person was an absolute gift; the words "heirs," or "heirs of his body," or "executors and administrators," had no effect whatever upon the quantity of interest; nor was the quantity of interest affected by the use of restrictive expressions, as "for life," or "for years." And when the courts departed from the ancient doctrine and allowed partial interests to be created, they could not allow that "heirs of the body" was a restriction upon a gift which was and still is an absolute one, in all cases, unless it be restricted; because as chattels personal generally do not descend, heirs of the body could not take, and therefore the words

were simply nugatory. No limitation over, indeed, after a gift even of land to a person and the heirs of his body can be made at the common law,[1] for it is held that the whole estate, in such case, passes under the gift, subject only to a possibility of reverter. But be the reason what it may, it is settled beyond dispute, that whenever a gift of chattels is so made that it would create an estate tail under the statute *de donis*, if the subject were real property, such gift passes the absolute title to the chattels.[2]

§ 26. The difference between real and personal property in this respect is, that when a tenant in tail dies without having destroyed the entail, the realty descends to his heirs *per formam doni*, but when personal property so limited vests in a *quasi* tenant in tail he takes the absolute property, and upon his death intestate it passes to his personal representatives. The similarity is, that by creating life estates, both kinds of property may be rendered unalienable for the same length of time. And hence, though chattels personal cannot be entailed, yet they may be so limited as to answer the purpose of an entail for a limited period.

§ 27. There is, at least, an apparent exception to the rule that an interest similar to a fee conditional in land cannot be created in chattels personal. The exception exists in favor of personal annuities. In Turner v. Turner, Lord Loughborough said: An annuity, then, when granted with words of inheritance, is descendible; but as to its security is personal only: it may be granted in fee; of course it may as a qualified or conditional fee. But it cannot be entailed, Co. Lit. 20, and conse-

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[1] See Mazyck v. Vanderhost, 1 Bailey's Eq. R. 55, for a learned note by the Reporter, who discusses the subject, and asserts the ancient law to have been otherwise.

[2] 2 Fearne's Rem. (463); Co. Lit. Hgr. note (7); 1 Bailey's Eq. R. 48, *et ubique*.

quently there can be no remainder of it; for there can be no remainder of property which is not within the statute *de donis*. * * * * It is argued that as there could not be a remainder, there could not be a limitation by way of executory devise. I cannot see the reason of this, provided the executory devise was within the common rules of executory devises. * * * Another character of this kind of property is, that an annuity must not tend to a perpetuity, for a fee simple conditional must end or become absolute in the life of a particular person.[1]

The last proposition is not true; for in Nevil's case, the rules which govern fees conditional are stated, and it is there said that if the donee had issue within the gift, he might alien, and if he died without aliening, his heir inheriting might alien, and so on; but if at any time there was no heir *per formam doni*, the land reverted, unless it had been aliened after issue within the gift had been born. And it is added in the report: These rules yet hold place in case of a grant of an annuity to one and the heirs males of his body, and all other inheritances not within the Statute *De donis conditionalibus*.[2]

§ 28. The statute of uses has no application whatever to chattels personal, and of course no limitation can be made of them by virtue of a power which exists by virtue of that statute; but subject to that exception, limitations of chattels personal may be made by virtue of powers, and they are subject to the same general rules that govern limitations of real property made in that way.

§ 29. Limitations of chattels personal may be either absolutely, or upon condition (*a*).

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[1] 1 Bro, Ch. Rep. (325.) [2] 7 Rep. 35.

(*a*) In Shaw *et al.* v. Shaw *et als.*, A promised to give his son a certain slave, upon condition that he would give the slave to a certain grandson, in addition to his distributive share, and the son promised: afterwards by will A gave the slave to the son, and the son gave the negro to the grandson, and died intestate. It is held that the grandson must account as for an advancement by his father.—6 Hump. 418.

§ 30. The general doctrine of devises upon condition is, that if the condition upon which the devise depends be precedent, and be illegal, contrary to public policy, contrary to good morals, uncertain in itself, or impossible, the limitation is void; but if, on the contrary, the condition be subsequent, and be illegal, contrary to public policy, contrary to good morals, uncertain in itself; or if it be repugnant, or be impossible in its creation, or subsequently become impossible by the act of God, of law, or the party who is entitled to the benefit of it, then the limitation remains as if no such condition had been imposed.

§ 31. But there are exceptions to this general doctrine in its application to bequests of chattels personal.

§ 32. Thus, when a condition precedent to the vesting of a legacy is impossible, as that the legatee shall drink up all the water in the sea, the condition is void, and the bequest will take effect, as if no condition had been imposed. This is the doctrine of the civil law, and has been adopted by the Courts of Equity[1].

§ 33. "If, indeed, the impossibility of the condition were unknown to the testator, as where a legacy is given on condition the legatee marries the testator's daughter, who happens then to be dead; or where the impossibility arises from a subsequent act of God, as if she be living at the date of the will, but dies before the marriage can be solemnized; the impracticability of the performance will be a bar to the claim of the legatee; in cases, at least such as those mentioned, where the performance of the condition appears to be the motive of the bequest."[2]

§ 34. So, also, when testators, through ignorance, have required acts to be done that have been performed, or events to

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[1] 2 Williams' Ex'rs, (786.)

[2] 2 Williams' Ex'rs, (786.) See, also, 1 Roper on Leg. (756.)

happen which have taken place, the act or event is classed as an impossible condition, and the legacy is taken without qualification. Thus, if a legacy be given to B if he remit a debt, and he has already remitted it; or if a certain ship shall return, and the ship has already returned, the legacy is without condition.[1]

§ 35. And so generally when the condition precedent becomes impossible, either from the act of God, or the party making the bequest, the bequest is taken as if no condition had been annexed to it.[2]

§ 36. Thus, also, when the condition precedent does not concern anything *malum in se*, but is merely *malum prohibitum*, or contrary to public policy, or *contra bonos mores*, the bequest is single and good; for the condition not being lawful, it is held in the phrase of the civil law *pro non adjecta*. An example of this is furnished by the case of Brown v. Peck.[3] In that case, Mr. Sparks bequeathed to his niece *Rebecca* 15*l.* for mourning, and if she lived with her husband, 2*l.* a month, and no more; *but if she lived from him* and with her mother, then she was to receive 5*l.* a month. Lord *Northington* was of opinion that *Rebecca* was entitled to the monthly payment of 5*l.*, observing that the condition being both impossible at the time of its imposition, and *contra bonos mores*, the bequest was simple and pure.[4]

§ 37. In regard to marriage as a condition precedent, the doctrine is, that conditions which require or prohibit marriages with particular persons, or limit marriages to particular families, or which prescribe a particular place for the performance of the ceremony, or a particular lawful ceremony, or which prescribe that the marriage shall not take place whilst the legatee is under twenty-one years of age, or other reasonable period, or that it shall not take place without the consent of trustees, guardians,

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[1] 1 Rep. on Leg. (756.) [2] Ib. [3] 1 Eden, 140. [4] 1 Roper, (756.)

and the like, are valid and must be complied with in order to vest the legacy. And when such a condition precedent be prescribed, it matters not whether there be or be not a limitation over in case of the non-performance of the condition, for the rule is the same in both cases.[1]

§ 38. These exceptions concern conditions precedent; but there are exceptions also to the doctrine of conditions subsequent when applied to bequests of chattels personal. Thus, when there are conditions subsequent in partial restraint of marriage, and there is no limitation over, the violation of the conditions does not defeat the interests to which they are annexed. But if there be a direction that the legacy, in the event of a breach or non-performance of such a condition, shall go over to another legatee, the condition is obligatory; for the court is bound to protect the interest of the party in whose favor the ulterior limitation is made.[2] A mere gift, however, of the residue to a particular person will not be considered such a limitation over, unless the testator also directs the legacy to fall into the residue in case of the breach of the condition.[3]

§ 39. And so where legacies are given to persons upon conditions not to dispute the validity or the dispositions of wills, the conditions are not in general obligatory, but only *in terrorem*. If, therefore, there exist *probabilis causa litigandi*, the non-observance of the conditions will not be forfeitures.[4] The reason, adds Mr. Roper, seems to be this: a Court of Equity does not consider that the testator meant such a clause to determine his bounty, if the legatee resorted to such a tribunal to ascertain

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[1] 1 Rop. on Leg. 507, *et seq.*

[2] As to the reason of the rule, see Lloyd v. Branton, 3 Mer. 117.

[3] 2 Williams on Ex'rs, (792.) See further, 1 Jar. on Wills, (839,) *et seq.*; Lloyd v. Branton, 3 Mer. 117; Colliers' Ex'r v. Slaughter's Adm'r, 20 Ala. 263; Hoopes v. Dundas, 10 Barr, 75.

[4] Powell v. Morgan, 2 Vern. 90; Lewes v. Lewes, 6 Sim. 304.

doubtful rights under the will, or how far other rights might be affected by it; but merely to guard against vexatious litigation.

§ 40. But when the acquiescence of the legatee appears to be a material ingredient in the gift, which is made to *determine* upon his controverting the will, or any of its provisions, and in either of those events the legacy is given over to another person, the restriction no longer continues a condition *in terrorum*, but assumes the character of a *conditional limitation*. The bequest is only *quosque*, the legatee shall refrain from disturbing the will. And if he controvert it, his interest will cease, and pass to the other legatee.[1]

§ 41. If, however, the limitation over upon disputing or claiming against the will have none other effect than what the law would produce, if the express disposition had been omitted, the condition will be *in terrorem* only. So that if a legacy, to which such a condition is annexed, instead of being given to a stranger, be limited over to his *executors*, who would be entitled to receive it as part of his assets, without any such particular direction, the testator will be considered as meaning no more by the declaration, than if he had said nothing upon the subject; and then the bequest falls within the rule of construction before mentioned, in regard to conditions *in terrorem*.[2] This is true also in regard to conditions in regard to marriage previously mentioned, and accords with the maxim: *expressio eorum quæ tacite insunt nihil operatur*. But if, as stated in another place, the testator *direct* the legacy to fall into the *residue*, upon a breach of the condition, and *dispose* of that fund, the *residuary* legatee will be a *particular* legatee of the individual legacy, and as such will be entitled to it, if the condition be broken.

§ 42. It is said: But there is a class of cases where legacies

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[1] 1 Rop. on Leg. 530-31. [2] Ib. 531.

given upon condition that the legatee shall release the executors and all claim on the testator's estate, or that he shall not disturb the trusts of the will, in which under circumstances, the condition has been enforced[1]; it will be found, however, that the doctrine established in such cases is, that the conditions are merely *in terrorem*, unless there is a limitation over, or unless the legatee is put to his election to claim under the will or against it—or unless, as Mr. Jarman says,[2] in regard to conditions precedent to marry with consent, the legatee takes a legacy or provision in the alternative of his disputing the will or refusing to make the release.

§ 43. The opinion of the Vice Chancellor *In re* Dickson, may be cited here in explanation of this matter. In that case a testator bequeathed 10,000*l.* in trust for his daughter for life, but in a codicil, after mentioning the bequest, he declared: "but now finding that she contemplates remaining in a Roman Catholic Convent, and becoming a nun, I consequently hereby declare that in the event of her carrying out her intention of taking the veil, becoming a nun, continuing to reside in a convent, or in any other way associating herself permanently with any Roman Catholic establishment of that nature, she shall forfeit all claim to or benefit from the said sum of 10,000*l.*, and I hereby in that case revoke the said bequest," &c. The Vice Chancellor Rolfe, after holding that the intention of the testator was a lawful one, said: The intention, it is admitted, is a lawful intention, and expressed so as to leave no doubt as to what it is. Why is the Court not to carry it into effect? The ground relied on by the petitioner is a supposed rule of law, that wherever there is a legacy given absolutely in the first instance, but followed by a declaration that it shall be forfeited, or that it is revoked, if the legatee does not comply with some condition subsequent mention-

[1] See Note (2), Powell v. Morgan, 2 Vern. 90.
[2] 1 Jar. on Wills, (839.)

ed in the will, there, unless on the non-compliance with such condition the legacy is given over, the clause of forfeiture or revocation is inoperative, being treated as a mere idle threat to induce the legatee to comply with the condition, and not really to affect the bequest. I do not, however, think that any such rule of law exists. The argument in favor of the existence of such a rule was derived from a supposed analogy between the case put, and a case of a bequest which the testator has declared to be forfeited on the marriage of the legatee. In such cases there are, no doubt, very numerous authorities for the proposition that the legatee takes an absolute legacy, and the condition subsequent attempting to defeat it upon the legatee contracting marriage is void. The condition is said to have been introduced into his will by the testator merely *in terrorem*, and not to have been intended by him really to affect the interest of the legatee. It is impossible to refer to the numerous cases on this subject, without feeling that the Judges, in deciding them, have never felt very sure of the ground on which they were treading. It is, however, certain that the decisions have proceeded on maxims of the civil, and not the common law. Now, by the civil law, any condition in restraint of marriage was considered as a *conditio rei non licitæ*, and therefore, in whatever form imposed, it was held to be null and void. The subject is discussed in the 35th book of the "Pandects," c 33, to which it is sufficient to refer. Inasmuch, therefore, as legacies may be sued for in the ecclesiastical courts, where the rules of the civil law would prevail, this court has felt itself bound to conform to that law in order that there might not be a conflict of decision in the two courts. In cases, therefore, where a legacy has been given coupled with a condition that the legatee shall not marry, there this court has felt bound that the testator could not really have meant what he has said; or if he did mean it, then that he meant to prohibit what he had no right to prohibit, and so that his expressions must be considered as merely indicating his

wishes, and so far as they import a forfeiture of the bequest, used merely *in terrorem*. The rule itself, and the reasoning upon it, and the grounds which have been relied on as taking cases out of its operation, have been often stated to be very unsatisfactory. But the rule is established, and it would be very unsafe to call it in question in cases to which it applies. But I do not think that this is such a case. The rule depends for its principles not merely on the form in which the intention is expressed—not merely on its being a condition subsequent, but also on the nature of the condition which is to determine the legacy. If the condition, being a condition subsequent, be in the class of those which impose a restraint considered by the civil law as unlawful, there if the condition be a simple prohibition, or a prohibition with a declaration of the forfeiture of the legacy without more, the rule of civil law prevails, *remittitur conditio*, and the legacy stands as if no such condition had been found in the testament. If, on the other hand, there be something beyond a condition and clause of forfeiture—if the forfeited legacy is on breach of the condition given over; or, which is the same thing, is directed to become part of the residue, and that residue is given over—then this court disregards the doctrine of the civil law and acts on its own ordinary rules. The legatee over becomes entitled and the original legatee forfeits his legacy. It is not necessary to inquire whether this doctrine can, under any circumstances, be applicable to the case of a condition precedent. The same rule that prevails in the case of legacies which are revoked on the marriage of the legatee, prevails also in the case of a legacy made void in case the legatee should dispute the will of the testator—and on the same ground, viz: that the condition has been considered (whether justly or not it is unnecessary to inquire) as contrary to the policy, or according to the language of the *Touchstone*, p. 132, "against the liberty of law." Such a condition, therefore, like a condition in restraint of marriage, has been considered as a

conditio rei non licitæ, and so it has been treated as a mere clause *in terrorem*, unless where there has been a gift over, on the condition being broken.

Now, in the present case, there is certainly no gift over. There is merely a revocation of the legacy on the happening of the event which has occurred, namely, the legatee associating herself with a Roman Catholic establishment. If, therefore, this was, like a condition in restraint of marriage, or a condition not to dispute the will, to be treated as a *conditio rei non licitæ*, the doctrine to which I have referred would apply. The testator would have been treated as merely expressing strongly his wish on a subject on which he had no right to impose restraint, and that expression of wish would have been inoperative. But the condition here imposed is a perfectly lawful condition. There is neither principle nor authority for saying that a parent may not make a provision for his daughter cease on her taking the veil, or becoming permanently connected with a convent. The condition is a *conditio rei licitæ*, and so the rules derived from conditions in restraint of marriage or otherwise against the liberty of the law are inapplicable.[1]

§ 44. In Clark v. Parker, Lord Eldon criticised the calling of these conditions, conditions *in terrorem*—for he spoke of them as conditions "which are supposed to alarm persons when we know they contain no terror whatever."[2] But the phrase seems to be very expressive and quite correct.

§ 45. These doctrines, then, in regard to bequests of chattels personal, were derived by the courts from the civil law, and are in derogation of the principles of the common law. They seem, therefore, to govern bequests alone, whilst limitations of chattels personal upon condition, when made by deed, whether directly

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[1] 1 Eng. L. & Eq. Rep. 149; see also Lewes v. Lewes, 6 Sim. 304.
[2] 19 Ves. 13.

or by way of trust, seem to be still subject to the principles of the common law.

§ 46. It is a rule governing limitations of real property, at the common law, though not by way of use or by devise, that if a particular estate be limited upon condition with a limitation over after the expiration of the particular estate, the limitation over destroys the condition; but this rule does not apply to chattels personal.

§ 47. Before quitting this subject, two points may be mentioned, which were decided in Kirkham, Ex'or, *et al.* v. Mason *et als.* It was held in that case, that where the payment of a legacy is made to depend on the estate being worth a specified amount after the debts are paid, the point of time at which the value of the estate is to be ascertained is not that of the testator's death, or of the probate of his will, but that at which the assets are applied in due course of administration to their proper objects, in conformity with the directions of the will. It was also held there, that if the payment of a legacy is made to depend on the condition that the estate in the hands of the executor is worth a specified amount after the debts are paid, the distributive share of the widow, so far as it exceeds her legacy, is not to be estimated in ascertaining the value of the estate.[1]

§ 48. The questions now arise, Who may make these limitations of chattels personal? and to whom may they be made? The general answer is, that any person may make them, and that they may be made to any person, natural or artificial.

§ 49. There are exceptions, however, to the general rule. Thus, the gift of an infant is, at least, voidable; and that of an idiot or lunatic is absolutely void. But a lunatic, during a lucid interval may make a valid conveyance, for then he is of "dispo-

[1] 17 Ala. 134.

sing memory." And an infant, by the common law, may make a testament of chattels, if a male and of the age of fourteen, or if a female and of the age of twelve years. But this matter is regulated by statute. As to powers, Sugden says, "that an infant cannot exercise a power over *real estate*, unless it be a power *simply* collateral, but as to personalty, clearly he may exercise a power over that, at the age at which by law he may dispose of personalty to which he is absolutely entitled."[1] And so, if not prevented by statute, we must look to the common law to ascertain when an infant may make limitations of personalty under powers. A statutory change of the time when an infant may dispose of chattels to which he is absolutely entitled would not *per se* affect his common law capacity to execute a power.

§ 50. Married women are incapable of making any disposition of chattels personal, unless it be under a power; or unless they be such as are held to their separate use.

§ 51. Slaves, as a general rule, can neither make nor receive limitations of personalty, since they are incapable of taking or holding property. But a valid trust may be created in their favor, which is to take effect *after* manumission. Thus, a man may by will direct his executor to send his slaves to a state or country where slavery does not exist, and then to pay to each one a certain sum of money, or to invest a certain sum for their benefit. So he may make a conveyance in trust for them after emancipation, and then emancipate them according to the law of the State, and the trust will be good. But in neither case would it be good if to take effect whilst they are still slaves, for then they have no capacity to take.[2]

§ 52. In Lillard v. Rucker,[3] it was held that a deed of slaves

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[1] Sug. on Pow. 161. [2] See Atwood's Heirs v. Beck Adm. 21 Ala. 590.
[3] 9 Yerger 84; see also Newsom et al. v. Thompson, Ex'r, &c. 2 Iredell's Law Rep. 277.

to persons not in *esse* was not effectual to pass the property when they came in *esse*. This doctrine applies, of course, to all chattels personal; and the ground of it is, that *delivery* is essential to the validity of a deed, and there cannot be a delivery to a person not in existence.

§ 53. But this doctrine does not invalidate a conveyance to a person in *esse* in trust for persons yet unborn, or yet unbegotten; nor does it affect the validity of a future limitation for their benefit, when there is a prior taker in *esse*. Thus, if a chattel personal be given by deed to A, in trust for the children of B, who has none, the trust will wait for the children. So if there be a conveyance by deed of a chattel personal to A for life, remainder to the children of B, the remainder will wait for their coming if there be none in *esse*.[1]

§ 54. The doctrine, indeed, does not seem to affect a deed delivered to a third person as an *escrow* to be delivered to a person not in *esse;* and such deed so delivered would seem to be effectual, if, subsequently in the lifetime of the maker and before the request had been countermanded, it were delivered to the grantee.

§ 55. A bequest to a person not *in esse* is valid. But there is a distinction between a gift *in præsenti* and a gift *in futuro*. If the bequest be *in præsenti* and the legatee is not *in esse* at the death of the testator, the gift is void; but it is not so, if the intention is to make a future gift. No certain rule can be laid down that will apply to all such cases; for the intention is to govern, and that must be ascertained in each case from its own circumstances.

§ 56. It is said that a remainder in realty to a corporation, not *in esse*, is not good even though such corporation should come into existence before the termination of the prior estate; but it

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[1] See Williamson & Wife v. Mason Ex'r, June Term, Ala. 1853.

cannot be held that future limitations of chattels personal would not be good under such a state of facts.

§ 57. A maxim of the common law is, that a man cannot make a gift to himself; and the maxim is as applicable to personal as it is to real property. The conveyance is simply nugatory. A man, however, may make a conveyance of chattels and reserve to himself a present interest, but that is nothing more than the creation of a future interest in the other party, and not the conveyance of an interest to himself. It is true that a party may acquire a new estate in real property by a conveyance to uses or in trust. The statute of uses has no application, as we have already said, to chattels personal; but a person may convey chattels personal to another in trust for the donor, and the trust will be good.

§ 58. Another maxim of the common law is, that a man cannot convey property in *præsenti* to his wife; but he may make such gift in trust for the separate use of his wife; or he may make a conveyance to her after a limitation to a third person, and it will take effect, if he dies before the limitation falls into possession.

§ 59. Another maxim of the common law is, that a man cannot make a conveyance of real property to his "*heirs*."(*a*) But chattels do not descend upon the death of their owner intestate; they pass to the administrator, as assets for the payment of debts, and then for distribution. Heirs, therefore, as heirs, have nothing to do with chattels personal; yet the rule of the common law, as it is applied to devises of real property, is applied to gifts of chattels personal. The principle extends to gifts to "next of kin," "distributees," "relations," "legatees," and other gifts which by construction, are to "next of kin." The principle is, that when a person has a title by law, he shall claim by that

(*a*) See Keyes' Rem. 29, for origin and reason of rule.

title, for it is higher than a title derived from man. But the principle cannot apply, if the gift be to persons by name, though they happen to be next of kin, nor to persons by a description which is not sufficiently comprehensive to include any person who by possibility might be next of kin at the donor's death (*b*). Nor does the principle apply when the gift is to "heirs" or "next of kin," if they are to take under the gift in a manner different from that in which they would take by law—as if they are to take "as tenants in common" when their title by law would be as joint-tenants. Nor does it apply if the interest which they take under the gift is different in quantity from the interest which they would have taken by law, *had the gift to them been simply omitted.* It must be remembered, however, that the only way by which the next of kin can be made to take a partial interest is by a valid disposition of the residue to some other person. And here we may add, that the gifts of which we have been treating are such as are to take effect after the donor's death.

§ 60. There is a difference of judicial opinion in regard to a gift in trust to an unincorporated company. In the Trustees of the Philadelphia Baptist Association *et als.* v. Hart's Ex'rs, there was a bequest to the Association "for the education of youths of the Baptist denomination, who shall appear promising for the ministry, always giving a preference to the descendants of my father's family." The Association had existed for many years as a regularly organized body, but was still unincorporated at the death of the testator. The Court held that the Association could not take the trust as a society, nor could the bequest be taken by the individuals who composed the Association at the death of the testator; that there were no persons to whom the legacy could be decreed, were it not a charity, and that it could not be sustained as a charity.[1]

(*b*) See *Post*, § 96.

[1] 4 Wheaton, 1.

The contrary opinion, however, seems now to be the better one, at least upon authority.[1]

§ 61. Gifts of chattels personal for charitable purposes are not restricted; but every alienation of them made for the purpose of delaying, hindering, or defrauding creditors, is void *as to them*, by Statute of 13 Eliz., c. 5, (which has been, with but little variation, re-enacted or continued in force in the several States;) unless made upon valuable consideration and *bona fide* to a person not having at the time of such alienation any notice of such fraud.[2]

§ 62. And so *voluntary* settlements of chattels personal when fraudulent are also void as to creditors. When such settlements are fraudulent, is a vexed question. The Courts are agreed that a man must be indebted at the time, or he must make the settlement in contemplation of becoming so, in order to render it fraudulent; but they differ as to whether *any indebtedness* at that time will avoid the settlement as to existing creditors. It has been held that any amount of indebtedness at the time of the settlement is *per se* fraudulent; and, on the other hand, it has been held that the question, whether it is fraudulent or not, is to be determined not from the mere fact of indebtment at the time alone, but from all the circumstances of the case. The latter seems to be the better doctrine, and therefore if a man make a settlement upon a wife or child, and he has still enough for the payment of his debts, the settlement will not be *per se* fraudulent.

The Courts are also agreed that when a voluntary settlement has been set aside as to existing creditors, that the subsequent creditors are also let in; but there is a difference of opinion up-

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[1] Carter *et ux.* v. Balfour's Adm'r, 19 Ala. 814; Judd, &c. v. Woodruff, 2 Root, 298; McCord v. Ocheltree, 8 Blackf. 15.

[2] Williams on Per. Prop. (43.)

on the question, whether a subsequent creditor can impeach a settlement, as fraudulent, by reason of the prior indebtedness.

§ 63. There is still another question connected with this matter which demands notice here; and that is, whether the property conveyed must be such as is liable to be taken in execution for debts? The English Courts hold the affirmative, and hence in England a voluntary settlement of stock, or of *choses* in action, or of any other property, not liable to execution, is valid both as to subsequent and existing creditors. The same doctrine is also held by Courts in this country; but other Courts here hold the contrary.[1] In this State, the doctrine has been carried very far. In Patterson v. Campbell, the facts were, that Patterson contracted with one Hall to do work for him about the erection of a cotton press, and by the contract was to receive a certain amount in cash, and for the balance Hall was to convey a lot to the infant daughter of Patterson. The contract and the deed, in accordance therewith, were made before the work was commenced. A bill was filed against Patterson and his daughter by an execution creditor, to subject the lot to the payment of his debt. The Court held, that, under the statute giving to Courts of Equity the power to subject things in action to the payment of debts, the lot was liable to the payment of the execution creditor.[2]

§ 64. But these conveyances, whether voluntary or not, are good between the parties and their privies, and even when voluntary, cannot be annulled by the grantor, unless the object of the settlor is his own benefit or convenience. Thus, a maiden lady, not immediately contemplating marriage, but thinking such an event might happen, transfered stock to trustees in trust for herself until she should marry, and after her marriage, in

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[1] See 1 Story's Eq., § 353, *et seq.*; Buford, &c. v. Buford, 1 Bibb, 305

[2] 9 Ala. 933.

trust, for her separate use for her life, and after her death, upon trusts for the benefit of any husband she might marry, and her child or children by any such husband or husbands. She afterwards being still unmarried, filed a bill to have the settlement delivered up to her and cancelled, and to have the stock transferred back to her by the trustees. The Master of the Rolls held that the settlement was binding; and said: The doctrine itself has never been disputed, and has been the subject of repeated decisions, from the cases of Villers v. Beaumont, 1 Ver. 100, in the year 1682; and of Brookbank v. Brookbank, 1 Eq. Ca. Abr. 168, in 1691; down to the modern cases of Ellison v. Ellison, 6 Ves. 656, and Pulvertoft v. Pulvertoft, 18 Ves. 84; and he added: It must, indeed, have been coeval with the statute of 27 Eliz., inasmuch as the second section of that act declares that voluntary conveyances shall be void only as against purchasers for valuable consideration.[1]

§ 65. But where a father conveyed his estates to trustees for paying off annuities granted by his son, together with the arrears, and also the son's debts, if they thought proper to pay them, remainder to himself for life, remainder to his son in fee; and the annuities were mentioned in a schedule, but the annuitants were not parties to the deed; and the father and son then executed other deeds varying the former trusts, the court held, upon a bill filed by an annuitant to enforce the former trust in his favor, that the settlement was revocable, and having been revoked, that the plaintiff could take nothing by his bill.[2]

§ 66. In cases, however, in which such conveyances are made in trust for the creditors of the grantor, the conveyances cease to be revocable, when the creditors assent to them; and generally, at least, when they have notice of the trust, it is presumed that they assent, unless they dissent.

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[1] Bill v. Cureton, 2 My. & Keene, (503.)

[2] Walwyn v. Coutts, 3 Sim. 14; see also Garrard v. Ld Lauderdale, Id. 1.

§ 67. The statute of 27 Eliz. c. 4, by which voluntary settlements of lands and other hereditaments are void against subsequent purchasers for a valuable consideration, though it extends to chattels real, does not apply to chattels personal. A voluntary settlement of chattels personal cannot, therefore, be defeated by a subsequent sale of the property by the settlor.[1]

§ 68. There are several other matters to be considered in the creation of interests in chattels personal.

§ 69. There must be certainty in the subject of the conveyance; certainty in the object of it; certainty as to the event upon which the limitation is to take effect; and certainty in the intent to give.[2]

§ 70. Thus, in regard to the subject, if a man make a conveyance of his white horse, and he has four white horses, the conveyance is void for the uncertainty; unless it can be shown *aliunde*, as it may be, which one of the white horses was intended. But if the conveyance were of one of his white horses, instead of *his white horse*, then the party to whom the conveyance is made may elect which one of the white horses he will take, and thus the uncertainty is avoided. So, if the conveyance be of a definite portion of a larger quantity, as ten bushels of corn, when the party conveying has five hundred; or if it be of a definite number, and the party conveying has a larger number, as when he has a hundred cows and makes conveyance of twenty, the donee shall have his election, and the maxim is *id certum est quod reddi certum potest*. But this election must be made by the party in his lifetime, and cannot be by his executor or administrator.[3]

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[1] Williams on Per. Prop. (216) Bill v. Cureton, 2 My. & K. 503.

[2] Kea v. Robeson, 5 Iredell's Eq. Rep. 373; Proctor v. Pool, 4 Dev. Law Rep. 370, Doe v. Porter et al. 3 Ark. 18.

[3] 4 Bac. Abr. (Bouvier) 525.

§ 71. The question of uncertainty in the subject of a conveyance seems most frequently to have arisen in bequests, where there was a gift of chattels personal to one person, and at his death, of *what shall remain, or be left*, to another.

Thus, in Bull v. Kingston, there was a bequest of personal property in trust for A, a married woman, for her separate use, with a power of disposing by will except to particular persons; and then the testatrix added: "in case my said sister (A) dies without a will, I give all that may remain of my fortune at her decease to my godson, William Ashby." The court held that A took an absolute interest in the property, and that the bequest over was void for the uncertainty.[1]

So, where there was a bequest to M. E. of the legal interest on bonds, debentures, and funded property, together with household furniture, &c., to be disposed of as she shall think proper, and in case F. E. should survive the said M. E. that he should have the interest of money and whatever does belong to her, that she does not dispose of; it was held that the bequest over was void for the uncertainty.[2]

So, in Wynne v. Hawkins, the testator gave to his wife personal estate, "not doubting but that she will dispose of what shall be left at her death to our two grand-children." The Lord Chancellor said: If the intention is clear, what was to be given, and to whom, I should think the words "not doubting" would be strong enough. But, where in point of context it is uncertain *what property was to* be given, and to whom, the words are not sufficient, because it is doubtful what is the confidence which the testator has reposed; and when that does not appear, the scale leans to the presumption that he meant to give the whole to the first taker. Accordingly the bill which had

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[1] 1 Mer. 314.

[2] Philips 2. Eastwood, Lloyd & G. *Temp.* Sug. 270. Stated 4. Bar. & Har. Dig. 352.

been filed by the surviving grand-child against the personal representative of the wife, who had died intestate, was dismissed.[1]

In Pushman v. Filliter, the testator bequeathed personalty "unto my said wife, Mary Pushman, desiring her to provide for my daughter, Anne, out of the same as long as she my said wife shall live, and at her decease to dispose of *what shall be left* among my children in such manner as she shall judge most proper." The bill was filed by the children against the executor of Mary Pushman, claiming that an absolute trust upon the death of their mother, was created in their favor. The Master of the Rolls said: The only question, then, is, whether the person, in whose favor the request is made, and the property to which it applies, are certain; if so, all these words now used by a person having a right to command, shall create a trust. * * * * Therefore it is merely a question of construction upon the words "*what shall be left;*" whether they mean only what shall be left after providing for his daughter *Anne*. I think Wynne v. Hawkins as strong as this. It might have been equally contended in that case, that he meant all after she had expended what was necessary for her own income. In this it must be contended, that if a bill had been filed, the property would have been impounded. I am clearly of opinion that I should go too far, if I did not hold, that he left it in the discretion of his wife to give to his children any part she did not dispose of. I construe the words larger than the plaintiffs; that it is an absolute gift to his wife of any part of this property to any use she might think fit, clothed only with a trust for his daughter *Anne*, who, I admit, could have filed a bill: but no one else could.[2]

In Sprange v. Barnard, a woman, by virtue of a power, bequeathed 300*l.* South Sea annuities to her husband, and "at his death, the remaining part of what is left, that he does not want for his wants," to her brother and sisters.

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[1] 1 Bro. Ch. Rep, 180. [2] 3 Ves. 7.

The Master of the Rolls said: It is contended for the persons to whom it is given in remainder, that he (the husband) shall have it only for his life, and that the words are strictly mandatory on him to dispose of it in a certain way; but it is only to dispose of what he has no occasion for, therefore the question is whether he may not call for the whole; and it seems to me perfectly clear, on all the authorities, that he may. I agree with the doctrine in Pierson v. Garnet,[1] following the cases of Harland v. Trigg,[2] and Wynne v. Hawkins,[3] that the property, and the person to whom it is given, must be certain, in order to raise a trust. Now, here the property is wasting, as it is only what shall remain at his death. The cases are so much in point, that they are scarcely worth mentioning; they are Bland v. Bland,[4] LeMaitre v. Bannister,[5] Wynne v. Hawkins, where "not doubting" would have been sufficient to have raised the trust, had it not been for the uncertainty of the following words. Palmer v. Scribb[6] is not worth mentioning. Then the present case is "so much as he shall not want for his wants." It is contended that the court ought to impound the property; but it appears to me to be a trust which would be impossible to be executed. I must therefore declare him to be absolutely entitled to the 300*l.*, and decree it to be transferred to him.[7]

In Wilson v. Major, the testator bequeathed to his wife all his effects whatsoever or wheresoever for her maintenance, upon full trust and confidence in her justice and equity, that at her decease she would make a proper distribution of what effects might be left in money, goods, or otherwise, to his children, accounting what they had already received in money or effects as part of their shares; and it was held that she was absolutely entitled to the whole of the personalty.[8]

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[1] 2 Bro. Ch. R. 38; Id. 225. [2] 1 Id. 142. [3] 1 Id. 179.
[4] 2 Cox, 349. [5] Stated 2 Bro. Ch. R. 40.
[6] 2 Eq. Ca. Abr. 291. [7] 2 Bro. Ch. R. 585. [8] 11 Ves. 205.

§ 72. In regard to the class of cases just stated, Mr. Jarman says: Here, it may be observed, that, in numerous instances, a devise or bequest of *what shall remain or be left* at the decease of the prior devisee or legatee, has been held to be void for uncertainty. Some of these cases certainly had special circumstances, and the indefiniteness seems not to have been invariably considered to be such as to invalidate the gift. At all events, the expression is susceptible of explanation, where the property or part of it consists of household furniture, or other articles of a perishable nature, by considering these words as referring to the expected diminution of the property by the use and wear of the first taker. Such, it is clear, would be the construction, if the property (whatever its nature) were given to the first taker expressly for life; indeed, there is not, it is believed, any case in which such expressions have been held to render the gift void, when the prior interest was expressly limited in such terms: and the case of Cooper v. Williams[1] is an authority against such a construction.

So, in the recent case of Gibbs v. Tait,[2] where a testator bequeathed a residue to A for life, and after her decease or marriage, he gave *what should be remaining of such residuary moneys* to other persons, no objection seems to have been advanced to the validity of the gift on the ground of uncertainty.[3]

§ 73. But in all cases, in which the first taker takes the absolute ownership of the property, a gift over at his death of what shall then be left is a void gift.[4] It is void in Equity as a trust for the reason given in all the cases, that the property to which the trust is to attach is too uncertain, or for another, and perhaps better, reason, that there is *no* property to which the trust can attach. It is void, at law, because a gift of the absolute property is a gift of the whole property, and therefore

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[1] Pre. Ch. 71 pl. 64. 2 Eq. Ca. Abr. 290; Kinnard v. Kinnard, 5 Watts, 110.
[2] 8 Sim. 132. [3] 1 Jar. on Wills, (321.) [4] Riddick v. Cohoon, 4 Rand. 547.

there is nothing upon which the gift over can operate; and that is the ground of repugnancy, and is not only a better, but is the true ground of the doctrine.

§ 74. When, however, chattels personal are given to A generally, and *what shall be left or remain* at his death is given to B, there may be a question whether the gift to A is not a gift for life only. It is a question of construction as to the intention of the donor. The better opinion seems to be, that the determination of it will, in the absense of other circumstances, depend upon the nature of the property. Thus, if money be so given, the gift over seems to be void; for a gift of chattels generally is a gift of the absolute property, and though such a gift might be held to be but a gift for life, where there was a general gift over at the death of the first taker, yet a gift over of *what shall be left* seems not to be a qualification of the interest first given. But if the chattels consist wholly of articles which are worn out in using, as household furniture, or in part of such articles, then the better opinion seems to be that the first taker takes but an interest for life in the whole, and that the person to whom the limitation over is made, will be entitled accordingly.

§ 75. In regard to the other proposition, that such a gift after a gift expressly for life, or other limited period, is not void, there seems to be no objection; except it be in regard to articles *quæ ipso usu consumuntur;* and as to them, the books conflict, inasmuch as many of them hold that a gift of such articles for a limited period is an absolute gift.

§ 76. The case of Duhamel v. Ardovin requires notice here. In that case Marbeuf made his will in French; in the beginning of which he said, he thereby gave all his worldly goods and estate. Afterward he gives particular legacies, and makes a provision for his wife. Then says, "Whereas, my daughter Mari-

anne is very ill; if she dies, in that case I leave to my wife the revenue and dividends of what little estate I have: but if my daughter lives, my wife shall enjoy her dowry only. *Item*, I give to my daughter Marianne the residue and dividend." Then if she dies without children, he gives several pecuniary legacies, concluding with, "I give to my brother, Lewis Marbeuf, *ce que ce trouvera.*"

The daughter survived her father, but died of the same illness and without issue; the husband filed a bill as her administrator, claiming the whole property.

The Lord Chancellor, after deciding that the widow was entitled for life, said: The last clause concerning Lewis means what shall be left, from the idiom of that language; and I think it a very sufficient residuary bequest, as strong as *I leave all to my mother*, including the whole not particularly disposed of before, and that falls in with the beginning as not intending to die intestate as to any part. But I do not rely barely on the words: it was a natural disposition and intent; his daughter being then likely to die of a violent distemper, it was natural for him to make a larger provision for his wife in that event, and afterward to give it to his brother.[1]

§ 77. Mr. Jarman adds to what has been previously quoted: And if the gift of *what shall be left* is preceded by a power of disposition or appropriation reserved to the prior legatee in favor of particular objects, the expression evidently points at that portion of the property which shall be unappointed or unappropriated under the power.

As in the case of Surman v. Surman,[2] where a testator bequeathed his personal estate to his wife for life or widowhood, with a power to apply the same to her own benefit, and the maintenance of A and B during minority; and at her decease

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[1] 1 Ves. sr. 162. [2] 5 Madd. 12.

or second marriage, he gave the same or *so much as should then remain*, to certain persons ; this was held to be a good bequest of the personal estate unapplied to the prescribed purposes.[1]

The case of Upwell v. Halsey may also be stated, especially as there the gift to the first taker was not expressly for life.

The clause of the will upon which the case turned was this : I make my wife whole and sole executrix of all my personal estate ; and my will is, that such part of my personal estate as she shall leave of her subsistence, shall return to my sister." The interest of the personal estate was not sufficient to maintain the wife. The wife afterwards married and died, and the dispute was between the sister and the second husband.

Sir Joseph Jekyll, Master of the Rolls, before whom the cause was heard, gave it in favor of the sister. He said, that such a sense, if possible, ought to be put upon a will, as is agreeable to the intention of the party, and consistent with the rules of law. And such a one he thought this will capable of ; for he understood it thus : "I devise the use of my personal estate to my wife for her life, with a power " (the interest not being sufficient for her maintenance) " to dispose of as much of the principal as shall be necessary for her subsistence ;" and his sister to have the residue. He thought no stress was to be laid upon those words, "all my personal estate ;" for that is no more than what the law implies ; for when a person is made executor, the law vests all the personal estate in him. But then it is true, that this gift which by construction of law is absolute, may be qualified by the declared intention of the testator. Here it is restrained to her for life ; but with a power, indeed, to dispose of so much of the principal as shall be necessary to her subsistence, over and above the interest. And accordingly an account was decreed to be taken.[2]

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[1] 1 Jar. on Wills, (322.)

[2] 10 Mod. 442, 1 P. W. 651.

§ 78. Upon the whole, therefore, we are satisfied that no gift over of "what shall be left," or "what shall remain," is void for uncertainty, since there are many cases to which such a principle would apply, that are held to be free from objection; and since it is a matter which may be rendered certain by account, and therefore in contemplation of law is already certain.

§ 79. But let us take two or three cases illustrative of the rule which requires certainty in the description of the subject of the gift, since it is clearly not necessary that the description should be accurate in every respect.

In Barnes v. Simms, there was a gift of a slave named Laman, and it was held that a slave named Aaron would not pass without other circumstances of identity.[1] But in Tudor v. Terrel *et al.*, under a gift of a certain number of slaves, which were there named and two of them called Phillis, a slave named Philip was allowed to pass, there being but one slave named Phillis belonging to the donor. And it was held that such a case was one of latent ambiguity, and was, therefore, open to extrinsic testimony.[2] So, under a gift of a slave named Jack, now in the possession of A B, a slave in the possession of A B named Jim might pass.

§ 80. We come now to consider certainty in regard to the objects of a conveyance. This question is most frequently presented by wills, though it may well arise in deeds of trust, and in limitations over by deed not by way of trust.

§ 81. When a conveyance is to B, and two persons of that name claim under it, then as the uncertainty is produced by matter *dehors* the instrument, it may be removed by matter *dehors;* but if it cannot be thus removed, the uncertainty is fatal.

§ 82. The question as to certainty may and does most often

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[1] 5 Iredell Eq. Rep. 392. [2] 2 Dana Rep. 47.

arise under a conveyance to persons, not by name, but by description; and when the uncertainty is in the description itself, it cannot be obviated by extrinsic evidence, and it necessarily, therefore, renders the conveyance void.

§ 83. In Waite v. Templar, a testator who had long resided in India, gave one-fifth of a residue "to Thomas Parlby, Esq., junior, who resided at Stonehouse, near Plymouth, Devonshire, when I left England, or to his heirs, executors, administrators, or assigns, forever." Thomas Parlby was dead at the date of the will, and it was held that the bequest "to his heirs, executors, administrators, or assigns," was void for the uncertainty.[1]

§ 84. In Lowndes v. Stone, the testator gave the residue of his effects to his "next of kin, or heir at law," and the court ordered distribution to be made according to the statute.[2] The bequest was therefore held to be void; for if it had been held to be a good bequest to the next of kin, they would have taken as joint-tenants.[3]

§ 85. In Gallego's Ex'rs v. The Attorney General, a gift to be distributed among needy, poor, and respectable widows was held to be void for uncertainty as to the beneficiaries.[4]

§ 86. A gift to "relations" seems to be indefinite, but it is well settled, that under such a gift those persons who would have been entitled in case of intestacy, are entitled, and alone entitled, to take. The same rule is said to apply where the gift is to "near relations," or to "poor relations," or "necessitous relations," or "poorest relations," or "most necessitous relations;" unless the legacy is given to establish a charity for poor relations, and then the fund is to be divided among the most indigent.[5] There is, however, says Sugden, a considerable weight

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[1] 2 Sim. 524.
[2] 4 Ves. 649.
[3] Vice-Chancellor in Waite v. Templar.
[4] 3 Leigh, 450.
[5] 2 Williams on Ex'ors, 730; M'Neilledge v. Galbraith, et al. Ex'ors. 8 Serg & R. 43; Same v. Barclay, 11 Id. 103.

of authority against holding "poor," "necessitous," or the like, as merely nugatory, though he thinks the doctrine as stated the better one.[1] "Nearest relations," is construed to mean nearest in blood.[2]

§ 87. When a testator bequeathed 50*l.* to each of his "relations by blood or marriage," Lord Rosslyn held, that the word "relations" must be confined to relations entitled under the statute of distributions, and to persons who had married relatives entitled under that act.

§ 88. Where the gift is to relations of a specified name, a change of name by marriage will not exclude one who would otherwise be entitled; and this was so ruled by Lord Hardwicke in Pyot v. Pyot.[3]

§ 89. In Gower v. Mainwaring, there was a gift "among his friends and relations," and Lord Hardwicke said friends is synonymous to relations; otherwise it is absurd.[4]

§ 90. When a power is given to appoint to relations, and the donee has a right of selection, he may select without as well as within the degree of next of kin. Thus, if the power be to appoint among "such of my relations" as the donee shall think fit, he has a right of selection.[5]

§ 91. But if the donee has not the right of selection, he can appoint among the next of kin alone. Thus, in Pope v. Whitcombe, the donee was directed to appoint among the testator's relations in such manner as she should think fit, and the court held an appointment to testator's relations, who were not next of kin, to be void.[6]

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[1] Sug. on Pow. 521.
[2] Smith v. Campbell, Coop. 277.
[3] 2 Ves. sr. (86.)
[4] 1 Ves. sr. 338.
[5] Cole v. Wade, 16 Ves. 27; see Grant v. Lyman, 4 Rus. 297; Sug on Pow. 524.
[6] 3 Mer. (506) m.

§ 92. If there is a gift over to the relations in default of appointment, the court will, of course, construe "relations" in the same manner as if there had been no power.[1]

§ 93. In regard to family: In Doe v. Joinville, a testator, after giving divers legacies, declared: And as to all the rest, residue, and remainder of my goods, chattels, estate and effects, whatsoever and wheresoever, both real and personal, I give, devise and bequeath the same unto my beloved wife Sarah Hayter, for and during the term of her natural life; and from and after her death, then I give, devise, and bequeath the said rest and residue in manner following, viz: one half part thereof unto my wife's family, subject to the payment of a legacy; "and the other remaining half part thereof unto my brother and sister's family, equally to be divided between them, share and share alike." The testator, at the time of making his will and of his death, had one brother, Jos. Hayter, who then had six children, two sons and four daughters, all of whom, together with their father, were still living. The testator had also one sister, who, at the time of making his will, had six children, and she and her children were still alive. The testator had survived five brothers, who had died without issue, but he had a sister who died before the making of his will, who left twelve children, all of whom were living at the testator's death. The court, after much consideration, held the limitation over to be void for the uncertainty, who was meant by the word "family."[2]

In Robinson v. Waddelow, a testator directed 10,000*l.* to be invested, and the interest to be paid half-yearly to a married daughter for life for her own private use, without being subject to the direction or control of any husband, or other person whatever; and he also directed other 10,000*l.* to be invested in the same manner in every respect, for another married daughter.

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[1] Sug. on Pow. 524.

[2] 3 East. (172.)

He then declared: All the rest and residue of my effects to be equally divided between my said daughters, and their husbands and families. The bill was filed by the executors and trustees of the will, against Mr. and Mrs. Waddelow, and their five children, and Mr. and Mrs. Featherstone, and their three children, praying that the rights and interests of all parties in the testator's residuary estate might be ascertained and declared. The Vice-Chancellor said: If the words of the residuary bequest comprehend all the children of the two daughters, then they must, of necessity, comprehend all their husbands.

The word "family" is an uncertain term: it may extend to grand-children as well as children. The most reasonable construction is, to reject the words "husbands and families." He mentioned Doe v. Joinville, and added: I think that the best construction in this case is, to hold that the two daughters take the residue equally and absolutely as tenants in common.[1]

In Barnes v. Patch, the testator gave the residue of his estate to be equally divided between "brother Lancelot's and sister Esther's families." The Master of the Rolls said: The only construction is, that by the word "family," children are meant; and if that is the construction, does it not follow that the division must be *per capita?*[2]

In re Parkinson, the testator directed his executors to lend out the residue of his estate, and pay the interest to his widow during life or widowhood, and the principal at her death or widowhood to his five sisters and their respective families, if any. Some of the sisters had children born during the testator's lifetime, and some had children born after his death, but during the lifetime of the tenant for life. One of the sisters, and the representatives of another, petitioned for payment of one-fifth to each. Lord Cranworth, after stating the case, said, that three constructions had been contended for. On behalf of

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[1] 8 Sim. 134. [2] 8 Ves. 604.

the petitioners representing the sisters, it was argued that the gift must be read as if it was a gift to them in fifths. Mr. Elderton contended that each of the sisters took an estate for life, with remainder to her children born during the lifetime of the tenant for life; and Mr. Shebbeare, on behalf of the children born at the death of the testator, contended that it was a gift to the widow for life, with the remainder to the five sisters, as to each share, and to such children as should be living at the death of the testator as joint tenants. Mr. Phillips, on behalf of the sisters alone, contended that the word "family" must be rejected; he relied particularly on the case of Robinson v. Waddelow, 8 Sim. 134, before the Vice-Chancellor of England, in which that word was rejected. I cannot say that that case is quite satisfactory to my mind, but I think it went on the specialty of the language. I see that I was counsel in it, but I cannot recollect anything about it. I do not quite follow the reasoning, and I cannot agree, if it is meant to say that the word "family" is to be always rejected, and I do not think I can act upon it. Mr. Phillips insisted that there were no cases, except Beales v. Crisford, 13 Sim. 592; and Wood v. Wood, 3 Hare, 65; in which the court had given effect to the word "family." But there is a case before Lord Hardwicke, and the case of Barnes v. Patch, 8 Ves. 604, before Sir William Grant, in which it is said that the word meant children. So in Wood v. Wood, 3 Hare, 65; and the only question is, whether there is any difference where the gift is to the parent and family. In Woods v. Woods, 1 My. & C. 401, Lord Cottenham held that the gift for the benefit of a woman and her family gave the children an interest. So in Beales v. Crisford, in which, however, the will was so strangely worded, that it can hardly be said to be an authority. I do not think I can reject these words as unintelligible. In common parlance, in speaking of a woman and her family, her children are meant. We find that none of the sisters had been married above six or seven years, and there-

fore could have no family except children. I think it is obvious, that what he meant was his sisters and their children. That consideration decides not only against Mr. Phillips, but also against Mr. Elderton. This construction would have been a very good will, but not the will that was made. He might have given to his sisters for life, with remainder to their children, but that he has not done. On this point, Froggart v. Wardell, 14 Jur. 1101, was cited, but I cannot rely upon that case, nor would the learned Judge who decided it say it was any authority, as it depended upon such nice specialties, that it cannot govern any other cause. The result of my consideration, therefore, is, that the estate must be divided into fifths; and as to each fifth, each sister and such children as were living at the death of the testator, take that one-fifth as joint tenants.[1]

In M'Leroth v. Bacon, Lord Alvanley—proceeding upon the special words of the will—considered a husband as one of the family of the wife, though he said that he desired to be understood that such could not be the construction, unless required by the context.[2]

In Grant v. Lyman, it is said that "family" will be construed to mean "next of kin," and that "family" and "relations" have the same meaning.[3]

In Williams v. Williams, the testator by codicil declared: It is my wish that you should enjoy everything in my power to give, using your judgment as to where to dispose of it amongst your children when you can no longer enjoy it yourself. But I should be unhappy if I thought it possible that any one not of your family should be the better for what I feel confident you will so well direct the disposal of. The Vice-Chancellor said: Now Lady Williams, (the legatee) at the death of the testator, had four children; one of them, Lady Chichester, was married, and of course, adult, and she was younger than her sister.

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[1] 2 Eng. Law & Eq. Rep. 104. [2] 5 Ves. 159. [3] 4 Rus. 297.

What were the ages of the sons does not appear. In this state of things, I think that the word "family," as used in the codicil, is not confined to children only, but would include descendants in any degree. The word "family" is one of doubtful import, and may, according to the context, mean "children," or "heirs," or "next of kin." But here I think the words "of your family," are equivalent to "of your blood," i. e., your posterity, your descendants.[1]

In Tolson *et als.* v. Tolson *et als.* the testator gave the residue of his estate to his seven sons, and added: "I request my seven sons above-named to take care of their brother, John Tolson, and his family." The bill was filed by John Tolson, and Eleanor his wife, and their adult and infant children, praying for the execution of the trust. The court said: The term "family," as used in this will, does not designate, we think, any individual persons with sufficient accuracy. So far, then, as regards those who were in the contemplation of the testator, when he used this language, the devise must fail for uncertainty, but this will not affect the devise to John.[2]

§ 94. The same rules, in regard to powers, which are applied to "relations," are also applied to "family."[3]

§ 95. In regard to issue: The general rule is that it includes all descendants, but it may be confined to children by the context. Thus, in Swift v. Swift, where by marriage articles a reversionary interest in a fund was agreed to be settled on the husband for life, remainder to the wife for life, and after the death of the survivor, on the issue of the marriage, living at the death of the survivor, in equal shares, if more than one, and if but one, then the whole was to go *to such only child*, it was held that the context showed that "*issue*" meant children alone.[4]

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[1] 5 Eng. Law & Eq. 47.
[2] 10 Gill & John. 159; see Wright v. Atkyns, 1 Tur. & Rus. 143.
[3] See Grant v. Lyman, 4 Rus. 297; see Sug. on Pow. 518 *et seq.*
[4] 8 Sim. 168.

And so "issue" may in one part of an instrument mean descendants generally, whilst in another part it may be confined to children. Thus, in Dalzell v. Welch, a testator in designating the objects of a power of appointment given to his daughter, used the words "issue" and "child or children," synonymously; and in a subsequent part of his will he gave his son a power of appointment over a different part of his property, and in pointing out the objects of it, used the word "issue," simply: the son had both children and grand-children living at his death, and it was held that the exercise of the power in favor of the former only was void, notwithstanding the term "issue" as used in the first part of the will meant children only.[1]

In Pope v. Pope, under a bequest for all and every the "issue" of E. living at her decease and that of her husband; but if any of the issue should die in the lifetime of the survivor of E. and her husband, leaving issue, the "issue of such issue," so dying, should take the share his parent would have been entitled to; it was held that the word "issue" meant children, and that, if the testator had intended to express descendants, the words "issue of such issue" would not have had any meaning.[2]

§ 96. In regard to next of kin: In Elmsley v. Young, A assigns a fund to trustees, upon trust to pay the interest to B for his life, and after his decease to pay, transfer, and assign the same among B's children, and if no child of B, then as A should appoint, and in default of appointment, to such person or persons as should at the decease of A be A's next of kin. A died in the lifetime of B without having made any appointment, and B died without issue. B was the only surviving brother of A, but there were children of a deceased brother. It was held by the Lords Commissioners, over-ruling Philips v. Garth,[3] Hinckley v. Maclarens,[4] and the decision in this case at the Rolls

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[1] 2 Sim. (320.)
[2] 3 Cro. Ch. Rep. 64.
[3] 9 Eng. L. & E. Rep. 193.
[4] 1 My & Keene, 27.

that the words "next of kin," when used *simpliciter*, are to be taken to mean "nearest of kin," and that consequently B's representatives were entitled to the whole fund.[1] They also held that B was not excluded by the gift to him from the benefit of the limitation to A's next of kin. But as to the first point, *quære ?*

§ 97. In regard to Children: This word is construed in its natural sense, and is not so extended as to include grand-children, unless the intent is apparent, or the instrument would otherwise be inoperative.[2] The *onus* rests upon those who desire to extend the construction.[3] So of nephews, nieces, &c.

It may be added here, that in Illingworth v. Cooke,[4] it was held that a bequest by a testatrix in favor of all her grand-children, except one, viz: —— ——, was a bequest to all the grand-children. And that in Lane v. Green,[5] under a gift by will to four sons of A B, that three sons and a daughter, the only children of A B, were entitled to take.

§ 98. Legal Representatives: The leading case is Bridge v. Abbott.[6] In that case the testatrix bequeathed the residue of her estate to certain persons named, share and share alike; and she directed "that in case of the death of any of them before her, then the share or shares of him, her, or them, so dying before her, should go to, be had and received by his or her legal representatives." The executor of one so pre-deceasing claimed his share under this bequest, and so did his residuary legatee; and Lord Alvanley held that it went to neither, but to the next of kin. He said: I am of opinion, that the true construction is, that by *legal representatives*, she meant such persons as could

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[1] 2 My & Keene, 780.
[2] See note 2 Sim. 326, citing Marsh v. Hague, 1 Edw. 174.
[3] Id. citing Shelley v. Bryer, Jac. 207.
[4] 5 Eng. L. & Eq. R. 66.
[5] Id, 225.
[6] 3 Bro. Ch. Rep. 224.

claim John Webb's property in their own right; which would be his next of kin.

In Jennings v. Gallimore, money was settled in trust to be paid according to the appointment of Ambrose Gallimore, and in default thereof, to his legal representatives, according to the course of administration; Ambrose Gallimore, in pursuance of the power, by will, appointed to his legal representatives, according to the course of administration; and he gave the rest, residue and remainder, of all his real and personal estate and effects to his nephew, William Gallimore, son of his elder brother, and to his heirs and assigns forever. He appointed his said nephew residuary legatee, and appointed his said nephew and John Home, executors. The fund was claimed by the nephew, William Gallimore, and the other next of kin, a sister and nieces. The Master of the Rolls said: Upon the will I am of opinion, first, that he did not intend William Gallimore to have this fund; and then the only persons who can take it must be those entitled to his personal estate. Therefore declare, that it belongs to the next of kin.[1]

Palin v. Hills, the Lord Chancellor said: I cannot, for the first time, overrule such an authority as that of Bridge v. Abbot, without any one case, and with scarcely one *dictum*, the other way—an authority worthy of all acceptation on all accounts, for the learning, the peculiar care and assiduity which distinguished the excellent, most pains-taking, and candid Judge who decided it—an authority never yet noticed but to be approved, when it has been brought under the deliberate consideration of the court.[2]

§ 98, *a*. Personal Representatives—Legal Personal Representatives. Mr. Roper says: The legal construction of the words "personal representatives" or "legal personal representatives,"

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[1] 3 Ves. 146. [2] 1 My. & Keene, 486

is the *executors* or *administrators* of the person described. Consequently, if a legacy were given to A, and his personal or legal personal representatives, the absolute interest must vest in A. But if no bequest be made to A, and the limitation be to the personal or legal personal representatives of A, unexplained by anything in the will, A's executors or administrators would be entitled to it, not as representing A, or as part of his estate, or liable to his debts, but in their own rights as *personæ designatæ* by the law. This legal construction and appointment only take place he adds, when testators have not manifested any intention in their wills to the contrary; for if it appear from the dispositions in the instrument, whether it be a deed or will, that those words were used in reference to other persons than executors or administrators, that intention will prevail.[1] The better rule, however, is, that the executors or administrators in such case take for the next of kin, and not beneficially, unless the donor "indicate such an intention either in express words too plain to leave any doubt, or raise any question," or unless the intention that they shall take beneficially appear from the whole context of the will taken together. So great, indeed, is the improbability that a donor intended a benefit to a person whom accident should ascertain, that a court would not be justified in construing a gift to personal representatives, or legal personal representatives, to be a gift beneficially to executors or administrators, unless the construction were utterly unavoidable.[2]

In Tipping v. Howard, there was a settlement by deed of 3000*l.* upon trust, in an event to pay one-third part to a cousin Hannah Cotton, or her legal representatives; one-third part to other cousins, Ann Crole and Mary Linister, or their legal representatives, equally; and one-third part equally amongst the children of an uncle, James Lomax, or their legal representatives, &c. The suit was instituted for the purpose of having a

[1] 1 Roper on Leg. 108. [2] Palin v. Hills, 2 My. & Keene, 470.

construction put on the words "legal representatives." It was contended that next of kin, and not executors or administrators, was meant, because the latter words were frequently used in the deed, but with reference only to the trustees, which was sufficient, it was said, to show that the author of the settlement had a distinction in his mind. It was also said that the words "equally between them," showed an intention to refer to next of kin; and further, that the statute of distributions had given that meaning to "legal representatives" under it. Several authorities were cited. Knight Bruce, V. C. said: In the first place I will observe, that I consider the present case is not governed by any of the cases cited, and I therefore give no opinion as to any one of them. There are three possible interpretations of these words, either of which leads to the same result. They mean "executors or administrators," and be, therefore, merely what are called words of limitation; or if words of substitution, they apply to those persons living at the date of the settlement; or they are void for uncertainty; and as each leads to the same result, it is not necessary to say to which I incline. I may add, that the words "legal representatives"—I do not say "legal personal representatives"—is a phrase so loose, and susceptible of so many arguable constructions of a plausible kind, that if a person using those words desires to have them acted upon by a court of justice, he is bound to supply a context to explain them.[1]

§ 99. Executors and Administrators: The intention that they shall take beneficially must clearly appear; as in Sanders v. Franks,[2] where the gift was "to the executors or administrators of the wife, to and for his, her, or their own use and benefit, and it was held that the wife's administrator took beneficially by force of the latter words.

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[1] 6 Eng. L. & Eq. Rep. 99.

[2] 2 Mad. 147, cited by counsel in Collier v. Squire, 3 Rus. 473.

An illustration of the general rule is furnished by the case of Collier v. Squire. In that case, by a marriage settlement, stock, the property of the husband, was settled in trust for the separate use of the wife during her life, and after her death, for the husband, if he survived her; but if he died in her life-time, then for such persons as he should by deed or will appoint: and in default of appointment, for his executors and administrators. The husband died in the wife's life-time, having appointed an executrix, but without exercising his power, and it was held, that the executrix was not entitled beneficially, but as the representative of the husband.[1] So in Palin v. Hills, a testator gave a legacy of 2000*l.* to A, and in case A should die in his life-time, he directed that the legacy should go and be paid to her executors or administrators. A died in the life-time of the testator, having made a will, by which she appointed R. P. her residuary legatee; and it was held by the Lord Chancellor, upon appeal from the Rolls, that A's next of kin were entitled beneficially, and not the residuary legatee or the executors of A[2].

In Hames v. Hames, John Hames, in consideration that all of his intended wife's personal property except her interest in long annuities should be his, and in order to make a further provision for her and the issue of the marriage, assigned leaseholds to trustees, on trust, to permit him to receive the rents and profits during his life; and immediately after his death to pay an annuity of 250*l.* to his widow; and after the payment of the said annuity upon trust, to pay the residue of the rents, if any, "unto the executors or administrators of the said John Hames, for and during the natural life of the said Grace Hayter (the intended wife); and from and after the decease of the survivor of the husband and wife, on trust, with all convenient speed, to sell the leaseholds, and receive the purchase money, and thereout pay the expenses of the trust, and to each child of

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[1] 3 Rus. 467. [2] 1 My. & Keene, 470.

the marriage so much money, as together with the interest of such child in the long annuities, would amount to 1500*l.*, to be payable at twenty years of age, with a provision for maintenance in the meantime: and in case any such child should happen to die under the age of twenty-one years, as to the share of such child so dying, and also as to the residue of such trust moneys, to arise from such sale or sales as aforesaid, upon trust for the executors, administrators, or assigns of the said John Hames, to and for his and their own absolute use and benefit; and in case there should be no such child or children of the body of the said John Hames, on the body of the said Grace Hayter lawfully to be begotten, or there being such, all of them should die under the age of twenty-one years, then as to the whole of such trust moneys, upon trust for the executors, administrators, and assigns of the said John Hames, absolutely forever; and to and for no other trust, intent, or purpose whatever.

John Hames then covenanted to renew the leases, to insure the premises against loss by fire; and further, that in case he should die in the lifetime of his intended wife, his executors or administrators should, during the life of the wife, pay to her the annuity of 250*l.*; and then followed a proviso, that so long as the executors or administrators of Hames should pay the annuity, the trustees of the settlement should stand possessed of the leaseholds, "upon trust to permit and suffer the executors or administrators of him, the said John Hames, to receive and take the rents, issues and profits thereof, to and for their own use and benefit, anything thereinbefore contained to the contrary thereof in any wise notwithstanding."

There were two children of the marriage, George and the defendant William. John Hames made his will, appointing his wife and G. G. Hayter, his executors, and died. George, the son, then died, leaving his mother and his brother his next of kin. G. G. Hayter, trustee and one of the executors of John Hames, died, and afterwards Grace, the widow, died, having bequeathed

all her property to the defendant. The question was, whether the surplus of the produce of the leaseholds, after providing for the portions of the children of the marriage, formed part of the residuary estate of John Hames, the settlor, or belonged to his executors beneficially.

The Master of the Rolls said: It is extremely improbable, that the settlor, executing a marriage settlement, and professing that his object was to make a provision for his intended wife, and the issue of the marriage should silently intend to make a provision for the person who should chance to be his administrator—perhaps a small creditor—perhaps a person to whom administration might be granted *durante minori ætate*, or upon some other contingency: and unless the words are incapable of any other construction, and the court is absolutely compelled, by force of them, to impute that highly improbable intention, that conclusion ought not to be adopted. After discussing the matter at some length, and admitting that the words were "strong and difficult to manage," he decided that the executors took as representatives merely, and not beneficially.[1]

§ 100. *Descendants.*—In Butler v. Stratton, the testatrix gave her residuary real and personal estates to trustees, in trust to sell the former, and divide the proceeds, with her personal property, "equally between the descendants of Thomas Fairbank, deceased." When the testatrix died, Thomas Fairbank had three sons and eleven grandchildren; and Lord Thurlow determined that all Fairbank's descendants, as well grandchildren as children, were entitled to the fund *per capita*.[2]

§ 101. *Heirs.*—In the absence of any thing controlling the meaning of the word in a *direct* gift to "heirs," the construction is that "next of kin" is meant.[3] But that construction

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[1] 2 Keen, 646. [2] 3 Bro. C. Rep. 367, stated 1 Roper on Leg. 115.

[3] See Baskins' Appeal, 3 Barr, 304.

may be controlled by the intention of the party making the conveyance. Thus, in Loveday v. Hopkins,[1] the gift was: I give to my sister Loveday's heirs 6000*l.* I give to my sister Brady's children 1000*l.* equally. Mrs. Loveday had two daughters only, and both were living when the will was made. One of them died before the testatrix, leaving three children, and the other survived her and claimed the whole 6000*l.* The question was, whether the children of the deceased daughter should participate with the surviving daughter, which depended upon the construction of the word "heirs." And Sir Thomas Clarke was of opinion that the testatrix had explained that word by the term "children" in the bequest which immediately followed. So that the word "heirs" was to have the same and only meaning as "children," a construction that entitled the surviving daughter to the whole 6000*l.*[2] But this seems to be a hard construction.

In Eddings *et al.* v. Long *et al.*, the testator gave his widow all his lands, and several slaves, for her life-time, and gave the remainder in the lands and slaves to certain other persons, who were his children, and then declared: I wish that such of my property that I have not willed away, may be sold and divided among my *legal heirs*. The Court said: The testator, after making what he considered a proper division of his lands, slaves and other effects between those entitled to be remembered, was aware there yet remained a large surplus undisposed of. This he indicates shall go in the precise manner as if no will was made, when he uses the expression that he wishes it to be sold and divided among his legal heirs. When the term "heir" is used in connection with the personal estate only, there is no conflict in the cases, that it is to receive the construction of next of kin.

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[1] 4 Ambl. 273. [2] Stated 1 Roper on Leg. 85; see Simms v. Garrot, 1 Dev. & Battle, 393; Read *et als.* v. Fite, 8 Hum. 328.

Lowndes v. Stone, 4 Ves. 649; Holloway v. Holloway, 5 ib. 399; Vaux v. Henderson, 1 J. & W. 388.

This term, used solely in this connection, seems to be precisely equivalent to legal representatives, and the decisions are numerous where this is held to mean next of kin, and that these take under the will as under the statute of distributions.—Bridge v. Abbot, 3 Bro. C. C. 64; Long v. Blackall, 3 Ves. 486; Cotton v. Cotton, 2 Beavan, 67. These authorities are conclusive to show the court did not err in letting in the widow under this bequest, and the statute of distributions determines her share to be one-fifth, where there are more children than four.[1]

§ 102. Heirs of the Body: The natural construction seems to be, children; and if no children, then grand-children, &c.

§ 103. Heirs Male of the Body: Sons; if no sons, then grandsons, &c. It is not necessary that the descent should have been through *males*, for the son of a daughter would be entitled, though in claiming by *descent*, it is otherwise [2]

§ 104. Heirs Female of the Body: Daughters; if no daughters, then grand-daughters, &c. (See heirs male of the body.)

§ 104, *a*. Heir: This word has the same signification as 'heirs;' for if there be several heirs, or co-heiresses, they make but one heir in law, and therefore if A give to the "heir" of B, the gift is the same as if it had been to the "heirs" of B.

§ 105. Legatees: Ordinarily there seems to be no difficulty in the construction of the word. In Smith *et als.* v. Martin's Ex'rs, its meaning was controlled by the words of the will. In that case, the residuary clause was: The remainder of my property, not before enumerated, and what I may hereafter come into possession of, I give to be equally divided among my *lega-*

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[1] 10 Ala. 203. [2] 2 Jar. on Wills, 7-10.

tees, agreeably to the laws of the State in which I reside." He had previously given legacies to his wife, to his children, and to several grand-children. Parsons, J., in delivering the opinion of the Court, said: If the word "legatees" is to be taken in its literal sense, it applies to and includes his wife, children, and grand-children who are mentioned in the will, to all of whom, by a previous part of the will, he had given legacies. But we think it appears by the will itself, that the testator intended the residue of his estate for such of his legatees as it would have gone to in case he had died intestate—his wife and children only. The residue consisted of personal estate. It was bequeathed "to be equally divided among my legatees, agreeably to the laws of the State in which I reside." The word legatees, which otherwise would have included all, was restricted, we think, to such of his legatees as might have claimed the residue under the statute of distributions, in the event of his dying intestate, by the words that followed—"agreeably to the laws of the State," &c. Those words related either to the division or to the legatees. If to the division, they had neither meaning nor effect; for the division was to be equal, according to the express language of the testator. But if they related to the legatees, then they have both meaning and effect, as they are restrictive of the number of his legatees who are to take the residue. We do not feel at liberty to reject words which have a clear meaning and effect, and which are consistent with what he probably intended. We could only reject them upon the clear impression that they were used without meaning and without effect.[1]

§ 106. Servants: When a bequest is made to servants, the first question is, whether they are servants *de contractu*, or servants *de jure*.

§ 107. If they are servants *de contractu*, then those persons

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[1] 18 Ala. 819.

alone are entitled to take, who, at the death of the testator, were bound by agreement to serve during each and every part of the time for which they contracted to serve. This is so laid down by Mr. Roper,[1] but it seems to be rather too stringent a construction; for if a person had taken a boy, and the boy without any contract had remained in some humble capacity rendering service until the testator's death, it seems right upon construction to say that the boy should come in for a portion, and yet the case seems not strictly to fall within the rule as laid down.

§ 108. In regard to servants *de jure:* In Fable v. Brown, Ex'r, it was held that the *status* of our slaves is to be ascertained by reference to what was anciently held to be the condition of alien enemies and pagans, and therefore that a legacy given to a slave is not void, but that it cannot be recovered from the executor by the slave or his master, though it may escheat to the State in the hands of the executor. And the learned Judge who delivered the opinion, added: I do not say what the effect would be if the executor should think proper, of his own accord, to pay over the legacy to the slaves, or their master.[2] In Walker's Ex'ors v. Bostick,[3] however, it was said that the condition of slaves in this country is analogous to that of the slaves of the ancient Greeks and Romans, except in a few cases, wherein the manners of modern times have been softened by the benign principles of Christianity; and therefore that a legacy to a slave failing from incapacity to take sinks into the *residuum* of the testator's estate. This is the better doctrine, and was asserted by the court in Brandon v. The Huntsville Bank,[4] in Trotter v. Blocker & Wife,[5] and in Alston v. Coleman *et al.*[6] This being the state of the law, the question now under consideration cannot arise as to this class of servants.

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[1] 1 Roper on Leg. 121. [2] 2 Hill's Ch. Rep. 378. [3] 4 Dessaus. 207.
[4] 1 Stewart, 320. [5] 6 Porter, 269. [6] 7 Ala. 795.

Ordinarily, where slavery exists, no persons except slaves are known as servants, though a case may well arise in which hired servants might claim under a bequest to servants, when the testator was also the owner of slaves. (a)

§ 109. In regard to "survivors" we content ourselves with a reference to the forty-seventh chapter of Mr. Jarman's Treatise on Wills.

§ 110. An illustration of another kind of uncertainty is found in the case of a gift to one of the sons of A. B. when A. B. has several sons.

§ 111. Uncertainty, it is said, is sometimes produced by the mention of several objects alternatively, as in the case of a gift to A or B. But this is sometimes avoided by construing "or" to be "and," or by construing the gift to the second person to be a substitute in some event, as in Girdlestone v. Doe, where the gift was in remainder to B, or his heirs.[1]

§ 112. Where in the case of alternate gifts, the gift is void as to one alternative, it may be good as to the other. Thus in Hill's Ex'ors v. Bowman *et al.*, a testator, after devising lands to his executors to sell, bequeathed as follows: I give the money arising from "the sales of the lands and tenements aforesaid, and the collection of my outstanding debts, as well as all moneys which I may have on hand at the time of my death, in trust to my said executors, that they shall so dispose of the same for the purpose of aiding any of *the members of my family*, or any other person or persons, who may be in distress, and whom they may think I would myself have assisted in such

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(a) Upon the subject generally, see 1 Roper on Leg. Ch. 2. 1 Sug. on Pow. (568) *et seq.* 1 Bac. Abr. (Bouvier's ed.) 147 *et seq.* 2 Wms on Ex'ors, (729) *et seq.*

[1] 2 Sim. 226; 1 Jar. on Wills, 324 and note (w); Forsaith v. Clark, 1 Foster's (N. H.) Rep. 409.

cases, confiding the disposition of the said trust fund entirely to their discretion." Carr J. in his opinion said: That part of the clause in the will before us, which empowers the trustees to give a part of the fund "to any other person or persons who may be in distress," is clearly void for uncertainty; but why should it vitiate the foregoing part, for the benefit of the members of the testator's family? It is answered, because the word "*or*" couples the succeeding with the foregoing part of the sentence, and makes the word "distress" relate back to "members of my family." Suppose this construction were agreed to —does any one suppose that a trust raised by a testator for the benefit of any members of his family, who might be in distress, would be void? The books teem with such cases; and the only question about them is, whether the words *in distress* are not wholly inoperative, and the distribution of the fund to be made without them. The cases are both ways. But all the books agree that such a trust is valid; and surely, if so, the connecting it with a trust void for uncertainty cannot vitiate it. Tucker, P. also delivered an opinion, in which he came to the same conclusion.[1]

§ 113. And so, where the conjunction *or* connects parties who are the same, the gift of course is not thereby rendered uncertain; as in Philips v. Evans, where the gift was "unto and amongst the personal representatives or next of kin," no question was made as to the uncertainty of the gift.[2]

§ 114. The general proposition is, that it is not necessary that all the particulars of the description of the object of a conveyance should be accurate. Thus, under a gift to John and Benedict, sons of John Sweet, a son named James (there being no John) was held to be entitled.[3] So in Lane v. Green, the

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[1] 7 Leigh, 650. [2] 6 Eng. L. & Eq. Rep. 37. [3] 1 Jar. on Wills, (331.)

testator bequeathed as follows: I give and bequeath 100*l.* apiece to the four sons of Ann Hazell, wife of Mr. Hazell, of Chorley near Wallingford, by her former husband. Ann Hazell had three sons and one daughter by her former husband, who were living at the date of the will, and at the death of the testator; and they were the only issue of that marriage. Knight Bruce, V. C. said: I think it is impossible to say that the testator did not intend to give 400*l.*, and as there is no dispute as to the parties he intended to benefit, I think, on this particular will, the three sons and daughter of Mrs. Hazell take the 400*l.* equally among them.[1]

So in Adams v. Jones, the bequest was to Clare Hannah Adams, wife of Thomas Adams. The wife's name was Hannah, only; but Thomas Adams had a daughter named Clare Hannah Adams, who, at the date of the will, was two years old. It was held that the gift was not void for uncertainty, but that the wife was entitled.[2]

§ 115. The next certainty to which we are to look is in regard to the event. This certainty must be not only as to the event intended, but it must also be in the determinable quality of the event. It is not the uncertainty that an event will ever happen that renders void a limitation which is made to depend upon it; for *id certum est quod reddi certum potest:* but it is that uncertainty which prevents a court from determining whether the event has or has not happened.

Thus, in Hutchin v. Mannington, the testator, after noticing that his fortune was vested upon securities in the East Indies, gave several legacies. Most of them were particular to several of his brothers and sisters, with clauses annexed to each, directing that "if the legatee should die before he or she *might have*

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[1] 5 Eng. L. & Eq. Rep. 235; see also Trustees, &c. v. Peaslee, 15 N. H. Rep. (New Series) 317.

[2] 9 Eng. L. & Eq. 269.

received the legacy, it should go to the children of the legatee equally, and in default of issue, among the other brothers and sisters." Then the testator, after stating how much the legacies would amount to, gave the residue (calculating the amount) to his father absolutely, "but *in case of his death before he might have received* it," he gave it to his brothers and sisters and their children. The testator died about the year 1781, and his father in 1784, without having received any part of the residue; and the question was, whether the brothers and sisters were entitled to it under the limitation over, or the father took an absolute vested interest in the fund at the death of the testator, so as to entitle his personal representatives to claim it, although the father died before the receipt of any portion of it; upon the ground that the bequest over, if the father died before he might have received the residue, was an event so uncertain, and so impracticable to ascertain, as to be insufficient to divest the bequest which had vested in the father? And Lord *Thurlow* was of opinion, that the father took an absolute vested interest in the property at the death of the testator, and consequently that the brothers and sisters had no title because of the uncertainty when the gift over was to take effect.[1]

§ 116. It remains to be observed that the foregoing principles which relate to uncertainty in bequests are equally applicable to limitations by deed.

§ 117. The next question in regard to certainty is concerning the intent to convey; and here there are many cases to be found in the books as to the creation of trusts by words of recommendation or other precatory words.

§ 118. Judge Story says that such words ought not to be construed in an imperative sense, unless that sense is irresistibly

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[1] 1 Ves. 366; stated 1 Rop. Leg. 405.

forced upon us by the context. He does not, however, lay that down as the rule which is deducible from the authorities, but as the reasonable rule; and adds: Accordingly, in more modern times, a strong disposition has been indicated not to extend this doctrine of recommendatory trusts; but, as far as the authorities will allow, to give to the words of wills their natural and ordinary sense, unless it is clear that they are designed to be used in a peculiar sense.[1] Rogers, J. however, in delivering the opinion in Coates's Appeal, says: In my opinion—and I announce it with all deference—the reverse is the proper rule, unless it appears from the context that such was not the intention of the testator.[2]

§ 119. But let us look into some of the older and some of the later cases. We have seen incidentally that in Wynne v. Hawkins,[3] where a testator gave personalty to his wife, "not doubting but that she will dispose of what shall be left at her death to our two grand-children," the Lord Chancellor thought the words were strong enough to create a trust, if there were not uncertainty as to the property.

In Pushman v. Filliter, the testator bequeathed personal estate "unto my said wife, Mary Pushman, desiring her to provide for my daughter Anne out of the same as long as she my said wife shall live, and at her decease to dispose of what shall be left among my children in such manner as she shall judge most proper." The bill was filed by the children against Filliter, executor of Mary Pushman, claiming that an absolute trust, upon the death of their mother, was created in their favor. The Master of the Rolls said. The words are clearly sufficient to raise a trust; for we are now got beyond any possibility of doubt as to the rule of the court, that all words of recommendation, or desire, by a person having power to command, shall operate

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[1] 2 Story's Eq. § 1069. [2] 2 Barr, 129. [3] 1 Bro. Ch. Rep. 180.

as a trust. The only question then is, whether the person in whose favor the request is made, and the property to which it applies, are certain; if so, all these words used by a person having a right to command, shall create a trust. The Lord Chancellor, in Malim v. Keighley, seems to think the Lords Commissioners, in Cunliffe v. Cunliffe, did not intend to break in upon the rule. I cannot but think still, that it is over-ruled by Pierson v. Garnett; but, however, his lordship agreed with me, and it is now clearly settled upon Wynne v. Hawkins, Pierson v. Garnet, and the other cases, that any words of recommendation by a person having a right to command, do create a trust, if the person and the property are defined.[1]

In Meredith v. Heneage, the testator, after giving his real and personal estates to his wife, anxiously and warmly entreated her to settle such part of the real estate at her death as she might think proper in trust for certain persons; and added, that he had given her the whole of his property unfettered and unlimited, in full confidence and with the firmest persuasion that in her future disposition and distribution of it, she would give it to such of his father's heirs as she might think best deserved her preference. It was held that no trust was created. The Lord Chief Baron said: It is not necessary to travel through the cases which have been furnished by the great industry, and urged by the great ability of the learned counsel on both sides. Lord Alvanley, when Master of the Rolls, in Malim v. Keighley,[2] has extracted and stated the result of all the cases before that time; and the subsequent cases have, it seems to me, made no alteration. He states the result in the following manner: Wherever any person gives property, and points out the object, the property, and the way it shall go, that does create a trust, unless he show, clearly, that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it.

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[1] 3 Ves. 7. [2] 2 Ves. 333, 529.

I will not stay to inquire whether the language of that very learned and excellent Judge is very accurate and critically correct, as applied to the cases; but I believe they are the very words his honor used. I think, however, that the result, as stated by him, is sufficiently correct for the present purpose; and I shall consider the passages in the will accordingly; and I confess that I feel myself bound by the doctrine delivered in it as generally consistent with the doctrines that have prevailed. But I hope to be forgiven if I entertain a strong doubt whether, in many, or perhaps in most of the cases, the construction was not adverse to the real intention of the testator. It seems to me very singular that a person, who really meant to impose the obligation established by the cases, should use a course so circuitous, and a language so inappropriate and also obscure to express what might have been conveyed in the clearest and most usual terms—terms the most familiar to the testator himself, and to the professional, or any other, person who might prepare his will.

In considering these cases, it has always occurred to me, that if I had myself made such a will as has generally been considered imperative, I should never have intended it to be imperative; but on the contrary, a mere intimation of my wish that the person to whom I had given my property should, if he pleased, prefer those whom I proposed to him, and who, next to him, were, at the time, the principal objects of my regard. I am happy to reflect that, in this opinion, I have the concurrence of a noble Judge, than whom there never has been, nor, I believe, ever can be a person more active in investigating the principles of the law in all its bearings, or more extensively learned on every legal subject. For in Wright v. Atkyns,[1] the Lord Chancellor (Eldon) says, "this sort of trust is generally a surprise on the intention; but it is too late to correct that." * *

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[1] 1 V. & B. 315.

I have said so much as a justification, or rather as the foundation of the opinion which I entertain, that, though I feel myself bound by the decisions and cannot object to follow them, I do not consider it to be my duty to extend the rule of construction which has been adopted in them, and to add to the number of those where the court appears to me rather to have made, than to have given effect to the wills of testators.

But without following the learned Baron through his argument, we may quote an additional paragraph and leave the case.

It has been held, said he, and must, I think, be admitted, that if an intention appear in any part of the will to give to the devisee a right or power to spend the property, words of equal force with those would not be imperative; the court, in its acuteness to extract the meaning, conceives it to be inconsistent with the intention to create an imperative trust, that the party should have the right or power to dispose of the property at his pleasure, and, by using that privilege to any extent, leave nothing, or more or less, to remain the subject of a trust. In this case, the words "unfettered and unlimited," which are used by the testator to show his opinion of the extent to which he had devised, are certainly as strong to manifest an intention to convey the absolute dominion to the party, as if words had been used more directly authorizing her to spend it, or to deal with it as she pleased.[1]

In Sale v. Moore, a testator having given an annuity to one of his next of kin, and expressed a reason for giving nothing to the others, gave the residue of his property to his wife, recommending to her and not doubting that she would consider his near relations, as he would have done if he had survived her: it was held that no trust was created. The Vice-Chancellor said: The first case that construed words of recommendation into a command, made a will for the testator; for every one

[1] 1 Sim. 543.

knows the distinction between them. The current of decisions has, of late years, been against converting the legatee into a trustee.[1] But there was uncertainty in the quantity in that case which would have rendered an express trust void, for how could it be ascertained how he would have considered his relations.

In Williams v. Williams, the Vice-Chancellor said: I doubt if there can exist any formula for bringing to a direct test the question, whether words of "request," or "hope," or "recommendation," are, or are not, to be construed as obligatory. It may be very safe in general to say, that where there is uncertainty as to the subject matter, or as to the objects in whose favor the request, or hope, or recommendation is expressed, those precatory words cannot have been intended to be absolutely binding. But the converse of the proposition is by no means equally true. The subject matter of the bequest and the object of the testator's bounty may be perfectly ascertained, and yet the context may show that words of hope or recommendation were not intended with the absolute discretion of the legatee[2] Accordingly, in that case, where a testator gave all his personal property to his wife absolutely, and afterwards by a codicil, in the form of a letter addressed to her, declared: "I hope my will is so worded that everything that is not in strict settlement, you will find at your command. It is my wish that you should enjoy everything in my power to give, using your judgment as to where to dispose of it amongst your children, when you can no longer enjoy it yourself. But I should be unhappy if I thought it possible that any one not of your family should be the better for what I feel confident you will so well direct the disposal of." It was held that the widow took absolutely, and that there was no trust created.

In Briggs v. Penny, the testatrix gave various legacies, and

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[1] 1 Sim. 534.

[2] 5 Eng. L. & Eq. Rep. 50. See Knott v. Cottee, 2 Philips, 192.

then gave S. P., whom she appointed sole executrix, 3000*l.*, and a like sum of 3000*l.* in addition, for the trouble she would have in acting as executrix. She made other bequests, and then gave all the residue of her personalty to S. P., her executors, administrators and assigns, "well knowing that she will make a good use, and dispose of it in a manner in accordance with my views and wishes." It was held that there was an intent to create a trust as to the residuary gift, and therefore that S. P. could not take beneficially. The Lord Chancellor said: I conceive the rule of construction to be, that words accompanying a gift or bequest, expressive of confidence, or belief, or desire, or hope that a particular application will be made of such bequest, will be deemed to import a trust, upon these conditions, —first, that they are so used as to exclude all option or discretion in the party who is to act, as to his acting according to them or not; secondly, the subject must be certain; and thirdly, the objects expressed must not be too vague or indefinite to be enforced. * * * * It is most important to observe, that vagueness in the object will unquestionably furnish reasons for holding that no trust was intended; yet this may be countervailed by other considerations, which show that a trust was intended, while at the same time such trust is not sufficiently certain and definite to be valid and effectual. And it is not necessary—to exclude the legatee from a beneficial interest—that there should be a valid or effectual trust; it is only necessary that it should clearly appear that a trust was intended.[1]

§ 119*a*. The question as to certainty in the intent to give, arises also in cases of direct conveyances. Thus, in Young v. Carson, a testator declared by will, "I wish her to get Stanford in her third of the property, if she chooses," and it was held that it was not a specific legacy of the slave to his wife, but gave her a

[1] 8 Eng, L. & Eq. 221. Another case upon the subject is Lucas v. Lockhart et als. 10 Smedes & Mar. 466,

right to take him as a part of her third, charged at his valuation.[1]

In Ham v. Ham, a testator declared: I lend my daughter C. my negroes, &c, during her life-time, or widowhood, and then I give them to her lawful heirs, for them and their heirs forever," and the Court held that the absolute interest in the slaves passed to the daughter.[2]

In Benton v. Pope *et als.*, William Pope, by deed, conveyed two slaves to his grand-children Salina, Mary, and Sally, daughters of his son, W. W. Pope, to have and to hold forever; "the same to remain in the possession of Wm. W. Pope during his life, but not to be subject to his creditors, or liable for the payment of his debts, in any way whatever; and the said Wm. W. Pope is not to dispose of said negroes in any way or manner, either for his life, or any number of years." The Court said: We have no hesitation in saying, that the whole and exclusive legal title to the negroes is vested by the deed in the plaintiffs, the grand-children of the donor; and if the father has any interest whatever, under the deed, it is a mere equitable *usufruct*, subordinate to their legal title, not liable for his debts, and not available for any purpose in a court of law.[3]

§ 120. Another matter for consideration, in the creation of interests in chattels personal, is repugnancy. And there are several ways in which the question of repugnancy may present itself.

§ 121. It may present itself in the gift of the same thing by deed, or by will, to different persons. Thus, a chattel, in the first part of a deed or will, or even the first part of a clause, may be given to A, and in a subsequent part, the same chattel may be given to B. The old rule in such case was, that the first gift in a deed, and the last in a will, should take effect, and the other should be void.[4] Thus, in Ulrich v. Litchfield, Lord

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[1] 1 Dev. & Bat. 360.
[2] 1 Dev. & Bat. Eq. 598.
[3] 5 Hump. 392.
[4] 2 Black. Com. (381.)

Hardwicke said: In the case of a simple legacy, if a man makes a will and gives a horse to A in the first part, and in the latter end of it, gives the same horse to B, it is a revocation of the former legacy, and therefore Swinburne is mistaken in point of law.[1]

In Sherratt v. Bentley, Brougham, Lord Chancellor, said: The rule has often been cited, though very seldom made the ground of judicial determination, which requires us to give effect to the last of two repugnant clauses in a will, though in a deed the first shall prevail. It is, indeed, as old as the time of Lord Coke, who states it in the first Institute, Co. Litt. 112 *b;* and it is curious to observe how he deduces it from the text. Littleton, s. 168, simply says, "that if a man at divers times makes divers testaments and divers devises, &c., the last devise and will shall stand." His learned and subtle commentator educes from &c. this further meaning: "Hereby, &c., is to be understood, also, that in one will where there be divers devises of one thing, the last devise taketh place, *cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est.*" But subsequent authority has, though by no means uniformly, adopted this principle. Some have held that both of the repugnant gifts are void; and Mr. Butler,(*a*) in his Note, (Co. Litt. 112 *b*, N. 1,) says, the better opinion is, that each devisee takes a moiety. I think, however, that the weight of authority is the other way; and I feel bound to say, that the law is otherwise, and that Lord Coke's doctrine is the sound one; and I do so in deference to the weight of authority, and not to the reason of the rule. For, besides the inconvenience of so severing the parts of one instrument as to set the latter against the former, instead of construing the whole together, (which would lead either to giving effect to both or to neither,) the refinement seems

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[1] 1 Atk. 375.

(*a*) The Note is Hargrave's.

sufficiently puerile which introduces this rule of construction in the case of wills, merely because of the maxim, *voluntas est ambulatoria usque ad mortem;* whereas ample effect would be given to the principle, if the whole will were considered as one act, instead of being separated into parts, an earlier and a later. Besides, there is manifest inconsistency in this doctrine; for if the last expression of all is to prevail, wherever the will is executed by signing and publication, necessarily the last act of all, the latest expression of intention is the execution, and this refers to the earlier as well as to the later clauses, and recalls them into existence, if they had been destroyed by those later clauses.

Such appears to be the reasonable view of the subject, and it would lead either to the opinion of those who have held that both clauses are destroyed, or to that which considers both devises to take equally, on the sounder principle of giving effect as far as possible to the whole instrument. The weight of authority, however, is against this opinion. Ulrich v. Litchfield, 2 Atk. 372, is a case reported in a very slovenly way; but it appears that Lord Hardwicke, so far as his opinion can be gathered from it, inclined to the rule laid down by Lord Coke, and dissented from the opinion of Plowden, and from the case of Paramour v. Yardley, Plowd. 539. But, in Ridout v. Pain, 3 Atk. 486, which was decided five years afterwards, Lord Hardwicke puts the case of a devise to A and his heirs, of a farm in Dale, and in a subsequent part of the will, a devise of the same to B and his heirs, and says that, "though the old books held this to be a revocation, yet latterly it has been construed either a joint tenancy, or a tenancy in common, according to the limitation." Were it not for the opinion expressed by Lord Hardwicke upon the import of the cases, I should have said that these decisions do not materially depart from or conflict with Lord Coke's rule; for he evidently contemplates devises irreconcilably repugnant, and which in no way of reading them can stand together; and where the authorities held the two devisees to take jointly or in

common, there was no irreconcilability, repugnancy, or necessary revocation of the one by the other. I incline to think that the Touchstone takes the same view of the matter, p. 451, as the learned editor, Mr. Preston, certainly does, in his edition of that valuable publication. But I speak with much distrust of my own view of the subject, when I find that the point struck Lord Hardwicke in a different light.

In Wykham v. Wykham, 18 Ves. 395, Lord Eldon considered Lord Hardwicke as having decided Coryton v. Helyar, (which had then not been published by Mr. Cox,) on what his lordship calls the doctrine prevailing in all times as to wills, that a subsequent limitation inconsistent with a former one, cuts down the former by a necessary implication. But, in Coryton v. Helyar, 2 Cox, 340, Lord Hardwicke supplied the words, in the gift of a term of ninety-nine years, "if he should so long live;" so that it should seem the case was one of construction, and not of revocation. I nevertheless must regard this expression of Lord Eldon as lending the sanction of his authority to the doctrine he refers to in Wykham v. Wykham.

Lord Alvanley had occasion more than once to consider this subject. In Sims v. Doughty, 5 Ves. 243, he says, that where two parts of a will are perfectly irreconcilable, so that they cannot stand together by rejecting words in either part as inserted by plain mistake, he knows of no rule but by taking the subsequent words as an indication of a subsequent intention, and he adds, "the Court is in a dilemma, and cannot act at all unless they do that." Again, in the last case, which this learned and laborious Judge decided, Constantine v. Constantine, 6 Ves. 100, he refers to the opinion just cited, and says that he adheres to it; admitting, however, that where the same thing has been given to two persons in different parts of a will, doubts have been entertained whether they should not both take, as joint tenants.

But in Doe *dem.* Leicester v. Briggs, 2 Taunt. 103, the doc-

trine was carried farther than I am aware of its having been carried in any other case. The question there arose upon the construction of repugnant words in the same clause; and it was whether a devise to A in trust to pay unto, or to permit and suffer B, to receive the rents and profits was a trust, or a use executed in B; and Chief Justice Mansfield delivered the judgment of the court after time taken to consider. The court—consisting of three most eminent common lawyers, besides the Chief Justice, viz: Heath, Lawrence, and Chambre, Justices—held "the use executed in B, and expressly upon the ground of the general rule, that, if there be repugnancy, the first words in a deed, and the last in a will shall prevail." The Chief Justice added, that "for want of a better reason, the court was forced to give the beneficial with the legal estate," and he prefaced his judgment by observing that "the case might be argued and considered forever without advancing it at all in law, reason or precedent." But these observations most probably referred to the peculiarity which marked the case of the repugnant words being parts of the self-same gift. Had the irreconcileable opposition been between different clauses separated by a considerable interval, there cannot be a doubt that the court would have applied the rule without any hesitation. It must then be admitted, that the great weight of authority, both of Lord Coke and of the modern decisions, is in favor of regarding a subsequent gift in a will as revoking a prior one to which it is repugnant, and not rendering it at all void for uncertainty. How far that repugnancy could be got rid of by presuming an intention to give each legatee an equal moiety, where the very same thing is given first to one and then to another, there being no expressions excluding such intention, might be a different question. The repugnancy which existed in those other cases, may be said not to arise here. If in one part of a will an estate is given to A, and afterwards the 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 Ulrick v. Litchfield, 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 subsaquent gift, entirely and irreconcilably 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.[1]

§ 122. Upon this case, Mr. Jarman remarks: It will be perceived that Lord Brougham considered that the two devisees take in moieties; i. e., tenants in common. It is submitted, however, that to hold the devisees to be joint-tenants, is a preferable construction, as less violence is thereby done to the testator's language than by making them tenants in common, as the creation of a tenancy in common requires positive intention; and this seems to have been the notion of Lord Hardwicke, who, in Ulrich v. Litchfield, treats it as clear that the devisees, if they take concurrently, are, joint tenants.[2]

§ 123. No one, it is presumed, would question the position that the devisees or legatees, in such case, take as joint tenants,(a) unless a different intention appear; and the contrary opinion does not seem to have been held by the Lord Chancellor in the case just cited. He was not addressing himself to the distinction between the two kinds of tenancy. The point was,

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[1] 2 My. & Keene, 149. [2] 1 Jar on Wills, (418.)

(a) If a man in one part of his will devised his lands to A in fee, and in another part of his will devised the same to B in fee, they are joint-tenants, per Dyer and Brown, J. 8 Vin. Abr. 281.

shall one take, or shall both take? He said, "each may take a moiety." Does not a joint tenant take a moiety?—"an undivided moiety of the whole?"[1] It is true, that a tenant in common also takes a moiety—"the whole of an undivided moiety." Hence it appears that the remark of the Lord Chancellor is strictly in accordance with principle and authority. Besides, the manner of expressing the general rule is not a novel one; for Copley, Sergt. in arguing Edwards v. Symons, said, "the courts have of late altered the rule of construction, and if a thing be given in one part of a will to one, and in another part to another, instead of holding that the last words shall be pursued and the first rejected, the court have said, *the devisees shall take in moieties.*"[2] And so also said Hargrave, in his note to Co. Litt. 112 b.

§ 124. It is observable, also, Mr. Jarman adds, that both Lord Hardwicke and Lord Brougham considered that the doctrine in question did not apply to a single indivisible chattel; but such an exclusion is attended with difficulty, for though, certainly, it may seem rather absurd that a testator should give a horse or a watch to several persons concurrently, yet it is impossible to say that there may not be such an intention; and where is the line to be drawn? Is it to depend upon the greater or less convenience attending a joint or concurrent enjoyment of the subject of the gift?[3]

§ 125. The general doctrine, then, laid down by Lord Brougham, is, that where there are two gifts, in the same instrument, of the same property, to different persons, they shall take it equally, unless there appears an intention to revoke the former gift, which intention will not appear from the mere fact that a subsequent gift of the same property has been made by the same instrument, to a different person. And that when such an

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[1] 2 Black. Com. (182) [2] 6 Taunt. (218.) [3] 1 Jar. on Wills, 418.

intention appears, as by the words "not to the first donee," or other words of like import, then there is a case of repugnancy, and the reputed doctrine of Lord Coke applies, viz: that the first gift in a deed, and the last in a will, shall take effect.

§ 126. Now, in regard to a deed, there can be no doubt of the general rule, that if the *habendum* be repugnant to the premises, that the premises shall prevail; and it is said that the *habendum* shall never introduce one who is a stranger to the *premises*, unless it be as a remainder-man.[1] But a deed may be so informal as not to have its regular parts, and in such case the question might be material, what are the premises? In Sumner v. Williams, the premises are defined to be everything which precedes the *habendum*.[2] But there may be a good deed without a *habendum*, and there may be gifts of the same thing to different persons in the *premises* as defined. The pole star construction, both of deeds and wills, is the intention. The court which is called upon to construe either, will look to the whole instrument, and, it is said, will transpose words,[3] sentences, or parts,[4] in order to effectuate that intention which is deducible from the whole instrument. In Losh v. Townley, however, Lord Brougham, said upon this point: A language in construing instruments has long been used, partly for the convenience of its conciseness, which, however, has a tendency to mislead, and we speak familiarly of reading "and," "or,"—of rejecting words, as "for life," or "no longer,"—of inverting the order of words, and of inserting words, till we almost seem to be altering the instruments we are called upon to interpret; and sometimes we are apt to use the device which these expressions denote, rather because there exists such a phrase, than because we are entitled to use the thing. In truth, all these

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[1] Bac Abr. Tit. Grants, (1) (Bouvier's ed.) 529. [2] 8 Mass. R. 174
[3] 2 Black. Com. (379); 1 Touchstone, (Prest. ed.) (88) § 10.
[4] Doe v. Philips, 3 Ark. Rep. 57; Carter v. Carter, 1 Ves. sr. (168.)

forms of expression mean but one thing, though framed with variety of diction. It is, that the meaning of the maker of the instrument is inaccurately expressed, either from being obscurely, or elliptically, or contradictorily enunciated; and that having, upon a view of the whole matter, ascertained his real, or full, or prevailing sense—real, where it is given ambiguously; full, where elliptically; and prevailing, where contradictorily—we give to the whole such effect as the result of that inquiry authorizes, for accomplishing his purpose.[1] But returning from this criticism, we may lay down the rule, that where there is a gift of the same chattel to different persons in the premises of a deed, or in different parts of the deed, one part not being a *habendum*, the construction will be that it was intended they should take jointly, unless a different intention appear.

§ 127. The doctrine in regard to wills, as laid down by Lord Brougham, seems to be correct, with the exception of the indivisible chattel;[2] and as to that, Mr. Jarman seems to be right. There does not seem to be any authority for the exception, and there is certainly no distinction in principle: besides, the point was expressly decided against the exception in Field, Adm'r, v. Eaton's Ex'ors.[3]

§ 128. It sometimes happens that an apparent gift of the same thing to two persons is reconciled by construction, so that they take at different times. Thus, in an old and anonymous case, Anderson, C. J. said, that if one devise land to J. S. in fee, and after by the same will devise that land to J. D. for life, both parts of the will shall stand; and in construction of law, the devise to J. D. shall be first.[4]

So in Chycke's case,[5] the devise was, "I give the fee simple

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[1] 1 Coop. Sel. Ca. 372; 8 Eng. Ch. Rep. 484.
[2] 19 Vin. Abr. 45; Cro. Eliz. 9.
[3] 1 Dev. Eq. 283; see also McGuire v. Evans, 5 Iredell's Eq. 269.
[4] Cro. Eliz. 9. [5] Dy. 357a.

of my bigger house in Loper-lane to my cousin Alice Ludlam, and after her decease to William L. her son," who was heir apparent, and Dyer reports that it was adjudged that the construction was an estate for life to the mother, remainder for life to the son, remainder in fee to the mother. Bendloe and Anderson, however, report that the mother had but a life estate, and the son the fee in remainder. But they must have erred in their report; and Dyer's is the best opinion. In another case, at least, where A devised the fee of his land to B, his wife, remainder to C for life, remainder to D for life, it was held that B took an estate for life, with remainder in fee expectant upon the estates of C and D.[1]

§ 129. Another way in which the question of repugnancy may arise, is in regard to the quantity of interest given by the deed or will. Thus, if there be a gift of chattels personal "to A, his executors and administrators," or "to A and his assigns forever,"—*habendum* to him the said A for life—there is repugnancy, and the *habendum* is void, and the gift absolute. But if the *habendum* had been to him the said A, &c., for the life of B, the *habendum* would have been good.[2] Lord Coke says: Note, reader, a difference between an estate in the premises implied, and an estate expressed; for if A grants a rent to B generally, the same by implication and construction of law is an estate for life; but if the *habendum* be for years, it is good, and shall qualify the generality and implication of the premises.[3] So if the gift be "to A, without more, *habendum* to him the said A for life or years," the *habendum* shall control the premises which by implication would have passed the absolute title. And so also, if the gift be to A for life or for years, *habendum* to him the said A, his executors, administrators and assigns, or to him the said A forever, the *habendum* is void.[4] This is said upon

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[1] 8 Vin. Abr. (247) § 11.
[2] 2 Lomax's Dig. 217.
[3] Baldwin's Case, 1 Rep. B. 2, p. 24.
[4] Id.

the supposition that partial interests in chattel personal may be created by deed, and that *quasi* reversions are admitted to exist when partial interests in them are created, and there is no limitation over of the residue.

Take the case of Porter v. Ingram, as one in point here. In that case, Daniel Porter, by deed, gave to his daughter a negro girl named Rose, "to have, hold and enjoy all and singular the said negro girl Rose, *after my death*, to the said Phebe Porter, her heirs, executors, and assigns," &c. In delivering the opinion of the court, Mr. Justice Huger said: The deed of gift to Phebe is formally drawn. The premises, however, appear to be at variance with the *habendum*. In the premises Rose is given *in præsenti*, the *habendum* is *in futuro*. Where the premises of a deed are not complete and perfect, resort must be had to the *habendum*, to ascertain the intention of the parties. It may then limit or extend, or even frustrate the premises. But when the premises are complete and perfect, and the *habendum* is at variance with them, and they cannot stand together, the *habendum* is void. The first part of a deed has priority in law as well as in fact, which is said not be the case with wills. 3 Dy. 272; 14 Vin. 51, 56, 100, 141, 145. If, therefore, the *habendum* to Phebe, after the death of the donor, be inconsistent with, and repugnant to the gift *in præsenti*, set forth in the premises, the *habendum* is void, and Phebe was entitled to Rose from the date of the gift. It is unnecessary, in this case, to determine whether the premises and *habendum* may not be reconciled, by regarding Phebe as taking Rose in trust for her father, during his life, and to her own use, after his death; in either case she is now entitled to Rose, if the deed was not fraudulent, and Rose was delivered in conformity to its provisions.[1]

§ 130. But the question of repugnancy can scarcely arise in

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[1] Harper's Law Rep. 492.

this way in a will, for where inconsistent interests are given by will to the same person, the legatee will take the larger interest, unless there be something else in the will to control it.(a) In Ridout v. Pain, Lord Hardwicke said: Another objection has been started, that the residuary devise is to the same person who is before made tenant for life, and therefore inconsistent to give her the same thing in fee, which he had given her for life only, in the former part of the will. This objection deserves to be considered, but I think is not sufficient. It is a great deal too much, to say, that when a man makes a will, and gives a a person a particular limited estate in one part of that will, and afterwards devises to the same person in more general words, that the devisee shall not take benefit by such general residuary devise.[1]

§ 131. The question of repugnancy may also arise between a gift and some provision inconsistent with it.[2] Thus, if a testator bequeath five hundred dollars to B for life, to be paid out of the proceeds of the sale of his real estate, and then direct that his real estate shall be sold after the death of B, there is a fatal repugnance. But if, as in the case of Sweet v. Chase,[3] the gift to B were absolute, then there would be no inconsistency, and B would take a vested legacy, though its enjoyment would be postponed until his death.

So in the old case of Dorrell v. Collins, the jury found that the masters and scholars of the college of Sinkford were seized in the time of Hen. 8, of the manor of Hodley, of which the place, &c., is parcel, and let all their lands in Lambehurst (ex-

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(a) For double legacies, see Ridges v. Morrison et al. 1 Bro. Ch. R. 389; Creveling v. Jones, 1 New Jer. 573; Cases 8 Vin. Abr. 308; Ford v. Ruxton, 1 Collier, 403; Manning v. Thesiger, 2 My. & Keene, 29; Guy v. Sharp, 1 Coop. Sel. Ca. 8; 8 Eng, Ch. Rep. 386; 10 Johns. 158.

[1] 3 Atk. 492.

[2] Shoenberger v. Lyon, 7 S. & W. 184; Youde v. Jones, 13 Mees. & and Wels. (534.)

[3] 2 Comstock's Rep. 73.

cept the manor of Hodley, in Kent and Sussex) to J. S. for years; and they further found that the masters and scholars had no other lands in Lambehurst than the said manor. The question was, if the manor passed by the lease. And all the court held, that it being found they had no other land than the manor, the exception was void, because it goeth to the whole thing demised; otherwise of an exception of part.[1] So in another old case where a man demised a house and shops excepting the shops, the exception was held to be repugnant and void.[2]

So in Bradley v. Piexoto, the testator bequeathed the dividends of 1620*l.* bank stock to his son for life, and at his death the principal and interest to his heirs, executors, administrators and assigns, with a proviso that he should forfeit his interest if he attempted to alien it, and it should therefore pass to other children who would observe the tenor of his will. The court held the proviso to be repugnant and void.[3] But that was not the question.

So every *general* restraint upon alienation of the interest given, whether it be an interest forever or for a limited period, is repugnant and void. But a *partial* restraint imposed upon a a gift, whether of an absolute or partial interest, is good—at least if it be not as to a particular mode of conveyance.[4] Thus, a gift to B provided, that if he aliens to a particular person, or a gift to B to be delivered to him at twenty-five years of age, provided if he aliens before that age, it shall go over to C, the proviso is good; and if violated, the gift over will take effect. The time, however, during which alienation may be restrained, does not seem to be fixed.[5]

§ 132. But it is necessary very carefully to distinguish between *conditions* and *limitations*. Thus, if there be a gift to

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[1] Cro. Eliz. 6.
[2] Horneby v. Clifton, Dy. 264*b*.
[3] 3 Ves. 323.
[4] Ware v. Cann. 10 B. & Cress. 433.
[5] See Tilghman, C. J. in McWilliams, et al. v. Nisly et als. 2 S. & R. 513.

A, with a proviso that if he alien his interest, it shall cease, it is a *condition*, and being in restraint of alienation, which is incident to property, it is unlawful as well as repugnant, and therefore it is void; but a gift to A for life, or *until* he shall become bankrupt, or until he shall attempt to sell the thing given, according to authority, contains no condition. It is held to be, not a restraint imposed, but a limit fixed. But hear Lord Eldon: In Brandon v. Robinson, he said: There is no doubt, that property may be given to a man until he shall become bankrupt. It is equally clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents to a life estate; and, as I have observed, a disposition to a man, until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for life, with a proviso that he shall not sell or alien it. If that condition is so expressed as to amount to a limitation, reducing the interest short of a life estate, neither the man, nor his assignees can have it beyond the period limited.[1] The case of Shee v. Hale is in point. In that case, there was a bequest of an annuity for life, or *until* the annuitant should sign some instrument whereby he contracted or agreed to sell or charge the same, and in that event, the annuity was to cease and to fall into the personal residue, which was disposed of by codicil. The annuitant took the benefit of the insolvent act, and inserted the annuity in the schedule of his property. It was held that the annuity was at an end.[2]

§ 133. But note, if the gift be to A for a limited period, or it is said, absolutely,[4] with a proviso that upon alienation, it shall cease, and the property shall pass to B, the proviso loses its character of a condition, and becomes a limitation which is valid.

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[1] 18 Ves. (433.) [2] 13 Ves. 404.

[4] Lew. on Trusts and Trus. (140.) The cases do not seem to go so far, but there seems to be no reason why they should not.

This falls within the remark of Lord Eldon, in Brandon v. Robinson, and seems to have been the idea of the Master of the Rolls, in Wilkinson v. Wilkinson.[1] There is, indeed, no other ground upon which the cases can be sustained.[2]

So, if the proviso be that the interest shall cease upon the first taker becoming bankrupt, or taking the benefit of the insolvent act.

§ 134. Mr. Roper calls these limitations over conditional limitations, but they are, by construction, strictly *quasi* remainders. They would be void as conditional limitations, because an unlawful condition which is to defeat an interest is void, and therefore a limitation cannot depend upon it. The clause must therefore be a limitation either in fact or by construction. The gift, then, is an interest with a double aspect; an interest with two limits, one absolute, the other until alienation; and therefore it is, that the gift over upon alienation is a *quasi* remainder. The cases, therefore, in order to be consistent, ought to hold the clause to be a limitation as well when there is no limitation over, as when there is. Not that they ought to hold that a proviso, or condition not to alien, is a limitation; but they ought to hold the clause declaring that the interest shall cease upon alienation to be an original limit of the interest.

§ 135. The cases seem, indeed, to have departed from principle in holding that a gift forever, or until alienation, is a gift until alienation, for it is nothing more than a condition *per obliquum* in restraint of alienation. They seem also to have departed from principle in allowing a limitation over to take effect in the event that the first taker aliens; such limitation over is strictly a conditional limitation, for it is to take effect in defeasance of the prior limitation, and upon a condition that it is unlawful.

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[1] 3 Swans. 521. [2] See 1 Rop. on Leg. 526.

§ 136. An exception to the general proposition is thus stated by Mr. Lewin: A person cannot settle his own property on *himself*, with a limitation in the event of bankruptcy or insolvency, though, on his marriage, if he receive a portion with his wife, he may settle a fund of his own to the extent of his wife's fortune; for though apparently a settlement by the husband, it is in fact a settlement of the money advanced by the wife.[1] This last would not, of course, be true, if the marital rights were prevented by statute or otherwise from attaching to the wife's property.

§ 137. But it has been a question, whether an alienation *in invitum* as by execution, is an alienation within the meaning of the proviso. Mr. Roper denies that there is any distinction, but the cases establish that when it appears that the alienation intended was by the act of the party, then an alienation *in invitum* will not be held to be an alienation within the proviso. It is always a question of intention; but the limitation, it is said, must always be construed with great strictness.[2] Thus in the case just cited, the words were, "in case they, or any or either of them shall charge, or attempt to charge, affect, or incumber the same, or any part or parts thereof respectively, then" &c., and it was held that they did not extend to bankruptcy.

But where an alienation *in invitum* is not included in the words, still if the party attempts an alienation under cover of such an alienation, his alienation will be held to be voluntary.[3]

§ 138. Another instance of repugnancy between a gift and a provision inconsistent with it, is furnished by the cases in which the attempt was made to render the gift merely personal—cases in which the attempt was made to give a person the enjoyment of property without giving him the property itself. Thus in

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[1] Lew. on Trusts, (140.)

[2] Lear v. Legget, 2 Sim. 479.

[2] See Doe v. Carter, 8 D. & E. (300.)

Green v. Spicer, there was a devise of real estate to trustees, "upon trust to let and manage the same, and receive the rents, issues and profits to or for the board, lodging, maintenance and support, and benefit of my son, Robert Pinning, at such times and in such manner as they think proper, for and during the term of his natural life; it being my wish that the application of the rents and profits for the benefit of my said son may be at the entire discretion" of the said trustees, "and that my son shall not have any power to sell or mortgage, or anticipate in any way the same rents, issues and profits, or any rents, issues and profits, dividends or interests derived under this my will." The son took the benefit of the insolvent act, and the question was whether the assignees were entitled. The Master of the Rolls said: The question in this cause is, whether the testator's son, Robert Pinning, takes any estate or interest under the will, other than by the discretion of the trustees. Robert Pinning takes a vested life estate, of which the trustees cannot deprive him by any exercise of their discretion: they are bound to apply the rents, issues and profits for the benefit of Robert Pinning, and their discretion applies only to the manner of the application.[1]

So, in Snowden v. Dales, A assigned 800*l.* to trustees in trust during the life of J. D. H., or such part thereof as they should think proper, or at such other times and in such portions as they should judge expedient, to pay the interest to him; or, if they should think fit, to lay it out in procuring for him diet and other necessaries, but so that he should not have any right to the interest, other than the trustees, in their uncontrolled discretion should think proper, and so as no creditor of his should have any claim thereon, nor should the same be subject to his debts, disposition or engagements: and it was declared that after his death, the 800*l.* and all savings and accumulations of interest, if any, should be in trust for his children, and if he should

[1] 1 Rus. & My. 395.

have no child, then in trust for C. J. D. H. became bankrupt, and the question was, whether the assignees were entitled. The Vice-Chancellor said:—It is plain, that the grantor did intend to exclude the assignees: and that object might have been effected if there had been a clear gift over.

But the question is, whether there is any thing in the deed that amounts to a direction that the trustees shall withhold the payment of the interest and accumulate it, during the life-time of J. D. Hepworth, if they shall think fit. Although the words, "savings and accumulations," as they first occur, might bear that construction; yet, taking the whole of the instrument together, I think that the better construction is, that those words do not enable the trustees to withhold and accumulate any portion of the interest during the life of J. D. Hepworth. Accordingly, he declared the assignees entitled to the life interest.[1]

§ 139. But here a very important exception exists. If property be given in trust for the separate use of a married woman, with a proviso that she shall not anticipate or alien, the the proviso is valid. If, however, the gift be to a *feme sole*, the proviso is null, as it would be if the gift were to a man; and so, if a married woman to whom such a gift is made becomes a widow, the proviso is invalid during her widowhood; but if the *feme sole* or the widow afterwards marry, the proviso becomes effectual.

In Tullet v. Armstrong, a testator gave property in trust for his wife for life, with remainder to M. A. T., then a *feme sole*, for life, in such manner that M. A. T. should not anticipate, sell, assign, or dispose of her interest, and in such manner that it should be for her sole and separate use. M. A. T. was unmarried at the death of the testator, but she married in the life-time of the widow.

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[1] 6 Sim. 524.

The case was presented to Lord Chancellor Cottenham, upon appeal from the Rolls.

The counsel in support of the appeal said there were two questions: 1. Whether a settlement to the separate use of an unmarried woman is good, and they admitted it to be so. 2. Whether the restraint imposed upon anticipation in such case is good, and they contended that it was not. The Lord Chancellor, affirming the opinion below, held that the questions were identical in principle. That it was well established that a separate estate might be given to a woman, and that a proviso against anticipation and alienation was valid in such case. That wherever the separate estate was held to exist, the *proviso* imposed upon it must also be held to exist. That both the separate estate and the proviso were equally the creatures of equity, and equally inconsistent with the ordinary rules of property. That the proviso was but a qualification and restriction of the separate estate, and so must stand or fall together. He said:— When this court first established the separate estate, it violated the laws of property as between husband and wife, but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a *feme sole*, the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property, supported the validity of the prohibition against alienation. In the case now under consideration, if the after-taken husband be permitted to interfere with the property given or settled before the marriage to the separate use of the wife, much of the benefit and security of the rules which have been so established will be lost. Why then should not equity in this case also interfere?—and if it cannot protect the wife consistently with the ordinary rules of property, extend its own rules with respect to the separate estate, so as to secure to her the enjoy-

ment of that estate which has been so invented for her benefit? It is no doubt doing violence to the rules of property, to say that property, which, being given with qualifications and restrictions which are held to be void, belonged absolutely to the woman up to the moment of her marriage, shall not be subject to the ordinary rules of law, as to the interest which the husband is to take in it; (and that is the sense, and the only sense, in which the expression used in Massey v. Parker, "why may she not by the act of marriage give it to her husband," is to be understood) but it is not a stronger act to prevent the husband from interfering with such property, than it was orignally to establish the separate estate, or to maintain the prohibition against alienation. In doing this, I feel that I have much to overcome, of which the observations thrown out by myself, in Massey v. Parker, is the only part of which I do not feel the important weight. I have to contend with Lord Brougham's observations in Woodmeston v. Walker, and the Vice-Chancellor's decisions in Newton v. Reid, Brown v. Pocock, Malcolm v. O'Callaghan, Johnson v. Fruth, and Davis v. Thornycroft, to which I have before adverted, and the doctrine now established, though denied by Sir John Leach in Brown v. Pocock, and Woodmeston v. Walker, that before marriage or after the coverture has determined by the death of the husband, the settlement or gift to the separate use, and the prohibition against anticipation are wholly inoperative and void.

In establishing the validity of the separate estate with its qualification, which constitutes its value, that is the prohibition against anticipation, I am not doing more than my predecessors have done for similar purposes, and I have much satisfaction in finding myself justified, upon the grounds I have stated, in doing what in me lies to dissipate the alarm which has prevailed lest the separate estate should be held not to exist at all during the subsequent coverture, or what would in many cases be a

greater evil, that it should exist without the protection of the clause against alienation.[1]

§ 140. But this exception is not confined to gifts in trust; it extends also to gifts when made, without the intervention of a trustee, for the separate use of a woman with a proviso against alienation.[2]

§ 141. If property be purchased by the woman whilst she is unmarried, with the savings of her separate estate, and she afterwards marry, the marital rights attach to such property; but if the separate property were exchanged for other property, or the separate property were sold by the woman before her marriage and other property bought with the proceeds, or the proceeds retained, the trust would follow the property into its new form. And so must the remark of the Lord Chancellor in Newlands v. Paynter be taken: "the principle of my decision was that the subsequent marriage attaches upon the property as it is."

§ 142. The marital rights will also attach to property purchased by the wife, during coverture, with the rents and profits of her separate estate, unless, indeed, she act in such case as the agent of the trustee,[3] or unless there be some agreement between them that the property so purchased shall be part of the separate estate.[4] If the property be so purchased by the trustees, or by the husband, when no trust is interposed, principle seems to require that the marital rights should be excluded. So much for the exception and its extent.

§ 143. Another illustration of repugnancy between a gift and a provision in it is to be found in the case of Weatherford v.

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[1] 4 My. & Craig, 377; Scarborough & Borman, Id.
[2] Newlands v. Paynter et als. 4 My. & Craig, 408.
[3] Carne v. Brice et al. 7 Mees. & Wels. 183, and note.
[4] See Shirley v. Shirley et al. 9 Paige 363, and note (*a*).

Tate.[1] In that case, there was a bequest of slaves to A, for life, and after his death to the lawful heirs of his body, with a provision that they should not be removed out of the State, and it was held that A took the slaves absolutely, and that the provision was void.

§ 144. The question of repugnancy may also arise between limitations over and previous limitations; and here the general rule is, that where the whole interest has been limited, there cannot be a limitation over, except by way of conditional limitation.

§ 145. There are three classes of cases which seem to fall within the general rule, and in which the limitations over are therefore void for repugnancy.

§ 146. The first class consists of those cases in which there is an absolute gift of the property to one person, and then a gift over of so much of the property as shall be left at a certain time to another person. The leading case of this class is Attorney General v. Hall; and it is thus stated in the Abridgments: W. H. being seized and possessed of a considerable real and personal estate, makes his will on the 16th of February, 1717, in these words: Item, I give and bequeath *all my real and personal estate unto my son F. H., and to the heirs of his body*, to his and their use, to *be paid unto him in three years after my death, and during that time I make Sir J. N. executor of this my will, and after the three years expired, I do appoint that my said son F. shall be executor; and if my said son F. H. shall die leaving no heirs of his body living, then I give* and bequeath *so much* of my said real and personal estate *as my said son shall be possessed of at his death, to the Goldsmith Company* of London, in trust for several charitable purposes mentioned in his

[1] 2 Strob. Eq. 27.

will; but my will is, that the company shall not give my said son any disturbance during his life. The testator dies, and after the three years, F. H. takes upon him the execution of the will, and in sometime after, suffers a common recovery of the real estate; afterwards he makes his will, and the defendant, his then wife, executrix thereof, and then dies without issue. The court was unanimous, that the limitation over was void, as the absolute ownership had been given to F. H., for it is to him and the heirs of his body; and the company are to have no more than he shall have left unspent, and therefore he had a power to dispose of the whole; which power was not expressly given to him, but it resulted from his interest; the words that gave the estate tail in the land must transfer the entire property of the personal estate, and then nothing remains to be given over.[1] There is another statement of the case given in the margin in Eq. Ca. Abr., and the reason of the ruling of the court there given, is: "In regard the *ownership and property of the personal estate was vested in* F. Hall, and not *the use only*, the limitation to the company is void. It is giving a man an estate in money to spend, and limiting over to another what does not happen to be spent." But the words "and not the use only," could not have formed a part of the reason of the court; for it had been previously decided by the cases cited by the counsel, that a gift of a chattel personal for a limited period was but a gift of the use of it; and, therefore, had the gift over been otherwise unobjectionable, the court would have held that the gift of the personal estate to the son was but a gift of the use. It is true, however, that the Solicitor General who argued against the validity of the limitation over, said: It is plain he might have aliened it all, for the devise over is only of such part as he should be possessed of at his death: and the difference is where the thing itself, as here, and where the use only is devis-

[1] 8 Vin. Vin. Abr. 103, § 50; 1 Eq. Ca. Abr. 293, § 21.

ed; and cited Clarges Mil. v. Ducissam, 2 Vern. (245); and referred also to 2 Vern. 600; but the reference is supposed to be to Hide v. Parrat, 2 Vern. (331).

The true ground of this decision, then, is that the son had the absolute power of disposition, as an incident to his interest, and the gift over was therefore repugnant. There was no right of property upon which the gift over could operate. But it is clear, if the gift had been to Francis Hall and the heirs of his body, with a limitation over of the personalty, and not *of what should be then left*, in case he should die without leaving heirs of his body living at his death, that heirs of his body would be construed to mean children, and the limitation be allowed to take effect as an executory bequest.[1] It may be added, that the remark, that: "The recovery, although it could only affect the freehold, yet showed an *evident intention to acquire the dominion* of all the property devised by the father's will,"[2] is calculated to mislead, and is utterly foreign to the true ground of the adjudication.

In Riddick v. Cohoon, the testator gave to his daughter Betsey Cole, her heirs and assigns forever, certain real and personal estate, and then proceeded: Item, it is my will and desire, that if my aforesaid daughter, Betsey Cole, shall die without lawful heir or issue of her own body, that then, all the lands, and all the other estate, I have herein given to my said daughter Betsey, *that shall be left remaining at her death*, be equally divided to and between my aforesaid three sisters, namely, Christian Cole, Mary Cole, and Esther Cole, to them, their heirs and assigns forever." Betsey Cole died without issue, and the question was, whether the limitation over was valid. The court upon this point said: It is clear that he intended to give his daughter an absolute power of alienation; and in that case, could not control the property not disposed of by her, as

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[1] Ide v. Ide, 5 Mass. 500

[2] Bourn v. Gibbs, 1 Tamlyn, 414, note

such control would be inconsistent with the nature of the estate given to her, and the limitation void for the uncertainty as to what property was to go over.[1] It seems, however, to be void for the *certainty* that there was no property to go over by virtue of the limitation, since the whole had already passed under the preceding limitation, and with it an absolute title.

In Flinn v. Davis *et al.*, the testator gave to his daughter and the heir or heirs of her body, real and personal property, and then provided: "If my said daughter should die without leaving issue from her body, then I will and ordain that all the estate which she may die possessed of, or entitled to, both real and personal, under and by virtue of my will, shall go to and be equally divided between Benjamin Davis and Lucy Ann Davis, and to their heirs, and to hold the same, share and share alike, forever." The daughter died without leaving issue at her death, and the question was whether the limitation over was good. At the June Term, 1849, Dargan, J. delivered the opinion of the court, Chilton J. dissenting. After stating the general rule, that an absolute power of disposition is inconsistent with a gift over, and therefore renders it void, and citing several cases to that effect, he says: If we ask the question, what estate or property did the testator devise over, the answer will be, all his daughter was possessed of at the time of her death, and all that she was entitled to under the will. What then was the meaning of the testator? Did he intend to devise over only such as she might be possessed of? I think not. But he intended to give over, not only such as might be in her possession at the time of her death, but all that she took under the will, whether in her possession or not. Had the testator stopped at the words "possessed of," this case would have fallen directly within the case of Jackson v. Bull, 10 John. 19, but he adds the words,

[1] 4 Leigh, 547; and so is Ide v. Ide, 5 Mass. 500, Jackson v. Robins, 16 Johns. 584; McDonald & Wife v. Walgrove et al. 1 Sand. Ch. R. 274.

"*or entitled* to under and by virtue of my will." These words enlarge the devise over, and in my opinion were designed to embrace all the estate that his daughter should be entitled to receive from the hands of his executors under the will. The language is at least capable of this meaning, and by thus construing it, we carry out one of the obvious designs of the testator, by sustaining the remainder over. But by implying from this language an absolute power of disposition, we defeat one of the manifest objects of the testator, and this too, by placing a construction upon language capable of bearing a meaning entirely consistent with the expressed intention of the testator. I hold it to be a sound rule of construction, that if the language be capable of two distinct meanings, one of which would sustain, but the other defeat a plain and manifest design of the testator, we should so construe it as to support the manifest intention, and should not imply an intention repugnant to the expressed will of the testator, unless the language will bear no other reasonable construction. Even then, if it were doubtful whether the testator intended his daughter should have the power of disposing absolutely of all the property he devised to her by the will, this doubt should not defeat the remainder over. That the testator intended to create a valid remainder over is beyond doubt, and the language, from which it is argued he has defeated this remainder, is capable of conveying a meaning that will support it; we cannot, therefore, defeat the remainder without giving effect to a doubtful intention at the expense of one of the plain and manifest designs of the testator."

But Collier C. J. having resigned, and Parsons J. being appointed, the court, upon re-argument, came to a different conclusion, though Dargan, then Ch. J., still adhered to his opinion. The ground upon which the majority based their conclusion was, that the testator had given to the daughter the absolute power of disposal, and that the gift over was of what should be left undisposed of by her at her death, and therefore that the gift

over was repugnant and void. Chilton, J. said that the rule was equally applicable to real and personal property, and added: Nor does it make any difference, whether the first taker has exercised the power of alienation or not." And Parsons, J. said, that the absolute power of disposition might arise by implication, and that whether the testator intended to give such power of disposition was a question which must be determined from the will.[1]

It may be added that the conclusion of the majority of the court upon the re-hearing seems to be sound and satisfactory; though it is very clear that, if the testator intended that the whole of the property should pass in the event, the limitation over was good as an executory bequest.

§ 147. But this class of cases must be carefully distinguished from those in which the first gift is, either expressly or by implication, but for a limited period.[2]

§ 148. The second class of cases consists of those in which there is a gift of property to one person with a gift of it over in the event of the non-disposition of it by the first taker.

This class includes cases in which there is a gift to a person and his heirs, or heirs of his body; or to one and his executors, administrators and assigns, with or without an express power of disposition, and there is a gift over in case of non-disposition *generally*. Thus, if there be a gift to A and his heirs, and if he does not dispose of the property by deed, or will, or otherwise, then at his death to B, it is said that the gift to B is repugnant and void.

§ 149. The difficulty in this class of cases lies in determining whether a gift over, in the event that the first taker does not dispose of the property in a particular way, may not take effect as a conditional limitation. And here there is conflict of opinion.

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[1] 18 Ala. 132.

[2] See "Certainty."

In Grey *et al.* v. Montague *et al.*, the testatrix bequeathed all her personal estate—after payment of her debts, funeral expenses, and certain legacies—to her son, and after reciting that she had a power to appoint 3000*l.*, she proceeded: Now I, the said Elizabeth Rogers, by this my last will and testament, do hereby appoint and order, that upon the death of my said son without issue, or in case my said son does not dispose either by will or deed, which shall first happen," that then it shall go over to divers persons. The son died without issue, and without having made a deed, or will, and a bill was filed praying payment of the legacies. Lord Chancellor Northington dismissed the bill and there was an appeal; and upon appeal it was contended, that the words *upon the death of my son without issue* did not import an indefinite failure of issue, but a failure of issue at his death. But even if the words were construed to mean, *dying without issue generally*, yet in this particular case it was apprehended that the legacies were not void, but took effect upon the happening of that event. That the words of the will, *in case my son does not dispose either by deed or will, which shall first happen*, did not give, or were intended to give him the absolute property of the 3000*l.*, but merely a power of appointing by deed or will, which he might execute or not, as he thought proper. That the legacies being given to take place upon a certain event, not contrary to law, and the event having happened, the legacies were valid, and ought to be raised and paid.

On the other side it was argued, that no personal property can be limited to take place on so remote a contingency, as the death of a person dying without issue generally; and that there was nothing in this will to restrain the contingency to the time of the son's death. That it was a limitation over to other persons, after the absolute interest was vested in, and an unrestrained power of disposition given to the son. That the testatrix seemed to have imagined, that she might by law make further

limitations of personal property, after such a remote contingency, and an absolute power of disposition; but in this she was mistaken, such limitations having been long since settled to be null and void. The appeal was dismissed and the decree affirmed; but the reason is not given.[1]

In Green v. Harvey,[2] the suit was instituted to determine the construction of the following clause in the will of R. Green, made in 1819:

"The house No. 4, in the Royal Crescent, with coach-houses and stables belonging to No. 4, I give and bequeath to my son Richard, with all the household furniture, plate, &c., thereunto belonging. Should he die without heir or will, the profits of the said No. 4 to be equally divided between all my grand-children by the consent of his mother." The premises comprised in this gift were lease-hold. Richard, the son, survived the testator, and died unmarried and intestate; and his personal representatives claimed to be absolutely entitled to the property. The grand-children of the testator claimed the same property under the bequest over in the events which had happened.

The Vice-Chancellor, Sir James Wigram, after construing the word "or," in the phrase "without will or heir," as meaning "and," said: The next question is the effect of the limitation over, in the event of Richard dying without a will. The gift to Richard is absolute in the first instance; and the general rule of law is, that an absolute interest is not to be taken away by a gift over, unless that gift over may itself take effect. Now, it has been repeatedly decided, that where a legacy is given absolutely, and a gift over is superadded in the event of the legatee dying without having disposed of his legacy, the gift over is void, and the legacy is absolute. Ross v. Ross, 1 Jac. & W. 154; Bradley v. Peixoto, 3 Ves. 324.

He added: The question, then, is, whether there is any dif-

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[1] 6 Bro. Par. Ca. 429. [2] 1 Hare, 428; 23 Eng. Ch. Rep. 429

ference between a gift over, in the event of the legatee not disposing of the legacy, and a gift over in the event of his not disposing of it by will. I think no such distinction can be maintained. The will of *Richard* is not to be the exercise of a power, but an incident to property which is sufficient to place the whole at the absolute disposal of the legatee. And accordingly, the Vice-Chancellor declared the gift over void, and the personal representative of *Richard* entitled to the leasehold premises.

Subsequently to the preceding was determined the case of Doe *d.* Stevenson v. Glover. In this case there was a devise "unto my son, Mordecai Glover, and his heirs and assigns forever; to hold to him and to his heirs and assigns forever: but, in case my said son, Mordecai Glover, shall happen to depart this life without leaving any issue of his body lawfully begotten then living, or being no such issue, and he my said son *shall not have disposed and parted with* his interest of, in, and to the aforesaid" premises, then there was a devise over to Ann Stevenson, an illegitimate daughter of the testator. Mordecai Glover, the son, made a will devising the premises to his wife in fee, and died seized of the premises, and without any issue of his body living at his death.

There were two questions in the case: 1. Whether the devise by the son was a disposing of and parting with the premises according to the intention of the father: 2. Whether, if the gift over was upon a non-disposition by deed, it was a good executory devise.

In the argument of the case for the devisee of the son, Gaselee Sergt. said: In Jarman on Wills, vol. 1. p. 809, it is said: Conditions that are repugnant to the estate to which they are annexed, are absolutely void. Thus, if a testator, after giving an estate in fee, proceeds to qualify the devise by a proviso or condition which is of such a nature as to be incompatible with the absolute dominion and ownership, the condition is nugatory, and the estate is absolute." [Tindal C. J. The author

is there showing the distinction between conditions, strictly so called, and limitations.] If such be the opinion of the court, it is still submitted that the condition has been well performed by a disposition of the estate by Mordecai Glover, the son, *by his will.* The intention of the testator evidently was, that the son should have full and absolute dominion over the estate. If the word used had been "disposed" only, it clearly would have comprehended a disposition by will; and this construction is in no degree weakened by the addition of the words "parted with," which, though not so applicable to a testamentary disposition, when taken in conjunction with the other words, sufficiently shows that such a mode of parting with the property was within the testator's contemplation.

Sir S. Wilde, in reply, was stopped by the Court.

Tindal, C. J. This case appears to me not to fall within the doctrine that has been relied on by my brother *Gaselee*, for the purpose of showing that the provision in the will of Mordecai Glover, the father, upon which the claim of the lessor of the plaintiff is founded, is in the nature of a condition that is repugnant to, and incompatible with, the prior absolute gift to Mordecai Glover, the son. Strictly and properly, it is an executory devise, cutting down the interest which the son was to take, upon the happening of certain events, which have happened. The only question, therefore, for our consideration, is, what was the intention of the testator? Upon that, also, the case appears to me to be free from doubt. The words, "parted with," which are in opposition to, seem to me to be explantory of, the prior and more general word, "dispose," and clearly to indicate a disposition, or parting with the estate by the devisee, by a conveyance that was to have its complete effect and operation *in his life-time.* If *parted with* had been the sole phrase used, it could only have been satisfied by a conveyance by deed executed by the party in his life-time: and, when we find the two expressions thus coupled together, I think we cannot give a more

extended interpretation to the word "disposed," than the sentence would have been susceptible of if that word had not been found in it. But, even if it had rested upon the word "disposed," I should have inclined to hold, upon the principle that a will is ambulatory and speaks only from the time of the testator's death, that a devise of the estate in question was not a *disposing* of it, within the meaning of the will. The fair inference arising from the whole scope of the will, tends to the same conclusion. The testator, in the first place, gives the estate to his son, and to his heirs, should he have any; and he gives him a full power to dispose of it in his life-time. And this was by no means an unreasonable mode of dealing with the property.

Coltman, Creswell, and Earle, Justices, each delivered opinions concurring with the Chief Justice.[1]

In commenting upon this case, Mr. Lewis says: The Court held that the proviso referred solely to a disposition by the first devisee, which would take effect in his life-time, and not to a disposition by will, and this gift to take effect, in the event of there being no such disposition by deed, the Court held valid, as not being repugnant to any rule of law. Whether the Court intended to draw a distinction between a clause contemplating a total failure of disposition, and one that referred to a non-disposition in a particular mode, or whether the Court distinguished between gifts of realty and of personalty, the report does not enable us to determine, though certainly as far as the statements of the learned Judges extend, no ground is furnished to suppose that they intended to rely on either of the distinctions suggested. But, whether or not there be reason in such distinctions, the variance between the conclusions in Green v. Harvey and Doe v. Glover, is not to be accounted by reference to them; for, in Green v. Harvey, equally with Doe v. Glover, the subject-mat-

[1] 1 M. G. & Scott, 448, 50 Eng. Com. Law Rep. 447.

ter was land, though of leasehold tenure, and the disposition, the absence of which the gift over provided for, was not a disposition in *any* form, but a disposition in *one* mode only, viz: by will. At present, therefore, these authorities are opposed: but, as it is a question not itself belonging distinctly to the present work, we must leave it, with the observation that the case of Doe v. Glover, as conflicting with several most respectable authorities, and as not furnishing any intelligible distinction in point of doctrine, cannot stand *concurrently* with the law, which has been generally considered deducible from those authorities. If the doctrine of Doe v. Glover be sound, it is not a rule of the English law, that a gift of land on the death of a prior devisee in fee, without disposing of his estate, is invalid; for it seems quite hopeless to maintain any distinction between a provision for an omission to dispose of the property in any way, and an omission to dispose of it in one way. The only chance left for maintaining Doe v. Glover and the older cases, is the possible soundness of the distinction formerly taken in this particular between a gift of real and of personal estate; in which, however, there seems but little substance.[1]

§ 150. It is certainly true that the principle involved recognises no distinction between real and personal property; besides, the point was made in Jackson v. Robins, and expressly denied.[2]

§ 151. But, in order to obtain a correct view of the principle, it will be necessary to go back a little. At common law, every gift of a fee passed the whole property out of the donor, and any subsequent limitation of the property was therefore repugnant. Then came the doctrine of conditional limitations, by which a fee once given may, upon the happening or non-happening of an

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[1] Sup. Law. on Per. (70,) 40 Law Lib.

[2] 16 John Rep; 586; see, also, Allen & Wife v. White, adm'r, 16 Ala. 181; Flinn v. Davis *et al.*, 18 Ala. 132.

event, be made to cease, and the property to pass to another person. But the subsequent gift must be a *limitation*. The *general* and *absolute* power of alienation is one of the component parts of a fee simple, and if the gift over is not to defeat that, as well as every other incident of the estate, it cannot be said to be a *limitation*. If, therefore, property be given to A in fee, and if he shall not dispose of it by deed, will, or otherwise, then at his death it shall pass to B; A during his life is the absolute and unqualified owner of the property, for in no event is his estate to be defeated. The gift over is, therefore, the gift of a right of property which is already given, and given without *limitation*, and therefore it is repugnant. Repugnancy does not relate to the *rem*, but to the *jus ad rem*. The gift over, in order to be a good conditional limitation, must therefore be limited, to take effect upon the happening or non-happening of an event, which *impends* over the *jus ad rem*. Suppose, then, that a limitation be made to A and his heirs, but if he should die without a son living at his death, then the estate shall pass to B and his heirs. The event *impends* over the *jus ad rem*. But suppose that the limitation be to A and his heirs, and if he should die without making any disposition of the estate by deed, or will, or otherwise, then the estate shall pass to B and his heirs, there the event does not impend over the *jus ad rem*, which is in A. If, however, the gift be to A and his heirs, but if he shall not dispose of the property by deed, then at his death, it shall pass to B, the event *impends* over the *jus ad rem*. And so, also, if the gift to B were limited to take effect *in the event* that A did not dispose of it by will, the event *impends* over the *jus ad rem* which passed to A by the previous limitation. The distinction may be a nice one, but it is a plain one in principle. The question, as we have said, is not as to the *rem*, but as to the *jus ad rem*. In the one case, there is no right of property upon which the second limitation can operate; in the other, there is a right of property upon which it can operate. In the one case,

A has the absolute and unqualified ownership of the property; in the other, his ownership was always qualified. If, in the first case, A had aliened in fee, as he might have done, and then died without a son living at his death, his alienation would have been defeated by the *event;* but, in the next case, no right of ownership, which he might have chosen to exercise, could in any wise be affected by *the event*.

§ 152. But it is often laid down as a rule, that it is essential to the validity of an executory devise, or bequest, that it cannot be defeated by the first taker, and the reason given for the rule is, that such executory limitation is repugnant. The rule, however, is incorrectly stated, for a devise to A in fee, but if he pay not twenty dollars to B within a year, then to B; or a devise to a widow, but if she marry, then to B, are undoubtedly cases in which the executory devises are good, and yet they may be defeated by the first takers. And so Cresswell, J., in delivering his opinion, in Doe v. Glover, said: "The son might have prevented the devise over from taking effect, by disposing of the property in his life-time," and such was the opinion of the whole court. It is essential, however, to the validity of an executory devise or bequest, that the first taker have not the power to defeat it *in the event* upon which it is limited.[1] The only exception to this rule is, that a tenant in tail may, before the event happens, suffer a common recovery, and thereby defeat an executory devise engrafted upon his estate. The same principles which govern executory devises govern also executory bequests; but as personal property cannot be entailed, the rule above laid down, in its application to personal property, stands without a single exception.

§ 153. The conclusion, then, is, that Doe v. Glover is entirely consistent with principle.

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[1] See Allen v. White, 16 Ala. 181.

§ 154. There are cases, however, which seem at first sight to be inconsistent with it. The case of Green v. Harvey is one, but it may well be placed upon the doctrine of remoteness; for, under the construction of the Court, the limitation over was to take effect upon A dying without will and *heir*. The same construction may be given to "or," in Grey v. Montague *et al.*, and the case then placed with Green v. Harvey, upon the doctrine of remoteness.

The case of Bradley v. Peixoto, cited as an authority in Green v. Harvey, does not touch the point. It was a condition in restraint of alienation, that was involved in that case, and that is an entirely different matter. The case of Ross v. Ross, also cited in Green v. Harvey, is not in conflict with Doe v. Glover; for there the bequest was of a legacy to A, to be paid at 25, or between 21 and 25, if the executors should think proper, and maintenance in the meantime; with a limitation over in case A should not receive or dispose of it by will, or otherwise, in his life-time;[1] and therefore the limitation over was repugnant and void, according to the principle.

In Cuthbert v. Purrier, where a gift was made by will to the testator's natural son, to be paid to him at 21, with a bequest over, in the event of his dying under that age, or afterwards, without lawful heirs and intestate; it was held, that the limitation over was not good, upon the ground that a person, after investing another with the absolute property, cannot give it over in the event of the legatee's not exercising that power, which is incident to and a consequence of property. The case of Ross v. Ross was referred to by the Master of the Rolls as decisive of the point.[2] But take another case: In Mifflin v. Neal, adm'r, Ann Mifflin bequeathed to her two sons the residue of her personal estate, "and in case either of them died without will or lawful issue," then his share to go the survivor. One of them

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[1] 2 Bridg. Eq. Dig. 347. [2] Jac. 415, stated 2 Fearne, § 667

died without issue and intestate, and the Court held that his share passed to his surviving brother.[1]

§ 155. The principle, then, is, that a limitation over may take effect as a conditional limitation, if limited to take effect upon an event which qualifies the absolute title in the first taker; and if it is to take effect in case of non-disposition in every way except one, then the event qualifies the absolute title, and the gift over is therefore good.

§ 156. This second class includes, also, it is said, those cases in which there is a gift expressly for a limited period, with a general power of disposition to any person, and in any way. Thus, in Goodtitle v. Otway, there was a devise to one for life, who was heir at law, and after to her issue, and if she shall have no issue, that she shall have power to dispose thereof at her will and pleasure. It is said: After argument at the bar, the whole court was of opinion that Agnes, the devisee for life, had an estate in fee simple by the will, as the contingent remainder to the issue never vested; that the testator by giving her power to dispose thereof at her will and pleasure, in case she had no issue, has given her a fee simple, according to what is said by Sergeant Shuttleworth in 1 Leon. 283, where the words are the same as here; but supposing these words did not carry a fee simple, yet as she was heir at law, the fee descended to her upon the death of the testator, and she having no issue, it was never out of her. Against this opinion was cited 3 Leon. 71, where the like devise was only held to be an estate for life, with authority to dispose of the reversion; but the court said that case was not law, and that the case in 1 Leon. 283, was determined after that in 3 Leon. 71.[2]

§ 157. It may be remarked of this case, that as the devisee for life took the fee by descent, the question upon the will was

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[1] 6 Serg. & R. 460. [2] 2 Wils. 6.

not fairly before the court, and we may therefore regard the decision of it as *obiter dictum*.

§ 158. In the case in the first of Leonard's Reports, the devise was to the testator's wife during her widowhood, remainder to A in tail, and if A died without issue in the life-time of the wife, that then the land should remain to her to dispose thereof at her pleasure. A died in her life-time, without issue, and it was determined that the wife took a fee simple. The Court relied upon the words of the limitation of the remainder to the wife, *Quod integra remaneat dictæ Edythæ*. In this case, then, it was the *remainder* which passed the fee to the devisee, and this case therefore is not an authority for the position that a general power of disposition cannot co-exist with an express estate for a limited period. And if it may co-exist, as a mere power, a limitation over in default of its exercise cannot be held to be repugnant.

§ 159. The case of Irwin v. Farrer is also cited as an authority for the position, that a gift for a limited period, with a general power of disposition, passes the whole property, and therefore renders repugnant any limitation over in default of the exercise of the power of disposition. In that case, there was a gift in trust to be laid out in stock, and to pay the dividends as they became due to A for life; and after her death to pay the principal, according to her appointment by will or otherwise, and the Court, upon a bill praying that the whole be paid to her for her own use, declared their opinion, that under this will the legatee had an absolute power of disposition over the whole fund: that the demand by the bill was a sufficient indication of her intention to take the whole for her own benefit; and the execution of a formal appointment in writing was not necessary.[2]

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[1] As stated 1 Sug. on Pow. 102.

[2] 19 Ves. 86.

§ 160. This case turned upon the exercise of the power of disposition, and cannot therefore be claimed as authority for the position; it is, indeed, an authority on the other side.

§ 161. Barford v. Street is also cited as an authority, and in that case there was a gift by will of real and personal property in trust to pay the rents and interests to Mary Barford for life, as the same should be received, for her separate and exclusive use and benefit, and after her death to convey to such person or persons, and in such proportions and at such time or times, and in such manner, as she in lifetime should by any deed or deeds, writing or writings, executed by her and duly attested, or by her last will and testament in writing, or any writing purporting to be her last will, signed and published by her, and duly attested, limit or appoint; and in case of her death before the testatrix, or in default of such appointment, then the trustees should sell all of the said property and divide the proceeds among certain persons. There was a codicil, but it is sufficiently noticed by the Master of the Rolls, who said: What do you contend to be the nature and extent of her interest? An estate for life with an unqualified power of appointing the inheritance comprehends every thing. What induced me at first to doubt was the indication of an intention, in the codicil, that the estate should remain in the trustee for life of the plaintiff, (Mary Barford,) with powers to her inconsistent in a great degree with the supposition of her having, or being able to acquire, the absolute interest. But I do not think I can by inference from thence control the clear and express words by which the power is given to the devisee to dispose of this estate in her life-time, by any deed, or deeds, writing or writings, or by her last will and testament. How can the Court say, that it is only by will that she can appoint? By her interest she can convey her life estate. By this unlimited power she can appoint the inheritance. The whole equitable fee is thus subject to her present disposition.

The consequence is, that the trustee must convey the legal fee according to the prayer of the bill.[1]

§ 162. Now in this case Mary Barford had by deed properly attested, directed the trustees to convey to her, and therefore she was entitled to the equitable fee, at least, by virtue of the appointment, and so it does not appear from this case, that the gift over would not have been allowed to take effect in the event of no appointment. On the contrary, it is clear that the Master of the Rolls regarded the power of disposition as a mere power, which had been well exercised, and the case cannot therefore be taken as an authority to show that she was entitled to the property absolutely before she had exercised the power of disposition.

§ 163. In Jackson v. Robins, Chancellor Kent says: We may lay it down as an incontrovertible rule, that when an estate is given to a person generally, or indefinitely, with a power of disposition, it carries a fee; and the only exception to the rule is, where the testator gives the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal. In that particular and special case, the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion. "This distinction," he adds, "is carefully marked and settled in the cases."[2]

§ 164. But the cases cited do not seem to go quite so far; they seem to establish only that when a gift is made to one expressly for life, with a power of disposing for a particular purpose, or to particular persons, or with a power of disposing to any person in a particular way, then the donee takes but a life estate with a mere power, and not the absolute interest.

Thus, in Tomlinson v. Dighton, the testator devised to his

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[1] 16 Ves. 135. [2] 16 Johns. 588.

wife for life, and then to be at her disposal, provided it be to any of his children, if living; if not, to any of his kindred that his wife shall please. It was held, that the wife took but an estate for life, with a power to dispose of the fee.[1]

So, in Crossling v. Crossling, the testator devised to his wife for her life, after which followed these words, "and she shall dispose of the same amongst my children by her at her decease, as she shall think proper;" and it was held that she took but an estate for life, with a power to dispose of the fee.[2]

In Reid v Shergold, there was a gift to a niece for life, and after her death to such person or persons, and in such proportions, as she, by her will duly executed, should give and dispose thereof. It was held that the niece took but an estate for life, with a power of disposition.[3]

The other case cited by the Chancellor, that of Goodtitle v. Otway, we have already stated; and it is very clear that, so far as it is an authority in point, it is directly against the position assumed by the Chancellor.

§ 165. It is true, however, that, in Tomlinson v. Dighton, Parker, C. J., said: And as to this, the difference is, where a power is given with a particular description and limitation of the estate, (as here,) and where generally, as to executors to sell; for, in the former case, the estate limited being express and certain, the power is a distinct gift, and comes in by way of addition; but in the latter, the whole is general and indefinite; and as the persons entrusted are to convey a fee, they must consequently, and by a necessary construction, be supposed to have a fee themselves. And this seems to be as broad as it is laid down in Jackson v. Robins.

§ 166. The distinction is broadly asserted by Robertson, Ch.

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[1] 1 P. Wms. (149.) [2] 2 Cox, (396.)

[3] 10 Ves. 370; see, also, Bradley v. Westcott, 13 Ves. (445,) and Archibald v. Wright, 9 Sim. 161.

J., in delivering the opinion of the Court in Caleb v. Field *et als.*, and it is said that a gift for life expressly, with an unlimited power of disposition, passes but an interest for life with a power.[1] But the point was not necessarily involved in the decision of the case.

§ 167. In the case of Keith v. Seymour, the testator gave all his personal estate to his wife for life; and, from and after her decease, one moiety thereof was to be at her entire disposal, either by will or otherwise; the other moiety he gave to other persons. The Master of the Rolls denied that there was any distinction in this respect between real and personal property; and said that by reason of the express estate for life given to the widow, she did not take the absolute interest, but had only a power of appointment, and held Irwin v. Farrer to be an authority for the position.[2]

§ 168. But without pursuing the matter, we may assert, that the better opinion is, that a gift to one *expressly* for a limited period, with an absolute power of disposition, does not pass the whole property,[3] and therefore that a gift over, in default of disposition, is not repugnant to the first gift.

§ 169. It cannot, however, be admitted that principle requires the first gift to be *expressly* for a limited period; but it may well be contended that principle requires no more than that the first gift should be for a limited period, utterly disregarding the fact whether it is so expressly or by implication.

§ 170. When there is a gift generally, as "to A," and an absolute power of disposition is added, the addition of the power is simply nugatory; for by the general gift the absolute power of disposition passed as an incident to the interest, and neither

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[1] 9 Dana, 346. [2] 4 Rus. 263.

[3] See Pullam v. Byrd, 2 Strob. Eq.; Smith v. Hilliard, 3 Strob. Eq. 214.

an interest, nor an incident, can exist by virtue of a limitation, where it has existence by virtue of law; and this, because the title by law is higher than the title by limitation; hence the maxim, *expressio eorum quae tacite insunt nihil operatur*. And so it is in other cases, in which the absolute property is held to pass. But this does not apply to cases in which the first gift is for a limited period, either expressly or by implication. Thus, if there be a gift to A, with the power of disposing by will, but if A die without making such disposition, then to B, the gift to A is clearly but an interest for life, with a power of disposition by will. The addition of the power itself furnishes sufficient evidence that such was the intention of the donor; for, *expressio unius, exclusio alterius*, and therefore the donor did not intend the absolute power of disposition should pass. Besides, a gift "to A," and after his death to B, passes by construction but a gift for life to A; and there is no reason for saying that the addition of the power shall by implication enlarge the interest, whilst on the contrary that enlargement is forbidden by the maxim, *ut res magis valeat quam pereat*. So if the gift be to A, with a power of disposition among particular persons, and in default of such disposition, then to B, A would take but an interest for life with a power of disposition according to the gift. Or, if it be to A with a power of disposing by will, except to particular persons, and there is a gift over to B in case of non-disposition, as prescribed, the gift to A is but an interest for life with a power, and the gift over is not therefore repugnant, and for this Bull v. Kingston[1] may be cited as an authority. So, if there be a gift for life, with a general power of disposition at death, it is but an interest for life, with a power of disposition by will.[2]

So, if the gift be "to A," with a power of disposing of the property for a particular object, and this is the case of Upwell

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[1] 1 Mer. 314. [2] Archibald v. Wright, 9 Sim. 161.

v. Halsey. In that case the clause in the will was: "I make my wife whole and sole executrix of all my personal estate; and my will is, that such part of my personal estate as she shall leave of her subsistence, shall return to my sister." The question was as to the validity of the limitation over. Sir Joseph Jekyll, Master of the Rolls, before whom the cause was heard, gave it in favor of the sister. He said, that such a sense, if possible, ought to be put upon a will, as is agreeable to the intention of the party, and consistent with the rules of law. And such a one he thought this will was capable of; for he understood it thus: "I devise the use of my personal estate to my wife, for her life, with a power" (the interest not being sufficient for her maintenance) "to dispose of as much of the principal as shall be necessary for her subsistence;" and his sister to have the residue. He thought no stress was to be laid on those words, "all my personal estate;" for that is no more than what the law implies; for when a person is made executor, the law vests all the personal estate in him. But then it is not true, that this gift, which by construction of law is absolute, may be qualified by the declared intention of the testator. *Here it is restrained to her for life;* but with a power, indeed, to dispose of so much of the principal as shall be necessary to her subsistence, over and above the interest. And accordingly he decreed an account to be taken.[1]

§ 171. The reason, why this doctrine is not applicable to cases in which the first taker takes the whole interest expressly, is, that construction requires that the gift over shall be held to be a conditional limitation, and not a *quasi* remainder; and so it is if the first gift be general, and the limitation over be in the event of non-disposition, for in such case the first taker takes the absolute property, and the addition of the power is merely nugatory, since it passed as an incident to the property.

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[1] 10 Mod. 442; s. c. in 1 P. W. 651; Larned v. Bridge, 17 Pick. 339.

§ 172. The third class of cases consists of those in which two ingredients of the preceding classes are found. Thus, in Bourne v. Gibbs, there was a bequest of a residue, after payment of debts and legacies, "unto my said wife, to and for her own use and benefit; and to be at her own absolute disposal, and free from any control whatsoever; provided, nevertheless, that if my said wife shall make no disposition thereof either by expenditure, sale, transfer, assignment, gift, or otherwise, in her life-time, or by her last will and testament, then I direct that "the said residue, or such part thereof as shall remain undisposed of as aforesaid, shall immediately after my said wife's decease, go to, and I accordingly give and bequeath the same unto my said two nephews, Peter John Saunders and Thomas Saunders, and my said niece, Ann Gibbs, equally to be divided between them, share and share alike, and their several and respective executors, administrators and assigns."

Mr. Pemberton, who argued in favor of the limitation over, said he did not deny that the widow had the power to make herself the absolute owner. She did not dispose of it by her will or otherwise. The only question was, whether the widow had assumed to herself the right of ownership. There was nothing in this case to show that she had so done, and consequently the bequest over was good. But the Master of the Rolls held the gift to the widow to be absolute;[1] and the gift over was therefore repugnant and void.

So, in Jackson v. Robins, a case very elaborately argued, the question arose upon this clause in the will, "I give, devise and bequeath all my real and personal estate whatever unto my dear wife Sarah, to hold the same to her, her executors, administrators, and assigns; but in case of her death without giving, devising, or bequeathing by will, or otherwise selling or assigning the said estate or any part thereof, then I do give, devise, and be-

[1] 1 Tamyln, 414.

queath all such estate, or all parts thereof as shall so remain unsold, undevised, or unbequeathed, unto my daughter, Lady Catherine Duer." The Court held the limitation over to be repugnant and void.[1]

§ 173. But are we not carefully to distinguish this class of cases also from those in which the first gift is, either expressly or by implication, but for a limited period? Thus, if there be a gift to A for life, with a power of disposition, and after his death the whole or so much as shall remain undisposed of to B, it seems that the limitation over is good. So, if there be a gift to A with a power of disposing of it by deed, and after his death the whole or so much as shall remain undisposed of to B, the gift over seems to be good. So, if the gift be to A with a power of disposing of it to particular persons, or for a particular purpose, with a gift over to B at the death of A of the whole, or so much as shall remain undisposed of, the gift over seems to be good. So, if the gift be to A with an absolute power of disposal, and after his death, the whole, or so much as shall remain undisposed of to B, the gift to A seems by construction to be a gift for life with a power, and the gift over seems therefore to be good.

§ 174. We are carefully to distinguish from the cases which fall within the principle of repugnancy, those cases in which a trust is created. For, when a person bequeaths property to another, absolutely or for a limited period, accompanied with words expressive of recommendation, request, hope, or expectation, that the legatee will dispose of the gift as his own, to or among one or more objects, the Court of Chancery will construe such a recommendation or request as a trust; provided the words be imperative, and the objects and the property certain.[2] But,

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[1] 16 John. 537; 15 ib. 169.

[2] 2 Rop. on Leg. 297; 2 Story's Eq. § 1068, *et seq.*

without going into the numerous cases which are to be found upon this subject, we may content ourselves with the case of Coates' Appeal. In that case, the testator declared: "It is my will and desire that all my just debts and funeral expenses be fully paid and discharged. Then I will and bequeath unto my dear wife, Martha Pennock, the use, benefit, and profits of all my real estate during her natural life, and also all my personal estate of every description, including ground rents, bank stock, bonds, notes, book debts, goods and chattels, absolutely, having full confidence that she will leave the surplus to be divided, at her decease, justly amongst my children." In other items, he bequeathed unto his four unmarried daughters the sum of $50, to be paid to each of them yearly, during the life-time of the wife; in case, however, of the marriage of his said daughters, the allowance of such to cease. These payments were to be made out of his personal estate. The court construed the word "surplus," therefore, to mean the residue of his personal property after the debts, funeral expenses and legacies were paid, and held that the widow took but a life estate in that property for her own use; and that she was trustee for the children, subject to her life interest.[1]

§ 175. Repugnancy may also exist between a general intent and a particular intent. When such appears to be the case, it is the duty of the Court to put such construction upon the instrument as will give effect to every part of it, but if the two intents be in fact so repugnant that construction cannot reconcile them, then the general intent must be allowed to prevail. And this is the *cypres* doctrine of construction.

§ 176. An illustration of the apparent repugnancy between two intents which were yet reconciled by construction, is found in the case of Stallsworth *et al.* v. Stallsworth, ex'r. In that

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[1] 2 Barr, 129.

case the testator bequeathed slaves to his children, and afterwards directed a tract of land to be set apart for the use of his wife and the minor children, together with horses, stock, &c., for their exclusive use, until the youngest child, who may then be living, arrives at the age of twenty-one, and then that the real estate be sold and equally divided between the wife and such of the minors as might then be alive; and it was held, that there was no incongruity between these clauses of the will, but that both could stand together—that the intention of the testator was, that the minor heirs were entitled to their legacies as soon as distribution could be made, and had the right to work their slaves on the land set apart, in concert with their mother.[1] The general intent contended for, was that the executor was to retain the property until the majority of the youngest child, the particular intent that the slaves bequeathed were to be distributed as in ordinary cases.

§ 177. Illustration of repugnancy in fact between a general and particular intent, is furnished by those cases in which an express estate for life is given, and in default of issue, over; for the particular intent to give but a life estate, gives way to the general intent that the issue shall take, and so gives the first taker an estate tail in real, and an absolute estate in personal property.[2]

§ 178. We come now to the subject of remoteness. The rule is, that every future interest in chattels personal must be so limited, that, from the first moment of its creation, it may be said, it will necessarily vest in right, if at all, within the period occupied by the life of a person in being, that is already born, or *in ventre matris*, or the lives of any number of persons described and in being, not exceeding that to which testimony can

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[1] 5 Ala. 143.

[2] See Robinson v. Robinson, 1 Burr. 38; Chandless v. Price, 3 Ves. 99; Brouncker v. Bagot, 1 Mer. 271.

be applied to determine when the survivor of them drops, and by the infancy of any child born previously to the decease of such person or persons, or the gestation and infancy of any child *in ventre matris* at that time; or within the period occupied by the life or lives of such person or persons in being, and an absolute term of twenty-one years afterwards, and no more, without reference to the infancy of any person; or within the period of an absolute term of twenty-one years, without reference to any life.[1]

§ 179. No exception to the rule is known in its application to chattels personal, for neither remainders strictly so called, nor entails can be created in that species of property.

§ 180. The rule seems to be a plain one, and yet there sometimes arises a difficulty in determining when the future interest is to take effect. The cases in which this question most frequently arises, are: 1. Those in which the interest is limited to take effect upon a failure of issue. 2. Those in which the gift is to a class comprising individuals who may not come into existence at all within the period prescribed by the rule, or persons who may not be *in esse* at the death of the testator, and the vesting of whose shares is postponed beyond majority.

§ 181. In regard to the first class, it is said, that the words, "die without issue," "in default of issue," "on failure of issue," "for want of issue," "if he have no issue," and "if he die before he has any issue," import of themselves an indefinite failure of issue,[2] and that a gift of chattels so limited to take effect, is void for remoteness; because it cannot be said that an indefinite failure of issue will necessarily happen within the time prescribed by the rule.

§ 182. There is one exception to this rule of construction, and that is, where a donor, *having no issue*, makes a gift to take

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[1] See 2 Fearne's Rem., § 706.

[2] 2 Fearne's Rem., § 538.

effect upon his dying "without issue," or &c.; in which case the words are construed to refer to the time of his own death.[1]

§ 183. The general rule itself will yield to an intention in the context, to use the words in the restricted sense of *issue living at the death.* The courts, indeed, have "been rather astute and anxious to catch at any circumstances appearing on the will itself which may restrict the failure of issue to the period of the death of the first taker. The leaning is against the indefinite construction, in gifts of personal property, but it is in favor of it in gifts of real property; and this Lord Brougham laid down as an undeniable proposition, to be collected from the very numerous cases on the subject.[2] A distinction was once attempted[3] between chattels real and personal, in regard to remoteness, but it was rejected.[4]

§ 184. We have said that the general rule itself will yield to an intention in the context to use the words in a restricted, instead of an indefinite sense. Now there are four classes of cases in which it is held that such an intention appears in the context.

§ 185. The first class consists of those cases in which the failure of issue is combined with an event personal to the individual; as dying without issue and unmarried.(*a*) Mr. Jarman thinks this construction would prevail in case of real property, and he seems justified in that opinion by the cases which he cites.[5] If the construction would prevail in case of real property, *a fortiori* would it prevail in case of chattels personal.

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[1] 2 Jar. on Wills. (421.) [2] Campbell v. Harding, 2 Rus. & My. 390.

[3] Hughes v. Sayer, 1 P. Wms. 534. By M. R., in Forth v. Chapman, 1 P. Wms. 665; Pleydell v. Pleydell, ib. 748.

[4] Beauclerk v. Dormer, 2 Atk. 314; Attorney Gen'l v. Bayley, 2 Bro. Ch. 558. [5] 2 Jar. on Wills, (428-9.)

(*a*) Doe d. King v. Frost, 3 Barn. & Ald. 546—(gift over, charged with money to be disposed of by prior donee)—seems to belong to this class.

§ 186. The second class consists of cases in which words, or phrases, are furnished by the context, which of themselves restrict the failure of issue within the time prescribed.

To this class belongs Nichols v. Hooper,[1] where the gift was to B for life, remainder to C and his heirs; but if C should die without issue of his body, then 100*l.* apiece to two nieces, to be paid within six months after the death of the survivor of B and C.

To this class belongs Target v. Gaunt,[2] where the gift was to A for life, and no longer, and after his decease, to such of his issue *as he should by will appoint;* and in case he should die without issue, remainder over.

To this class belong Hughes v. Sayer,[3] and Nicholls v. Skinner,[4] "which are substantially the same," where the gift was, "if A or B die without issue, then to the *survivor*." In Campbell v. Harding,[5] these cases are said to be cases "where the circumstance that the legatee over was to be one of the individuals for whose lives the whole had been previously limited, was considered restrictive and inconsistent with the notion of a perpetuity." Whether the remark be true or not, it is certainly true that cases like Hughes and Sayer are supported by more general reasoning, viz: that it appears that a personal benefit is intended when the gift over is to a survivor, without adding, "executors, administrators and assigns," or the like, and therefore the donor could not have contemplated an indefinite failure of issue. Thus, in Stevens *et als.* v. Patterson, the testator bequeathed a slave to his daughter, "to her and the heirs of her body, but should she die without lawful issue, then to go back and be equally divided amongst the survivors of my children aforementioned," and it was held that the limitation over was not too remote.[6]

In Massey v. Hudson, there was a devise of an estate charged

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[1] 1 P. Wms. 198. [2] Id. 432. [3] Id. 534. [4] Prec. Ch. 528.
[5] 2 Rus. & My. 390. [6] 1 Bailey's Eq. 42.

with two several legacies to A and B, and "in case A or B shall die without lawful issue, then the whole of the said two legacies to go to the survivor, his or her executors, administrators, or assigns." The Master of the Rolls said: I think the bequest over in this case is too remote. A bequest to C after the death of B, does not import that A must himself live to receive the legacy. The interest vests at the death of the testator, and is transmissible to representatives, who will take whenever the event of B's death may happen. So, if the bequest be to A, in case B shall die without issue. If that were allowed to be a good bequest, A's representatives would be entitled to take at whatever time the issue might fail. It is for that reason that it is held too remote. But if A is personally to take the legacy, then the presumption is strong that an indefinite failure of issue could not be in the testator's contemplation.

Prima facie a bequest over to the survivor of two persons, after the death of one without issue, furnishes this presumption; for it will be intended that the survivor was meant individually and personally to enjoy the legacy, and not merely to take a vested interest, which might or might not be accompanied by actual possession. For, if the survivorship be necessary only to vest the interest, and to render it transmissible, the objection of remoteness is not at all obviated, and the restrictive presumption does not arise. Now the addition of the words, "executors, administrators, or assigns," excludes the presumption that it was a mere personal benefit that was intended for the survivor. For, though there should be no such failure of issue as would enable him personally to take, yet his representatives would be entitled to claim in his right whensoever the failure of issue should happen.[1]

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[1] 2 Mer. (100;) see, also, Ranelagh v. Ranelagh, 2 My. & Keene, 441; De Treville v. Ellis, 1 Bailey's Eq. 40. The opinion, as to this point, in Timberlake *et ux.* v. Graves, 6 Munf. 174, seems to be erroneous.

To this second class belongs, also, McGraw v. Davenport & Wife.[1] In that case the gift was of seven negroes to A during her life, and at her death to be equally divided by valuation between his two daughters, "or should either of them die without issue," the other was to take the seven negroes, and their increase, and it was held that the dying without issue was confined to the death of A.

So in Keating & Wife v. Reynolds,[2] where there was a gift of chattels to A and B severally, and to the heirs of their bodies; but if either of them "should die without having a lawful heir to live," then over, it was held that the dying without issue was restricted to the death.

Pinbury v. Elkin[3] belongs also to this class. There the bequest was to A, and if she died without issue, then after her decease 80*l.* to remain to the testator's brother, and it was held that the gift of the 80*l.* was not too remote. This case is recognised in Paine v. Stratton,[4] and by the Lord Chancellor, in Campbell v. Harding.[5] It is true that, in Thubridge v. Kilburne,[6] Lord Hardwicke said, the words "immediately from and after the decease," were too precarious a foundation for the restricted construction; but, as said in Campbell v. Harding, this remark of Lord Hardwicke's is at variance with Pinbury v. Elkin,(*a*) and is moreover but a *dictum*.

To this second class belong those cases in which the word "*leaving*" is inserted before issue.

§ 187. And here we may notice that a distinction is taken between "dying without leaving issue," when used in reference to real and to personal property, even when both species of pro-

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[1] 6 Por. 329. [2] 1 Bay. 78. [3] 1 P. Wms. 563.
[4] 2 Atk. 647; 3 Bro. P. C. 329. [5] 2 Rus. & My. 390.
[6] 2 Ves., sr. 233.

(*a*) Hopkins v. Jones, 2 Barr, 69, is said to be coupled with Pinbury v. Elkin, but it seems contrary to authority--see 1 P. Wms. 200, N. (1.)

perty are included in the same gift. Forth v. Chapman[1] is the leading case, and though it has been doubted and denied, yet the weight of authority is in favor of it at the present day.[2] In relation to real property, they are held to import an indefinite failure of issue, whilst in relation to personal property, they are held to import a failure of issue living at the death of the first taker. But the distinction must be regarded as a nice one, since the case of Porter v. Bradley[3] is considered as resting upon words "behind him," which were added to "leaving no issue."[4] In some of the American Courts it has been said that, inasmuch as no estates tail exist, real property must be put upon the same construction in this respect with personal property.[5] But this may be doubted, since the reason of the distinction is, that the courts catch at every thing to relieve themselves from the legal construction of indefinite failure of issue, when applied to personalty, and this in order to support the limitation over; whilst in regard to realty, the construction of indefinite failure of issue is favored, because the interest of the heir is concerned, and him the common law will not allow to be deprived of his inheritance, except by plain intention.

§ 188. The distinction, then, seems to be nothing more than an exception, in favor of personalty, from the general rule which governs realty. If this be so, then the abolition of estates tail cannot relieve the courts from maintaining the distinction in full vigor.

§ 189. The third class of cases, in which the indefinite im-

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[1] 1 P. Wms. 663.

[2] Doe d. Cadogan v. Ewart, 7 Adol. & El. 636; 2 Jar. on Wills, (419); Campbell v. Harding, 2 Rus. & My. 390; Mazyck *et als.* v. Vanderhost & Wife, 1 Bailey, Eq. 48; Booker *et als.* v. Booker *et als.*, 5 Hump. 505.

[3] 3 Durn. & East. 143. [4] 7 Adol. & El. 636; 2 Jar. on Wills, (433.)

[5] Dargan, C. J., in Flinn v. Davis *et al.*, 18 Ala. 145; Jones v. Spaight, 1 N. C. L. R. 544.

port of the failure of issue is restricted, consists of those in which the subject of the gift necessarily precludes the idea that any other than a restricted failure was in the contemplation of the donor. Thus, "if an estate held for the life of A and B, be devised to C for life, and if he shall die without issue, then over to D, it is perfectly clear that the limitation over must vest in D, according to the strict rule, within the compass of lives in being."[1]

§ 190. The fourth class consists of those cases in which "a restriction is raised from the nature of the estate given by the limitation over; as when, for example, the interest given over is an estate for life, or lives, that circumstance imports such a restriction, and raises a presumption in favor of the words meaning issue living at the time of the death, which thus prevents the perpetuity." "I state this proposition," adds the Lord Chancellor, "with diffidence, because it appears to be somewhat at variance with the doctrine laid down by Sir W. Grant, in Barlow v. Salter, 17 Ves. 479, although the case with which he was there dealing was that of a gift to survivors absolutely, and not merely of life estates, and in that respect differed from the class I am now considering." * * * * The cases at law, however, leave no doubt that the character of the devise over, as being an estate for life only, has been imported into the consideration of the question of construction."[2]

§ 191. The case of Keily v. Fowler[3] is said to be *sui generis* —a case in which the Court "laid hold of all the circumstances, but most particularly the circumstance of its being a personal trust, the duties imposed on the executors strongly implying a *delectus personarum:* the very peculiar form of the direction, that the property should return back to the executors, in order to be

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[1] Campbell v. Harding, 2 Rus. & My. 390. [2] Id.
[3] 3 Bro. P. C. 299.

divided, and the nature of the chattels to be given to the daughter, viz: twenty cows and one horse, in the event of the limitation over taking effect, were also material features in the case; and from all these circumstances and expressions taken together, the Court considered itself justified in holding that the failure of issue must be intended to be confined to the period of the life of the first taker."[1]

§ 192. It makes no difference in this matter whether the first gift be expressly for life, or of a larger interest; for, in either case, the failure of issue is construed to be a failure of issue at any period of time; the first estate is enlarged by implication into an absolute interest, and the limitation over is void for remoteness. And this is so laid down in Lepine v. Ferard.[2]

§ 192. It is also to be observed, that it makes no difference in regard to the application of the rule under consideration, whether the first gift be of the principal, or merely of the interest.[3] So is Butterfield v. Butterfield;[4] and so, doubtless, are all the cases.

§§ 194–95. Another point worthy of notice here, is, that a court, in ascertaining whether the gift over be upon an indefinite or restricted failure of issue, will not search through the whole instrument for a general intention, but will confine itself to the terms of the gift. "I will not," said the Lord Chancellor, in Campbell v. Harding, "be stopped by a colon or a period; if the next succeeding sentence is manifestly a substantial part of the bequest, I shall treat it like an act of parliament, which has no stops, and read it as a part of the bequest; but I will not go into another branch of the will for the purpose of showing a general intention. Of what use is it to look at intention in these cases? Did any man ever make a will in which he wished that an executory devise should fail?"

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[1] Campbell v. Harding, 2 Rus. & My. 390. [2] 2 Rus. & My. 378.
[3] Id. [4] 1 Ves., sr. 153.

§ 196. The Code of this State provides that, "When a remainder in real or personal property is limited to take effect on the death of any person without heirs, or heir of his body, or without issue, the word "heirs," or "issue," must be construed to mean heirs or issue living at the death of the person named as ancestor."[1]

§ 197. A dying without heirs, or heir,(*a*) or heirs of the body, is construed by the common law, like a dying without issue, to be too remote an event upon which to suspend a limitation. The Statute provides, therefore, for those cases also. But there are cases which do not seem to be included in the Statute. Thus, if the limitation be to A, and if he shall die without descendants, then to B, the limitation to B depends upon an indefinite failure of issue. So, if there be a devise of real property to B, a stranger, if A, a stranger, die without issue, and there is no express devise to A, or his issue, or his heirs, the devise to B is an executory devise to take effect upon an indefinite failure of issue. The case does not seem to be met by the Statute, because, as there is no prior interest created, either expressly or by implication, the limitation to B cannot be a remainder even in the lax sense of any *subsequent* interest. A like case might, of course, arise in limitations of personal property, and the Statute could not aid the court in escaping from the construction of remoteness, unless it could be held that "remainder" means any *future* interest, and that would be a very strong definition.

§ 198. Notwithstanding it is everywhere said that a limitation over to take effect upon an indefinite failure of issue of a person

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[1]Code, § 1302. There is a similar Statute in England, 7 W. 4, and 1 Vict., but more generally worded—see Doe v. Ewart, 7 Adol. & El. 636.

(*a*) Moon *et als.* v. Herndon *et als.*, 4 Dessaus. 459, cited 3 Strobh. Eq. 222, holding that "if either of my said children should die without an heir," meant "if either of my said children should die without a child," and that a limitation over was therefore not too remote.

who takes the absolute property, is void, because it is in violation of the rule against perpetuity, yet another reason, as potent in such case, is that a limitation over of personal property cannot be made to take effect *after* the expiration of an absolute interest—whether absolute, expressly, or by implication.

§ 199. The other class of cases previously mentioned as one of those in which the question of remoteness most frequently arises, is composed of those in which the limitations are to a class of persons, who may not come *in esse* within the time prescribed by the rule, or who may not be *in esse* at the death of the testator, and the vesting of whose shares is postponed beyond majority. In the former case, says Mr. Jarman, the rule is fatally violated, even though the gift to the unborn objects is so framed as to confer on them vested interests immediately on their birth. A strong illustration of the other case is furnished by Dodd v. Wake, where the bequest was as follows: "I give and bequeath the legacy or sum of 30,000*l.* of lawful English money, unto and amongst the children of my daughter, Mary Maria, the wife of George Anthony Wake, who shall be living at the time the oldest shall live to attain the age of twenty-four years, and the issue of such of the children of my said daughter as may then happen to be dead, leaving issue, to be equally divided between or among them, share and share alike, *per stirpes*, and not *per capita*, as tenants in common, and to be paid and payable unto them respectively, when and as they shall respectively attain the age of twenty-four years, but without any interest in the meantime." The daughter of Mrs. Wake had three children, who at the testator's death were of the respective ages of thirteen, twelve, and nine years. The Vice-Chancellor said: The testator appears clearly to have intended that only those children of his daughter should take, who should be alive when the *eldest child, for the time being*, should attain

the age of twenty-four; and therefore the bequest is void for remoteness.[1]

§ 200. When a gift is to a class, it matters not that some or even all of the class actually come *in esse* within the time prescribed by the rule, still the gift is invalid, for by the terms of the rule the gift *must necessarily* vest, if at all, within the time prescribed.

In Leake v. Robinson there was a gift in trust for William Rowe Robinson for life, and after his death for the maintenance, education and advancement of all and every the child and children, if any, of the said W. R. R., until (being sons) they should attain twenty-five; or (being daughters) until they should attain such age, or marry with the consent of parents or guardians; and then to pay all the trust fund "to such child or children, being a son or sons, who shall attain such age or ages of twenty-five as aforesaid, and to such child or children, being a daughter or daughters, who shall attain such age or ages, or be married as aforesaid, his, her, or their heirs, executors or administrators; if only one such child, or having been more, if all but one should die before their shares should become payable as aforesaid, then the whole to such only, or surviving child." And in case of the death of W. R. R. without leaving issue, or leaving issue, such issue should not live until the time prescribed, then unto and among all and every the brothers and sisters of the said W. R. R., share and share alike; if brothers, at twenty-five; if sisters, at twenty-five, or marriage as aforesaid. W. R. R. had two brothers born after testator's death, and he attained twenty-five and died without leaving issue, and after his death a sister was born. Sir William Grant said: The bequests in question are not made to individuals, but to classes; and what I have to determine is, whether the class can take. I must make a

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[1] 8 Sim. 615.

new will for the testator, if I split into portions his general bequest to the class, and say that, because the rule of law forbids his intention from operating in favor of the whole class, I will make his bequests what he never intended them to be, viz: a series of particular legacies to particular individuals, or what he had as little in his contemplation, distinct bequests in each instance to two different classes, namely, to grandchildren living at his death, and to grandchildren born after his death.[1]

§ 201. But note, in Kevern v. Williams the testator bequeathed his residuary estate to trustees, in trust for his wife for life, and after her decease, "to preserve the then remaining part of my estate for the grandchildren of my brother C, to be by them received in equal proportions when they shall severally attain the age of twenty-five years; and when the youngest shall have attained the age of twenty-five years, and he or she shall have received their final dividend, or share of my estate, the trust shall cease." The testator left his widow surviving—eight grandchildren of the brother were in existence at the widow's death, and several were born afterwards. The Vice-Chancellor said that, in Leake v. Robinson, no distinction was made between the time of gift and the time of enjoyment: that in this case, those only of the grandchildren were entitled to take, who were *in esse* at the death of the tenant for life.[2]

§ 202. Two points are to be remembered here: 1. That the postponement of the enjoyment alone, either partially or wholly, does not invalidate a gift, but it is itself nugatory, whenever the gift is vested: 2. That a gift to a class may, by construction, be held to be to such number of the class as are *in esse* before a particular time, and the rule against remoteness be thus avoided.

Now, in Knight v. Wall, Gaston, J., in delivering the opinion of the Court, said: Where a legacy is given to a described

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[1] 2 Mer. 363. [2] 5 Sim. 178.

class of individuals, as to the children of A B, and no period is appointed for the distribution of it, as the legacy is *due* at the death of the testator, and the two years allowed (by statute) to the executor for settling the estate, are given but for the convenience of the estate; the rights of the legatees are settled and determined at the death of the testator. Unless, therefore, something else appears in the will to indicate a different intent, the persons answering the description at his death, that is to say, the children of A B then in existence, or legally considered as then in existence, are alone entitled to the bequest. When the enjoyment of the thing given is not to be immediate, but is postponed to a particular period, as at the death of A B, and there are no special provisions in the will indicating a different intent, then not only those who answer the description at the death of the testator, but those who come into being after his death, and before the time when the enjoyment is to take effect, so as to answer the description at any time before that assigned for the distribution, are all entitled to take. In the latter case all are embraced, because no inconvenience can result from taking them in, and each one of the family of children is supposed to have been comprehended by the testator within such general words.[1] "But," as said in M'Meekin v. Brummet, "all the authorities, without exception, apply to the case of a *will*, and no such principle has ever been applied to a deed or gift *inter vivos*. A deed or gift *inter vivos*, speaks at the time of its execution, and the grantee or beneficiary under it, must be such as answers the description at that time. "I do not mean to say," added the Chancellor, "that a contingent future interest may not be given by deed to a person not in existence, but that intention must appear in the instrument, (or in the gift *inter vivos;*) and if there be a person to answer the description at the time, it will never be applied to another coming afterwards into

[1] 2 Dev. & Bat. 129-30.

existence, who may come within the terms of the description.[1] Notwithstanding this case, however, we can but believe, when a future interest is created in chattels personal, by deed of trust, or by parol trust, whether it be a springing interest, a *quasi* remainder, or a conditional limitation, that the same construction should prevail, as prevails in case of wills. Nor can we believe, that when a *quasi* remainder or conditional limitation is created by deed directly, and the gift over is to a class, that the construction should be different from a like case upon a will.

§ 203. Every limitation of personal property that is ulterior to a limitation that is void for remoteness, is also void; unless it is to arise upon another event, which must necessarily happen within the time prescribed by the rule. The exception is but the rule, that when a limitation is made to depend upon either of several events, that the illegality of one or more of the events will vitiate the limitation *pro tanto* only. Thus, if there be a bequest to A, and if he die without issue living at his death, or leaving such issue, they should die under the age of twenty-three years, then to B, the limitation to B is good in the first event, but it is too remote in the other.

§ 204. "In case of appointments testamentary or otherwise, under powers of selection or distribution in favor of defined classes of objects, the appointees must be persons competent to have taken directly under the deed or will creating the power. The test, therefore, by which the validity of every such gift must be tried, is to read it as inserted in the deed or will creating the power.[2] If the power be to issue generally, and the appointment be within the rule, it is good; and if the power restrict the appointment to objects within the rule, but if the appointment be made to a *class*, some of whom are not within the power or the rule, the appointment will be good *pro tanto*."[3]

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[1] 2 Hill's Ch. Rep. 639. [2] 1 Jar. on Wills. (243.) [3] Ib. (250.)

§ 205. But without going farther into this matter, we may, in conclusion, add, that trusts for accumulation are subject, when not governed by statute,[1] to the rule against perpetuities.

§ 206. But the rule against remoteness, we have said, is directed against future contingent interests, and not against future vested interests. It is necessary, therefore, that we inquire when a future interest is held to be vested, and when it is held to be contingent.

§ 207. It is a general rule, that interests shall be construed to be vested, rather than contingent. Or, to state the rule, as Mr. Smith says, more precisely, "in doubtful cases, an interest shall, if it possibly can consistently with other rules of law, be construed to be vested in the first instance, rather than contingent; but, if it cannot be construed as vested in the first instance, that at least, it should be construed to become vested as early as possible."[2] This rule, however, as was said in Richardson *et als.* v. Wheatland,[3] is not to be so pressed as to defeat the intention of the instrument.

§ 208. It may be laid down as a general rule, that where a donee is *in esse*, and ascertained at the time the instrument takes effect, and the gift is not dependent upon a condition precedent, then though the enjoyment is postponed to a future time, yet is the gift of a vested, and not of a contingent interest.

§ 209. In regard to the position, "where a donee is *in esse*," it may be said that it matters not, whether the donee be born, or be still *in ventre sa mere;* for in the latter case the donee is *in esse*, for the purposes of a gift, from the moment of conception; provided such donee be afterwards born alive, and after

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[1] See Code (Ala.) for statutory rule.

[2] 2 Fearne's Rem., § 201.

[3] 7 Metcalf, 171.

such period of fœtal existence, that continuance of life may reasonably be expected.[1]

§ 210. In regard to the donee being ascertained, the rule, of course, is that the donee must answer the description according to the intention of the donor. A strong case here is that of Trower v. Butts, in which it was held, that under a gift to children "born in my life-time," a child *in esse*, but unborn at the testator's death, was held to be entitled to a share.[2] The Vice-Chancellor said: It is now fully settled, that a child *in ventre sa mere* is within the intention of a gift to children living at the death of a testator; not because such a child (and especially in the early stages of conception) can strictly be considered as answering the description of a child living; but because the potential existence of such a child places it plainly within the reason and motive of the gift.[3] This accords with the maxim of the civil law, "*posthumus pro nato habetur.*"

§ 211. We come now to consider the condition precedent.—The great rule is, that if the donor, either expressly or by clear implication, has pointed out a particular time when the gift shall become a *vested* interest, then the arrival of that time is a condition precedent. But we must distinguish between the time of vesting in enjoyment and vesting an *interest*, for they are very different matters. Thus, if there be a gift of money or of other chattel personal to A, "payable, or to be paid, or to be

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[1] 2 Bouvier's Institutes, 353.

[2] 1 Sim. & M. 99; 2 Paige, 35—cited Chilton's Probate Court, Law & Practice, 423, N.—where it is also said: "Children born within six months after conception are presumed to be incapable of living, and therefore cannot take or transmit property, unless they actually survive long enough to rebut the presumption."—2 Paige, 35. And: "A child born within eight months and twenty-one days, after the death of his sister—held entitled to distributive share of her estate."—4 Sim. & M. 99.

[3] 1 Sim. & Stu. 181.

delivered," at his age of twenty-one or other definite time, A takes a vested interest, for the time is annexed to the enjoyment and not to the gift. So if the gift be to take effect in enjoyment after payment of the testator's debts, the interest is vested, unless a different intention appear.

§ 212. But if the money or chattel is to be paid or delivered upon an event which must not necessarily happen, as upon marriage, or birth of a child, then the interest is contingent, unless it appear that the donor intended the event to be a condition subsequent and not precedent. Let us take three cases by way of illustration.

In Monkhouse v. Holme, the testator gave the use of 800*l.* to his wife for life, and from and after her decease, disposed of the said 800*l.* in the following manner: to L. B. 100*l.*, to M. M. 100*l.*, to E. and C. H. 100*l.* each, to M. H. 5*l.* a year. Then followed other devises and bequests. He then declared: I also give to Jonathan Monkhouse, son of my brother George, the sum of 100*l.* He then gave the residue to his wife. The testator died, and then Jonathan, and then the widow. After the death of the widow, the representative of Jonathan claimed the 100*l.* It was contended that it was part of the 800*l.*, and therefore lapsed by the death of Jonathan in the lifetime of the widow. But Lord Loughborough held that it was vested. He said: The 800*l.* is a gift to the trustees, to pay the interest to the wife for life, and then in parts and shares. That shows his intent to be to give a vested interest to the several legatees. But this is said to be contrary to the rule of not vesting legacies given by words *de futuro*. I rather take the rule to be, that when the time is annexed, not to the form, but to the substance of the gift,[1] then it lapses by the death of the legatee. There are instances both ways, in Dyer 59 *b*, on the will of Lord Lat-

[1] See Marr's Ex'rs v. McCollough, 6 Porter, 507.

imer. The rule in legatory cases is taken from the civil law. * * * If the day is certain, it is vested; but where uncertain, the true question will be, "whether it is in the nature of a condition," for if it is conditional, then, in the very nature of the thing, the time is annexed to the substance of the gift, as in the case of marriage, of puberty, or of any other situation in life, when the arrival of the time is a condition, without which the testator would not have made the gift. * * The circumstance of introducing a legatory subject by the word "after," cannot be construed so to affect the gift as to make it a condition. The solid substantial distinction is, whether the testator meant it as a condition.[2]

In Morgan v. Morgan, a testatrix directed her executors to pay to A 5000*l.* upon her marriage, with all the accumulations of interest thereon from the time of her death; and it was held that the marriage of A was a condition precedent to the vesting of the legacy.[3]

In Ridgway v. Ridgway, a testator bequeathed his residuary personal estate to trustees, upon trust for A for life, and after the death of A, the said trust money and income in trust for all and every the children of A, share and share alike, to the son or sons when they should have attained the age of twenty-one, and for the daughter or daughters at that age or marriage; with a gift over of the said trust money and the interest, dividends, and annual produce thereof, if A should die without having a child or children, or having any, such children should die, being sons before twenty-one, or being daughters before that age or marriage. The legatee had one child, a daughter, who survived and died at the age of sixteen, and without having been married. It was held that the trust-property had vested in the daughter, so that the income between the death of A and the death of the daughter belonged to the estate of the daughter.[3]

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[1] 1 Bro. Ch. Rep. (298.) [2] 2 Eng. L. & E. Rep. 35. [3] 4 Ib. 108.

§ 213. It is a question of intention in each case, whether the future gift is dependent or not upon a condition precedent, and therefore it is a question of fact rather than of principle.

§ 214. But the cases are useful as showing the construction which has been given, and which the courts will therefore in like cases give again, for *stare decisis* is a maxim which applies with as much force to construction as to principle.

In Benyon v. Maddison, the testator gave the whole of his estate, subject to his debts, to John Maddison, the defendant, "in order to pay the income to my mother, Hester Lynde, for life, my intent being that she should enjoy the same during her life; but, after the death of Mrs. Hester Lynde, I then give to (five persons) the sum of 500*l.* each, three per cent. annuities, and to J. Benyon, and Mary his sister, the sum of 100*l.* each, three per cent. annuities. All the residue I give to my executor; and I hereby empower him to dispose of by will the residuum he will be entitled to after the decease of my mother."— The mother was dead, and J. Benyon died in her life-time, and the plaintiff was his representative, and filed the bill for the legacy of 100*l.*, three per cent. annuities. The Master of the Rolls held the legacy to be vested, and said: I do not mean to remove the rule, that where a legacy to a person requires that he should acquire a particular situation, there the legacy shall not vest; but considering the present as merely a money legacy, I think it does not fall within the rule. I must therefore decree the 100*l.* three per cent. annuities to be transferred to the plaintiff, with interest from the death of the mother.[1]

In May v. Wood, the testator declared: I give to my daughters, Mary and Margaret, the sum of 3000*l.*, five per cent. navy annuities, and all the dividends and proceeds arising therefrom equally to be divided between them, and all my estate at St.

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[1] 2 Bro. Ch. Rep. (75.)

Oyth to be equally divided between them, when they shall arrive at twenty-four years of age. One of the daughters married and died after arriving at twenty-one, but before she reached her twenty-fourth year. The bill was filed by the husband, claiming his wife's share of the legacy by virtue of representation. Lord Alvanley, M. R., said: It has been contended, upon the part of the plaintiff, that, according to the rule established in all former cases, this legacy must be considered as vesting *in præsenti*, and the period of twenty-four years annexed to it is not a condition, but the *time* when the party should be put into complete possession. All the cases establish this principle, that when the time is mentioned, as referring to the legacy itself, unless it appears to have been fixed by the testator as absolutely necessary to have arrived before any part of his bounty can attach to the legatee, the legacy attaches immediately, and the time of payment is merely postponed, not being annexed to the substance of the gift; but if it appears that the testator intended it *as a condition precedent*, upon which *the legacy must take place*, then if such *condition* or contingency does not happen, the gift never arises. It has therefore been insisted by the defendant's counsel, that the word *when* must be considered as synonymous to *if;* it is universally so, where the word *if* is used in denoting a condition annexed, and therefore in such a case, the legacy cannot take place. Here the words are, *to be equally divided when they arrive at twenty-four years of age;* the latter words refer to the whole of the preceding sentence, and it is not for me to consider whether the words, "to be equally divided," make any difference, and I do decide this point without any reference to *those* words. He then cited Atkins v. Hiccocks, 1 Atk. 500, and Onslow v. South, Eq. Ab. 295, and added: These have been the cases relied upon; and it has been also contended, that, according to the true construction of this clause, the word *when* must be synonymous to *if*, and consequently that the legacy has never vested. Has the court

ever adopted such a construction? On the contrary, all the cases, for full half a century, upon pecuniary legacies, have determined that word not as denoting a condition precedent, but only marking the period when the party shall have the full benefit of the gift, except something appears upon the face of the will, to show that his bounty should not take place, unless the time actually arrived; and not where he has merely used the word when for the sole purpose of postponing the time of payment.[1] In regard to the preceding proposition, however, Sir William Grant, in Hanson v. Graham, is reported to have said: This proposition is stated so broadly and generally, that I rather doubt the correctness of the report. Considering the well known diligence of the late Master of the Rolls in examining cases, and his uncommon accuracy in stating the result of them, he would hardly have drawn this conclusion from an examination of the cases; for no case has determined that the word "when," as referred to a period of life, standing by itself, and unqualified by any words or circumstances, has been ever held to denote merely the time at which it is to take effect in possession; but, standing so unqualified and uncontrolled, it is a word of condition; denoting the time when the gift is to take effect in substance. That this is so, is evident upon mere general principles; for it is just the same, speaking of an uncertain event, whether you say "when" or "if" it shall happen. Until it happens, that which is grounded upon it cannot take place." He asserted that the distinction was derived from the civil law, and added: In the case cited, Stapleton v. Cheales, it was clearly held that the expressions, "at twenty-one," or "if," or "when" he shall attain twenty-one, were all one and the same; and in each of those cases, if the legatee died before that time, the legacy lapsed. He then notices the distinction between the

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[1] 3 Bro. Ch. Rep. 471.

effect of giving a legacy at twenty-one and a legacy payable at twenty-one, and says that it also was transferred from the civil law.

But it was held, notwithstanding, that the legacy in that case was vested; and it is necessary, therefore, that we should look further into it. The facts were, that the testator gave to his three grand-children 500*l.* apiece of 4 per cent. Consolidated Bank Annuities, when they should respectively attain their ages of twenty-one, or day or days of marriage, which should first happen, provided, it was with such consent of his executors and trustees, as therein mentioned; and he declared, his mind and will was, that the interest of said several 500*l.* amounting in the whole to 1500*l.* 4 per cent. Consolidated Bank Annuities so given to his three grand-children, as aforesaid, as often as the same should become due and payable, should be laid out at the discretion of his executors and trustees, in such manner as they or the survivor of them should think proper, for the benefit of his said grand-children, till they should attain their respective ages of twenty-one years, or day or days, of marriage, and to and for no other use, intent or purpose whatsoever, &c. The testator died, and then one of the grand-children at the age of nine years. The bill was filed by the surviving grand-children after the death of their mother, for an account of what was due in respect of the legacy given to the deceased grand-child. And the Master of the Rolls, after considering the effect of "when," proceeded: In this cause, therefore, I should have determined against the plaintiffs, if it stood merely upon the first words. But then it is contended that they are entitled, because interest is given; and that they come within an established rule of the court: that though such words are used as would not have vested the legacy, yet the circumstance of giving interest is an indication of intention, explanatory, and denoting that the testator meant the whole legacy to belong to the legatee. On the other side it was contended, that the interest is not so given as to bring it within the general rule, but what is given is more

like maintenance. It is true, it has been held, that has not the same effect as giving interest; upon this principle, that nothing more than a maintenance can be called for—what can be shown to be necessary for maintenance, however large the interest may be; and therefore what is not taken out of the fund for maintenance must follow the fate of the principal, whatever that may be. But by this will it is clear the whole interest is given. Can there be any doubt, that in this case all the interest became, as it fell due, the absolute property of these infants, as separated altogether from the residue? All that is left to the trustees, is to determine in what manner it may be best employed. It is not merely so much of the interest as shall be necessary for the maintenance, but the interest entirely, separated from the principal. It is therefore the simple case of interest. It was observed for the defendants, that here is not only the period of the age, but also marriage with consent; and it was asked, supposing any of them had married without the consent of the executors, was it to vest? That is just the same question. If it is shifted to the question, whether it is to be paid, if any of them married without consent, the executors might say, no: the period of payment had not arrived. But marriage with consent is not a condition precedent; for at the age of twenty-one, whether married with consent or not, they would be entitled. That, therefore, not operating as a condition precedent, does not make any material distinction. The legacy is accompanied with an absolute gift of the interest; which, according to the established rule, has the effect of vesting it. I am therefore of opinion, that the plaintiffs are entitled.[1]

In Watson v. Hays, the testator directed his estates to be sold and the proceeds to be invested in real or government securities. He then desired, among other things, his executors to pay the sum of 25*l.* yearly by equal quarterly payments, for the

[1] 1 Ves. (239.)

maintenance and education of Sophia, his natural daughter, until she should attain twenty-one, or be married, which should first happen, when he required them to pay her 500*l.* for her own sole use and benefit. The legatee survived the testator, but died under twenty-one, and unmarried; and one question was whether the legacy had vested.

The Vice-Chancellor said: Twenty-five pounds is the amount of interest on 500*l.*, at 5 per cent.: and as that is the rate of interest which money is usually considered to bear, the 25*l.* directed to be applied for the maintenance and education of Miss Leeson, may be fairly regarded as intended to be the interest of the 500*l.* which is directed to be paid to her on her attaining twenty-one, or being married. Therefore, I think that she took a vested interest in the 500*l.*

There was an appeal from this decision, and upon appeal the Lord Chancellor said: There is no gift of the 500*l.*, except in the direction to the executors to pay that sum to the daughter, when she shall attain twenty-one or be married. Here is the word "when" distinctly applied to the gift itself, and not to the time of payment, to which Sir William Grant's judgment in Hanson v. Graham (6 Ves. 239) is therefore directly applicable; and there is also the absence of any terms of gift, except in the direction to pay at a given time, which never arrived, or upon a given event which never took place, to which Sir William Grant's observations in Leake v. Robinson (2 Mer. 363) directly apply, and which doctrine has been frequently recognised as a settled rule. This case appears to me to come so clearly within those rules, that I cannot think that any doubt would have been entertained as to this legacy having failed by the death of the legatee in infancy, if the question had not been supposed to be affected by the gift of the 25*l.* per annum for its maintenance and education. It is well known, that a legacy, which would upon the terms of the gift, be contingent upon the legatee attaining a certain age, may become vested by a gift c

the interest in the meantime, whether direct or in the form of maintenance, provided it be of the whole interest; which clearly marks the principle, that it is the gift of the whole interest which affects the vesting of the legacy. In this case, 25*l.* per annum, out of the proceeds of the real and personal estate, after investment in real or government securities, is directed to be paid quarterly, for the maintenance and education of the daughter till twenty-one or marriage, when the 500*l.* is to be paid. That the testator fixed upon the sum of 25*l.* per annum as the interest at 5 per cent. upon 500*l.* is probable, but it is clearly not given as interest upon that sum. The gifts are perfectly distinct, and the title to the 25*l.* per annum could not be affected by the interest upon 500*l.* not amounting to that sum. In Batsford v. Kibbell, (3 Ves. 363) Lord Rosslyn, there being no gift—except in the direction to pay at a certain age—held the legacy not vested before that time, although the legacy was of the dividends of 500*l.* 3 per cents to the legatee, until he should attain the age at which the stock was to be transferred to him. That case necessarily includes and governs that now before me.[1]

§ 215. The case last cited in the previous opinion shows that a gift of the interest will not have the effect to vest the gift of the principal, if there is no gift of the principal except in the direction to pay or transfer it at a future period. In that case, the testatrix gave to A the dividends of 500*l.* stock till he should attain thirty-two years of age; at which time she directed her executors to transfer the principal to him. A died before he attained thirty-two, and the bill was filed by the residuary legatee, upon which the question was whether the legacy to A was vested or contingent.

The Lord Chancellor said: In this case there is no gift but

[1] 5 My. & Cr. 125; cited 3 Sim. 501 n. 2.

in the direction for payment; and the direction for payment attaches only upon a person of the age of thirty-two. Therefore he does not fall within the description. In all the other cases the thing is given, and the profit of the thing is given.[1] The legacy to A was therefore held to be contingent, and in the event that it had fallen into the residue.

§ 216. When the condition is annexed as well to the interest as to the principal, the gift of the interest cannot, of course, have the effect of vesting the principal. Thus, if there be a gift to A of one thousand dollars with interest at 8 per cent. on the day after he shall have arrived at his twenty-first year, the gift of both principal and interest is contingent.[2]

§ 217. Let us take another case illustrative of the proposition, that words importing contingency may be controlled by expressions and circumstances. In Branstrom v. Wilkinson, the question was upon the following bequest: "I give and bequeath to the two twin children of my said niece, Charles Branstrom and Frederick Branstrom, my one Dock share in the present new Dock at Kingston-upon-Hull, when they shall attain the age of twenty-one years, to be equally divided between them, share and share alike, and I appoint Mr. John Branstrom, the father, in trust for the same, and trustee for them during their minority, —and my will is, that in case of the death of either of them, the survivor to take the whole; and in case they both die in their minority, I then give the whole Dock share to my said niece and her heirs forever."

The testator appointed the defendant executor and residuary legatee. The bill was filed by the parents and the infant children against the executor, praying a transfer of the Dock share. The question was whether the children had a vested interest

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[1] 3 Ves. 363.

[2] See 1 Jarman on Wills, (766) Watson v. Hayes, wrongly cited.

before twenty-one. It was admitted that the share was to be considered as personal estate; and the dividends, till the majority of the children, was claimed by the defendant. The Master of the Rolls said: There is no doubt upon this point. It is perfectly clear, what this testator intended to postpone was, not the vesting, but the possession. He appoints a trustee. How could there be a trustee for them of nothing? There are many cases in which, notwithstanding the word "when," the interest vested. In Hanson v. Graham, I held, that a bequest in these terms may be so controlled, by expressions and circumstances, as to postpone the possession only, not the vesting. Of what is the father trustee during their minority? I cannot put any other meaning upon those words. He intended to appoint a trustee for them beneficially.[1] Accordingly he decreed the share to be transferred to the father upon the trusts of the will.

§ 218. It seems also to be true, that where there is a gift to a person or a class "when," "at," "if," "provided," "in case," &c., and there is a gift over upon death before the time, the first gift will, notwithstanding the apparent contingency, be held to be vested in interest, and the gift over construed to be a conditional limitation. This construction is settled in regard to real property,[2] and it seems equally applicable to personal property. The construction is subject, of course, to the intention of the testator, and if, therefore, it appears that he did not intend the interest to vest before the time, the intention will prevail: as if he declares that the interest shall not vest until the time mentioned shall arrive, or if the gift be to those, "who shall attain," &c.,[3] or "then living."[4]

§ 219. The Master of the Rolls, however, in Bland v. Williams, denied the construction in its fullest extent. He said:

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[1] 7 Ves. (422.)
[2] See 1 Jar. on Wills, (739.)
[3] Bull v. Pritchard, 1 Rus. 213.
[4] Lett v. Randall, 10 Sim. 112.

If the gift over is simply upon the death under twenty-four, then the gift could not vest before that age. In this case, the gift over is not simply upon the death under twenty-four, but upon the death under twenty-four without leaving issue. If, upon a death under twenty-four, at whatever age issue was left, then the gift over is not to take place. It is in effect, therefore, a vested interest, with an executory devise over, in case of death under twenty-four without leaving issue; all the cases upon the subject, except the one before Lord Gifford, *i. e.* Bull v. Pritchard, are reconcilable with this distinction.[1]

§ 220. Mr. Jarman denies that any such distinction is discoverable in the cases;[2] and he thinks that, on the whole, the authorities do not warrant, though they point to the general position above taken, when the gift is residuary and to a class.[3] But inasmuch as there seems to be no reason for a different construction in this respect between real and personal property, and as the reason of the construction applies with like force to a specific legacy and to a residuary bequest, we have ventured to take the general position.

§ 221. It is laid down, that where life interests are bequeathed to several persons in succession, terminating with a gift to children, or any other class of objects *then* living, the word "then" is held to point to the period of the death of the person last named, whether he is or is not the survivor of the several legatees for life, and is not considered as referring to the period of the determination of the several prior interests.[4] Archer v. Jegon is cited as authority for the position. In that case a testator gave 7000*l.* in trust for the sole and separate use of his sister for life, and after her death to her husband, John Graham, for his life, "and from and immediately after his decease," he

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[1] 3 My. & Keene, 411.
[2] 1 Jar. on Wills, (776) n (x)
[3] Id. (777.)
[4] 1 Jar. on Wills, (768) n (k.)

bequeathed 7000*l.* and the interest and dividends thereof unto the children of his said sister "who shall then be living." The testator died; then John Graham, leaving a son and four daughters; then one of the daughters died; and then Mrs. Graham died: and the question was, whether the daughter who died took a vested interest. The Vice-Chancellor held that she did, saying: "It is possible that the testator may have meant that those children only should take, who should be living at the death of the survivor of Mr. and Mrs. Graham; but he has not said so. He certainly, however, contemplated her marrying again." After reciting the clause in the will, he added: "There the word *then* necessarily refers to the antecedent, 'after his decease.'"[1] But this seems to be an unsatisfactory construction, since upon that construction the children seem to have been entitled to fund and interest in exclusion of the mother upon the death of the father.

§ 222. There is a distinction taken between the gift of a specific legacy, and the gift of a residue. In May v. Wood, Lord Alvanley is reported to have denied that there was a difference; but in Booth v. Booth, he denies the correctness of the report,[2] and says: That there is a difference between a bequest of a legacy and a residue, with reference to this point, cannot be denied, either on principle or precedent. Every intendment, he adds, is to be made against holding a man to die intestate, who sits down to dispose of the residue of his property.[3]

§ 223. The facts of the case last cited were these: A testator gave a fund to trustees "upon trust to pay the dividends and produce thereof as the same should from time to time become due, equally, between his great-nieces, Phœbe Booth and Ann Booth, until their respective marriages; and from and immediately after their respective marriages, to assign and trans-

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[1] 8 Sim. 446. [2] 4 Ves. (405) (408.) ([3] Id. 407.)

fer their respective moieties or shares thereof unto them respectively." Both legatees survived the testator, but one of them died unmarried; and the question was, whether the legacy was vested in her and passed to her executor, or whether it belonged to the next of kin of the testator. The Master of the Rolls, upon the circumstances of the case, upon the ground that it was a residue, and upon the words of the bequest, held that the residue vested and that the case was an exception to the rule *dies incertus in testamento conditionem facit.*[1]

§ 224. In Leake v. Robinson, Sir William Grant, in speaking of the preceding case, said: There is certainly a strong disposition in the court to construe a residuary clause so as to prevent intestacy with regard to any part of the testator's property. With all that disposition, it is evident that Lord Alvanley felt that he had a difficult case to deal with. Some violence was done to the words in favor of what he conceived to be, and what in all probability was, the intention. That intention, however, was collected from circumstances that do not occur in the present case. Both the legatees were adults at the time the will was made. Lord Alvanley admits that, if it had been otherwise, it might have made some ingredient in the argument. Then the whole interest was given to them absolutely—a circumstance which has always been held to furnish a strong presumption of intention to vest the capital, and which is not afforded by a direction for maintenance out of the interest, as was decided in the case of Pulsford v. Hunter.[2] The legatees might both live to extreme old age, without the event ever happening on which the legacy was made payable. There was no survivorship between them, nor was there any bequest over in the event of the death of both or either; so that intestacy must have been the consequence of death before marriage.[3]

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[1] 4 Ves. (409-10.) [2] 3 Bro. Ch. Rep. 416. [3] 2 Mer. (294)-(295.)

§ 225. If, however, there is anything in the distinction, it is nothing more than this: that a presumption arises from the gift being a residuary gift, as it does from the gift of interest, that the donor intended a vested, and not a contingent gift. But in order for the presumption to arise from a residuary gift, it is necessary that the holding it vested will have the effect in every event of preventing intestacy; for otherwise, the basis of the presumption does not exist.[1] And here it may be added, that when there is a gift over to the survivor or survivors, in case one or more of the class dies before the time, the presumption of a vested interest being intended, is much stronger than when the gift over is to a stranger; for how can there be survivorship unless there is something to survive?

§ 226. In regard to sums payable out of land *in futuro*, the old rule, says Mr. Jarman, was, that, whether charged on the real estate primarily, or in aid of the personalty, they could not be raised out of the land, if the devisee died before the time of payment; (and this, it seems, that the inheritance might not be unnecessarily burthened;) but this doctrine has undergone some modification; and the established distinction now is, that if the payment be postponed *with reference to the circumstances of the devisee of the money*, as in case of legacy to A, to be paid to him at his age of twenty-one years, the charge fails, as formerly, unless the devisee lives to the time of payment; and that, too, though interest in the meantime be given for maintenance. But on the other hand, if the postponement of payment appear to have *reference to the situation or convenience of the estate*, as, if land be devised to A for life, remainder to B in fee, charged with a legacy to C, payable at the death of A, the legacy will vest *instanter;* and consequently, if C die before the day of payment, his representatives will be entitled; the raising of

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[1] Lett v. Randall, 10 Sim. (117.)

the money being evidently deferred until the decease of A, in order that he may, in the meantime, enjoy the land free from the burthen.[1]

§ 227. There is a matter of construction which may be noticed here. If chattels personal be given by will to A and her son, or to her and her sons, or her daughters, or her children, and A has a son, or &c., there is a joint taking; but if at the time the interest falls into possession there is not and has not been a son, then A takes the whole. Thus, if there be a gift to A and her children after the death of B, and A have no children at the death of B, she takes the whole property, and no child which she may afterwards have can claim under the gift.

§ 228. In cases of real property, it has sometimes been held that "son" is a word of limitation, but there must be a necessary inference from the context that the whole line of male issue was included by the intention.[2] In Malcolm v. Taylor, where the gift was of personalty "unto the said John Malcolm and his assigns for life; and after his decease to his eldest son forever," the Lord Chancellor said: That "son" may be a word of limitation is not denied; but there must be some plain reason for making it so. None of the cases from Byfield's case downwards, certainly not Robinson v. Robinson, came at all near the violence which it would be doing to the obvious meaning of this clause to construe "eldest son" as *nomen collectivum*. As to the superadded words "forever," they clearly are only used to contradistinguish the interest which the eldest son of John Malcolm was to take, from that which John Malcolm himself was to take; the one for life, the other absolutely.[3]

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[1] 1 Jar. on Wills, (756); see further (757)-(759) and more fully 1 Rop. Leg. Chap. x. & xi.

[2] Byfield's case cited, 1 Vent. 231; Sonday's case 9 Rep. 127; Robinson v. Robinson, 1 Bur. 38.

[3] 2 Rus. & My. 416.

§ 229. In Corbet's case, Walmsley, J. said, that if a man makes a feoffment in fee of land to the use of A and his heirs every Monday, and to the use of B and his heirs every Tuesday, and to the use of C and his heirs every Wednesday, these limitations are void; for we do not find such fractions of estates in law.[1] If such limitations of realty by way of use are void, so also would such limitations of personalty be void. If, however, there were a like limitation for each day in the week, as, to A every Monday, to B every Tuesday, to C every Wednesday, to D every Thursday, to E every Friday, to F every Saturday, and to G every Sunday, the construction ought to be that the grantees take jointly, and not that the limitations are void. Such construction is supported by analogy, for where there is a devise to "heirs" in England, and there are superadded words of modification, as share and share alike, or as tenants in common, the words of modification are held to be void; and it is required by the maxim *ut res magis valeat quam pereat.*

It might, indeed, be contended, that if a limitation were made to A and his heirs every Monday, the whole fee would pass, since when a grant is made whatever is necessary to the enjoyment of the grant, passes also; and the whole fee must pass to A in order that he may enjoy it on every Monday. And as in the case put by Walmsley, A, B and C ought to take the whole fee jointly.

§ 230. Any number of future limitations of personal, as well as of real property, may be made, and each one of them may carry the whole interest; but then each limitation subsequent to the first limitation carrying the whole interest, must be a conditional limitation, or it must be a mere alternative limitation.

§ 231. An alternative limitation is a limitation which is to take effect in case the preceding limitation should fail to take

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[1] 1 Rep. 87.

effect. An alternative limitation may be of a partial or absolute interest *in præsenti*. Thus, if A bequeath chattels to B for life or absolutely, but if B should die before the testator, then to C, the limitation to C would be a mere alternative limitation.

It may be of a future partial, or absolute interest. Thus, if there be a gift of chattels to A for life, remainder to B for life or absolutely, but if B be dead before A then to C, the limitation to C would be a mere alternative limitation with the limitation to B, though as to the limitation to A it would be a *quasi* remainder. This shows that a limitation may have one character as to one limitation, and another character as to another limitation. All *quasi* remainders, and all conditional limitations are, indeed, *ex vi termini*, alternative limitations, unless a contrary intent appear, but then they are something more.

§ 232. If a limitation take effect, all limitations, which are merely alternative with it, are forever defeated; but if the subsequent limitations are *quasi* remainders, or conditional limitations, then, though they have lost their character as alternative limitations by the taking effect of the prior limitations, yet they may still take effect at the time limited.

§ 233. Difficulty frequently arises in determining whether a limitation is to take effect as an alternative merely with a prior limitation, or whether it is to take effect as a conditional limitation, or as a limitation by way of remainder.(*a*)

Thus, in Hinckley v. Simmons, the bequest was: "I do give and bequeath unto my sister Mary Hinckley all my fortune and everything I have a power to leave; and *in case of her death*, I do then give and

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(*a*) The reason for stating the many cases which follow is, that such cases frequently arise, and their determination depends upon precedent, rather than principle. The general reader may therefore pass over them to § 234.

bequeath all I have to my mother, Mary Hinckley." The Lord Chancellor said: "Upon the construction of the will, I am perfectly satisfied upon the case of Lowfield v. Stoneham, 2 Str. 1261, which is precisely this—taking the words to import a contingency, and not limiting the estate of the defendant Mary Simmons (the sister, formerly Mary Hinckley,) to an estate for life—I am of opinion she is entitled absolutely."[1]

So, in the older case of Trotter v. Williams, J. S. bequeathed to A 500*l.*, to B 500*l.*, and gave 500*l.* apiece to five others, and then declared, "if any to whom I have given any money legacy happen to die, then her legacy, and also the residue of my personal estate, shall go to such of them as shall be then living, equally to be divided betwixt them all." It was held that the words, "shall go to such of them as shall be then living," must refer to a certain time, and that is when the legacies become payable, which is at the death of the testator, so that the death of any of the legatees after would not carry it to the survivors.[2]

In a marginal note to the case last cited, it is said: If a time of payment had been limited, that might have made it another construction than now it will—*Per* Rawlinson, who cites the case of Clerk and Bridges; and it seems very clear that it would.

But in Lord Douglas v. Chalmer, the question was upon the following clause of a codicil: "for and to the use and behoof of my daughter, Francis Lady Douglas, and *in case of her decease*, to the use and behoof of her children, share and share alike." The Lord Chancellor said: Such a gift implies naturally that the parent is to take for life, and that the children are to take the capital; but the period at which their interests commence can only happen at the death of the parent. It would be much too subtle to make a different construction from that which would arise from the use of the words "at her decease," or "from her decease," which would clearly mark the situation and period at which the bequest over is to take effect. The argument for the plaintiffs requires me to imply a particular event, the death of Lady Douglas in the life of her mother; without express words, or some very particular intimation of that intention, it would be such a construction against the natural import of the expressions used, as the court would not be warranted in making.[3] And on another day he said: I have not found any case, and I have looked very carefully into them all, that bears against my decision. Lord Suffolk v. Lord Binden applies to a different subject; words creating a joint tenancy

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[1] 4 Ves. (160.)
[2] 2 Eq. Ca. Ab. 344, M. 2.
[3] 2 Ves. 505.

up to a certain period upon a tenancy in common. In Trotter v. Williams, the construction was inevitable; the testator there could not mean to reduce the legacies to an interest in life for each; and it was apparently providing against a lapse. Nowlan v. Nelligan, cited on the other side, was much stronger than this. All the arguments used are convertible arguments.[1]

In Billings v. Sandom, the bequest was: "I give to my sister Sarah Sandom the sum of 1000*l.*; *and, in case of her demise*, I give to James Billings 800*l.*, and to John Billings the remaining sum of 200*l.* There was a residuary gift to the sister absolutely. The Lord Chancellor said, according to the best construction he could put, the testator meant to give a share of his bounty to his sister, and also to the others: the word "*and*" implied this; therefore that she should have it for life, and then they should take it.[2] This case has lately been characterized as one "which happens to be another Gibraltar case."[3]

In Nowlan v. Nelligan, the bequest was: "I give and devise to my beloved wife, Harriet Nowlan, all my real and personal estate; I make no provision expressly for my dear daughter, knowing that it is my dear wife's happiness, as well as mine, to see her comfortably provided for; but, in case of death happening to my said wife, in that case, I hereby request my friends Staples and Hunter to take care of and manage to the best advantage for my lovely daughter, Harriet Nowlan, all and whatsoever I may die possessed of." The Lord Chancellor said, that it was impossible to tell with precision what was the testator's meaning, but he thought it too much to determine, that *in case of death happening*, meant dying in the husband's life-time that therefore the meaning must be supposed to be in the event of her death, whenever it should happen.[4]

In Webster v. Hale, James Findlay bequeathed to his executors on trust the sum of 8000*l.* stock in the 5 per cent. Irish Fund, for the use exclusive right and property of his dear sister, Clementina Webster but should Clementina Webster happen to die, then in that case, the above-mentioned sum of 8000*l.* 5 per cent. Irish stock, was to be divided among her children, male and female, in equal shares; and he also bequeathed to his said sister the sum of 4000*l.* in the 3 per cent reduced stock, to be paid to her as soon as possible, or in the event of her death, the said sum of 4000*l.* in the 3 per cent. reduced stock was to be divided amongst her children, share and share alike.

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[1] 2 Ves. 507. [2] 1 Bro. Ch. C. (394.)

[3] Knight Bruce, V. C., in Smith v. Stewart, 3 Eng. L. & Eq. Rep. 176.

[4] 1 Bro. Ch. C. 489.

He also bequeathed to his sister, Helen Findlay, the sum of 1000*l.* East India stock; and, in case of her death, the sum of 1000*l.* East India stock was to be divided among her children, share and share alike. He then gave his step-mother, Mrs. James Findlay, the sum of 2000*l.* 3 per cent. reduced stock, to be paid to her as soon as possible; and to be entirely at her own disposal; and he also gave Janet Walker the sum of 1000*l.* in the 4 per cent. stock; and he gave several other specific and pecuniary legacies.

The bill was filed by Clementina Webster, Helen Findlay, and Janet Simpson, formerly Walker, and their husbands, claiming their respective legacies absolutely.

The Master of the Rolls said: The difficulty in all such cases is to ascertain what the testator intended by applying words of contingency to an event that is certain. The words, taken literally, imply doubt as to an event, of which no doubt could be entertained. A construction, therefore, is absolutely necessary; either that, whenever the first legatee dies, the other shall take; or, that if the first is prevented from taking by dying in the life of the testator, the other shall be substituted for him; in other words, whether it means an interest for life to one, with remainder to the others, or only, that in case one does not take, the other shall. The first consideration is, which construction the words naturally bear. It does seem, that the two first bequests point more to an alternative disposition, either to Mrs. Webster or to her children, than to a bequest in succession, first to her, and afterwards to her children. In the first bequest he uses words which seem to convey an intention of giving her the absolute property in the stock. The word "*but*" is disjunctive and adversative. It opposes one case to another, and implies that the children are to take in an event different from that in which the parent is to take. In making the second bequest to the same sister of 4000*l.*, a different stock, he directs it to be paid to her as soon as possible, or in the event of her death to be divided among the children. The direction for payment to her strongly implies an intention to make it her entire and absolute property; and what follows, is again a disposition in the alternative, in the sense in which I understand it, when following words conveying an intention to give absolutely; in the event of the mother being incapable by her death of taking absolutely, then to her children.

The other bequest to Mrs. Findlay is in the very terms of Lord Douglas v. Chalmer; and if that stood alone, I should be bound to the same construction. But if the testator did not mean to confine Mrs. Webster to an interest for life in her legacy, it is by no means probable that he meant to confine Mrs. Findlay, his other sister, to the receipt merely of the interest of her legacy. There are hardly two

clauses of this will even for the same thing, conceived in the same manner. I think, therefore, it does sufficiently appear, the testator meant Mrs. Webster to take absolutely, if at all; and I cannot, from this very slight variation, collect a contrary intention as to the other sister. They therefore take absolute interests in all the three legacies.[1]

In a preceding case, that of Cambridge v. Rous, the testator being in the East Indies, made among others the following disposition to his two sisters, then in England. "I give, devise and bequeath to my eldest sister, Martha Mierop, the sum of 4000*l.* sterling, lawful money of Great Britain, and in case of her death, to devolve upon her sister, Cornelia Mierop. I give, devise and bequeath to my youngest sister, Cornelia Mierop, the sum of 4000*l.* lawful money of Great Brittain, and in case of her death, to devolve upon her sister, Martha Mierop."

The Master of the Rolls said: The words in which the bequest over is expressed have not, in themselves, nor have they by construction received a precise and definite meaning; in which they must be uniformly understood. The expression itself is incorrect; as it applies words of contingency to an event, which is certain. No man can, with propriety, speak of death as a contingent event, which may or may not happen. When, therefore, a testator so expresses himself, the question is, what he means by that inaccurate expression. He may, perhaps, have had some contingency in his mind; as, that the legatee was dead at the time he was making his will, or might be dead before his own death, or, before the legacy should be payable; and then the inaccuracy consists in not specifying the period, to which the death was to be referred. He might have meant to speak generally of death, whenever it might happen; and then the contingent or conditional words must be rejected; and words of absolute signification must be introduced; and, accordingly, in every instance in which these words have been used, the courts have endeavored to collect from the nature and circumstances of the bequest, or the context of the will, in which of these two senses, it is most likely, this doubtful and ambiguous expression was employed.

In Billings v. Sandom, the testator's mode of giving the residue, contrasted with the mode of giving the particular legacy, afforded evidence that one was given absolutely, and a limited interest only in the other.(*a*) In conformity to that intention, the words were there construed to be the same as "at" or "upon" her demise. In Nolan v.

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[1] 8 Ves. (410.)

(*a*) But see if this be true--"and"?

Nelligan, it was evident some benefit was intended for the daughter: but it was doubtful, as the extent was not clearly expressed, whether it could be made effectual by imposing a trust upon the will—some benefit, however, was evidently intended for the daughter; and none could be assured to her except by limiting her mother to an interest for life. The construction was, therefore, agreeably to the intention, that the words meant "upon," or "at." In Lord Douglas v. Chalmer, Lord Rosslyn thought, that from the whole will he was able to collect an intention to make a provision for the children; to effect which it was necessary to construe, as he did, the words, "in case of her decease." But he did not determine, that is the only construction the words will bear. The contrary is evident from the whole scope of his argument, and from his decision in Hinckley v. Simmons; in which precisely the same words were differently construed. The case referred to by Lord Rosslyn, Lowfield v. Stoneham, is, as has been stated, a *Nisi Prius* case, before Lord Chief Justice Lee. The only point reported is, that parol evidence was not admissible, as it certainly was not, for the purpose of showing the intention, that Joseph Stoneham should have only the interest of the 1000*l.*, and that upon his death, whenever it should happen, it should go over. But it is sufficiently apparent, the opinion of the court was against the defendant; who therefore thought it necessary to attempt to introduce parol evidence, to show an intention contrary to the construction, which, upon the face of the will, Judges were disposed to put upon it. In King v. Taylor,[1] Lord Alvanley very properly held, that the word "if" did not mean "when"; but only referred to the contingency of the legatee's death, before the legacy became payable.

As it appears, then, the construction is to depend upon the intention, what is most likely to have been the intention in this case? The testator being at a great distance from this country, it might be matter of uncertainty, whether both his sisters were living at that time; and it is possible, he might have meant nothing more than, in case of either being dead. However, there is an absence here of any such circumstances as might have influenced the construction in any of the three cases relied upon for the plaintiff. The case therefore resembles more Hinckley v. Simmons, and Lowfield v. Stoneham, than either of the other three. In those two, no particular circumstances to influence the construction appeared: nothing to argue from in the context of the will; and they seem to support the proposition, that when such words occur by themselves, and there is nothing to explain them, they

[1] 5 Ves. (807.)

import the contingency of dying before the testator. But there is, not only an absence of any such circumstances as occurred in either of the cases relied upon for the plaintiff, or leading to that construction, but a strong improbability, that the testator had the intention that construction imputes. It is to be presumed naturally, that he meant a separate and independent provision for each sister, if both should be alive, to take the benefit; but by the plaintiff's construction, during their joint lives, neither of them could touch a shilling, or make use of her share, for her own establishment, or the use of her family; and if one died leaving children, her share could not have been used for her family, but would have gone to her sister; for no other reason, but that she happened to survive. Ordinarily, in gifts between such near relations, if any restraint is imposed upon the first taker, it is for the benefit of the children. The supposition that it is a gift of 4000*l.* to each for life, with reciprocal remainders of each other's legacies, is the most absurd disposition that ever was made; for when Martha died, her 4000*l.* would go from her family to Cornelia, and when Cornelia died, her 4000*l.* would go to Martha's family; the family of each taking 4000*l.*, but not her own. The absurdity of that proposition induces the plaintiffs to contend, that their construction does not necessarily lead to that; and they wish to read the will, as if the words "in the life-time" of the other were inserted. That is departing from the construction of dying generally; and adopting some period; and so far giving way to the argument of the defendants, fixing upon a period to give effect to the bequest over. If we must take a period, which is the most likely to be intended: to suspend the vesting, till one sister should die; or to give to both absolutely, if both should survive the testator? I think he intended that, if both should be alive at his death, both should take absolutely; and if it is not so, it is difficult to put any other construction than that, which the defendants say is necessary, if the plaintiff's construction is to prevail.[1]

In King v. Taylor, the testatrix bequeathed to her son a sum of stock, "when he has attained the age of twenty-three, likewise" her household goods, plate, china, and a box of linen. And to her daughter she bequeathed her wearing apparel and a sum of stock, and desired, if the daughter's husband be living, that the stock should be transferred to certain persons whom she appointed trustees to hold and manage the same for her daughter's benefit. She then bequeathed whatever interest might be due to her, "jointly between my aforesaid two children," and added, "then I do will and ordain that, if either of

[1] 8 Ves. (12)—see, also, Ommaney v. Bevan, 18 Ves. (291.)

my children should die, the surviving shall have what I have left to the other." The testatrix died, and then the daughter, and the contest was between the husband, as plaintiff, and the son, as defendant.

The Master of the Rolls said: I am much inclined to think it impossible to raise any judicial doubt upon this case; for repugnancies would arise from the construction of the defendant. This is perfectly distinguishable from all the cases, upon the words, "in case of," "if it should happen," &c.; *for here is a specific time pointed out, at which it appears evidently to be the intention, that the legatee should be put in complete possession of the legacy;* which must be expunged, and declared not to operate to any intent whatsoever, and to have been put in for no purpose, upon the defendant's construction. The disposition in favor of these children preceding that clause, is without any limitation, or intimation that they are to be prevented from the full enjoyment of it; or, that if either should die leaving children, that share should not go to them, but to the survivor. Then comes this clause—I do not recollect whether these precise words, "if either of my children should die," have occurred. Trotter v. Williams is in favor of the plaintiff: the other cases, as far as they have gone, are with the defendant. I do not agree with the argument for the defendant, in distinguishing this case from Trotter v. Williams. It is directly in point; and almost exactly the same as the present. But subsequent cases have occurred, in which words very similar to these have been confined to the death of the party." He cited Billings v. Sandom, and Nowlan v. Nelligan, and said, "the words in these cases are not "if he should die," which is a very extraordinary condition to creep into any will, but "in case of his death;" which has more reference to the time than the other expression." He cited Lord Douglas v. Chalmer, and said the Lord Chancellor's reasons in that case certainly did not apply to this one; and added: "The Lord Chancellor, after considering all the cases, continued of the same opinion; shows how the case of Lord Bindon v. Lord Suffolk applied to a different subject; and says, in Trotter v. Williams, the construction was inevitable, and it was only providing against a lapse. It was no more so there than in this case. I say the same here. The legacy of the defendant vested at the age of twenty-three; and it would be totally inconsistent to make that an interest for life only, and to expunge what precedes these blind words." He concludes: This case comes up to Trotter v. Williams; and is by no means affected by either the decisions or the reasoning of the other three cases; and the ground of my decision is, that the construction that these words mean, whenever the death of either shall happen, would be totally inconsistent with the rest of the will. The conclu

sion is, that there was an absolute interest in the daughter at the death the testatrix; and in the son at the age of twenty-three; and as to the former, it is put into the hands of trustees by words, the construction of which must be, that it is to her separate use.[1]

In Laffer v. Edwards, a testator bequeathed a sum of stock to trustees, upon trust for his wife, for life; and after her death, to pay one-third part of the principal to his son, J. E., if he should then be living; and if dead, to his child or children; and one-third to his daughter, M. A. E., if living at the decease of his wife; and if dead, to her child or children; and the remaining third to his daughter, H. E., or her child or children, in the same manner. Provided, always, that if either of his said daughters *should die* unmarried and without issue, then their shares should go to his son, J. E., if living; and if dead, to his children. L. E., the testator's wife, died in his life-time, but the son and daughters survived him. Sir John Leach, V. C., held, that in the events that had happened, the interests of the daughter vested in them absolutely. That the deaths of the daughters unmarried and without issue, was plainly referable to their deaths in the life-time of the wife. That the only contingency in favor of their issue was, the chance of their deaths in the life-time of the wife.[2]

In Home v. Pillans, the testator's will contained, among others, the following provisions:—"I give and bequeath to my nieces, Catherine and Mary, the sum of 2000*l.* sterling each, *when and if they should attain their ages of twenty-one years*, and which said legacies to my said two nieces I give to them for their and each of their own sole and separate use, free from the debts or control of their or either of their husbands: *and in case of the death* of my said nieces, or either of them, leaving a child or children, I give and bequeath the share or shares of each of my said nieces, or niece so dying, unto their, or her respective children or child." The residuary clause of the will gave the residue of the testator's personal estate to trustees, upon trust for his nephew, William C. Macpherson, to be transferred and paid to him when and if he should attain the age of twenty-one; and it then proceeds in these words:—And in case of his death under that age, then to my said nephews, David and John Home, and to my said nieces, Catherine and Mary Home, in equal shares and proportions; the shares of my said nieces to be enjoyed by them respectively, for their respective lives, for their own sole and separate use, free from the debts or control of their respective husbands, and on their death the share of each of them to go to their respective children; the children of each to take

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[1] 5 Ves. 806. [2] 3 Mad. 210—as stated by Smith, 2 Fearne's R., § 136, *a*.

the share of their respective parents equally." The Master of the Rolls held that the interest taken by each of the testator's nieces in the 2000*l.* legacy did not become absolute on their respectively attaining the age of twenty-one, but continued to be subject to an executory bequest over, in the event of their leaving children living at their death; and an appeal was brought from that decision. The Lord Chancellor, after a most elaborate examination of the case, declared: I am, on the whole, clearly of opinion, that the decree cannot stand; that it gives a construction to the will neither consistent with the natural import of the words, nor borne out by any authority; while it is contradicted by all the decisions upon the point, and almost all the authority upon questions of a similar kind." The nieces were therefore held to be entitled to an absolute interest in their legacies of 2000*l.*, upon attaining the age of twenty-one respectively.[1]

The case of Child v. Giblett must be cited here. In that case, the testator bequeathed a residue to his two daughters, Selina and Elizabeth, in equal proportions, "and in case of the death of either, I give the whole thereof to the survivor of them; and in the event of their marrying and having children, then to the child or children of them, or the survivor of them, if they shall attain the age of twenty-one years; but if not, then among the children of Paul Giblett, share and share alike; and if only one child, then the whole thereof to that one child." The Master of the Rolls said: The rule is, that, where there is a bequest to two persons, and in case of the death of one of them, to the survivor, the words, "in case of the death," are to be restricted to the life of the testator; but the question is, whether the first expression used by this testator, to which this rule would apply, is not qualified by the subsequent words of the will. The testator cannot possibly have intended that the children of Paul Giblett should take in the event of a marriage of his daughters, and their death without children in his life-time, and that they should not take in the event of a marriage of his daughters and their dying without children, after his decease. That would not be a rational distinction. I am of opinion, therefore, that the general rule is here qualified by the subsequent words used by the testator; and that in the event of the plaintiff (the surviving sister, the other having died unmarried and without issue,) dying without children, or if she should have children, and none of them live to attain the age of twenty-one, the children of Paul Giblett will be entitled to the residuary property of the testator.[2]

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[1] 1 Coop. Sel. Ca. 198—same case published in 7 and 8 Eng. Ch. R.

[2] 3 My. & Keene, 71.

The case of McGraw v. Davenport & Wife must also be cited. In that case, the testator gave to his wife seven negroes for life, and he directed that at her death they, with their increase, should be equally divided by valuation between his two daughters, Louisa and Cynthia, "or should either of them die without issue, the other is to get the whole of the seven negroes, and their increase." It was held, that the death of the wife was the period at which one of the daughters must be dead without issue, in order to entitle the survivor to take the whole, and therefore that the limitation was an alternative limitation, and not a limitation to take effect after an indefinite failure of issue.[1]

In Smith v. Stewart, the testator gave his "gold watch to my brother James; in case of his death before me, to my sister Agnes; and in case of her death before me, then to the eldest son of my sister Agnes;" all the residue of his property, after payment of his debts, &c., he directed to be divided into fourteen equal shares, and he then gave certain shares to certain persons, and added: "*and I direct that the whole of the said legatees shall have the benefit of the survivorship between them, in the event of any one or more of them dying without leaving issue.*"

Knight Bruce, V. C., said: The question in this special case is, as to the meaning of the words, "dying without leaving issue," contained in the will before the court. Three constructions may be suggested, namely—first, that they mean "dying in my life-time, without leaving issue; secondly, that they mean, "dying after my decease, without leaving issue;" and, thirdly, that they mean, "whether in my life-time or after my decease, without leaving issue." It is only necessary to decide whether the first construction is right or wrong; for, as I understand, all the legatees mentioned in the will are alive. That construction appears to me not according to the proper force, ordinary sense, or presumptive meaning of the words; and therefore ought not to be adopted, unless a departure from the proper force, ordinary cause, or presumptive meaning, should be required by the context, or by circumstances, if any, admissible in evidence. Extrinsic circumstances are here out of the case, so that the only point is upon the context. The directions as to the watch, seem to me, if not immaterial, rather to bear against, than for the first construction. The language of contingency which the testator has made use of, is not inaccurate, as the proposition that a man will die without leaving issue, differs from the proposition that a man will die. It may also be remarked that, if James Smith (*one of the legatees*) had died in the testator's life-time, the shares given to him must have lapsed, whether he left issue surviving, or not surviving the testator, or left no issue; for there is no gift by

[1] 6 Porter, 319.

way of substitution, or otherwise, to any issue of James Smith. This name I, of course, select merely by way of giving one instance.

On the whole, I am of opinion, that the context does not warrant a departure from the proper force, ordinary sense, or presumptive meaning of the words under consideration, and that the first construction cannot be adopted, and that one of the other two is right.

This is a conclusion which, I think, is not forbidden by Cambridge v. Rous, 8 Ves. 12, nor by any authority previous or subsequent to Billings v. Sandom, 1 Bro. C. C. 393, which happens to be another Gibraltar case.[1]

§ 234. But let us turn now to another matter. In Patterson v. Ellis, Edmonds, Senator, said: "It is also a rule of law, that a devise of the *interest* or of *the rents and profits*, is a devise of the thing itself, out of which that interest or those rents and profits may issue. This rule, however, is to be understood with some limitations. Where the intention of the testator to give only the *use* is clear, manifest and undisputed, the rule must yield to the stronger force of the intention; but where it is doubtful whether the *use* only, or the *absolute ownership*, was intended to be given, the rule has been allowed to have a controlling effect. It is by no means clear, that in the case before us the use only was devised. If there is any doubt, it is whether the ownership was not intended to be given, and the rule to which I have adverted, comes with great propriety to our aid in solving the question." Afterwards he adds: "It is undoubtedly now a well-established rule, that when the *use* of a *chattel* is devised to one for life, with remainder to another, the devise of the remainder is valid. The devise for life in such case must be clear and explicit, and the intention of the testator to give only the use for life must be undisputed."[2] The Supreme Court of Arkansas sanctioned the rule, so laid down, in the case of Moody v. Walker.[3]

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[1] 3 Eng. L. & Eq. Rep. 175; 20 Law J. Rep. (N. S.) Chanc. 205—see, upon this subject, 2 Fearne's Rem., by Smith, § 656, *et seq.*

[2] 11 Wend. 298-299.

[3] 3 Ark. 188; see Butterfield v. Butterfield, 1 Ves. sr. 153.

§ 235. Now it is certainly true that a gift of the profits of a thing is *pro tanto* a gift of the thing;(*a*) but it does not seem to follow from that rule, that a gift for life must be clear and explicit, and that the intention of the donor to give only the use for life must be undisputed; nor does that rule seem to furnish any aid in solving the question whether a gift is a gift for life, or a gift absolutely. We have first to determine whether it is a gift for life, and if it be, then it is but a gift of the use; and whether it be so expressly or by implication, makes no difference.[1] And we deny, when it is doubtful, whether the first gift be for life or absolutely, that the rule is, that it shall be construed to be an absolute gift; and, on the contrary, we assert the rule upon principle to be in favor of construing the first gift to be for life, and thus allowing the subsequent limitation to take effect, *ut res magis valeat quam pereat.*[2]

§ 235*a*. If there be a gift of a chattel, and there be no gift over, and it is doubtful whether a partial or absolute interest was intended to be given, then the rule undoubtedly is to construe the gift to be absolute rather than partial. But that rule had nothing to do in Patterson v. Ellis. In that case there was a limitation to A; and if she died under twenty-one without leaving issue, then over; the question was as to the validity of the limitation over, and the court held it to be void for remoteness. And here we may add, that no case in the books does more violence to authority; for dying without leaving issue means, as to personalty, a dying without issue at the death; and had "leaving" been omitted, and the subject been real

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(*a*) Gift of interest of 1000*l*. to a woman for her sole and separate use; held to be an absolute gift of the principal. Humphrey v. Humphrey, 6 Eng. L. & Eq. Rep. 113.

[1] Ves. sr. 135, Page v. Leapingwell, 18 Ves. (467); 8 Vin. Abr. 287, § 14; case per Doddridge J. and Coke Ch. J.

[2] See Exel v. Wallace, 2 Ves. sr. (111.)

property, the construction should have been, without issue at the death; because a dying under a certain age without issue, is, by authority, a dying without leaving issue at that time.

§ 236. Great difference of opinion exists in regard to the policy of allowing partial and future interests in chattels personal to be created.

§ 237. Judge Tucker apprehends that they are calculated to create mischief and to give rise to vexatious litigation; that the preservation of his rights by the remainder-man will lead to a perpetual espionage into the conduct of the tenant for life; and that this prying into the private concerns of the latter will frequently excite the most bitter animosity on his part; that there are few principles in the law more calculated to generate and cherish petty law suits than this; and that the wisdom of the old common law is perhaps nowhere more conspicuous than in totally discountenancing all such limitations.[1] It is further urged that it is the policy of our law to keep all property, especially chattels personal, which are the chief instruments of commerce, free from all incumbrances and embarrassments; that it may be transferred with facility; that the possession may accompany the right of property, so that purchasers may not be deceived, and false credit obtained, and besides it is said that they are of too perishable a nature to admit of limitations of future interests being created in them.[2] And therefore, said the court, in the case of Smith v. Gates, the creation of uses and particular estates under various conditions and limitations, with reversions and remainders over upon personal property, cannot be favored; but the court will lean against their creation either by deed or will, unless by words that are clear and definite.

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[1] 1 Tuck. Com. 312, cited Kirkpatrick v. Davidson, 2 Kelly's Rep. 301.

[2] Smith v. Gates, 2 Root, 534. Counsel, *arguendo*, Griggs v. Dodge, 2 Day, 34; 2 Steph. Com. 75.

§ 238. On the other side it is said: "That although the genius of our law favors an equality, and is opposed to a perpetuity of property, it is not hostile to the creation of limited interests. The same necessity for the creation of such restricted interests arising from the frailties of human nature, and the peculiar condition of families, may exist in regard to personal property as forcibly as in regard to real property.

"The objection on account of the perishable nature of personal estate, regards merely the value of the gift. The ulterior *donee* can claim no more than the residue, after a reasonable use of the property. If the property becomes consumed by the use, no one can complain but the ulterior *donee*. The community surely are not injured by its want of value. But there are various descriptions of personal property to which this idea cannot apply, and whose duration may extend far beyond a life estate. Such are money, stocks, family paintings, libraries, &c. But the inconveniences of discriminating are so obvious, that the court will adopt the principle generally, and will not say, that because in some cases the residuary interest may not be of any value, therefore it shall not be protected in any.

"The interests of commerce, and the security of credit ought certainly to be regarded by a commercial people; but it cannot be seriously pretended, that either can be injured by a few solitary cases of restricted interests in personal estate. The empire of commerce is too deeply rooted in the enterprise and avarice of our citizens—the means of its support are too great, and too widely diffused—to suffer the smallest impediment from such trifling considerations. It may contract the objects of plunder within a narrower circle; it may screen the unguarded, intemperate, or dissipated youth from the rapacity of sharpers; the miser may complain that, in a few cases, the property of the spendthrift is protected by law from his grasp; but he that is satisfied with the acquisition of wealth by honorable means, will not complain of it as a discouragement to commerce.

"The possession of personal property is suffered, in many cases, to afford a credit where it is not owned: and the owner shall not be divested of his property, if the possession by the debtor was consistent with the broad principles of good faith. The person in possession is, by means of this external evidence of property, enabled to practise iniquity. Some inconvenience may arise from this circumstance. The evil, however, would probably be small in *this* as it is in other cases, and can be avoided only by incurring a much greater one.

"The right of continuing one's dominion over property beyond the grave, is certainly one of the most valuable rights derived from civil society. The possession of it is, at the same time, one of the strongest and most honorable incentives to industry. It ought then to be as unlimited in its exercise, and should be suffered to embrace as many of the relations and contingencies of life, as may possibly consist with the welfare of community. A man's whole estate may be personal; it may be indispensably necessary to guard against the prodigality of his son, incompetent to manage or retain for his children the property of their grand-father. He may have an aged relation for whose support he wishes to make provision; and it may be indispensably requisite to guard the weakness or credulity of age from the imposition of officious knaves."[1]

§ 239. Without entering into this controversy, it may be admitted that there are evils attendant upon these limitations; but it is submitted that they are advantageous to society, and are demanded by its exigencies; and that the evils address themselves to the *corrective*, and not to the *extirpative* wisdom of the Legislature.

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[1]Counsel *arguendo* Taber v. Packwood, 2 Day, 63-5; see also Carr et als. v. Jeannerett, 2 McCord, 92.

CHAPTER THE THIRD.

OF PARTIAL INTERESTS *IN PRÆSENTI.*

§ 240. We have already stated that, anciently, a partial interest in chattels personal could not be created either at law or in equity. We have also stated that subsequently it was held that the *use* of chattels personal might be given for a limited period; and afterwards, that a direct gift of them for a limited period was but a gift of the *use*, and so was good in that way.

§ 241. Now, it has never been denied that chattels personal might be loaned gratuitously, or for hire, for a limited period; and it is undeniable that the bailee, in such cases, is entitled to the *use* of the chattels bailed. Then what is the difference between bailments and partial interests? There does not seem to be any difference in the *nature* of the interest of a general bailee and that of a *quasi* particular tenant of chattels personal. A gratuitous loan of a chattel, even for a specified time, is said to be revocable,[1] whilst a gift of a chattel for a specified time is not revocable; but if we consider that a gratuitous loan for a specified period is by construction but a *quasi* tenancy at will, we may conclude that the difference is rather of construction than otherwise.

§ 242. The person to whom a chattel is loaned gratuitously or for hire, has a special property in it: the one who has it for hire, against the whole world: the one who has it gratuitously, against the whole world except the bailor. The person who has

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[1] Story's Bail. § 277.

a partial interest in a chattel personal, has a special property in it against the world, except a *quasi* tenant at will; and he, like a mere borrower, has it against the world except the general owner.

§ 243. A partial interest in chattels personal may be a *quasi* tenancy at will, for years, or for life, and there seems to be no principle which forbids a bailment *even for life*.

§ 244. A bailment may be made by parol, but it cannot be made by will. A partial legal interest *in præsenti* in chattels personal, may be created by will, but cannot be created by parol, unless it be as a bailment. Thus, if A, for a consideration, deliver a chattel to B, to be by him retained and used during his life, it would be an outrageous construction to hold that the absolute title passed, since but the *use* was intended to pass; and therefore, if the creation of a partial interest be denied, a bailment must be admitted, and that would satisfy the contract. But, if the transfer were without valuable consideration, then, unless it were held to be a partial interest, it ought to be held to be a mere gratuitous loan, and that would be a better construction than to hold that the absolute title passed by the delivery.

§ 245. But without prosecuting the inquiry further, as to the difference and the resemblance of partial interests *in præsenti* and general bailments, we may conclude that the general rights and liabilities resulting from each are and ought to be the same *in consimili casu*.

§ 246. It is often a question, and sometimes a difficult one, to determine whether an interest in chattels personal is an absolute or a partial interest. This difficulty presents itself when the interest, as first created, is partial, and there is ground for contending that it is enlarged by the subsequent terms of the conveyance; and also, when the interest is apparently absolute

at first, and yet there is ground for contending that it is cut down by matter subsequent.

First, in regard to enlargement: In Bradley v. Mosby, a father, by deed, gave to his daughter, the wife of E. M., the use of certain slaves during her life, and after her death to the heirs of her body, to the only proper use and behoof of such heirs, their executors, administrators and assigns; and in case she should die without heir of her body, in that case to his son, R. W., his executors, administrators and assigns, warranting the said slaves to his said daughter, the heirs of her body, or his said son, or to either of them, in manner and form above specified, as the case might happen. Roan, J. was of opinion that the daughter had an estate for life, with remainder to her eldest son and heir at law; Pendleton, J. that she had an estate for life, with remainder to all her children equally; and Lyons, J. that she had an absolute estate,[1] and the last is clearly the better opinion.

In Kay v. Connor, there was a gift by deed in the following words: "One negro boy, called Jacob, about seven or eight years old, and one negro girl going on six years, called Frankey, and all her future increase, I give to him (viz: Zachariah Gent) during his life, in trust for his heirs after his death." The court said: "To give any efficient meaning to these words, they must be construed as if they had read, 'I give to him for life with remainder to his heirs after his death.' The word '*heirs*' is a technical word, and is always construed to be a word of limitation and not of purchase, unless there be other controlling words, clearly showing that a contrary meaning was intended by its use. This, it is said is the case here; but we cannot, upon legal principles, think so. There is another clause in the deed by which a tract of land is given to him in the following words: 'In consideration of the good will and affection I bear towards my son,

[1] 3 Call. (50.)

Zachariah Gent, I do give and make over to him, in trust, for the benefit of all the children he may have, one tract of land,' &c. Now in this clause, the word children is used, which is also a technical word, and is always construed to be a word of purchase, unless it be controlled by other words used so as to show that it was intended as a word of limitation. It is argued that by the use of the word children in the first clause of the deed, it is fairly to be inferred that the donor, when he used the word heirs in the second, meant children. This inference is not legitimate; it would be as fair to argue that by the use of the word heirs in the second clause, he meant heirs when he used the word children in the first. But the legal inference to be drawn from the use of these different words in the two clauses of the deed, is that the donor knew their legal meaning, and used them accordingly; for why should he vary them? And this inference is strengthened by the manner of using them: in the first clause, the gift is to all the children that he may have, showing a disposition to provide for future children, and that in the second clause the gift is to heirs generally, showing no disposition to provide for children, but to keep the property from descending otherwise than in the limitation.

"We are therefore constrained, upon legal grounds of construction, to hold that the word *heirs* as used in the second clause of this deed, is a word of limitation, and not a word of purchase; and that the Circuit Judge erred in holding that the rule in Shelley's case is not applicable to it."[1]

§ 247. The conclusion in this case is doubtless correct, but it is certainly erroneous to say that the rule in Shelley's case applies to personal property.[2] The terms of the rule show that it is exclusively a rule of real property.

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[1] 8 Hump. 633.

[2] Wms. on Per. Prop. 193; Chandless v. Price, 3 Ves. 99.

§ 248. But there is a similar rule applicable to personalty. The grounds of the rule applicable to limitations of personal property are that "heirs" cannot take such property, because it cannot descend; the word therefore requires construction, and being a technichal word of *limitation*—that is, of *extension*—that meaning is given to it in construing limitations of personal as well as of real property; unless the party using it shows that he used it in another sense;[1] and that he cannot do, except by showing that he did not intend to include all the heirs.[2]

§ 249. The same rule applies to a gift to A for life, remainder to the heirs of his body, and vests in A the whole interest given.

§ 250. The interest given in such case is, by construction, the absolute property, for an estate tail cannot be created in personalty; nor can it be a fee conditional, and it must, therefore, of necessity, be the absolute property, since it is not restricted to a less estate.

Thus, where a testatrix gave her residuary real and personal estate upon trust, to apply the rents and profits for her son during his life, and afterwards for the heirs of his body, if any; and, in default of such issue, then in trust for her grand-son, &c; it was argued that the words "if any" had a peculiar force in this case, the son being a lunatic. But the Master of the Rolls held, that, even considering this as a mere disposition of personalty, the son took an absolute interest in the personalty, notwithstanding the words "if any" which must always be implied;[3] and he laid it down as clearly settled, that a bequest of personalty to a man for life, and afterwards to the heirs of his body, is an absolute bequest of personalty to the first taker.

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[1] Fearne's Rem. § 595.

[2] Keyes on Rem. 46; see a case *contra*, Price v. Price, 5 Ala. 581.

[3] Elton v. Eason, 19 Ves. 73; 2 Fearne's Rem. § 595.

And so in Britton v. Twining, the testator declared: Let 20,000*l.* out of the 22,000*l.* which I now have in the 3 per cent. stocks, be firmly fixed, and there to remain during the life of my wife, for her to receive the interest for the same, &c. And it is also my will and desire, that after the death of my wife, then the said 20,000*l.* which was settled upon her, be in the same manner firmly fixed upon the now infant boy William Cobb. I say, I would have it so secured that he may only receive the interest of the same during his life, and after his decease, to the heir male of his body, and so on in succession to the heir at law, male or female. But let it be noticed, that the principal 20,000*l.* stock is never to be broken into, but only the interest to be received as aforesaid; my intent being that there should always be the interest aforesaid to support the name of Cobb, as a private gentleman." The question was whether William Cobb took an absolute interest in the 20,000*l.*, or merely an interest for life. The Master of the Rolls said: He gives an estate for life to William Cobb; and he certainly meant that William Cobb should have no more than a life interest; but that is of no consequence, if he also meant that the heir male should take in the character of heir. Now there is nothing to qualify the words "heir male," or to show that they were not used in their strict technical sense. On the contrary, it is evident that the testator conceived he could make a perpetual entail of the property, so as to make it pass from heir to heir in succession; with a condition, however, which he also conceived he could impose on the power of disposition. The "heir male" is to take in the first instance, in the same manner as the "heir male or female" is afterwards to take; for he says "to the heir male of his body, and *so on in succession* to the heir at law, male or female;" so that he has inheritance alike in view with regard to them all.

"It would have been otherwise, if he had added the words "for life" to the words "heir male." Then the case would have

been the same as that of White v. Collins;[1] where after an estate for life to F. M. there was a limitation to the "heir male of his body lawfully begotten during the term of his natural life." This was held to be no estate tail in F. M. because of the superadded words. It is in this particular, also, that the case (which was cited) of Leonard v. Willock wholly differs from the present. There, the testator had in express terms restricted all the takers to estates for life, and the word "heirs" was inserted only for the purpose of designating the several persons who were to take such life estates. Here there is no such qualification. It is, indeed, declared, that the principal stock is never to be broken into, but only the interest to be received. But that is not sufficient to turn the "heirs" into tenants for life. It is equivalent to a declaration that no heir shall alien the estate, but only receive the rents and profits. But we are not to say that a testator has not given an estate tail, because he conceived he could perpetually restrain alienation.

"Assuming that, in the case of a devise of land, this would amount to an estate tail, I apprehend it to be settled ever since the case of Lord Chatham v. Tothill in the House of Lords,[2] that whatever would *directly* or *constructively* constitute an estate tail in land, will pass an absolute interest in personal estate. There, the dividends only were given for life, and it was evident that the first taker was intended to have no more than a life interest; but there was nothing to qualify the words "heirs of the body," and therefore the interest was held to be absolute in the first taker.

In Bradley v. Piexoto,[3] the testator had intended a clause of forfeiture in case of any attempt at alienation, and had declared that the dividends were bequeathed to the different takers for their support during their lives; yet, as he had at first used

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[1] 1 Com. 289. [2] 6 Bro. P. C. 450. [3] 3 Ves. 324.

words of limitation that were held to amount to a gift of the principal as well as the interest, the clause in restraint of alienation was considered as repugnant, and the whole fund was given to the first taker.

I conceive that in this case William Cobb took an absolute interest in the fund.[1]

So also in Ewing v. Standifer *et al.*, the bequest was: "I lend to my daughter, Lydia Standifer, during her natural life, five negroes, viz: Hanna, &c. These five negroes, with all their increase, I will to the lawful begotten heirs of Lydia Standifer, to be equally divided among them at her death;" and it was held that the interest given expressly to Lydia, was enlarged by implication to an absolute estate.[2]

So in Machen v. Machen, the bequest was: I leave to Jane Machen two negroes, Tamer and Prince, during her natural life; then to her bodily heirs. If there should be no heirs," then over, &c., and it was held that the express estate for life was enlarged to an absolute estate.[3]

So in Lenoir v. Rainey, a slave was conveyed by deed, in trust, "for the use of Martha Cargill, wife of Thomas Cargill, during her natural life; and after her death, said slave to be joint property of the heirs of the body of the said Martha Cargill;" and it was held that she took the absolute property.[4]

§ 251. The case of Saunderson and Wife v. Stearns, seems to be opposed to the cases cited, and indeed to the whole current of authority. In that case the bequest was: "I give and bequeath unto Eunice Saunderson, daughter, &c, ninety pounds out of my sums at interest at my decease, to be kept in stock, and the interest paid annually to her during her natural life; and at her decease, to be equally divided among her heirs lawfully begotten of her body." It was held that Eunice was not

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[1] 3 Mer. 116. [2] 18 Ala. 400. [3] 15 Ala. 373. [4] 15 Ala. 667.

entitled to the principal, but to the interest only during her life.[1] It is clear that, if the subject of limitation had been real property, the words would have created an entail under the statute *de donis*, for words prescribing a distributive mode of taking do not make the heirs take by purchase, unless there be superadded words of limitation.[2]

§ 252. Cases illustrating that "heirs," or "heirs of the body," are susceptible of explanation, and when explained, are not words of limitation, are found in the books. Thus, in Hodgeson *et als.* v. Bussey, where a term for years was conveyed to trustees in trust to permit Grace, the grantor's wife, to receive the rents and profits for her sole and separate use during the term, if he should so long live, and after her death to permit the grantor to enjoy the profits thereof during the remainder of the term, if he should so long live, and after his decease in trust for the *heirs of the body* of Grace by her husband, the grantor, begotten, *their executors, administrators and assigns*, and for default of such issue, remainder in trust for Henrietta Hodgeson during the residue of the term, if she should so long live, and after her decease, in trust for her two sons. The husband died, leaving the wife his survivor, and without issue. The bill was filed by the limitees, who were to take in default of issue, and Lord Chancellor Hardwicke said: I am of opinion, that the whole term is not vested in Grace Bussey, and that heirs of the body are not words of limitation, but of purchase.

"The general run of cases makes this plain, notwithstanding they sound like words of limitation; yet, upon circumstances, and the intention of the parties, they may be construed words of purchase, and descriptive of the person who is to take. Archer's case, 1 Co." After citing and commenting upon several cases, and noticing an objection that the construction he was

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[1] 6 Mass. 37. [2] 2 Jar. on Wills, (276); Keyes on Rem. 35.

giving obtained only upon wills and settlements, and asserting that the intention of the parties appearing on a deed always governs the court in construction, he further said: The present case is more strong to this purpose than any of the cited cases; for I am of opinion, that it will be the same here upon the words, *if she shall so long live,* as if it had been expressly given her for life only; *vide* the case of King v. Melling, 1 Vent. 214, 225.

"It was allowed at the bar, even in case of a freehold, that if the words *for life only* had been inserted, it must have put it out of doubt, notwithstanding heirs of the body had followed; so here, *if she shall so long live*, is an affirmative, implying a negative at the same time, that if she did not live so long, the remainder of the term shall go over to the plaintiffs.

"The reason the words *heirs of the body* vest an estate tail in the first taker, either in the limitation of a freehold or" (*an absolute interest*) "upon a term is, that it includes issue *in infinitum.*

"The second thing relied upon for the defendant is, the limitation over being too remote; *vide* Higgins v. Dowler, 2 Vern. 600; Clare and Clare, Cas. in Eq. in the time of Lord Talbot, 21. Sabbarton v. Sabbarton, *ditto* 55 and 245.

"I am of opinion, that if the words *heirs of the body* of Grace Bussey, are words of purchase, there is no limitation in tail, and that it is the same as if the limitation had run to the 2d, 3d and 4th sons; or if no son, then to the daughters; for the intention was that it should vest in some particular person, and not go in succession from heir of the body to heir of the body, and to executors, &c., of the heir of the body, but it must vest in the first taker; as if it had been to the first son, his executors, administrators, and assigns, for and during the residue of the said term, and for want of such issue, remainder to the plaintiff's heirs.

"Now the words for want of *such* issue, will be the same as if

it had been said, for want of such son or such daughter; for the word *such* confines it to *such* issue as is meant by the words heirs of the body, and then it is not too remote a remainder, but brings it to the case of Gore v. Gore, 2 P. Wms. 28.

"I am apprehensive it may be objected, that this is like the case of Higgins v. Derby, 1 Salk. 156, but the present differs greatly, for there it was said to be an attempt to entail a chattel, and therefore construed to vest in the first son to prevent the inconvenience of a perpetuity.

"Here the words heirs of the body, must mean heir of the body living at the time of the death of Edward Bussey, (the grantor) or born in some reasonable time after, and that differs it from all the cases that have been cited."[1]

§ 253. Two remarks may be made upon this case: First, that it was a case of a chattel real; and in regard to that it must be said that in this particular there is no difference between chattels real and personal.[2] Second, that the latter part, though it may seem at first sight not to be pertinent to the present matter, is so, because it shows that "in default of such issue" does not have the effect to enlarge a life estate, if the issue be sons or daughters.

§ 253*a*. In Dunn *et al.* v. Davis, the bequest was, "I give to my daughter, Mina, during her natural life, and at her death to her heirs or children, my negro man, Abram." A majority of the court held that *heirs* was explained by children, and that Mina took therefore but a life este.[3] *Sed quære?*

So, in Crawford v. Trotter, where the bequest was to a female and her heirs, (say children) it was held that she took but a life estate.[4]

So, in Evans v. Wells, James Jordan, by deed, declared:—

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[1] 2 Atk. (89.)
[2] Beauclerk v. Dormer, Id. 312.
[3] 12 Ala. 135.
[4] 4 Mad. 361.

"In consideration of the love and regard tnat I have for my daughter, Martha Evans, I have loaned to her the negroes aforesaid, for her support and no other, except she, the said Martha, should have issue or heirs of her body; and in that case, I loan said negroes to her and her heirs for their mutual support. And if said negroes should remain in possession of said Martha until her death, and she should have legal heirs of her body, I give said negroes with their increase to them." It was held, that the daughter took but for life, that heirs of her body meant children, and that they took by way of remainder after her death.[1] *Sed quære?*

§ 254. Again: This enlargement takes place, as a general rule, in all those cases in which there is a gift for life, with limitation over upon what is construed to be an indefinite failure of issue, some of which were cited when we were examining the doctrine of remoteness. But we may here take the case of Simmons v. Simmons as a case strongly in point. In that case the testator gave all his real and personal property to his daughter for her separate use during her life: "at her decease she shall be at liberty to will the same to her issue as she may think fit; but in case of her dying without issue, I wish the property to go to my dear brother and sister, Gwin Simmons and Ann Simmons, for their natural lives, share and share alike. In the event of my brother Gwin's death prior to the death of my daughter, then to the children of the said Gwin Simmons, share and share alike." The Vice-Chancellor said: "That he had no doubt that Elizabeth Simmons [the daughter] took an estate tail in the lands of inheritance, and an absolute interest in the personalty which was disposed of in the same clause.[2]

The case of Machell v. Weeding may also be stated. In that case, the testator gave real and personal property to his "wife

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[1] 7 Hump. 559. [2] 8 Sim. 22.

for life," and at her decease, to his son Joseph for life; but if Joseph should die without issue, not leaving any children, then he directed that the lands should be sold and the proceeds divided among his three other sons, and that if any of them should die before Joseph, then their shares should be divided amongst their children. The question was, what estate Joseph had in the real property, and the Vice-Chancellor said: The words "die without issue, not leaving any children," may be taken either as marking out one event or two. Suppose they are taken as referring to two events; then they must be read thus: "die without issue *and* not leaving any children;" and then it is perfectly manifest that the testator did not mean that the estate should go over as long as any issue of the first taker should be in existence. But, if the words are to be considered as referring to one event only, they must, in that case, be taken to refer to the greater event; that is, the dying without issue. The not leaving any child, is only a certain mode of dying without leaving issue. Joseph might die without leaving children, but not without leaving issue; as, for instance, if he were to have an only child, and that child were to die in his lifetime, leaving issue. I cannot but think that these words must be taken as descriptive of dying without issue: and I consider it to be a settled point, that, whether an estate be given in fee, or for life, or generally, without any particular limit as to its duration, if it be followed by a devise over in case of the devisee dying without issue, the devisee will take an estate tail."[1]

§ 255. But this enlargement is confined by the proposition to cases in which the gift over is construed to be upon an indefinite failure of issue. Therefore it is, that in all cases in which the failure of issue is confined to the death of the first taker expressly, by implication, or by statute, the enlargement cannot take place.

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[1] 8 Sim. 4.

Thus in the class of cases in which a gift over "in default of such issue," is construed to be a default of children; as in case of a gift to A for life, remainder to his children, and *in default of such issue*, to B.[1] So in case the gift to A for life, remainder to her children and their heirs, and *in default of such issue*, then to B, the express gift to A is not enlarged.[2] See what can be made of Robinson v. Robinson.[3]

In Hay v. The Earl of Coventry and others, where real estate was limited by will to A for life, remainder to his first and other sons in tail male, remainder "to the use of all and every the daughters, &c., as tenants in common, *and in default of such issue*, to the use of the right heirs of the devisor," and A had no son, but had one daughter who survived him; and after her death, it was held that she took but an estate for life. Lord Kenyon said: "If indeed the word 'such' had not been introduced in this clause, we might perhaps have said that as 'issue' is *genus generallissimum*, it should include all the progeny. But here the word 'such' is relative, and restrains the words which accompany it." He cites cases and argues in support of the ruling.[4]

§ 256. Thus, also, in the divers other cases in which the restrictive construction has been held, which have been mentioned in a previous chapter.

§ 257. But let us take a few cases as illustrative of the general position. In Andre v. Ward,[5] and in Green v. Ward,[6] a testator bequeathed a sum of stock to trusteess upon trust to pay the interest to his son during life, with a direction that if he married a woman with a fortune of a specified amount, to settle

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[1] Sheffield v. Lord Orrery et als., 3 Atk. 282.

[2] Doe v. Perrin, T. R. 484, and cases cited for plff. on appeal, Malcolm v. Taylor, 2 Rus. & My. 416. [3] 1 Bur. 38

[4] 3 Term Rep. (83.) [5] 1 Rus. 260. [6] 1 Rus. 262.

the fund upon her and the issue of such marriage; but in case of the son's decease leaving no issue of his body, the stock was given over to various persons; and the testator disposed of the residue of his estate. The son married a woman who had not the fortune required by the will, and died, leaving issue of that marriage, and it was held that the son's interest was not enlarged by implication.

In Ranelagh v. Ranelagh, there was a gift of a sum of money to each of four children, for life, the interest thereof at 5 per cent. to be paid to each until a certain time, with this proviso: In case of the demise of any of the above parties without legitimate issue, their, his, or her proportions to be equally divided amongst the survivors. It was held by the Master of the Rolls that the interests of the children were not enlarged by implication.[1]

In Goymour v. Pigge, there was a devise to A for life, with remainder to her first child and his or her heirs; but if such child should die under the age of twenty-one years without leaving any issue, then in like manner to the second, third, and every other child of A; regard being had to their seniority, and to their respective deaths under age without leaving lawful issue; for, in case of issue, it was the testator's will that they should inherit the estate, and he thereby gave the same to him or her, and to his or her heirs accordingly. But in case A died without having issue of her body, or having issue, such issue should die under the age of twenty-one years without leaving issue lawfully to be begotten as aforesaid, then he devised the estate to B for life, and after her death to C in fee. A never had any issue, and it was held that she took but an estate for life.[2]

In that case it was laid down by counsel as a general rule, "that where you find a limitation to a class of issue which does

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[1] 2 My. & Keene, 441. [2] 7 Beav. 474.

not enable all the issue to take, and there is a gift over upon a general failure of issue, an estate tail is created in the parent."

In Woodley v. Findlay *et al.*, the bequest was: "I lend to Mary Foster one negro girl, called little Dinah, during her natural life; and at her death, I give and bequeath the said negro girl, little Dinah, and her increase, to the lawful issue of her body, that may then be living, to them and each of them, share and share alike, their heirs and assigns forever; but should the said Mary die without lawful issue, then to go to her sisters, share and share alike." It was held that Mary took but an estate for life.[1] This decision is in accordance with the authorities. It does not depend, as seems to have been thought in Ewing v. Standifer *et al.*,[2] upon the distinction between "issue" and "heirs," for had the latter instead of the former word been used, the result would have been the same.[3] If the rule in Shelley's case would not be applied to a like limitation of real property, it will be admitted that the position taken is correct; for the rule applicable to personal property is, at least, no stronger than the rule in Shelley's case. That the rule would not be applied, appears from the proposition laid down by Mr. Smith, that its application is prevented "by prescribing for the heirs general or special, a distributive mode of taking, and also superadding words of limitation: as to A for life, remainder to the heirs of his body, as well males as females, as tenants in common, or share and share alike, or without any respect to be had in regard to seniority of age, or priority of birth, and their heirs and assigns forever."[4]

The case, however, of Doe v. Collis, is not so strong a case as that of Woodley v. Findlay *et al.*, and yet the same con-

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[1] 9 Ala. 716. [2] 18 Ala. 403.

[3] Bell & Wife v. Hogan, 1 Stew. 536; Dott v. Wilson, 1 Bay. 452.

[4] 2 Fearne's Rem., § 488—see Right v. Creber, 5 Bar. & Cress. 866, Holroyd, J.

struction prevailed. In that case there was a devise to the wife for life, remainder "to his two daughters, Eleanor Newsom, and Susannah, the wife of William Head, to be equally divided between them, not as joint-tenants, but as tenants in common, viz: the one moiety, or half part thereof, to his daughter, Eleanor Newsom, and her heirs forever; and the other moiety to his daughter Susannah, during the time of her natural life; and after her decease, to the issue of her body, lawfully begotten, and their heirs forever. It was held that Susannah took but a life estate.[1]

But the other point presented by Woodley v. Findlay *et al.*, is the point about which we are now interested, and that is in regard to the effect of the limitation over, upon an indefinite failure of issue. In that case, the limitation over did not enlarge the estate for life, and the reason is, that the issue were entitled to take by purchase, and the interest given to them was as large as that which would have arisen by implication, and there was, therefore, no room for an implication. Had the limitation to the issue been special, that is, to the sons, or to the daughters, the gift over upon "dying without issue" would not have enlarged the estate for life, for the dying without issue would have been construed to be a dying without the special issue named, and this accords in the end with realty.

§ 258. In cases of real property, when there is a devise to issue, and they are construed to take an estate tail by purchase, and there is a gift over in default of issue of the person to whom a life estate is given, Mr. Smith holds it to be the better opinion, that the ancestor in such case takes an estate tail in remainder after the issue.[2] But this may well be doubted, when all his issue may take by purchase, since they would seem to exhaust the limitation and leave not the slightest ground for an

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[1] 4 Durn. & East. (294.)

[2] 2 Fearne's Rem., § 571.

implication; and Ginger *d.* v. White[1] is an authority against it. When, however, the issue is *special*, and the gift over is in default of issue *general*, then the construction is reasonable, and is indeed necessary; since otherwise the estate could not pass to all the issue for whom it was intended. But this construction cannot apply to personal property, for words creating an estate tail general or special in real property pass the absolute property in personalty, and the rule in regard to realty is, that when the issue in such case take a fee by purchase, no estate tail can be raised by implication in remainder.[2]

§ 259. It is to be observed that, in deeds at common law, 'heirs,' and perhaps 'heir,'(*a*) are the only words of inheritance; they are also words of limitation in a devise; but in a devise inheritances may be created by any words which show intention to create them. Hence it is, that in a devise "issue," "son," &c. though *prima facie* words of purchase, are construed to be words of limitation, or of purchase, as will best comply with the testator's intention. And so is the construction both of deeds and wills of chattels. The difference, then, between "heirs," &c. and "issue," "sons," &c., is that "heirs," &c. have a technical meaning, which will be given to them, unless that meaning be controlled, but issue, "sons," &c., are not technical words of limitation, and will not be construed as such, unless it is required by the testator's, or grantor's intention.[3]

259, *a*. There is a difference, however, in the construction of "heir" and "heirs," which deserves a notice here. If there be a devise to A for life, with remainder to his heirs *for life*, the words, "for life," are held to be of no force whatever; but if the gift be to A for life, with remainder to his *heir* for life, A

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[1] 3 Willes, 348. [2] 2 Fearne's Rem., § 574.

(*a*) But see 4 Kent's Com. 5, N. (*a*).

[3] See Malcom v. Taylor, 2 Rus. & M. 416; Kay v. Connor, 8 Hump. 624.

takes but an estate for life, and the person who happens to be heir at his death takes but an estate for life also. So, if there be a devise to A for life, remainder to his heirs and their heirs, the words, "and their heirs," are rejected, and A takes a fee, and his heirs take by descent; but if the gift be to A for life, remainder to his heir and the heirs of such heir, A takes but an estate for life, and the person who happens to be his heir at his death, takes a fee by purchase. Note, however, that if there be a gift to A for life, with remainder to his heirs and the heirs female of their bodies, or other words which limit to the heirs of A an estate of a different nature, then A takes but an estate for life, and the taking at his death is by purchase.[1] The person who is heir at the death of A will take, and should there be a failure of heirs female of his body, then the person who is next of kin of A will take to him and his heirs female, and so on from next kin to next kin, and this, according to the doctrine of fictitious descent, as laid down in Mandevile's case. The doctrine of Mandevile's case, however, does not apply to personalty.

259, *b*. And in regard to issue, it may be here laid down, whenever there is a gift "to A and his issue," or "to A for life, with remainder to his issue," or other like limitations which in a devise of land would create an estate tail under the statute *de donis*, that always in such cases A takes the absolute interest, and the issue take by representation.[2]

§ 260. But again; this enlargement by implication may take place by the use of the words, "executors or administrators," or "executors, administrators, and assigns." Thus, if there be a gift to A for life, and after his death to his executors and administrators, A will be entitled absolutely. No enlargement, however, will take place in such a case, when it appears clearly to be the intention of the donor that the administrators or exe-

[1] See Keyes' Essay on Rem. 34, 46–7. [2] 2 Fearne's Rem. (Sm.) 597.

cutors shall take beneficially. As in Wallis v. Taylor, where a testatrix gave a sum of stock to trustees for the separate use of her daughter for life, and after her death, in trust for her executors or administrators absolutely, it was held that her administrator was entitled to it in his own right.[1]

The case of Grafftey v. Humpage furnishes an illustration and is an authority for the position above taken in regard to the words, "executors, administrators, and assigns." In that case by a marriage settlement, certain specified property of the wife was settled, with an ultimate limitation, in default of children, to her next of kin, and the husband covenanted to settle any property which his wife, or he in her right, should thereafter, during the coverture, succeed to the possession of, or acquire, on like trusts. At the time of the marriage, a sum of money, which was not mentioned in the settlement, stood settled, in trust, by her father's will, for the wife for life, with remainder to her children, with remainder as she should appoint, and in default thereof, "to her executors, administrators, and assigns." The husband survived the wife, there were no children, and the wife made no appointment. The husband having died also, it was held that the next of kin of the wife, and not the representatives of the husband, were entitled to the fund. And the Master of the Rolls said: Cases have occurred, in which to support the plain intent, the words, "personal representatives," or "executors and administrators," have been construed to mean next of kin(*a*); but the words, "executors, administrators, and assigns," do not appear to me to admit of this interpretation; and I think that, subject to the prior limitations and the power of disposition, the words of the will (the father's) gave an absolute interest to Mrs. Humpage; and if there had been no settlement,

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[1] 8 Sim. 241.

(*a*) In a note to the case it is said: "*Legal* or *personal representatives* may mean next of kin, but executors or administrators cannot,"—Lord Lyndhurst, Daniel v. Dudley, 1 Phil. 6.

would, in the events which have happened, have enabled her husband, as her administrator, to take the fund."[1]

§ 261. But the question of enlargement is not confined to the cases stated; for it may arise in as many ways as an intention to give a larger interest may be gathered from language.

Thus in Bird v. Hunsdon, John Hunsdon bequeathed the residue of his personal estate to be invested in government security, and proceeded thus: "The interest to be paid duly to bring up and educate Mary Morris, daughter of widow Mary Morris, and Samuel Seabrook, her uncle, to be her guardian; and the said Mary Morris to have the said interest to maintain her as long as she lives single, and no child; and when it shall please God to call her, that money shall come to my brother's and sister's children. All share and share alike, and their uncle Peter to be their guardian." Mary Morris, the daughter, attained twenty-one and married John Bird, and had a son, and the question was as to the quantity of her interest. The Master of the Rolls held that she took a life interest by implication.[2] Perhaps a better construction would have been, that the testator's representatives were entitled to the interest from the legatee's marriage to her death. And so in Smith v. Gates, the testator bequeathed a residue to his wife, "to be used and improved to her during her widowhood," and there was no limitation over. The Court said: The words, to use and improve during her widowhood; or so long as she remains my widow, as they are commonly used in wills, are obviously intended to prevent the estate from going into the hands of a stranger whom the widow might think fit to marry; a gift then to use and improve during widowhood, if widowhood continues through life, may fairly be construed to mean the same as a gift to use and improve generally; but a gift so to use and improve a personal chattel, is a gift of that chattel;

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[1] 1 Beaver, 47. [2] 2 Swans. 362.

and it is for this plain reason, that the very existence of the of the thing is exhausted and annihilated in the use and improvement."[1] But this case seems to be rather too strong; and so, also, does the case in Pickering, where the gift was to a woman for her use and disposal during her life, with a gift over of what shall remain at her death, and it was held that she took absolutely.[2]

§ 262. We come now to cases in which an apparent absolute interest is cut down to a partial interest. It matters not whether the interest appears to be absolute by express words or by implication, it will be cut down by construction when the intention sufficiently appears. Thus, if the gift be to A indefinitely, he takes the absolute property; but if it be added, "after his death then to B," the absolute property which would otherwise have passed to A, is cut down by the limitation to B, and is but a life interest. So, if the gift be "to A absolutely," or "to A and his heirs forever," or to A by other like words, or "to A," without more, and there be a limitation over to B, in an event that is lawful and not too remote, and the event happen, A's interest is cut down to a partial interest, though till then he has a *quasi* qualified fee.

One of the strongest illustrations of an apparent absolute interest being cut down by implication, is found in the case of Smith v. Bell. In that case the following clause of a will was presented for construction: "I give to my wife, Elizabeth Goodwin, all my personal estate whatsoever and wheresoever, and of what nature, kind, and quality soever, after paying my debts, legacies, and funeral expenses; which personal estate I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal absolutely; the remainder of said estate, after her decease, to be for the use of the said Jesse

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[1] 2 Root, 532. [2] Harris *et al.* v. Knapp *et al.*, 21 Pick. 412.

Goodwyn: and I do hereby constitute and appoint my said wife Elizabeth Goodwin, sole executrix of this my last will and testament." Mr. Chief Justice Marshall delivered the opinion of the court, holding that the wife took but a life interest in the slaves about which the suit was, and that she had no other power of disposal than such as was incident to such an interest.[1]

Admitting that the wife took but a life estate, this objection, upon principle, may be alleged against the decision, that it denied to the wife the power of disposition as fully as was required by the will, and as was consistent with the limitation over. The reason given for so restricting her power of disposal is, that a gift over of what remains at the death of a prior taker, to whom a power of disposal is given, is void for uncertainty. But we have already seen that such a principle cannot be maintained; and therefore the correct construction seems to be, if the wife took an interest for life, that she took with it an absolute power of disposal.

Another illustration of an apparent absolute interest being cut down by implication is furnished by the case of Madden v. Madden's ex'rs. In that case the testator bequeathed as follows: "I desire the moveable property of every description, after the death of my wife, should be sold, and the proceeds thereof equally divided among my four daughters—Nancy, Susan, Jane and Elizabeth: after all my just debts and legacies are paid, my desire is that my moveable property shall be at the entire disposal of my wife, Jane Madden: on her decease the same to be disposed of as above mentioned." It was held that the wife took only a life interest in such of the moveables as were capable of being returned in kind, and therefore her gift of a slave so held to one of the daughters, passed only the life interest of the wife.[2]

Another illustration is found in Flinn v. Jenkins. In that

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[1] 6 Peters, 68. [2] Leigh, 377.

case the testator declared: "I, Robert Flinn, of &c., carver and gilder, do will the whole property belonging to me, not named in this my last will, to my wife, Sarah Flinn, after her paying the following legacies: that is to say—the house No. 3 Stacey street, I give to my son, Robert Henry Flinn; the house No. 2 Stacey street, I give to my son, Henry Flinn, for their lives, and then to be equally divided among their children. My son Henry Flinn is indebted to me money lent, £2000; the interest of which he is to pay to my wife, Sarah Flinn, *as long as she lives.*

"The residue of my remaining property in the following manner, except the household furniture, plate, and wearing apparel, trinkets, &c., to be at her own disposal, and the remaining property to be equally divided between my two sons for their lives only, and then to be equally divided among their children, when of age." The Vice-Chancellor was of opinion that the widow was entitled to the residue for her life only.[1]

In Stone v. Maule, the testator bequeathed the residue of his personal estate to H. Doddridge, for his own use and benefit; and in case H. Doddridge should happen to die in his lifetime, or afterwards, without having any child or children, then the testator gave the residue to his nephew and nieces—John, Elizabeth, and Mary Stone. The Vice-Chancellor said: It has been assumed in the argument, that the words "without having any child or children," are to be taken as synonymous with the expression, "without issue." But why am I to put a construction upon those words which they do not strictly bear, for the purpose of defeating the intention of the testator? The question is not what is the effect of words creating an estate tail, but of words making a gift over. It appears to me that I should defeat the testator's intention, in this case, if I did not hold that the gift over took effect on the death of H. Doddridge.[2]

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[1] 1 Collyer, (365.)

[2] 2 Sim. (490.)

But in Bacon v. Cosby, the testator declared: I hereby revoke all wills, testaments, and codicils that I may have made, and leave my entire fortune equally divided between my two daughters; the part that I may have already given to my youngest being considered to form part of her moiety. I likewise direct that the portion of my said youngest daughter, Marie, shall devolve, *in case of her dying without children, to my eldest daughter Emily and her children*" At the date of the will, Marie was married, and having survived her father, died without ever having had a child. Emily had two children at the date of the will. Knight Bruce, V. C. said that, according to the whole course of the decisions, Mrs. Bacon (Marie) would have been held to have taken an estate tail in the realty, and an absolute interest in the personalty, but for the words "and her children" occurring at the end of the will, coupled with the fact that Emily had children at the date of the will. This, however, was much too weak and unsubstantial a reason to alter so settled a construction.

In the course of the argmment his honor said, that if the gift over had been to a stranger, or if the words "to her children" had been omitted, he thought that the question could not have been argued.[1]

§ 263. The case of Walker v. Watts strongly illustrates the doctrine that an interest may be cut down by implication. In that case George Walker, by his will, directed that his wife should have liberty to occupy, hold and enjoy the dwelling house at Liverpool he then lived in, for one twelvemonth; provided she continued so long in Liverpool. "*Item*, I order and direct my executors to pay and allow unto my said wife one guinea weekly, and every week during her stay in Liverpool, for and towards household expenses." The widow received a guinea a

[1] 3 Eng. L. & Eq. Rep. 186.

week for a year after the testator's death; and continuing to reside in Liverpool, filed her bill claiming to be entitled to a guinea a week as long as she should reside there. But Lord Loughborough dismissed the bill, observing that it would be giving a vast effect to the words, to suppose he meant her to have a guinea a week during her life. He supposed her to live a year in Liverpool, and gives her a guinea a week towards household expenses.[1]

§ 264. We have seen that it is laid down that courts lean against the construction that an interest in chattels is a partial interest; but we then denied that the rule extends to cases in which repugnancy would be the result of that leaning. Subject, however, to that qualification there can be no doubt that such is the rule. Under this general rule comes, perhaps, the doctrine laid down by Lord Alvanley in Harrison v. Foreman. In that case there was a bequest to A for life; and after her decease, to B and C in equal shares; and in case of the death of either of them in the lifetime of A, the whole was bequeathed to the survivor of them living at her death. The testator died; then B and C died, and then A died. The question was between the administratrix of B and C, and the testator's residuary legatees. His honor said, "that where there are clear words of gift, giving a vested interest to parties, the court will never permit the absolute gift to be defeated, unless it is perfectly clear, that the very case has happened, in which it is declared that the interest shall not arise." So he declared, "There is a vested interest; and the contingency upon which it is to be divested, never happened: the vested interest therefore remains, as if that contingency had never been annexed to it."[2]

So in Scott v. Price, after bequests to sons and daughters, the testator declared: It is further my will, that if it should

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[1] 3 Ves. 132; stated 2 Rop. Leg. 328.

[2] 5 Ves. (207.)

please God that any or either of my before-mentioned sons or daughters should die before he, she, or they attain the age of twenty-one years, unmarried, or without lawful issue, that then, or in either case, the bequest or bequests herein before made to any or either of them shall devolve to the survivors or survivor.

One of the daughters attained twenty-one and died, without having had issue, and it was held that the event upon which her interest was to be cut down had not happened.[1]

So also in Keates v. Burton, Mr. Burton bequeathed 2000*l.* to his natural son, James Christie; "but if his executors should think it more for the advantage of James to have 2000*l.* placed at interest, and to pay him interest for life, as it became due, or otherwise in such proportions, and at such times, manner and form as they *in their* discretion should think fit, they were authorized and empowered to place the money at interest, as therein mentioned, in their joint names, or in the names of the survivors, and directed to pay to him the interest in manner aforesaid during his life," with limitations over. One executor died, the others renounced probate, and the discretionary authority thus becoming impossible of execution, it was held that James's interest in the 2000*l.* was not cut down, but was absolute.[2]

The cases of Carr *et als.* v. Jeannerett, and Carr *et als.* v. Green, demands a notice here, not only because they are apposite to the matter now under consideration, but also because two learned tribunals came to different conclusions upon the same facts. The facts were these: William Wilson made a will which contained the following clause: "The rest and residue of my estate, both real and personal, to be equally divided between my two grand-sons, Wilson and Thomas, and delivered to them at the age of twenty-one years; but should they die leaving no lawful issue, in that case I give and bequeath the whole of my

[1] 2 Serg. and Rawle, 59; see also 1 Rop. on Leg. 414 *et seq.*

[2] 14 Ves. 434; stated 1 Rop. Leg. 416.

estate, both real and personal, to Richard, Thomas and Mary Godfrey, Rebecca Potts and Thomas Ballow, to be equally divided between them." Wilson, the grandson, died under age, and without leaving issue; Thomas, the grandson, was also dead, but he arrived at twenty-one years of age, and left issue.

The Chancery Court of Appeals in Carr *et als.* v. Green, held that the grandsons took but estates for life; that, upon the death of Wilson, Thomas took a cross remainder by implication, and that upon his death, his children took the estate, by virtue of the limitation, as remainder-men, and not as the personal representatives of Thomas.[1] And this conclusion was reached through much learning and through many cases.

The Court of Appeals at law, however, in the other case, held that Thomas, in the event, took an absolute interest in the whole property, and that his children therefore took by representation from him. According to the opinion, the whole property passed to Wilson and Thomas, and each had an executory limitation engrafted upon the otherwise absolute interest of the other.[2] And this seems very clearly to be the better opinion.

§ 265. In regard to partial interests with powers of appointment or appropriation, perhaps sufficient has been said in the preceding chapter. It may be added here, however, that if a party has a general power of disposition, with or without a partial interest, and *exercise that power*, the appointee takes, subject to the debts of the party exercising the power; but if the party does not execute or attempt to execute the power, creditors have no claim whatever. A Court of Equity will sometimes aid the defective execution of a power, but never supply the total want of it.[3]

§ 265*a*. As to the rights, liabilities, and remedies of parties having partial interests *in præsenti*, we shall find occasion to discuss them in a subsequent chapter.

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[1] 2 McCord, 75. [2] 2 Id. 66. [3] 4 Kent's Com. 339-341.

CHAPTER THE FOURTH.

OF THE DIFFERENT KINDS OF FUTURE INTERESTS IN CHATTELS PERSONAL.

§ 266. It has been said that chattels personal are subject to the same modifications of future interest as real property is. Now, every future interest in real property is either a reversion, a remainder, a conditional limitation, a springing interest, or an augmentative limitation.

§ 267. A reversionary interest in chattels personal, like a reversion, cannot be created, but arises by mere operation of law, and like a reversion it is also an interest that is to return into possession upon the expiration of a prior interest; but it differs in other respects from a reversion, and therefore it is properly called a *quasi* reversion.

§ 268. A remainder in chattels personal is like a similar interest in real property in this, that they are both limited to take effect upon the regular expiration of a prior interest; but they differ in other respects. For example: a remainder, strictly so called, when contingent, is destroyed by the destruction of the particular estate, but a like interest in chattels personal is independent of the preceding interest, and may take effect, notwithstanding the destruction or expiration of the prior interest before the happening of the contingency.[1] Thus, if there be a

[1] 2 Fearne's Rem. § 168-168*b*; Williams' Per. Prop. (194); 4 Kent's Com. (269-70); Burnett v. Roberts, 4 Dev. 81; Jones's ex'rs v. Hoskins, 18 Ala. 489—*contra*, *dictum* Price v. Price, 5 Ala. 582.

gift to A for life, and after his death to the first son of B who shall attain twenty-one years of age, and A die before any son of B attain that age, it will not prevent the limitation from *taking effect* at a future time; not, indeed, as a remainder, but as a springing interest.

§ 269. The cases cited by counsel in Griggs v. Dodge,[1] from the first of Dyer, 7*a* and 74*a*, notwithstanding the editor's opinion that the first "as it stands is law," have both long since been departed from; and even if they had not, they were cases of conditional limitations, and do not affect the present point.

§ 270. There is, it is believed, but one exception to the rule that a prior donee cannot prevent a subsequent limitation, by way of remainder, of chattels personal from taking effect, in the event upon which it is limited, and that is an exception *sui generis*. That exception is found in Jones v. Zollicoffer.[2] It is stated by Browne *arguendo*, and is sustained by the court. The exception is where an executor, or of course an administrator *cum testamento annexo*, is the prior donee, and without electing to take as legatee, and without, we may add, assenting to the subsequent limitation, sells the property *as the representative* of the testator.

§ 271. These limitations by way of remainder in chattels personal have, therefore, been very properly termed *quasi* remainders. They do not differ in their nature from springing interests.

§ 272. Conditional limitations of chattels personal do not differ in their nature from like interests in real property.

§ 272*a*. Springing interests in chattels personal do not differ in nature from like interests in realty.

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[1] 2 Day, 35-36.

[2] Taylor, (N. Car.) 212; see Hailes v. Ingram, 6 Iredell's Eq. 477.

§ 273. Augmentative limitations of real property differ, however, very materially from like limitations of personalty. Such limitations of realty require that the first estate remain unaliened, and unchanged in quality, until the event happens upon which it is to be augmented. Thus, if an estate for years in land be conveyed by deed to A, and upon his marriage, that then he shall have the fee, the latter is an augmentative limitation which will be defeated by A's alienation of his term. But it is not so in regard to chattels personal, for such limitations take effect as, and are, indeed, springing interests.

273*a*. It may be mentioned here, that limitations by way of augmentation are opposed to what are called diminuent limitations. Thus, if a chattel be limited to A for life, or forever, but if he pay not fifty dollars within one year, that then he shall have it but for three years, and he pay not the fifty dollars within the time, then is his interest reduced to the three years, and, as Lord Coke says of a like limitation of realty, was, in contemplation of law, never any greater interest.

273*b*. Every future interest in chattels personal, then, must be either a *quasi* reversion, a *quasi* remainder, a conditional limitation, or a springing interest.

§ 274. We come now to the consideration of *quasi* reversions. Personal property is said to be essentially the subject of absolute property; and it is therefore denied that, at law, there can be any such thing as a reversion in such property. Thus, says Mr. Williams, if any chattel, whether real or personal, be assigned to A for his life, A will at once become entitled in law to the whole. By the assignment, he adds, the property in the chattel passes to him, and the law knows nothing of a reversion remaining in the assignor. But he admits that this doctrine has no place in the modern Court of Chancery.[1]

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[1] Williams' Per. Prop. (186,) (188.)

§ 275. The legal doctrine, as stated, was once held, but Courts of Law, as well as Courts of Equity, are bound to recognise *quasi* reversions to the extent which they acknowledge the existence of partial interests. It would be a halting with one foot and a marching with the other to hold that a chattel might be given to A for life, and after his death to B, and yet to hold that, if there be no gift over, the donor shall not have the chattel again when A is dead. The substance of the principle was gone when partial interests were allowed, and it is wise when the substance is gone, to let its shadow go with it.

As was said by Counsel, in The State, use &c. v. Savin: The old doctrine was not that because you could not limit a remainder, therefore a bequest for life was a gift of the absolute property; but because the bequest for life was an absolute gift forever, *therefore* no remainder could be limited. So, the present doctrine is not because you may now limit a remainder, therefore you may bequeath a life estate in a chattel; but because you may now bequeath a life estate, therefore you can limit a remainder." It is true, however, the Referees in that case held that a donor or grantor of a life estate in chattels could not retain any interest in himself for his own benefit, or that of his personal representatives.[1] And so in the case of Brownfield's Estate, it was held that a bequest for life, with no limitation over, gives the legatee the absolute property.[2]

§ 276. But we may safely assert the better doctrine to be, that *quasi* reversions of chattels personal exist in all cases, both at law and in equity, in which partial interests alone are created in them; and in all cases in which partial interests are created with limitations over which may fail to take effect, or which are void *ab initio*, or which subsequently become void.

§ 277. The case of Black, adm'r, v. Ray may be cited as an

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[1] 4 Harr. 56, n. (*a.*)

[2] 8 Watts, 465.

authority for the first class. In that case, a testator bequeathed a negro girl named Hannah to his wife during her life-time, and made no other disposition of the property. It was held that the assent of the executor to the life-interest extended no further than such interest, and that the reversion remained in the executor, and after the death of the tenant for life, he was entitled to the property, as the representative of the testator.[1]

So in Young's Adm'r v. Small, it was held that the child, of a female slave given by deed for years and afterwards to be free, which was born during the years, belonged to the grantor by virtue of his reversionary right. The Court say: The cases which decide that the child of a female slave, born during the continuance of an estate for life in the mother, pass to the remainderman, decide also, in effect, that such child is not to be regarded as one of the incidental fruits of the right to the temporary use and service of the mother to which the tenant for life is entitled; and if so, it would seem that a gift or grant of the mere use and services of a slave during a particular period, should not be considered as including a child born during that period; and as the right to the child would not pass by the grant of the subsequent freedom to the mother, if it was not granted to the first donee as a part of, and incident to the temporary use of the mother, it remained of course in the grantor.[2]

So in Vannerson v. Culberson, there was a gift of slaves to A for life, without any further disposition of them, and the court held that A took but an estate for life, saying that if the testator has made no further disposition of the slaves, the law makes it for him.[3]

So in Hoes *et als.* v. Van Hosen, the testator gave to his wife the use and income of all his estate during her widowhood; his estate consisted of real and personal property; he gave certain

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[1] 1 Dev. & Bat. 334—see, also, Geiger v. Brown, 2 Strobh. Eq. 359.
[2] 4 B. Monroe, 220. [3] 10 Smedes & Mar. 150.

legacies; devised the real property after his wife's death to two of his sons, and directed them to pay the legacies; but made no disposition of the personalty after his wife's death; it was held that the reversionary interest in the personalty was the primary fund for the payment of the legacies.[1]

§ 278. But, without citing other cases of the first kind, let us proceed to cases of the second kind, viz: those in which a partial interest is created with a contingent ulterior interest, or with an ulterior interest that is void *ab initio*, or subsequently becomes so.

§ 279. An illustration of the first of this second kind may be made without looking into the books. Thus, if there be a gift of a chattel personal to A for life, and if A should have a son living at his death, then to that son; A will take an interest for life, and if he have a son living at his death, then that son will take; but if he have no son at that time, the chattel will revert; and until that time, the reversionary interest will continue in the donor or his representatives.

§ 280. An illustration of the next kind of this class of cases is found in the case of The Ex'rs of James v. Masters. In that case, the testator bequeathed certain slaves to his wife during her natural life, and directed that after her death they should be emancipated; he then gave several small articles to his nieces, and declared at the conclusion of his will, "that no person or persons whatever, being in any degree related to him or his wife, or any other person or persons whatever, other than was therein before mentioned, should ever, under any pretence, come in for a share or receive any part of his estate." He then appointed his wife and the plaintiffs in the case his executors. The widow, with the assent of her co-executors, took the slaves into possession as legatee, and kept them during her life. She made a will bequeathing all her property to the wife of the defendant, ap-

[1] 1 Comstock, 120.

pointed her executrix, and died. The defendant took the negroes into possession, and this was an action of detinue by the executors of James, to recover them.

It was contended, on the part of the defendant, that the direction as to emancipation was illegal and void; that though in England, the executor was entitled beneficially to all the personalty not given away by the will, unless an intent to exclude him appeared; yet when such intent appeared, he was converted into a mere trustee; that a bequest of a chattel for life, or for a day, is still held to be a disposition of the whole interest therein, when the ulterior limitations are void, and it is the testator's intention to dispose from his executors; that in the present case, the ulterior limitation being void, the whole beneficial interest in the slaves passed to the grantee for life, under whom the defendant claims; that upon the assent of the executors, the whole beneficial interest given by the testator was converted into a legal ownership. But Henderson, J., in delivering the opinion of the Court, said: The fundamental rule in the construction of wills, is, that the intention of the testator, if not inconsistent with the law, shall prevail; and all artificial rules have that object in view; and all the cases, cited by the defendant's counsel and relied on in this case, are bottomed upon that rule. As where an estate is given to one for life, with a remainder that is void, and the executor is excluded, it raises a presumption that the legatee for life shall have the whole interest, because there is none other mentioned in the will to take, after the determination of the life estate. But I cannot imagine a case, where a legacy can be claimed *under* a will, in express opposition to the plain intention of the testator. It is a contradiction in terms. But there are many cases where the next of kin take in express opposition to the words of the will; there they take as next of kin under the law, and not under the will. For the right of the next of kin is defeated only by a substitution of some person to take in their place, and not by a declaration that they shall not take.

As if a man by his will were to declare that his next of kin should have no part of his estate, and not direct who should take: the next of kin would take, not under the will, but under the law. The wife's claim in this case is *under* the will, that is, *that her life estate shall be extended into an absolute interest, because the ulterior limitations are void, and the executors are excluded;* which might raise a possible intent in her favor, were it not that there are words in the will in express opposition to such claim. And although she will take part as one of the distributees, she will take nothing as legatee. Therefore she had nothing to bequeath to the defendant; for her interest, as one of those among whom the residue of the estate undisposed of by the will, was to be divided, was not such an interest before the assent of the executors, as vested a legal title in her legatee.

"Next, as to the right of the executors. Although all beneficial interest may be taken from them by the will, this does not affect their interest as executors or trustees, or that interest arising from their office of executors, which is necessary to perform the trusts of the will, or the trusts raised by law. They therefore are entitled to the possession of the negroes; nor will the assent given to the life estate debar them from regaining the possession. An assent to a legacy passes an interest co-extensive with that legacy; and where there is a legacy to one for life or years, with a remainder, an assent to the legacy to the particular tenant, is an assent to the person in remainder, according to the English law; for they both in law constitute but one legacy. But where there is no remainder, the assent enures to the benefit of the particular tenant only, and the executor has a right to the possession of the chattel again, to perform the other trusts of his office. This doctrine is illustrated by the decision of this court, in the case of Dunwoodie's Ex'rs v. Carrington,[1] if it needed illustration."[2]

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[1] 2 Law Repos. 469. [2] See 3 Mur. 110; also, 6 Ired. Eq. 151.

In Brown v. Kelsey *et als.*, there was a gift of the income of a sum of money for life, with a limitation over of the money upon the death of the legatee for life. The court said: It was argued for this legatee, that the gift over of the fund after her decease was void for uncertainty, and consequently that an absolute property vested in her. But such a consequence would not follow if the gift over were void, but the fund would be liable to distribution among the heirs, as intestate property.[1]

§ 281. But it is said to be a rule that where the donor of a chattel manifests an intention to part with his whole interest, if the limitation over is either originally void, or incapable of vesting when the contingency happens, the whole interest vests in the first taker.[2] But this rule does not apply, except to cases in which conditional limitations are engrafted upon interests in the first takers, which, in the absence of the conditional limitations, would be held to be absolute interests. Thus, if there be a gift to A, and if he die without leaving issue, then to B, and A die leaving issue, the property does not revert; for by the general gift to A the whole property passed to him, and the limitation to B was a conditional limitation engrafted upon it, by the failure of which, the limitation to A became absolute. But, if there be a gift to A for life, and if he die without *leaving* issue, then to B, and A die *leaving* issue, then the property reverts to the donor or his representatives; for the gift to A is but for life. It is not enlarged by construction; the issue cannot take by representation, nor can they take by purchase. B cannot take, because the event in which he was to take did not happen; therefore, the remainder of the property is undisposed of, and consequently reverts: and for this, Green v. Ward,[3] and Andree v. Ward,[4] are authorities directly in point.

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[1] 2 Cushing, 243.

[2] Powell v. Brown, 1 Bailey, 100.

[3] 1 Rus. 262.

[4] Id. 260; the case Carr v. Green, 2 McCord, 75, (Chancery) is *contra*.

§ 282. It is not sufficient, therefore, to destroy the *quasi* reversion, or the possibility of reverter, that an intention to dispose of the whole interest in the chattel should appear, though it is so laid down in Fearne;[1] but there must be a valid and effectual disposition, otherwise the *quasi* reversion, or the possibility of *reverter*, will exist. The case of Powell v. Brown,[2] cited for the rule, is not inconsistent with what has been asserted, for that was a case of a conditional limitation engrafted upon an absolute interest. In that case there was a gift of slaves to Nancy Powell, to have and to hold the same to her and her issue forever, and it was declared to be the nature of the deed that if she should die without issue, the said slaves should return at her decease to the surviving heirs of the donor. She died without issue in the lifetime of the donor, and it was held that the negroes did not revert to the grantor, and that the idea that he could take under the limitation to his own heirs in his own deed, was "preposterous." Had the limitation, however, to Nancy Powell been for life, then, notwithstanding a limitation over to the "heirs" of the grantor, the *quasi* reversion would have continued in him precisely as if no limitation to his "heirs" had been made. Had Nancy Powell died in his lifetime, he or his assignee would have been entitled to the property, not by virtue of the limitation in the deed, but by virtue of the *quasi* reversion. Had Nancy Powell outlived him, and he had left the *quasi* reversion undisposed of, then "his heirs" would have taken not by virtue of the deed, but by virtue of their title as distributees; and this because *fortior et potentior est dispositio legis quam hominis.*

§ 283. These *quasi* reversions cannot, of course, depend upon estates tail, or upon *quasi* fees conditional; because such estates cannot exist in chattels, as we have already seen. Nor can even

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[1] Fearne, (488.)

[2] 1 Bailey, 100.

a possibility of reverter exist after a gift of chattels, which, in the case of real property, would be a fee conditional, except in the already stated case of an annuity; because, the absolute property in chattels is held to pass by such a gift. Thus, in Betty v. Moore, there was a gift of a slave to A, on condition, that if the donee died without issue, the slave with her increase should revert, and the court held that the absolute property passed to A.[1]

§ 284. But suppose the gift in this last case had been to A, and if she die without issue living at her death, then her estate in the slave and her increase should cease. In such case if A had died without such issue, the slave and her increase would have reverted to the donor or his representatives. And this is a difference—a *quasi* qualified fee may exist in chattels, if the event qualifying be not too remote; a *quasi* fee conditional cannot.

§ 285. This difference leads to the consideration of what, in cases of real property, is termed a possibility of reverter. This possibility of reverter may exist in chattels personal in all cases in which *a conditional limitation may exist*. Thus, if there be a gift to A, but if he die unmarried then to B, the limitation to B is a conditional limitation; so if there be a gift to A, but if he die unmarried then the property shall revert, the donor has a possibility of reverter in the event.

§ 286. It may, indeed, be laid down as a rule, that conditions which are to defeat interests in chattels personal, when valid as conditions, operate as limitations of those interests. It may be asserted, also, that conditional limitations and possibilities of reverter in chattels personal, are interests of precisely the same nature.

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[1] 1 Dana, 235.

But this difference exists in regard to them: conditional limitations are subject to the perpetuity rule, but possibilities of reverter are not; for the rule is directed against the commencement, not the ending of limitations.[1] Mr. Lewis, however, apparently forgetting the position that remoteness, against which the rule "is directed, is remoteness in the commencement of limitations, and not in the determination of them," argues for a different opinion, and tries to subject, by principle, possibilities of reverter to the perpetuity rule.[2] It ought, perhaps, to be so.

§ 287. There is another matter which deserves notice in this connection. We have seen that if chattels personal be conveyed upon condition subsequent, and the condition be void *ab initio*, or subsequently become so, the interest will continue as if no condition had been annexed to it.

§ 288. But if such condition amount to a trust, then the case comes under the doctrine of resulting trust. Thus, in Finley v. Hunter, a testator bequeathed slaves to his wife for life, with remainder to his son, upon condition that he would emancipate some forthwith, and others at a specified age. The executor assented to the legacy, and it was held that a subsequent act of the Legislature prohibiting emancipation could not affect the rights already vested in the legatees; who were, therefore, entitled to the slaves until the periods respectively fixed for their emancipation, when they would go to the testator's next of kin.[3]

§ 289. In such a case, a trust is created in favor of the slaves, which it is impossible to execute, and therefore there is a resulting trust in favor of the donor, or his representatives.[4]

§ 290. These *quasi* reversions and possibilities of reverter, arise not only where limitations are made by those who have the

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[1] Lew. Per. (173) Law Lib. [2] Id. (617.)
[3] 2 Strobh. Eq. 208. [4] See Lemmond v. Peoples, 6 Iredell's Eq. 137.

absolute property, but also when limitations admitting them are made by those who have but partial interests. Thus, one having an interest for life makes a gift for years, he has a *quasi* reversion after the years. If he dies during the years, the interest for years as well as the *quasi* reversion, are both thereby destroyed. And so if one having an interest for years make a gift for fewer years than he has, a *quasi* reversion remains in him. And so also it is of other partial interests. It is said, indeed, that a less interest than an estate at will cannot be created in realty, but if one having a chattel at will lend it to another, he has the right to resume the possession against all the world, except the owner, and so he seems to have a possibility of reverter. But this is *de minimis;* and besides, as already said, it belongs to the doctrine of bailments.

§ 291. Let us return to those persons who have interests for life. If a person having an interest in chattels for his own life, convey such chattels to another generally, or for life generally, such donee shall take for the life of the donor, and of course no *quasi* reversion will be left in the donor. And such construction is made in the first case, because by a gift generally of chattels, the whole property in them passes; but here the whole property cannot pass, and, therefore, the principle cannot operate except *pro tanto;* but it does operate *pro tanto*, and therefore the whole interest of the donor passes to the donee. And such construction is made in the second case, because that is the strongest construction the gift will bear, and therefore it is taken against the donor.

§ 292. But suppose that A, having an interest in chattels for his own life, give them to B for the lifetime of B, and then B die, will the chattels revert to A? The common law rule in regard to real property is said to be, "that an estate for a man's own life is more beneficial and of a higher nature than for any

other life."[1] This rule followed the estate, and shifted its operation. Thus, if A had an estate for his own life, he had a higher estate than if it had been for the life of B; but if he conveyed to B by fine, feoffment, or recovery, for the life of B, the estate conveyed to B was construed to be a larger estate than A had, and therefore worked a forfeiture of his estate. If this rule applies to limitations of chattels personal, it is clear that, in the case put, the chattels would not revert to A. It cannot be contended that a forfeiture is worked, when a person having a partial interest in chattels makes a conveyance of a larger interest in them; for all conveyances of chattels personal are innocent conveyances, and pass at most but such interest as the donor had. And it may be said, that the allowance of life interests in chattels was a departure from principle, upon the ground of intention, and that that departure was virtually an abrogation of the rule under consideration. That having allowed a reversionary interest to exist in chattels real after a gift for life,[2] it would be inconsistent to deny that such an interest should exist, after an interest *pur auter vie* created by such tenant for his own life; and that the same principles of construction ought to govern both kinds of chattels. That in the case put, either A, or the representatives of B, must take the chattels after the death of B, and that it was clearly not the intention of the parties that the representatives of B should have them; but on the contrary, it was their intention that A should have them again. That the intention of the parties ought to prevail, and therefore that it ought to be held that during the life of B, A had a possibility of reverter, and that on the death of B, A is entitled to the chattels again. But on the other hand it might be said, that the principle which decides that an estate for a man's own life is a larger estate than an estate for the life of another, is equally applicable to life interests in chattels;

[1] 2 Black. Com. (121.)

[2] Eyres v. Faulkland, 1 Salk. (231.)

that though the allowance of life interests in chattels was a departure from principle, yet that departure is in no wise inconsistent with the present principle, and that one departure does not justify another in such a case. That though it is clear it was the intention of the parties that A should have the chattels again in case he survived B, yet it is equally clear that the mere intention of parties cannot prevail against a principle of law; and, therefore, that on the death of B, the chattels shall pass to his representatives during the life of A, and shall not revert to A. If, however, this last reasoning prevail, it furnishes an example of an arbitrary principle which is allowed to defeat the intention of the parties in every case; for no one, who knew that such would be the construction, would make such a gift; but he would simply convey such interest as he had. It does more; it furnishes an example of an arbitrary principle which is not necessary—which has not a single reason in its favor—which is contrary to the common understanding of men, and which does violence in every instance to our common sense of justice. It is such principles that bring the law into disrepute, and induce the remark that the administration of it is not the administration of justice.

§ 293. It will be remembered that a conveyance of realty *durante viduitate*, or till any uncertain period within the life of the feoffer, &c., passed to such feoffer, &c., an estate for his or her own life determinable upon the event: provided the party conveying had the power to create such an estate. If he had not the power to create such an estate, and the conveyance was tortious, it worked a forfeiture; if it was innocent, it passed such interest as the grantor, &c., had. If, therefore, one having an interest in chattels personal for his own life, or for the life of A, convey them to B during widowhood or other like time, B takes an interest for the life of the person for whose life the donor had them, and that interest is determinable upon the event:—therefore the donor, in such case, has a possibility of reverter.

§ 294. If A has an intersst in a chattel for twenty or other number of years, and give to B a life interest in it, A has a possibility of reverter; and if the gift be for his own life and he die, and then B die during the years, the chattel will revert to the personal representatives of A. This is well established in regard to chattels real and long has been; and the same is doubtless true of chattels personal.

§ 295. Wherever it is held that a partial interest cannot be created in things *quæ ipso usu consumuntur*, it must also, of course, be held that nothing like a reversion, or a possibility of reverter, can exist after the gift of them, even for a moment.

§ 296. We come now to consider *quasi* remainders. A *quasi* remainder is a limitation of personalty, which is to take effect upon the regular determination of one or more partial interests created therein at the same time; which can be taken by purchase; which will not merge at its creation in another interest; which does not depend upon a condition that is void; and which is not void for uncertainty, repugnancy, nor remoteness.

§ 297. If a future limitation of personalty is not to take effect upon the regular expiration of a preceding partial interest, it is not a *quasi* remainder, for then it falls either within the class of springing interests, or within that of conditional limitations.

§ 298. A remainder in real property must be created at the same time with the one or more particular estates, or as the rule is sometimes inaccurately worded, must pass out of the grantor at one and the same time. The rule applies to chattels personal. If, therefore, A convey a chattel to B for life, and subsequently convey his *quasi* reversion to C, C's interest, though in its nature nothing more nor less than a *quasi* remainder, is yet in form still a *quasi* reversion.

§ 299. Contingent remainders require particular estates to

support them, but neither the rule, nor the reason of it, has any application to *quasi* remainders; for they, whether vested or contingent, require no interest to precede them, except to constitute them *quasi* remainders.

§ 300. A *quasi* remainder must, however, be limited to one who can take it by purchase. Thus, if A by deed convey a chattel to B for the life of A, remainder to the "next of kin," "the distributees," or "the relations" of A, the *quasi* reversion is in A, and upon his death the property passes by representation, and not by purchase.[1]

So, if A convey to B for life, remainder to his own executors, the limitation over is void, unless it appear that it was intended for the executors personally, and not in their representative capacity. In such case, if A be living at the death of B, the chattel will revert to him even when intended for his executors personally, and upon his death his executors will be entitled in their individual capacity if the gift were so intended. So, if a gift be made to A for life, remainder to his heirs, the limitation to the heirs is but an extension of the first gift into an absolute interest. And so also if the gift be to A for life, remainder to the heirs of his body. This is in accordance with the rule that "heirs," and "heirs of the body," are words of limitation; but the rule, as we have seen, is subject to qualification.

§ 301. It must also be exempt from merger at its creation. If, therefore, A bequeath a chattel to B for life, remainder to C for life, and make no further disposition of the chattel, and C is sole distributee, C will take the whole interest after the death of B, by virtue of his title as distributee.[2] And so, indeed, would he have done had the whole interest, after the death of B,

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[1] See *Ante*, § 59.

[2] See *contra* Magruder & Nichols v. Stewart's ad'mr, 4 How. (Mis.) 204.

been limited by A to his "next of kin," for the title by law is higher than the title by limitation.[1]

§ 302. The doctrines of void conditions, of repugnancy, remoteness, and of uncertainty, we have already considered. But it may be remarked here that the contested doctrine of possibility upon a possibility does not apply to limitations of chattels personal, though they are all subject, as already said, to the rule against perpetuities.

§ 303. We have said that a limitation of chattels personal by way of remainder does not require a particular interest to support it *as a limitation*, though it requires a particular interest to precede it in order to give it the denomination of *quasi* remainder. If, therefore, a gift of chattels personal be made to A, and after his death to B, and A be dead, or refuse to take, the limitation to B will take effect presently, unless a contrary intention appear.

§ 304. The same doctrine which governs devises and limitations by way of use, in this particular, applies to limitations of chattels personal.

§ 305. In an old case, Powell J. is reported to have said :— Where a devise *is to a monk, remainder to B.* In this case B shall take immediately, because devise to a monk is void; but if it were that *after the death of the monk it should remain*, B should not take till after the monk's death; and cited a Year Book.[2] So it is said if there be a devise to A for life, remainder to B in fee, though A dies in the life of the devisor, B shall take; or if A refuses, B shall take.[3] But in Thornby v. Duchess of Hamilton, we find counsel arguing: Alien, tenant in tail, remainder to a subject, he in remainder shall never come

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[1] See *supra*, § 59.

[2] 12 Mod. 285; stated 8 Vin. Abr. (369.)

[3] 1 Eq. Abr, 216, § 4.

in, until the estate tail be spent; though the alien be incapable of taking an estate tail for his own benefit.[1]

In Doo v. Brabant, the Lord Chancellor said: The old rule is, that where there is a particular estate created with a remainder over, and the first estate is void, the second estate shall prevail, as if it were an original estate. So, where the first estate is for life to a person incapable of taking with a remainder over, the remainder-man will take immediately. I suppose the authority referred to by Mr. Justice Powell, where he puts the case of a monk, and says, that where an estate is given to a monk for life with remainders over, that the remainders shall not take place till after the death of the monk, and if he die in the lifetime of the testator, the remainders shall not take place, is 19 Henry 6. I looked into the book, because I suspected there was no such case, as I thought it unreasonable. I take the law to be quite otherwise, and that the remainders should take place immediately. The same is the case where there is land limited to two jointly, and the one dies in the lifetime of the testator, the estate will survive to the other. There are no cases of executory devises of this sort; but whether it be by way of executory devise, or contingent remainder, the law seems to be, that where the event has actually happened, the case will fall under the same reasoning as if it were given as a remainder.[2]

So in Billingsley *et als.* v. Harris *et al.* ex'rs, where a testator gave six negroes to his wife for life, and after her death to such of his children as his executors should think proper, and the wife died before the testator, the court said: It is settled law, that the limitation over in such case takes effect upon the death of the testator; and that the rule is not varied by the gift to the tenant for life of a power of appointment.[3]

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[1] 10 Mod. (120.)

[2] 3 Bro. C. Rep. 396.

[3] 17 Ala. 214, citing Wms. on Ex'rs, 764, and Hardwicke v. Thurston, 4 Rus. 330.

§ 306. The Lord Chancellor, in Doo v. Brabant, seems to have done some little injustice to Justice Powell; for though the Justice may have been unfortunate in the application of the rule, yet he evidently intended to assert it to be, that a limitation by devise in the form of a remainder is *ex vi termini* an alternative limitation, with the limitation preceding it; unless a contrary intention appear. And that is the rule which governs limitations by devise and by way of use, and it is equally applicable to chattels personal. The rule is founded upon presumed intention; but that a contrary intention was at one time discovered in such cases appears from Lord Stafford's case, where it is said that a limitation over after an estate at will would not pass even an estate in possession, because the limitation is by way of remainder, and was not intended to pass an estate in possession.[1]

§ 307. The rule extends to cases in which the limitation by way of remainder depends upon a contingent determination of the first limitation, as well as to cases in which the limitation by way of remainder depends upon a certain determination of the first limitation. Thus, if there be a limitation to A until he marries, and then to B, and A be dead or refuse to take, the limitation to B takes effect as a limitation *in præsenti*.

§ 308. The rule extends further, and renders *quasi* remainders alternative limitations with preceding *quasi* remainders, unless a contrary intention appear.

§ 309. In cases of freehold remainders created at common law, it was necessary to adopt that construction, otherwise subsequent remainders could not have taken effect, if an intermediate remainder-man had been incapable of taking or had refused to take. But that necessity *ut res magis valeat* never existed in devises or uses, nor in chattels personal; for the heirs of the

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[1] 8 Rep. 75.

divisor, or the grantor or his representatives, might have taken the limitation which failed, and yet the subsequent limitations could have taken effect at the time when they would regularly have taken effect, had the limitation not failed to take effect. The rule therefore stands upon intention.

§ 310. It includes as well those limitations by way of remainder which are regularly to take effect upon the contingent determination of a preceding limitation by way of remainder, as those which are to take effect upon the certain determination of such preceding limitation. Thus, if there be a limitation to A for life, remainder to B until his marriage, remainder to C, and B dies in the lifetime of A, the limitation to C will take effect in possession upon the death of A.

§ 311. It follows from the rule, that if a condition precedent be annexed to a limitation, it does not extend to a subsequent limitation by way of remainder; unless it be so extended by the party creating the limitations.

Thus, in Denn d. Radcliffe v. Bagshaw *et als.*, there was a devise to Margaret, an only child, for life, remainder to the first son of her body, "if living at the time of her death," and the heirs male of such son, and for default of such issue male, remainder to A; Margaret had one son, who died in her lifetime, leaving a son: and it was held that neither her son nor her grandson took any estate, but that the remainder to A took effect.[1]

So, in Pearsall v. Simpson, there was a legacy in trust to pay the interest to the separate use of A for life, and after her decease to divide the principal among her children then living; if no child, to pay the interest to her husband during his life, and from and after his decease in case he shall become entitled to such interest, then to pay the principal to other persons. The

[1] 6 Term Rep. (503.)

husband died in the lifetime of the wife, and yet the limitation over was held to take effect upon the death of the wife without leaving issue.[1]

But in Doe v. Shepphard, there was a devise of land to trustees to pay 20*l.* of the rents and profits to the testator's daughter for life, and the residue thereof to her husband for life, and the whole thereof to the husband for life, after the death of, and in case, the daughter should survive her husband, then the land to the use of the daughter for life, and after her death to the use of her son in tail, then to the heirs of the body of the husband by the daughter, then to the heirs of her body, then to the heirs of the husband. The daughter died in the lifetime of the husband, and it was held that the limitations over could not take effect, because the condition which affected her life estate extended to the ulterior limitations, and operated as a condition precedent.[2]

In Davis v. Norton, Thomas Hooker devised lands to his son, William Hooker, and the heirs of his body, and if his said son should die without issue of his body, and the testator's wife should survive the said William, then to her for life, and after her decease, to the testator's sister for life, and after her death, the son being dead without issue as aforesaid, then to other persons. The testator died, the wife died, and then the son died without issue. The sister, who was heir, entered and afterwards died. The lands being of small value, and depending merely on the words of a will, a case was made and by consent determined by the opinion of Mr. Justice Reynolds, who said: If the devise had been to the testator's son, and the heirs of his body, and if the testator's son should die without issue, and the testator's wife should survive him, then to the wife for her life, it might be reasonable to take it to be a vested and a common remainder to the testator's wife, upon the son's dying without is-

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[1] 15 Ves. (29.)

[2] Douglas, 74.

sue; but as it would have been plainly otherwise, if the devise had been to the wife in *tail* or in *fee*, in case the son should die without issue, and the testator's wife should be then living; so in the present case, it is the same as if the devise upon this contingency had been to the testator's wife in *fee*, because all these remainders are but as one estate arising upon the same contingency, and as from one root.

"Moreover, this devise to Pierce and the two others in fee, on the testator's son dying without issue, cannot be taken as a substantive devise, because the devise is to Pierce and the two others in fee, the testator's son being dead without issue *as aforesaid;* which words, "*as aforesaid,*" imply as in manner aforesaid, or as if these words had been repeated viz: in case my son dies without issue, my wife then living; for which reason the contingency not happening, the devise to Pierce and the two others is void; and if this were but doubtful, yet by doubtful words an heir ought not to be disinherited."[1] Of this case, the Lord Chancellor, in Doo v. Brabant, is reported to have said: "When I considered this case, I was surprised at the note; it is against all the principles, and in the teeth of former decisions; all the remainders were vested, and should have taken place; the case is no authority for any one point; it is misconceived from beginning to end."[2] The case is very clearly wrong, but it recognises the principle, though it misapplies it. Let the limitation, however, to the wife be in tail, instead of for life, and then the conclusion at which the Judge arrived will be the correct one.

§ 312. Mr. Fearne distinguishes the cases in which a remainder is limited so as to depend on a contingency affecting the preceding estate, but which may not affect the ulterior limitation, into three classes: First, limitations after a preceding estate which is made to depend on a contingency that never takes ef-

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[1] 2 P. W. (390.) [2] Bro. Ch. R. 397.

fect. Secondly, limitations over upon a conditional contingent determination of a preceding estate, when such preceding estate never takes effect at all. Thirdly, limitations over upon the determination of a preceding estate by a contingency, which, though such preceding estate takes effect, never happens.[1] In the first and second classes, he holds that the contingency upon which the preceding estate depends, is not a condition precedent to the remainder; in the third class he holds that it is.

§ 313. In a note to Doo v. Brabant, it is said of this classification of Mr. Fearne's: Extremely minute subdivisions often tend more to perplex than to elucidate; these distinctions have been disregarded in all subsequent discussions of this question, and therefore serve more to display the analytical correctness of that profoundly learned and ingenious writer, than to assist in presenting a clear view of the various determinations. The true question in these cases, the writer adds, and indeed the one which Mr. Fearne has subsequently referred to, is, whether the condition be annexed to the preceding estate, or is a *condition precedent* upon which the subsequent limitations depend? No precise words, as it has been repeatedly decided, are necessary to constitute a condition precedent in wills. The intention, as collected from the whole will, must control particular expressions; and therefore words of apparent condition have, in these, as in other cases, been explained and controlled by the context.[2]

§ 314. If, however, any limitation be void by reason of its violation of the perpetuity rule, every subsequent limitation must also be void for the same cause; unless such subsequent limitation have a double aspect, in the other of which it is not too remote.

§ 315. If a limitation under a power be made to a person not

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[1] Fearne's Rem. (234.)

[2] 3 Bro. Ch. Rep. (399,) N. (*b.*)

an object of the power, and the subsequent limitation is to take effect after it, the subsequent limitation may take effect at the time, when such prior limitation would have expired, if it be otherwise unobjectionable. If the subsequent limitation is to take effect by way of remainder after the prior limitation to a person not an object of the power, and is also to take effect in default of the existence of that object, then it may take effect after the expiration of the first limitation, or it may take effect in the other event. The rule is, that a subsequent limitation is not accelerated by the fact that a prior limitation is void, because made to a person not an object of the power; unless an intention should appear that it should be, and then of course, it would be, for it is but a matter of intention.

§ 316. In another place, we have seen that if a condition subsequent be annexed to a particular estate in real property, and there be a limitation over by way of remainder, the limitation over destroys the condition. The same doctrine applies, of course, whether the particular estate be the first limitation or be itself a remainder. We mention it here because of the extension of the principle, and that we may have an opportunity of saying that it does not apply to chattels personal in this its extension, any more than it does in its more usual and simple form.

§ 317. These *quasi* remainders are either vested or contingent. The same rules by which a remainder is determined to be vested or contingent, are equally applicable to *quasi* remainders. Those rules are: First, Does the right to the remainder depend upon a contingent determination of a preceding interest? Thus, by way of illustration and application, if there be a gift of chattels personal to A until he marries, remainder to B, the limitation to B depends upon a contingent determination of the gift to A, and is therefore a contingent *quasi* remainder.

§ 318. A *quasi* remainder, however, may, like a remainder, depend on either of two or more events, and it may be vested

on one, and contingent on the other or others. Thus, if there be a gift of chattels personal to A for life, or until marriage, remainder to B, the limitation to B is vested *quoad* the death of A, but *quoad* the marriage of A, it is contingent. In devises of real property, it is held, that if A devise to his wife for life, if she shall so long continue his widow, and in case she marry, to B in fee, that it is merely an inaccuracy of expression, and that B shall take in either event, and therefore that the limitation to B, as in the former case, is vested as to one event, and contingent as to the other. There seems to be no reason why the same construction should not prevail in gifts of chattels personal.

§ 319. If the remainder does not depend upon a contingent determination of a preceding estate, then the second rule is: Is there a person *in esse*, and ascertained, who would be entitled to the possession or enjoyment of the remainder, if the time for its possession or enjoyment were to arrive at the moment of inquiry? If the answer be affirmative, then the remainder is vested; but if it be negative, then it is contingent. Thus, if there be a limitation to A for life, and if B attain the age of twenty-one years before A's death, then after A's death, remainder to B and his heirs, the remainder is contingent; for though B is a person *in esse*, and ascertained, yet A may die before B attain twenty-one years, and it is therefore evident that the remainder is and must continue to be contingent, until B shall attain the required age in the life-time of A; and it is equally evident that it would then become vested. And so it is of *quasi* remainders.

§ 319*a*. These *quasi* remainders, then, may be contingent, either because limited to a person not *in esse;* or to a person not ascertained; or to a person *in esse* and ascertained, but to take effect only in an uncertain event. And all these several causes may be united in the same limitation.

§ 320. An illustration of the first kind of *quasi* contingent

remainders is a gift to A for life, remainder to his first child, and A have no child at the time.

§ 321. An illustration of the second kind, is a gift to A for life, remainder to the next person who shall be governor of the State of Alabama. So, if the gift be to A and B for life, remainder to the survivor, the survivor is a person not yet ascertained, and the limitation is therefore contingent. And so, if the gift be to A for life, remainder to the heirs of the body of B, a person *in esse*, the limitation over is contingent, because the heirs of the body of B cannot be ascertained until his death.

§ 322. An illustration of the third kind, is a gift to A for life, and if B shall be living at the death of A, then to B, for it is uncertain whether B will be alive at the death of A. Had the gift, however, been to B for life, it would have been vested, and not contingent,[1] because that is a contingency to which every *quasi* remainder for life is liable, and a remainder is not contingent, unless it depends upon a contingency other than its own duration.

§ 323. It sometimes happens that in limiting *quasi* remainders, that words are used which seem to import a contingency, when in fact they mean no more than would be implied without them. Thus, if there be a gift of chattels personal to A for life, remainder to his first and other sons successively *for life*, and in default, or for want of such sons, to his daughters, the daughters will take vested interests; each one taking an interest as she is born, and this though A should have several sons.

§ 324. This brings us to the subject of vesting *sub modo*. Thus, in the last case, if the first child of A had been a daughter, the whole interest in remainder would have vested in her, and if the second child were also a daughter, the interest vested

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[1] 2 Fearne's Rem. 348.

in the first daughter would have been divested as to a moiety, which would have vested in the second daughter, and so of other daughters; and if a son should have been born, the whole interest in remainder would have become divested out of the daughters to the extent of his interest, and so as to other sons. But if the gift to the sons had been absolute, then the limitation to the daughters would have been a *quasi* remainder as to the interest of A, but an alternative limitation merely as to the limitation to the sons. The limitation to the daughters could not therefore have vested even *sub modo*, until there was no longer a legal possibility of there being a son, for the rule is applicable alike to remainders and *quasi* remainders, that every limitation subsequent to a contingent absolute interest, must be likewise contingent until there is no longer a legal possibility of the prior limitation becoming vested.[1]

§ 325. And there is another matter connected with this, viz: that when the subsequent limitation in such cases becomes once vested in interest, it cannot open or become divested so as to admit another person to take in preference to, or in substitution of the person in whom it once vested.[2] This rule does not extend to cases in which the preceding limitations are partial interests, unless the subsequent limitations are merely alternatives with the preceding limitations. Thus, if there be a gift to A for life, remainder to his first child yet unborn for life, remainder to B, the limitation to B will vest *sub modo*, that is, subject to be divested upon the birth of a child of A, so far as to let in the life interest of such child. But if the gift were to A for life, remainder to his first child for life, remainder to C; but if A should have no child, then to B for life, the limitation to B could

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[1] See Luddington v. Kime, 1 Ld. Ray. 203; *Doe d.* Winter v. Perrat, 10 Bing. 198.

[2] *Doe d.* Winter v. Perrat, 10 Bing. 198; see cases cited 2 Fearne's Rem., § 214, overruling Perry v. Philips, 1 Ves. 250.

not vest even *sub modo*, until the legal possibility that A will have a child is entirely gone; otherwise, according to the rule, the interest for life could never become vested in the child of A, who might subsequently be born.

§ 326. The general rule in regard to contingent remainders, is, that they must vest during the continuance of a particular estate, at least, in entry, or *eo instanti* of its determination. The question is, are *quasi* remainders subject to that rule? We have already asserted that it is not necessary that they should become vested during the continuance of a preceding limitation, or at its determination, and this for the reason, that a *quasi* remainder does not require a particular interest to support it.

§ 327. But this, of course, is subject to the intention of the party creating the limitations. Thus, if there be a gift of chattels personal to A for life, and after his death to the eldest son of B, and if B have no son at that time, then to D, the limitation to the son of B must vest before or at the death of A, else it will be gone forever, for the time is an essential ingredient in the gift.

§ 328. Another exception is, when the *quasi* remainder is to a class, and the ground of this exception is the inconvenience of compelling parties to refund. Thus, if there be a gift to A for life, remainder to the children of B, the children of B born after the death of A are not, according to the authorities, entitled.[1] But it seems that the reason of the ruling would not exclude a child born before the time allowed for settlement and distribution of the estate. The construction, at any rate, is departed from when there is a clear indication of a contrary intent. Thus, if the limitation over be to the children of B born after as well as before the death of A, all the children of B must be allowed to take. This doctrine extends, of course, to other limitations.

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[1] 2 Fearne's Rem., § 227, *et seq.*

§ 329. In such cases the parties take as joint-tenants, notwithstanding the different times of vesting; unless a contrary intention appear. But Woodgate v. Unwin[1] is an authority *contra*—holding that parties are tenants in common, unless they take simultaneously.

§ 330. Another case in which there is a vesting *sub modo* is, when there is a gift in default of appointment, and in this case it matters not whether the power of appointing is a power of appointing any estate, or expressly and restrictively a power of appointing an absolute interest.

§ 331. Cross remainders are a species of contingent remainders. It is said that they cannot be created otherwise in a deed than by express words, though no technical words are necessary to their creation; but that they may be created in a will by implication. But this distinction between deeds and wills of real property ought not to be extended to the construction of deeds and wills of chattels personal. The intention of the party in each case ought, when consistent with rules of law, to prevail, and there is certainly no difference in principle between an express and an implied intention.

§ 332. It was once, indeed, regarded as a settled distinction, that in the construction of a will, the presumption was in favor of cross remainders between two, but against them between a larger number. It was even held at one time, that the implication between two must be absolutely necessary, and that therefore they could not be implied when the words "several and respective" were used, because, it was said, they disjoined the title. But now it is held to be a matter of intention, whether between two or more.

§ 333. It was also held that cross-remainders could not be

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[1] 4 Sim. 129.

implied where there were express cross-limitations in certain events, but that is now well denied; for an express cross-limitation in one event does not affect the reasoning by which a cross-remainder in another event is implied.

§ 334. Cases illustrative of express *quasi* cross-remainders are found in gifts of partial interests to two or more persons, with limitations over to the survivor or survivors. Thus, if property be given to A and B for life, with remainder to the survivor, the limitation over is a cross-limitation by way of remainder.

§ 334*a*. When there is a gift to A, B, C, and D, with a limitation over to survivors, and A dies, B, C, and D take his share absolutely among them; and upon the death of either of them, the part so taken will not survive, unless that construction be controlled by the terms of the gift. But we may excuse ourselves from going into the cases by referring to Jarman on Wills.[1]

§ 335. An illustration of implied *quasi* cross-remainders may perhaps be found in a gift to A for life, remainder to her children as tenants in common, and for want of such issue of A, then to B. In such case, perhaps it would be held that the children of A took interests for life, with cross-remainders between them. Such was the construction made in Ashley v. Ashley[2] of a like gift, by devise, of real property.

§ 336. In Mackell v. Winter, the Lord Chancellor said in relation to the case then before him: My reasoning upon it is, that the same ground upon which the courts have held themselves bound to raise cross-remainders, will apply in cases of personal estate to supply a limitation, that is in the nature of a cross-remainder. The reasoning, upon which the courts have held themselves bound to supply the want of words for cross-remainders, apply equally to the case of personal estate. All

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[1] See Jar. on Wills, Ch. 47. [2] 6 Sim. 358; see 2 Jar. on Wills, (479.)

the cases of cross-remainders go distinctly upon this ground: that the court inserts limitations not expressed in the will, upon the ground disclosed by the will, that the general intention requires the insertion of such limitations, in order to carry on the general plan; and it is very remarkable, that in Comber v. Hill, 2 Str. 968, where the Court of King's Bench attempt a distinction—which has not since been approved—between that case and Holmes v. Meynel, (stated in Comber v. Hill) they particularly recite, that that decision is perfectly right, upon the circumstance that the whole is given over. Most of the cases turn upon that point.[1]

§ 337. We come now to the consideration of conditional limitations. A conditional limitation is a limitation which is to take effect in defeasance of a prior limitation; which does not depend upon a void condition, and which is not void for uncertainty, repugnancy, nor remoteness.

§ 338. It is the taking effect in defeasance of a prior limitation, which distinguishes a conditional limitation from a limitation by way of remainder, and distinguishes it also from a *quasi* augmentative limitation. But the distinction between a conditional limitation and a contingent limitation by way of remainder of chattels personal, so far as regards such subsequent limitations, seems to be a mere verbal one.

§ 339. By the common law an interest in real property could not be made to cease, and another interest to commence before the regular expiration of the prior interest. The reason was that an interest could only be defeated by condition and entry for the breach of it. No one could enter for breach of a condition but the feoffor or his heir; and when such entry was made, the feoffor or his heir was in of the old estate, and the limitation, of course, could not arise. But these conditional limitations

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[1] 3 Ves. (541.)

crept in with uses, and were afterwards tolerated by devise; and they were allowed upon the ground that the prior interest was determined in the event by the taking effect of the subsequent limitation, and so was the necessity of entry avoided.

§ 340. Conditional limitations cannot be prevented from taking effect in the event upon which they are limited by any act of a prior tenant, except of a tenant in tail; nor are they otherwise subject to destruction like contingent remainders; they are subject to the rule against perpetuity; they may be limited to depend on a possibility upon a possibility. *Quasi* contingent remainders are indestructible, in the event upon which they are limited, by any act of a prior taker, and are otherwise exempt from the destruction to which contingent remainders are liable; they are void when limited to take effect in violation of the rule against perpetuity; and they may be limited to take effect on a possibility upon a possibility; and hence the conclusion that *quasi* contingent remainders and conditional limitations of chattels personal differ in form and not in nature.

§ 341. We have said that it is the taking effect in defeasance of a prior limitation that distinguishes a conditional limitation from a *quasi* augmentative limitation. A *quasi* augmentative limitation operates not in defeasance, but in enlargement of a prior limitation. Thus, if there be a gift of chattels personal to A for life, and if he marry before he is thirty years of age, then to him absolutely, A's interest for life is not defeated by his marriage, but it is enlarged. And this, together with what was previously said,(*a*) shows that a conditional limitation cannot be made to the same person upon whose interest it is engrafted.

§ 342. But can conditional limitations of chattels personal be created by deed, otherwise than by way of trust? It is not

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(*a*) § 273*a*.

anywhere denied that such limitations may be created by will, or by way of trust; and there seems to be no sufficient reason for denying that such limitations may be made by deed, not by way of trust, wherever limitations of chattels personal are allowed by such instrument. The objection which exists to such limitations in common law conveyances of real property does not apply to limitations of chattels personal; and every reason which can be urged in support of allowing *quasi* remainders to be created in such property by deed directly, may also be urged in support of allowing conditional limitations.

§ 343. But in Wilson v. Cockrill, the court denies that such limitations may be made by deed, and the argument is so broad as to exclude even such limitations when made by way of trust.[1] Betty v. Moore[2] is cited in that case as an authority directly in point, but upon examination it will be found that the point in that case was whether a fee tail or a fee conditional can exist in chattels personal.

§ 344. On the other hand it is admitted that Higginbotham v. Rucker[3] involved the point, though it is said that it was not made and that no opinion was expressed in relation to it. The point, however, was made in Hill *et ux.* v. Hill *et al.* adm'rs,[4] and it was there judicially determined that conditional limitations of chattels personal might be created by deed without the intervention of a trust. Johnson, Ch. in delivering his opinion in the court below, said: The real question seems to be simply this: can a grantor, in conveying a perpetual title in personalty, annex a condition upon which that title shall be divested? Can he annex a clause of defeasance? Every mortgage of personalty is an affirmative answer to the question.

"If a grantor can provide a contingency upon which the title shall determine and revert to himself, what principle forbids his

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[1] 8 Missouri, 1. [2] 1 Dana, 235. [3] 2 Call. [4] Dudley Eq. 82.

substituting other persons for himself, to receive the returning property when the contingency shall happen?"[1]

Upon appeal it was said: There is, there can be, no difference, in any sound judgment, between compelling a life tenant to do justice to a remainder-man, and enforcing the instrument before us. The case is, to all intents and purposes, that of an absolute title, divested upon a contingency, and cut down to a title for life, with remainder over. And to the objection, that the principles which governed the court in enforcing limitations of chattels personal had never been applied to the case of a direct deed, it was answered: But if the principles exist, and are applicable, and justice demands it, why not apply them? Principles exist only for the purpose of being applied.[2]

§ 345. In regard to the other elements of a conditional limitation, enough, perhaps, has been said in another chapter. It may be well, however, to add here, that the principle "that estates in land cannot be determined in part only, and continue as to the residue, or vest and then cease, and again revest," seems to be applicable alone to common law conveyances of realty, and to be inapplicable to limitations of personalty. Thus, if there be a limitation to A forever, but if B marry before the end of the year, then to him for life, and after his death the property shall revest in A, it seems clear that B would take in the event, and that A would be entitled after the death of B. Whether A would be entitled after the death of B in the absence of any express declaration, is a more difficult question; but the better opinion seems to be, that A would be equally entitled in either case. The limitation to B is undoubtedly a good conditional limitation, and there seems to be no reason for allowing it totally to defeat A's interest, when a partial defeasance fully satisfies the whole conveyance.

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[1] Dudley Eq. 76. [2] Id. 84; see Hill, 1 Strobh. Eq. 1.

§ 346. We have said that there seemed to be no difference between *quasi* contingent remainders and conditional limitations, so far as their own natures were concerned; but there may, at first sight, seem to be a difference, so far as the donor and the prior limitee are concerned. For when a *quasi* contingent remainder fails to take effect, the property so undisposed of returns to the donor or his representatives, but when a conditional limitation fails, the interest of the limitee upon which it was engrafted is unaffected by it. This, however, is a difference of fact, and not of principle; for, if the cases be made alike, like results will follow. Thus, if there be a limitation to A for life, or until he marries, with remainder to B, B takes a *quasi* remainder, vested as to A's death, and contingent as to his marriage, and A's interest will terminate upon his marriage, because that is one of its limits. So, if there be a limitation to A for life, provided that if he shall attain forty years of age, then to B, B takes a conditional limitation, dependent upon A's attaining the required age. But that age is not a limit to A's interest, unless B's can take effect—the attainment of the age is the condition, and that with the interest given to B constitute the conditional limit to A's interest. In both cases, therefore, A's interest is determined by the limit prescribed. When, therefore, the gift is to A until his marriage, with remainder to B for life, and B dies, and then A marries, his interest ceases and the property reverts; but when the gift is to A, and provided that he attains twenty-one, then to B for life, and B dies, and A then attains twenty-one, the property does not revert, but the interest of A continues unaffected.

§ 347. It is a rule governing conditional limitations, that if the limitation upon which one is engrafted should fail to take effect, it may nevertheless take effect, unless a contrary intention appear. The ground of the rule is that a preceding limitation is not *per se* a condition precedent. Thus, in Jones v.

Westcomb, A, possessed of a long term of years, by will devised it to his wife for life, and after her death to the child she was *enciente* with; and if such child died before it came to twenty-one, then he devised one-third part of the same term to his wife, her executors and administrators, and the other two-thirds to other persons, and made his wife executrix of his will and died; and the bill was brought against her by the next of kin to the testator, to have an account and distribution of the surplus of his personal estate, not devised by the will. One question made was, whether the devise to the wife of one-third part of the term was good, because it happened she was not then *enciente* at all; and so the contingency upon which the devise to her was to take place, never happened. But the Lord Keeper delivered his opinion, that though the wife was not *enciente* at the time of the will, yet the devise to her of such third part of the term was good.[1]

So, in Andrews d. Jones v. Fulham, a testator bequeathed leasehold houses, "to my wife for her life, and after her decease to such child as my said wife is now supposed to be with child and *enciente* of, and his heirs forever; Provided always, that if such child as shall happen to be born as aforesaid shall die before it has attained the age of twenty-one years, leaving no issue of its body, then the reversion of one-third part to my said wife, and the other two-thirds to my sisters" A and B. The testator dying within a month after, the wife entered, and enjoyed during her life, but had no child or miscarriage; and upon her death the question was, whether, as no child had ever been born, the remainders, limited upon his dying under twenty-one without issue, could take effect. And after several arguments, the court held that they might; that though formerly there had been opinions to the contrary, yet according to the law now settled, the devise to the infant in *ventre sa mere* was well limited, and if

[1] 1 Eq. Ca. Abr. 245, § 10.

any child had been born, would have passed the term accordingly. Secondly, that though no child was ever born, yet the remainders are, notwithstanding, good; for there being no devisee, the devise, though void only *ex post facto*, falls to the ground as much as if it had been void in its creation, and this lets in the remainders immediately; that though the clause by which the remainders are limited is in words, strictly speaking, conditional —yet they do not make it a *condition*, but only a *limitation*.[1]

§ 348. This leads us to the conclusion that a conditional limitation, like a *quasi* remainder, is an alternative limitation with each preceding limitation, unless a contrary intention appear.

In Statham v. Bell, the facts were as follow: Statham, having an only child, a daughter, made his will, whereby, reciting that whereas his wife, Mary Statham, was then pregnant, he devised his estate to his son, if his wife should be delivered of a son, when he should attain the age of twenty-one. If she should have a daughter, then he devised one moiety of the estate to his wife, and the other moiety to his daughters, when they should attain their ages of twenty-one years. And if either of them should die before that time, then her share to the survivor, and if both should die under twenty-one, then the moiety to go to the wife. The testator died without having any child after the making of the will, his wife not having been *enciente*, and the daughter died before she was twenty-one. The question was, whether the plaintiff, the testator's heir at law, or the widow, who married Bell, the defendant, should have the estate in the event which happened. The certificate was in the following words: Having heard counsel, and taken the case into consideration, we think it was the plain intention of the testator, that, in case no son should be born, and he should have no daughter who should live to attain the age of twenty-one years, his wife should have

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[1] 8 Vin. Abr. 103, § 53.

the whole estate; therefore, in the event which has happened, we think Mary Bell took an estate in fee simple in the whole of the premises in question.[1]

In Fonnereau v. Fonnereau, there was a limitation over in the event of issue dying under twenty-one, and there never was any issue; and yet Lord Hardwicke held that the limitation over took effect.[2]

In Avelyn v. Ward, there was a devise in fee, upon condition that the devisee executed a release within three months after the death of the testator of all demands against his estate, with a limitation over in case of failure to do so; and the devisee died in the lifetime of the testator. It was held that the limitation over took effect, it being a conditional limitation and not a strict condition; and the Lord Chancellor said: I know no case of a remainder or conditional limitation over of a real estate, whether by way of particular estate so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation; but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place.[3] The rule, whatever it may be, is equally applicable to limitations of personalty; but it is laid down too broadly by the Lord Chancellor, as is said by Douglas and shown by the cases which he cites, so far as remainders are concerned;[4] and too broadly also, as it seems, so far as conditional limitations are concerned.

§ 349. And this brings us to the qualification, "unless a contrary intention appear." Thus, if there be a gift to A for life, with remainder to B, but if B should die before he attains twenty-one years, then to C, with a proviso that if B refuses to

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[1] Douglas 65, note (3.) [2] 3 Atk. 315. [3] 1 Ves. sr. 419.

[4] Douglas 487, note. But in Doo v. Brabant, 3 Bro. C. R. (398,) the Lord Chancellor said of Davis v. Norton, 2 P. W. 390, one of the cases, "the case is no authority for any one point; it is misconceived from beginning to end."

take, or be dead at the time, then to D, it is clear that if B refuses to take or be dead, the limitation to C can never take effect, for a contrary intention clearly appears.

So, if there be a gift to A for life, with remainder to her child with which she is supposed to be *enciente;* but if such child should be a male, and should die under twenty-one years of age, then to B; but if such child should be a female, and die before she attains her twenty-first year, then to C, and A be not *enciente* as was supposed, neither B nor C can take; for there is a condition precedent unfulfilled, and not a mere preceding limitation which failed, and so there is a *casus omissus.*

In Doo v. Brabant, Sarah Counsell made her will, and thereby gave 1000*l.* 3 per cent. consol annuities and other effects to trustees in trust for Sarah Counsell of the age of twelve years, until she should attain her age of twenty-one years; then to transfer the said sum to the said Sarah Counsell, her executors and administrators, to and for her own use and benefit. And in case the said Sarah Counsell *should die under the age of twenty-one years, leaving any child or children of her body* lawfully begotten, then *in trust for all and every such child or children* who should live to attain his, her, or their age or ages of twenty-one years; but in case the said Sarah Counsell should die under the age of twenty-one without leaving child or children, or being such they should all die under twenty-one, then in trust for testatrix's three nieces. Sarah Counsell, the legatee, married and died in the lifetime of the testatrix, having attained twenty-one years of age, and leaving two children, the plaintiffs. The question was whether the children of Sarah Counsell were entitled under the limitation to them. The Lord Chancellor said, *inter alia:* There have been different determinations as to this point; and I wonder at it because it was originally decided as it was afterwards. There is a case in Fortescue, 104, that the estate having lapsed, the condition lapsed, and the remainder could not take place. In that case an estate was given to A, upon con-

dition of paying £100 to B, and the estate lapsed; but upon the same reasoning that was used in that case, Lord Hardwicke, in Avelyn v. Ward, 1 Ves. 420, decided that the limitation was good, and that wherever there is a conditional limitation, and the first estate becomes void, the second estate shall take place. This doctrine has since prevailed; Hayward v. Stillingfleet, 1 Atk. 422. The rule is, that where there is a conditional limitation, it shall not be considered as a precedent condition, but as a description of the estate. This point first received its determination in the cases on Waith's Will: there the testator died, leaving a wife and three sisters. He devised to his wife for life, remainder to the child she was then supposed to be *enciente* of, and in case if such child should die before twenty-one, without issue, the reversion to his wife and two sisters, Elizabeth and Anne. The question first came on in Jones v. Westcomb, Pre. Ch. 316,[1] afterwards in Andrews v. Fulham, 2 Stra. 1092, Roe v. Wicket, Guillivre v. Wickett, 1 Wills. 105, and in Avelyn v. Ward, 1 Vesey 420. From the whole of the determinations on the case of Waith's Will, I must take it as a rule, that wherever the prior estate is made to depend upon any described event, and the second estate is to arise upon the determination of that event, the first is not to be taken as a condition precedent, but, upon its failure, the second estate must take place."

It being admitted that the children were born before the prior legatee, their mother, attained twenty-one, the chancellor inclined to decide in their favor, but gave permission to the other side to have a short case stated as upon leasehold property for the opinion of the Court of King's Bench. The case was accordingly sent, and that court certified: "We have heard counsel, and considered the case, and are of opinion, that the plaintiffs took no estate whatsoever in the said leasehold premises, by virtue of, and under the will of, the said Sarah Counsell; the

[1] See also for the case 1 Eq. Abr. 245.

events upon which their claim was to take place, not having happened."[1]

In Calthorpe v. Gough, there was a legacy of 10,000*l.* to Lady Gough, if she survived her husband, but if she died in the life-time of her husband, leaving children, then to her children: she survived her husband, and died, leaving children, in the testator's lifetime; and the decree was that the children could not take.[2]

§ 350. This brings us to the general proposition, that the event upon which a conditional limitation is to take effect, must happen before it can take effect, because it is a condition precedent.

Thus, in Parsons v. Parsons, there was a gift in trust to pay the interest to Isabella Henwood, until three months after the death of the testator's wife, and then if she should be living and should have attained twenty-one years of age, to pay the principal and arrears of interest to her; but in case she should happen to die before that time under the age of twenty-one and unmarried, then the legacy should sink into the residue of his personal estate; and in case she should survive his wife, and should be married at the time she became entitled to the legacy, then in trust to convey to such persons as she should appoint for her separate use; "and in case the said Isabella Henwood should happen to depart this life, before she should have attained the age of twenty-one years, leaving lawful issue," then to such issue. Isabella Henwood married Robert Parsons and had issue one son, and having attained twenty-one, died in the life-time of the testator's widow. The bill was filed on behalf of the infant son, and the Master of the Rolls, with very great reluctance, found himself judicially bound to decide that the bill could not be sustained. He said: It is one of those cases in which, as Lord Kenyon observed upon Denn v. Bagshaw, I find my wishes

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[1] 3 Bro. C. R. (393) and see note at the end of the case for others.

[2] As stated by Ridley, counsel, *arguendo*, Doo v. Brabant, 3 Bro. C. R. (395)—see note (*a*) same page, for the case; also, 4 T. R. (708,) N. (*b*.)

in opposition to what I am bound judicially to decide. I have been very desirous that I could upon judicial grounds raise an implication of what certainly is not expressed; that either the child of Isabella Parsons, or she herself took a vested interest in the fund; but, upon great consideration, I am under the necessity of determining that no interest vested either in her or in her child. This is almost exactly the case of Doo v. Brabant. It is true, when that case was first before Lord Thurlow, his lordship seemed to entertain considerable doubts upon my decision in Calthorpe v. Gough; but I rather think that case was not sufficiently stated to him; for it was not near so strong as Doo v. Brabant; which Lord Thurlow sent, after intimating a strong opinion upon it, to the Court of King's Bench; but that Court dissenting from that opinion, his lordship decided according to Calthorpe v. Gough.[1]

In Bell v. Phyn, the testator bequeathed the residue of his personal estate equally among his three children, George, Jane and Catherine; but if any of them died "without being married and *having* children," the share of such child was to be distributed among the survivors. After his death Jane married, and *having* a child, the question was whether she took an absolute vested interest in a third part of the residue? which depended upon the construction of the words, "without being married and having children;" for, if the having children was to be considered the same as without leaving children, then her interest would be liable to be divested on the happening of that event. But Sir William Grant, M. R., construed the words, "without being married," in the sense of "without ever having been married," upon the authority of Maberly v. Strode; and after declaring that "or" should be substituted for "and," he decided that "without having children," meant, in the present instance, without having had a child or children. And accordingly he

[1] 5 Ves. 578.

decreed, that Jane having married and had a child, the interest which vested in her at the testator's death became absolute.[1]

Now, in Maberly v. Strode, the testator gave a residue in trust to pay the interest to his son, Samuel Strode, for life, remainder, as to the capital, to divide among all Samuel's children, "but in case Samuel died unmarried and without issue," or having issue, the sons should die under twenty-one, and the daughters before that age or marriage, then in trust to transfer the fund to his nephews and nieces. Samuel married and died without issue; and one of the questions was, whether, as Samuel did not die unmarried, the limitation over was not disappointed and an intestacy created? But Lord Alvanley determined in the negative, declaring, first, that the word "unmarried" is to be understood to import as never having been married; and the word "and" to be changed for "or," so as to make a double contingency;(*a*) consequently, although Samuel married, yet, as the alternative event happened, *i. e.* his death without leaving a child, the limitations to the nephews and nieces took place.[2]

Another case illustrative of the necessity that the contingency shall happen before the conditional limitation can take effect, is the case of Sturgess v. Pearson. In that case the testator gave the interest of one-fifth part of his personal property to his daughter for life, and after her death the capital to be divided among her three children, *or such of them as should be living at her decease*, payable at twenty-one. The three children died before the daughter, and it was decided that they took vested

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[1] 7 Ves. 454—stated 1 Rop. Leg. 413.

(*a*) Upon construing "and," "or," and vice versa, see Girdlestone v. Doe, 2 Eng. Ch. R. p. 2, 227; 2 Philips, 494-6; 1 Philips, 551; 1 Philips, 543, and N. (1;) 2 Hill, 430; 2 Hawks, N. C. 613; 4 Hare, 542-3, N. (1;) 2 Rop. Leg. 290, *et seq.*; Malcolm v. Taylor, 2 Rus. & My. 416; Losh v. Townley, 1 Coop. Sel. Ca. 372; Miles v. Dyer, 8 Sim. 330; McGraw v. Davenport, 6 Porter, 331-2; 2 Fearne's Rem., § 235, *et seq.*

[2] 3 Ves. 450—stated in 1 Rop. Leg. 412.

interests, which were to be divested in the event of there being one or two of them living at the mother's death, an event which did not happen, therefore their personal representatives were entitled at the death of the mother.[1]

So, in Browne v. Lord Kenyon, 1000*l.* were bequeathed to trustees to pay the interest to Abagail Jones for life, remainder in trust to divide the interest between Miss Chetwode and Mrs. Davison, during their joint lives, and to pay the whole of it to the survivor for life, with remainder in trust after the survivor's death, to pay the capital to Sir John Chetwode; but if he were *then* dead, to divide it between his two brothers, Charles and Philip Chetwode, *or the whole to the survivor.* Abagail Jones died, then Miss Chetwode, then Charles, then Philip, then Sir John Chetwode, and lastly Mrs. Davison. It was held that the legacy vested in Charles and Philip as tenants in common, subject to be divested if one alone should survive Mrs. Davison, the last tenant for life; and that since there was no survivor in existence at that period, both brothers having died before her, the contingency upon which the interest was to be divested never happened; consequently the personal representatives of each brother were entitled to the fund.[2]

§ 351. Now the general proposition last stated, would be true without qualification, were it not for that other principle, that a conditional limitation is construed to be an alternative limitation, unless the contingency upon which the preceding limitation is to take effect, is extended to it also. Hence it is, that when the preceding limitation takes effect, it cannot be defeated except the contingency happen upon which the conditional limitation is to take effect. Hence it is, if the preceding limitation fails to take effect, and was limited on a contingency which is extended

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[1] 4 Mad. 411—stated 1 Rop. Leg. 415.

[2] 3 Mad. 410—stated 1 Rop. Leg. 415.

to the conditional limitation, then the conditional limitation cannot take effect except the contingency happen. Hence it is, if the preceding limitation fails, and the conditional limitation is to take effect upon a contingency unconnected with the preceding limitation, then the contingency must happen before such conditional limitation can take effect.

§ 352. If a conditional limitation be engrafted upon a limitation which is in violation of the perpetuity rule, it is also void for that reason, because the rule requires that a limitation must be so made that at the moment of its creation, it may be said that it must necessarily vest, if at all, within the time prescribed by the rule.

§ 353. If a limitation be made under a power, and to a person not an object of the power, and a conditional limitation to a person who is an object of the power be engrafted upon it, then if the prior limitation would have failed, had the appointee been an object of the power, the case falls within the principles which govern limitations not under powers; provided, of course, the conditional limitation be within the power. But if the prior limitation would not have failed had the appointee been an object of the power, then the conditional limitation must also fail, if it *depends* upon the taking effect, or upon the contingent determination of such prior limitation, as a condition precedent.

§ 354. "It is a rule," says Mr. Smith, "which, though not laid down by authority, yet commends itself to reason and the analogy of the law, that: Where the prior limitation carries the fee in real property, or the absolute interest in personal property, a subsequent limitation, in doubtful cases, ought to be construed as an alternative limitation, if possible, rather than as a conditional limitation, provided the prior limitation cannot fairly be construed to confer an interest vested prior to the event on which the subsequent limitation is to take effect, and an absolutely limited interest, either by reason of the form of its ori-

ginal limitation, or of some subsequent explanatory expressions."

"For, suppose," says the author, "the prior limitation to be executory in its original creation, but afterwards to confer a vested interest, it would seem that the subsequent limitation ought, in a doubtful case, to be construed, if possible, as an alternative, and not as a conditional limitation, in order that the estate of the persons taking under the prior limitation, who were the primary objects of the testator's regard, may not be defeated in favor of those claiming under the subsequent limitation, the secondary object of his regard. On the other hand, if the prior limitation never takes effect at all, it is clear that the subsequent limitation, even without the necessity of being construed as simply an alternative in its original creation, would be allowed to operate as an alternative. "The construction," he adds, "which leans towards holding a limitation to be an alternative rather than a conditional limitation, is sometimes aided by the doctrine of remoteness. For, where a limitation would be too remote, if it were held to be a conditional limitation, but not too remote if held to be an alternative, it should, if possible, be construed an alternative, according to the maxim, *Ut res magis valeat, quam pereat.*[1] But when the prior limitation is to take effect at a time preceding the event upon which the subsequent limitation is to take effect, it would be doing violence to the intention of the party making the limitations, to construe such subsequent limitation to be a mere alternative limitation."[2]

§ 355. If the general reasoning upon which the rule is based, that a limitation in such doubtful cases shall be construed to be an alternative, rather than a conditional limitation, be sound, it justifies us in asserting that the rule extends, if needed, to cases in which the prior limitation is of a partial interest.

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[1] 2 Fearne's Rem., § 651-54. [2] See Ib., § 655.

§ 356. There is another reason which supports the rule, and that is, that the law leans against a construction which would postpone the absolute enjoyment, and indeed keep in doubt and suspense the nature of the interest bestowed,[1] and though this is peculiarly applicable to absolute interests; yet the principle extends with equal force *pro tanto* to partial interests.

§ 357. These conditional limitations are, of course, always contingent until the contingency happens, and they are generally so framed that they are to take effect in possession on the happening of the contingency; but they may be so framed as not to take effect in possession until a time subsequent to the happening of the contingency. Thus, if there be a gift to A, but if B shall pay to A one hundred dollars, then one year after such payment by B the property shall pass to him, and B pay the hundred dollars to A, his interest becomes a certain executory one.

§ 358. A limitation may be a conditional limitation in one event, and a *quasi* remainder in another; it may be a conditional limitation in one event, and a springing interest in another; and it may be a conditional limitation in one event, and an alternative limitation, as it often is, *ex vi termini*, in another.

§ 359. We come now to springing interests. A springing interest is a limitation which is to take effect at a future time, neither upon the regular expiration of a prior limitation, nor in defeasance of it; which does not depend upon a condition that is void, which is not void for uncertainty, repugnancy, nor remoteness, and which may be taken by purchase.

§ 359*a*. There are two ways in which an interest may be limited to take effect at a future time: 1. It may be limited to take effect in right: 2. It may be limited to take effect in pos-

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[1] Home v. Pillans, 2 My. & Keene, 15.

session, or enjoyment, or in both, postponing the possession, or &c., but leaving the interest to vest in right. There are two classes of cases in which the possession, or &c. is postponed: 1. Those in which the party is entitled to the accruing profits during the intermediate time from the limitation, until it is to take effect in possession, or &c. either as they accrue, or at the time of possession, or &c.: 2. Those in which some person other than the limitee is entitled to the profits accruing between the making and taking effect of the limitation.

When a limitation is to take effect in possession, or enjoyment, or in both, at a future time, and the limitee is entitled to the accruing profits, either as they accrue, or at the time of possession, then the interest is not strictly a springing interest; unless the limitee is either a person not *in esse*, or not ascertained, or the taking effect is upon a condition precedent. In such case it is a *present vested* interest.

When the limitation is to take effect in possession, or &c. at a future time, and some person other than the limitee is entitled to the accruing profits, then if the interest be not by way of remainder, it is not a vested, but an executory interest. All limitations that are to take effect in right at a future time, are executory interests. It is apparent, therefore, that all springing interests are *executory* interests; and that they are either *certain* or contingent. An interest is not *vested*, because it is *certain;* and that is a distinction to be remembered.

359*b*. Executory interests are all subject to the perpetuity rule, and therefore all springing interests, whether certain or contingent, are subject to it. And this leads us to notice the distinction in this respect between a *quasi* remainder and a springing interest. If a chattel be limited to A for twenty-three years, remainder to B, the limitation to B is a vested *quasi* remainder, and seems therefore not to be in violation of the perpetuity rule; but if the limitation is to B, after the expiration

of twenty-three years, and the twenty-three years be undisposed of, the limitation is a springing interest—a *certain* executory interest—and is therefore void by reason of its remoteness. This distinction ought not to exist, for there is no difference in the nature of *quasi* remainders and springing interests.

360. These springing interests cannot be created by parol, except by way of trust; because the title to chattels personal cannot pass from one person to another by conveyance *inter vivos*, except there be a delivery of the property, or that which is tantamount to a delivery.[1] A trust, however, may be attached by parol to chattels personal, whether they be transferred to another or retained by the party creating the trust.[2] Whether a Court of Equity will enforce such a trust, is a question which must be decided in each case by the principles of a graduated conscience, to which that court ever looks in its administration of refined justice.

§ 361. A deed delivered is regarded as tantamount to a delivery of the property *quoad* the parties; and whether it is tantamount to a delivery of property *quoad* creditors and purchasers, seems to depend upon the question whether the conveyance is fraudulent. The better doctrine seems to be, that where a future interest in chattels is created by deed for a valuable consideration, the mere fact that the grantor retains possession consistently with the deed, is not evidence of fraud; but, that where such deed is voluntary, it is fraudulent against existing creditors;[3] for a man must be just before he can be generous; and fraudulent against subsequent creditors and purchasers without notice; because, by reason of continued possession, the

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[1] See Pitts v. Mangum, 2 Bailey, 588.

[2] See Sledge's Adm'r *et al.* v. Clopton, 6 Ala. 589.

[3] DeMillen v. McAlilley, 2 McMullan, 499.

donor traded and trafficked with others and *deceived* them. And this last is one of the reasons given in Twyne's case.

§ 361*a*. But the reason does not extend to subsequent creditors and purchasers with notice actual, or constructive; for they cannot say they were deceived, and therefore they ought not to be heard against the deed. The deed, it is admitted, passes the legal title to the voluntary donee, and the donor cannot directly revoke it; but if he may sell to a person with notice, or subject the property to the claim of a future creditor with notice, he is allowed to do *per obliquum*, that which he cannot do *per directum*, and that is contrary to a maxim of the law. A title by voluntary gift, when untainted with fraud, is as perfect as a title for valuable consideration, and to allow a subsequent purchaser or creditor, with notice of such title, to deprive the voluntary donee of it, is a violation of common justice, and a violation of the common maxim, *nullus commodum capere potest de injuria sua propria*.(*a*)

§ 362. We have been treating of but one badge of fraud viz: retention of possession; for it was that alone which distinguished the creation of a springing interest in chattels personal, from the creation of a present interest with a delivery of the property. Where it is clear, therefore, that a springing interest is not void by reason of the retention of the possession, the question whether it is otherwise fraudulent depends for determination upon the same principles precisely, which are applicable to the determination of a like question in regard to a present interest.

§ 362*a*. But the general proposition is, that springing interests in chattels personal may be created by deed or will, but not by parol, except by way of trust. When created by deed, to

(*a*) But see the cases—Adams v. Broughton, 13 Ala. 731; Bohn v. Headley, 7 Har. & Johns. 257; Hope v. Hutchins, 9 Gill & John. 77; and other cases cited in Adams v. Broughton.

take effect after the donor's death, they are sometimes called remainders; but they seem to be strictly springing interests, as distinguished from *quasi* remainders.[1]

§ 363. It is sometimes a question, whether an instrument creating an interest in chattels to take effect in possession at the death of the donor or grantor, is a deed or a will. The rule is, that if the instrument be intended to operate as a deed, it shall so operate, if that operation can be allowed consistently with the rules of law, and if it cannot operate as a deed, it may then be allowed to operate as a will, though not so intended; provided it was the intention of the party that it should operate after his death.[2] But the converse of the latter part of the rule is not true: "for," as said in Dawson v. Dawson, "what was expressly intended to have a testamentary effect, shall not lose its ambulatory and revocable character, and acquire a present energy, under any circumstances; since that would serve to rob the disposer of his rightful control, and must, therefore, necessarily be against his intentions."[3] *Prima facie* such an instrument is a will.[4]

§ 364. We have in other places said sufficient, perhaps, in regard to the elements of a springing interest, though a remark here in regard to taking by purchase may not be amiss. If the limitation be invalid for any cause, of course, it cannot be taken by purchase; but the words are used to show that if the gift be precisely that which the law gives—or if it be a part of what the law gives, and the law gives the residue, the taking is by

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[1]For cases of such interests created by deed, see Banks's Adm'r v. Marksberry, 3 Littell 275; Horn et al v. Gartman, 1 Florida, 63; Bohn v. Headley, 7 H. & J. 257; Hope v. Hutchins, 9 G. & J. 77; Adams v. Broughton, 13 Ala. 731, &c.

[2]Horn's ex'rs v. Gartman, 1 Florida, 63; Masterman v. Maberly, 2 Haggard, 235.

[3]Rice's Eq. Rep. 260.

[4]Pitts v. Mangham, 2 Bailey, 588.

representation and not by purchase. The question may arise under deeds or wills. The maxim in such cases is: *Fortior et potentior est dispositio legis quam hominis.* Thus, if A bequeath his personalty to those who are entitled under the statute of distributions generally, and not specifically, they take by representation, and not under the testament. And so it is if the gift be of a future vested interest, and there is no effective provision preventing the vesting of the residue.

§ 365. This is not an immaterial matter; for suppose a testator bequeath his whole estate to a daughter, an only child, after the death of her present husband, and make no other disposition in regard to it, it seems clear that the whole property would vest in her presently, and the husband would have the right to reduce it to possession—subject, of course, to previous administration. The principle was involved in Magruder and Nichols v. Stewart's adm'rs;[1] but the court seem to have gotten among the doctrines of *merger* and *remainder*, and thus to have overlooked the principle of the case. The facts of that case were, that Brocus made a will in which he declared: "I give and bequeath to my only daughter, Ann, so long as she may live, for the support of herself and children, the plantation whereon I now live, with negroes, Pitcher, Jimbo, Charlotte, Mary, &c., and when it may please the Almighty that her dissolution shall take place, I desire that the before mentioned seven negroes, &c., shall revert to gross estate and be disposed of as hereinafter set forth." No other disposition of the property was "set forth" in the will. The court, however, held that Ann did not become the absolute owner of the negroes, the only part of the property in controversy.

§ 366. When these springing interests are to arise at a future time out of an interest in personalty, or realty, then we have

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[1] 4 How. (Mississippi) 205.

the same question which we have had in other connections, viz: whether the taking effect of the interest out of which the interest is to spring is a condition precedent to its springing.

Thus, in Holmes v. Cradock, there was a gift upon trust to pay to the testator's son a residue of profits of freehold, copyhold, and leasehold estates, during the life of his mother, and if the son should die in the lifetime of his mother, without leaving a widow or child, then to his mother for life, and subject to the trusts of the will, in trust for the son, his heirs and assigns forever, chargeable with the legacies thereinafter given; and it was further provided, that if the son should die leaving his mother, and without leaving a widow or any child, then after his death and his mother's, certain legacies were to be paid to certain persons. The testator died, the mother died, and then the son, without leaving a widow or child; and the question was, whether in the events which had happened, the legacies were payable. The Master of the Rolls said: I am afraid I must decide against the legatee. I am perfectly satisfied as to the intention; but it is not sufficiently expressed to enable me to execute it. The will requires to be very minutely considered. It must be observed, that the testator gives the rents and profits to his son, during the life of the mother. The question is, whether these are legacies at all events to be paid upon the son's dying without a wife or child, or only upon that contingency happening in his mother's life. One cannot help wishing and straining as far as one can, to support what must be supposed to be the intention; but it is impossible for the court to indulge speculations against the heir, unless it is manifest that the testator intended that the legacies should be raised in the event that has happened. It has been determined, that conditional limitations shall never be extended beyond what is absolutely necessary from the context of the will, and shall not be supposed to govern any disposition, except that upon which they may naturally be supposed to attach.

"Therefore, if a testator says in his will, that if his wife shall be *enciente* at his death, and a son shall be born, he gives to that son, and after his death, over, the condition has been construed only introductory of the gift to that son, if born, and not to govern the limitation over. I have tried to extend that principle to this will. If it had been simply a gift to the son for life, then if he should die before his mother without a wife or child, to her for life, and subject to these trusts to the son in fee chargeable with these legacies, I should have held it an absolute charge at all events upon the reversion, and to be raised, whether he died without a wife or child in the life of his mother or not; but when I read these words, "chargeable with the legacies hereinafter given," I am bound to look, what are those legacies; for he gives no legacies except by reference. Can I reject these words, "leaving my wife," and decide that he must have intended these legacies to be raised at all events, whether the son survived the mother or not? I should, in my opinion, be going much farther than I am warranted, by totally rejecting words, unless they are repugnant to the clear intention manifested in other parts of the will. Nothing is given but a mere contingency upon a particular event; and when one considers what the intention might possibly be, there might be a reason for the intention, that these legacies should not arise but in that event. If the son died leaving a wife or child, even the widow was to have no life estate. It is natural to suppose an intention, that she should have it; but he has thought fit to make her interest in this estate depend entirely upon a circumstance which one would not think ought to govern it. When I see such an intention as that, it is impossible for me to say he might not have the intention, that in that event only these legacies should arise, and in the other the son should have the estate discharged.

"The cases decided govern this. Lord Thurlow, I know, in Doo v. Brabant, gave a strong opinion against my determina-

tion of Calthorpe v. Gough,[1] and rather intimated, that upon the clear intention, he could supply the words that were wanting in the will before him. It went to law; and the court of law made the same answer that I am afraid I must make here. So strong a case as that can hardly be stated. The next case was Denn v. Bagshaw.[2] A stronger could not happen. The court admitted, the intention must have been in favor of the grandson, but felt themselves bound, notwithstanding, to decide against him, under the extraordinary circumstances of that case. To apply the principles of that case to this: I cannot find myself at liberty to reject these words, and if I give any effect to them, these legacies do not arise." And accordingly the bill was dismissed.[3]

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[1] 3 Bro. C. C. 393, in note. [2] 6 Term, 512. [3] 3 Ves. 317.

CHAPTER THE FIFTH.

OF THE DESTRUCTIBILITY, ALIENATION, AND TRANSMISSION OF INTERESTS IN CHATTELS PERSONAL.

§ 367. The only points to be noticed here in regard to interests *in præsenti*, are—1. In regard forfeiture: 2. In regard to merger: 3. Extinguishment: 4. Suspension: 5. In regard to the acts of the executor or administrator when the partial interest is created by will.

§ 368. In regard to forfeiture, it may be said that a partial interest in chattels personal is not forfeited, if the person having such interest make a conveyance purporting to convey the absolute interest in the property.[1] The party to whom the conveyance is made takes such interest only, as the party making the conveyance was entitled to convey; for a maxim of the law is: *Nemo potest plus juris ad alium transferre quam ipse habet.* It is true that, at common law, a conveyance by a tenant for life, or years, of a larger estate in land than he had, if by fine, feoffment, or recovery, worked a forfeiture of his estate; but that doctrine was founded upon feudal reasons, and was not extended to conveyances under the statute of uses, nor to any kind of conveyances of chattels personal.

§ 369. In regard to merger, it seems very clear that, when two vested and concurrent interests in either real or personal property unite in the same person, the party can have but one interest. And so if one having a partial interest acquire

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[1] Lyde et als. v. Taylor et als. 17 Ala. 270; Jones's ex'rs v. Hoskins, 18 Ala. 489.

the residue of the absolute interest, the partial interest ceases to have an independent existence—but that is addition, rather than merger, for the two interests added together make the absolute interest, and therefore there would be as much propriety in saying that a person acquiring an absolute interest in the first instance had a partial interest, as in saying so in the other case. *Omne majus in se continet minus.* It is doubtless true, that a party having a prior interest may surrender his interest to one having an immediate subsequent vested interest, so that it may become merged in the subsequent interest; but then there must be an intention to give it that effect, otherwise the subsequent party will be entitled by accession. Thus, if there be a limitation to A for life, remainder to B for life, and A surrender to B, then if the intention be that B shall merely come into the possession of his interest, and that A's shall be extinct, it would have that effect; but if no such intention appeared, B would be entitled for the life of the survivor.

The case of Moye *et als.* v. ———, was detinue for a negro. A gave, by will, several negroes to B for his life, and then to the daughters of B. One of the daughters married, and B sent the negro in question to live with her. His other daughters also married, and he sent some of the negroes to live with each one of them. The husband of the daughter first married, died; then B died, and a division took place under the will, leaving out the negro in question. Taylor, J.: "All the daughters were entitled, in common, to the remainder of this negro. B could only pass his interest for life to his son-in-law, not that of his daughter. Neither could there be any merger; for the estate in remainder was not correspondent to the estate for life—this latter belonging to the son-in-law, the former to *all* the daughters. Neither did his wife's share in the remainder vest in the son-in-law who died; for a husband is not entitled to the remainder of his wife. Had there been a drowning of the life estate, the husband of the deceased daughter would have been

entitled to her share, and the person claiming under him tenant in common with the plaintiff, and could not have been sued by them in this action.[1]

Subject to what has been said, we cannot but incline strongly to the opinion that the docerine of merger is not applicable to interests in chattels personal.[2] It seems, at least, to be settled, that merger is not favored in Equity even in regard to real estate, except to promote the intention of the parties. It is said, indeed, that mergers are odious in Equity, and never allowed, unless for special reasons.[3] Several reasons are suggested for the doctrine of merger: one is the maxim, *nemo potest esse dominus et tenens;* another is that it was introduced for the purpose of deciding on the right between the heirs and the executors of a deceased tenant for years who was the owner of several estates, one for years, the other in fee. But whatever was the true reason, it was a doctrine of real property, and its extension to chattels personal, except so far as above stated, is not required, whilst on the other hand such extension would work nothing but injustice. And here we might, with Sir Henry Hobart, "exceedingly commend the Judges that are curious and almost subtile, *astuti*, (which is the word used in the Proberbs of Solomon in a good sense, when it is to a good end) to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury which, by rigid rules, might be wrought out of the act."[4]

§ 370. In regard to entinguishment: It is defined to be the

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[1] 2 Haywood, 186.

[2] But see Magruder & Nichols v. Stewart's Adm'rs, 4 How. (Miss.) 211.

[3] Preston on Merger, (558) Hopkins v. Hopkins, 1 Atk. 592; Philips v. Philips, 1 P. W. (41); see Richards v. Ayres, 1 Watts & Serg. 485; Lockwood v. Sturdevant, 6 Con. Rep. 383; Gardner v. Astor, 3 Johns. Ch. R. 53.

[4] Clanrickard *et ux.* v. Sidney, Hobart. 277*b*.

annihilation of a collateral thing or subject in the subject itself, out of which it is derived.[1] This doctrine is applicable to chattels personal; but of course a Court of Equity would never allow it to take place to the detriment of any one having a substantive, and not a mere derivative right to such collateral thing. Thus, if a legacy be charged on land, or on chattels personal, and the legatee afterwards become owner of such land or chattels personal, the legacy, of course, is extinguished. But if the legacy were given to A for the support of himself and of his children, a Court of Equity would hold the trust in favor of the children to be still subsisting. The principle is laid down in Pulteney v. Darlington, where the Lord Chancellor said: If A. B. has 20,000*l.* to be laid out in land for his use, he has nobody to sue; the right and the thing centering in one person, the action is extinguished. This point was much considered in the time of James the First, with respect to the debtor being made executor, and it was determined on the good sense of the case, that the rule did not apply, on account of the rights of the creditors; but if there is no legal or equitable title out against the party who is in possession of the fund, there the rule does apply, and the heir cannot say there was a use for him.[2] Extinguishment, however, cannot take place unless the interest in the subject be as large as the interest in the collateral thing. For, if it be not so large, then it falls under the next head.

§ 371. Suspension is defined to be a partial extinguishment.[3] It depends upon the same principles which govern cases of total extinguishment. If when the *jus in re* and the *jus ad rem* are united in one person, the *jus ad rem*, to borrow a phrase, must be "at home;" so, when the interest in the subject is smaller than the interest in the collateral thing, must the collateral thing be extinguished *pro tanto*.

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[1] Prest. on Mer. (9.)
[2] 1 Bro. Ch. R. (237.)
[3] Preston on Mer. (9.)

§ 372. In regard to the acts of the executor or administrator, when the partial interest is created by will.

Upon the death of a testator, the legal title to his chattels personal vests in his executor, or in his administrator *cum testamento annexo*. The assent of such executor or administrator is necessary to perfect the title of the legatee; except, it is said, in one instance, and that is when the chattel is delivered to the legatee by the testator in his life-time; and even then the executor or administrator may recover it, if it be necessary to the settlement of the estate. The contrary doctrine, however, seems to be the simpler and better one, viz: that the executor or administrator in such case is entitled to the chattel, regardless of the question of assets.

If the legacy be of a specific thing, and it be in pledge at the time, the legatee has a right to call upon the executor or administrator to redeem it, and deliver it to him. Upon the same principle, says Roper, if a horse were specifically given, which the executor refused to deliver, lest there should be a deficiency of assets, and having used and worked the horse a considerable time, he afterwards offered to deliver him to the legatee; the latter may insist upon the *value*. Or, if the horse had been unnecessarily sold, and the proceeds applied in payment of debts, the legatee would be entitled to the value of the animal, with interest from the moment it was so disposed of.[1] The rule, indeed, is, that if the assets do not want the specific legacy, the legatee is entitled to it, and if it be detained and be injured, the legatee is entitled to the value.[2]

If the chattel specifically bequeathed for life, or other limited period, be of such nature as not to admit of adequate compensation, as a family picture, a Court of Equity upon its every day principles would be compelled to interpose by injunction to prevent an unnecessary disposition of it.[3]

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[1] Rep. Leg. 230. [2] 4 Ves. (567.) [3] See 1 Rop. Leg. 231.

§ 373. In regard to the alienation of partial interests, there seems to be scarcely any thing worthy of particular notice, since the right of alienation and the exercise of it are governed by the same principles which govern the alienation of absolute interests.

§ 374. Every partial interest in chattels is not only liable to voluntary alienation, but it is also liable to alienation *in invitum*. Thus, in Dean v. Whitaker *et al.*, sheriffs of Middlesex, it was held that, if a party has goods on hire for a term, and the sheriff seizes them under an execution against such party, the owner of the goods may maintain an action on the case against the sheriff, if the sheriff sells the entire property of such goods; but to support the action, he must show that he apprised the sheriff that the goods were lent for a term only, in order that the sheriff mignt know that he had only a right to sell the qualified property that the hirer had in the goods. Gurney contended that the sheriff ought to have seized them in that special way. Abbot, C. J.—No. *Prima facie* the sheriff had a right to seize the whole of the goods entirely, as they ostensibly belonged to Greathead, (the defendant in the execution.)

A non-suit was taken, and upon a motion in Bank to set it aside, Bayley, J., said: You should have informed the sheriff of the nature of your interest; then he might have sold Greathead's interest only. If the goods were let to Greathead from year to year, the sheriff would be entitled to sell the use of them, for a year. Gurney.—Does your lordship think that was an interest which was seizable? Abbot, C. J.—There can be no doubt of that; but it is very desirable that persons should give their notices correctly.[1]

§ 375. But the purchaser, in such case, would not take a greater interest than the defendant in execution had,[2] unless the

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[1] 1 Carr. & Payne, 347.

[2] McDougal *et als.* v. Armstrong, 6 Hump. 428.

party having the subsequent interest were estopped by some act of his own.

§ 376. In McLaughlin's Adm'rs v. Daniel, it is laid down that the purchaser of property sold under execution has a right, in Equity—where the property is recovered from him or his vendee by virtue of a superior title—to be substituted for the creditor, and to have the amount of his purchase money refunded to him by the defendant in the execution, or—where the execution was against administrators—out of the assets of the intestate. And his rights, in this respect, are not affected by his knowing, at the time of the purchase, that the property sold belonged to a stranger, and was not subject to the execution. And it was also laid down that it is unnecessary for the purchaser in such case to show that he has reimbursed his vendee, to whom he alone, and not the defendant in execution, is liable.[1]

§ 377. The doctrine of election demands a notice here, since that seems to be an equitable mode of alienation, and is as applicable to partial as it is to absolute interests in chattels personal. A case of election may arise under a deed, as well as under a will.[2]

§ 378. The general doctrine is, "that it is sufficient to raise a case of election in Equity, that the testator does dispose of property, which is not his own, without any inquiry, whether he did so knowing it not to be his own, or whether he did so under the erroneous supposition that it was his own. If the property was known not to be his own, it would be a clear case of election. If it was supposed erroneously to be his own, still there is no certainty that his intention to devise it would have been changed by the mere knowledge of the true state of the title; and the court will not speculate upon it."[3]

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[1] 8 Dana, 182; see also Price et als. v. Boyd et als. 1 Dana, 436, and cases cited. [2] Freke v. Lord Barrington, 3 Bro. C. C. 285 & n.

[3] 2 Story's Eq. § 1093.

§ 379. A party cannot be put to his election, unless there is a clear intention of the donor that he should not enjoy his own property, and also the property given to him. Hence it is, that a general legatee cannot be put to his election, for it cannot appear from a general gift that a specific thing was intended to pass.[1]

§ 380. A case might arise, however, in which even such a legatee would be put to his election, as a gift "to A of all the residue of property which I have possession of, and which I claim," would be as strong as a specific bequest of a thing, which the testator claimed and possessed.

§ 381. The courts have differed in regard to the admissibility of evidence, under a general gift, to show that the donor intended a particular thing to pass. In Blake v. Bunbury,[2] Lord Commissioner Eyre said, "that putting devisees under a will to an election is a strong operation of a Court of Equity, and that the intent of the testator to dispose of that which is not his ought to appear upon the will, with such explanation, however, of the *prima facie* appearance as the law admits, and that it ought to appear by declaration plain or necessary conclusion from the circumstances; and no man ought, under pretence of this rule, to be spelt or conjectured out of his property." In Druce v. Denison, however, a statement of property, written by the testator, and his books and accounts, were admitted as evidence that he considered property his own, though not strictly his; and in Pulteney v. Lord Darlington, evidence was also admitted to show that the property not belonging to the donor was included in a general gift.[3] In the second case last above cited, the Lord Chancellor said that he made the decision, bowing to

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[1] Forrester v. Cotton, 1 Eden (532); Crostwaight et als. v. Hutchinson et als, 2 Bibb, 407; McGinnis et al. v. McGinnis, 1 Kelly, 496.

[2] 1 Ves. 523; 4 Bro Ch. Rep. 24.

[3] 6 Ves. (397.)

authorities, rather than being satisfied upon the rules of evidence as they were formerly understood. The case of Mann v. Mann's Ex'rs[1] seems also to be against the admissibility; as, indeed, does the general rule itself. In Stratton v. Best, John Light suffered a recovery of the whole of the manor of B, though he was entitled only to a part of it; afterwards he made a will, giving all his real and personal estate in general terms, and the question was whether, as the testator supposed himself entitled to the whole manor which was proved by evidence, that was sufficient to make a case of election. The Lord Chancellor said: But to do this I must say, that evidence, *dehors* the will, of testator's opinion at any time may be produced; and I do not think that is the law of the court. All the argument in Noys v. Mordaunt, and the whole suit of cases upon this subject, have been turned upon the expressions of the will. If I was to receive evidence of the testator's fancy, it would introduce a very desperate rule of property in this court."[2]

§ 382. Hence it is, also, that if a donor has an interest in the chattel, it will be presumed that he intended to give no more than his interest, unless the terms of the gift are so strong that the presumption cannot arise under them.

§ 383. Nor can a party be put to election if he had no interest vested or contingent in the thing, but acquired an interest subsequent to the gift.[3]

§ 384. It is said that a *feme covert*, an infant, or a lunatic, will not be bound by an election.[4] The case of Frank v. Frank[5] is cited as authority for the positon. In that case, Edward

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[1] 1 Johns. Ch. Rep. 231; McGinnis v. McGinnis, 1 Kelly, 496; *contra* Haydon v. Ewing's Ex'rs, 1 B. Monroe, 113; so seems 2 Bibb, 407.

[2] 1 Ves. 284.

[3] Crosbie v. Murray, 1 Ves. (561.)

[4] 2 Story's Eq. § 1097.

[5] 3 My. & Cr. 171.

Frank—many years after his marriage—executed a deed, in pursuance of a power, by which he appointed 400*l.* to be raised and paid after his decease, to his wife, for her life, with the usual powers of distress and entry in case of non-payment, and such annuity to be for her jointure, and in lieu of dower. The case was decided upon the statute of 27 H. 8, c. 10, by which it was provided, "that in case of a jointure made after marriage, the wife, if she outlive her husband, shall be at liberty, after the death of her husband, to refuse to accept the lands given her in jointure." And the Lord Chancellor said, "that the question was never put to Mrs. Frank in the shape of election at all." Mr. Cook, who argued for the plaintiff, said:—"My proposition is, that, in this court, a married woman is competent to make such an election, and will be bound by it, wherever the relative values of the two interests appear to be uncertain, and it is or may be for her advantage to exercise her option. Thus, in Ardesoife v. Bennett,[1] a *feme covert* was held to have elected, by her acts, to take under a will, in opposition to the interest she acquired as the testator's heiress at law; and that was a much weaker case, for no formal consent was ever given. So in Lady Cavan v. Pulteney,[2] Mrs. Pulteney was directed, in her husband's lifetime, to make her election to take, either under the will of Sir W. Pulteney, or under the will of General Pulteney; and if she should elect to take an estate tail under the former, then it was declared that she should not be entitled to any estate under the latter; and it was subsequently held that certain proposals laid by her before the Master amounted to an election to take under the will of Sir W. Pulteney.[3] In Wilson v. Lord Townshend,[4] it was decided that a *feme covert* was bound to elect between a life annuity given by will, to her separate use, charged upon a devised estate, and a title paramount to a part of the same estate; and it was there laid down

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[1] 2 Dick. 463. [2] 2 Ves. 544. [3] 3 Ves. 384. [4] 2 Ves. (693).

by Lord Loughborough, referring with approbation to the language of Chief Justice DeGrey, in Lord Darlington v. Pulteney, that, "election applies to interests of married women, interests immediate, remote, contingent, of value, and not of value." The same doctrine is recognized in Vane v. Lord Dungannon.[1]

Mr. Wigram, in reply, said: In all the cases referred to by Mr. Cooke, the question was ripe for election; for both the interests had accrued in possession, and it was necessary, for the sake of third parties interested adversely, that the *feme covert* should then exercise her option. The present, however, was not a case of election between jointure and dower; but between jointure, which is a provision which is to arise after the husband's decease, and an allowance for maintenance during his lifetime. The law on this subject is ably discussed by Mr Roper.[2]

In Lady Cavan v. Pulteney,[3] the Lord Chancellor quotes, and decides in accordance with, the language of Chief Justice DeGrey, "her being a *feme covert* has no effect; her disability is not like that of an infant."

§ 385. It is very clear that a married woman cannot, in such case, take the chattels given to her, and at the same time keep her own, that has by the same instrument been given to another person. In Wilson v. Lord Townshend, it is said: "If a specific thing belonging to one of the legatees is by the will given to another person, the legatee cannot hold both. He must make himself competent to take the legacy, by giving up that specific thing. Therefore the court says, there shall be an election; and gives an opportunity of electing; and will not easily hold the election concluded. But if the party is under restraint,

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[1] 2 Scho. & Lef. 118.
[2] 1 Roper Hus. & Wife, (by Jacob) 348.
[3] 2 Ves. 560.

and cannot accomplish that, it is the misfortune of the party; but the consequence is, that while he continues in that situation, his claim must be barred; for it is directly contrary to the intention and distribution of the property. That is in point of law implied."[1] If a married woman cannot elect, she cannot hold the legacy, and also such property of hers as has been given away, for a Court of Equity will lay hold of the property given to her, as it would if it were given to a person not under disability, and out of it make satisfaction to the disappointed legatee.[2] This is the rule under a will, and also under deeds, which are not the result of contract—as marriage settlements. But under marriage settlements, and other like deeds, the rule is not compensation, but forfeiture on the part of the donee bound to elect.[3]

§ 386. It being established, then, that married women can elect, the question is, How must they make their election? There seems to be no difference between a *feme covert* and a *feme sole* in this respect, for it does not appear that any private examination is required by the court; and though there was a reference in one case to a Master to inquire which interest would be most beneficial, yet the Lord Chancellor afterwards said that he laid no stress upon the report of the Master.[4]

§ 387. The question of election cannot arise under a gift to married woman so as to affect her chattels personal, unless they be such as she has to her separate use, or such as the husband has not reduced into possession. If the chattels are present interests which the husband has not reduced into possession, but which he has a right to reduce into possession, then the right of election would be in him alone. If the chattels are settled to

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[1] 2 Ves. 697. [2] Lord Darlington v. Pulteney, 3 Ves. 384.

[3] Green v. Green, 2 Mer. 94; 19 Ves. 666.

[4] Lady Cavan v. Pulteney, 3 Ves. (386.)

her separate use, then she is *quoad* those chattels a *feme sole* in a court of equity. We may fall back, therefore, upon the doctrine of that court in regard to the capacities of a married woman to control and dispose of her separate estate, and that settles the question, as we have stated, that there is no difference in regard to election between a *feme covert* and a *feme sole*, so far as we are at present concerned.

§ 388. If a person capable of electing choose "without a clear knowledge of both funds,"[1] the election will not prevent such person from electing the other fund afterwards, unless another person has been placed in a condition by reason of the choice, from which he cannot be restored to the situation in which he was; or unless the lapse of time has been so great, that a Court of Equity will not go into the inquiry.[2]

§ 389. It may be well to say, that the situation of the other party, at the time of the gift, is to have the chattels given to him, or to have the other interest sequestered *quosque* till satisfaction be made to him.

§ 390. Whether a party has elected, seems to be a question of fact in each particular case; except, of course, in those cases in which the court presumes an election from the situation of the other party, or from the lapse of time.

In Butricke v. Broadhurst, plaintiff's husband by his will—of which she was sole executrix—gave all his estates, both real and personal, to trustees, upon trust, to permit her to receive the rents and profits for life, provided she did not marry again. She proved the will. The trustees never acted; and she received the rents and profits for five years after his death: and then filed a bill claiming to elect to take an interest in a trust fund of £2000, under her marriage settlement, instead of the estate

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[1] Whistler v. Webster, 2 Ves. 371; Wake v. Wake, 1 Ves. (337.)
[2] 2 Story's Eq. § 1097.

under the will. The Solicitor General, who argued in behalf of the plaintiff, cited Lord Beaulieu v. Lord Cardigan, and the Lord Chancellor said: I thought Lord Northington tolerably well founded in that case; but it was determined otherwise in the House of Lords, who decided that the right of election lasted fifty years. But all that was determined by it was, that, under the circumstances, it may last till the whole affair is wound up, and the trusts executed. I agree, now, that if she had filed a bill, stating, that she did not know the state of the fund, and desiring to have the debts and legacies paid, and the property cleared, that she might elect to advantage, she might have done so. So, if the other parties had filed a bill, it could only have been to force her to make her election. But here having taken possession under the will, and the estate being a free fund from the beginning, I cannot think of a principle upon which the court can say she is now competent to elect. The bill must be dismissed; but I wish it to be understood, that it turns upon the particular circumstance, that the bill was filed without any ground; and no suggestion that the real or personal estate is in such a situation as to render it doubtful what the result would be. She consequently has laid no ground that entitles her to elect after enjoyment for five years."[1] Brown, in his report of the case, states that the Lord Chancellor said: That no lien could be drawn from mere length of time; but it must be from circumstances shewing the intent of the party; that he should think the receiving of the rents, much less the personalty officially, could not bind; but under all the circumstances of the present case, the plaintiff filing her bill for a transfer of the stocks without shewing any ground, must be presumed to have made her election.[2]

In Wake v. Wake, it was held that the receipt of a legacy

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[1] 1 Ves. 171.

[2] 3 Bro. Ch. Rep. 90.

and an annuity under a will for three years, did not prevent the legatee from electing, it being presumed that she did not act with a full knowledge.[1]

§ 391. It may be mentioned in this connection, that it is generally held that a married woman may alien a partial interest, as well as a general interest—given to her separate use—unless she is restrained by the instrument creating it; but in South Carolina, it is held that she cannot charge, encumber, or alien her separate property, except so far as she has power by the instrument creating such estate,[2] and that seems to be more consistent with the idea upon which a Court of Equity interposes to sustain such an interest.

§ 392. In regard to the transmission of partial interests *in præsenti*, it may be said that if the interest does not extend beyond the life of the party entitled to the interest, there cannot, of course, be any transmission, since there is nothing to transmit. If, however, the interest does extend beyond the life of the party, then it is transmitted precisely in the same manner as an absolute interest. Thus, if the interest be for twenty years, and the party die after ten years have expired, the remaining years pass to his representatives.

§ 393. If, at common law, land had been conveyed to A for the life of B, and A had died in the lifetime of B, the heir of A was not entitled as heir, because the estate was not of inheritance; neither was the administrator entitled, because the interest was not personalty. But under such a gift of chattels personal, the personal representatives of A would be entitled to the unexpired interest.

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[1] 1 Ves. 335. For another case, see the Earl of Northumberland v. The Marquis of Granby, 1 Eden, 489.

[2] Reid v. Lamar, 1 Strobh. Eq. 27.

§ 394. We come now to the consideration of the destructibility of future interests in chattels personal; but having incidentally, in other places, said nearly all that need be said upon that subject, we need do little more here than assert the general rule to be that they are as indestructible as executory devises of real property. The principles, which have been discussed in their application to partial interests *in præsenti*, seem to furnish an easy solution to like questions arising under this head. Thus, if a horse be given to A for life, remainder to B, and the executor sell the horse unnecessarily, B will be entitled to his value after the death of A. So, if a family picture be given to A for life, remainder to B, a Court of Equity would interpose by injunction in favor of B, in the same case that it would interpose upon the prayer of A. Nor would it make any difference that the interest of B was contingent, instead of vested, nor that it was a conditional limitation, or a springing interest, instead of a *quasi* remainder. For in the first case, B would be entitled to the value of the horse at the time when he would have been entitled to the horse; and in the second, a Court of Equity would be equally bound to protect any kind of future interests in chattels personal.

§ 395. There are two points, however, that require investigation here: 1. The destruction of future interests by estoppel *in pais*: and 2. The barring of them by the statute of limitations.

§ 396. First, in regard to the estoppel, the general rule is, that whenever a person makes an admission which induces another to act, the person who makes the admission is bound by it *quoad* that act. It matters not whether the admission be made by words, in writing, or by action merely.

In Cox v. Buck, a testator bequeathed his negroes to his sons, Peter and Harmon, to be equally divided between them at a time appointed, with the following limitation over: "And if either of

my two sons should die without lawful issue, that my other son shall have his part of my property." Jim and Joe, two of the negroes, had been allotted to Harmon, and had been sold by the sheriff, by virtue of executions against him. Harmon died without leaving issue, and an action of trover was brought by Peter against the purchaser. Peter had purchased Jim at the sale, and had sold him to Buck; the plaintiff was therefore concluded as to Jim. The controversy was in regard to Joe, and one of the assignments of error was, in effect, that, even if the plaintiff, by his representations, acts, or conduct, did mislead the defendant respecting the title to the slave, and did encourage the defendant to purchase, by inducing the belief that he would acquire an absolute property, yet the plaintiff cannot be estopped from recovering unless there be proof of positive fraud. Another assignment was that the defendant must "prove some positive act of the plaintiff, which amounted to a relinquishment of his contingent interest in the negro, at the sale."

Frost, J. in delivering the opinion of the court, said: The principle on which the plaintiff is held bound by his acts, conduct, or representations, in reference to the subject of the sale, is not derived from the equity doctrine, which has been relied on in the argument, though it does receive support and illustration from that quarter. It is of common law origin, and results from the rule that parties to a suit are bound by admissions, against their interest, respecting the subject of the action. Such admissions, *prima facie* conclusive against the party who makes them, may be explained or qualified; but if evidence for this purpose is introduced, the whole is submitted to the jury, and the liability of the party decided, by their verdict, as a question of evidence.

"Such admissions may be proved by the acts and conduct of the parties, as well as by their express declarations. If the plaintiff had, in this case, declared to the defendant, that Joe

was the absolute property of Harmon Cox; or that he would not assert his contingent title, thereby admitting the validity of the defendant's title in case he purchased, it would be conceded the plaintiff could not recover. But a party may as effectually make an admission by his acts and conduct, as by his expressions; and as he may be charged by his express declarations by any one who heard them, so he may be charged with admissions inferred from acts and conduct, by any who witnessed or observed them. A tenant, by his entry, is estopped to deny the title of his landlord; one who takes possession of the effects of a deceased person shall not be allowed to deny he is executor. A person shall be charged as partner who permits his name to be used in the firm; and a man shall be liable for the contracts of a woman whom he holds out to the community as his wife.

"Many cases, at common law, can be cited to show that a party who has, expressly or by his conduct, waived his claim or title to property, shall be estopped from asserting it against a party who has acted on the faith of such admission. A constable came to levy on one Benedict's property, and Stephens pointed out lumber, one fifth of which, he said, belonged to Benedict; whereupon the constable levied and sold, and Baird purchased. It was held Baird might recover the one-fifth in trover against Stephens, though, in fact, the whole lumber belonged to Stephens.[1] When the assignee of a chose in action purchases it, after a promise made in his hearing, before the assignment by the debtor to the assignor, that he would pay it, the debtor shall be estopped to set up any defence against the assignee. A surveyor running land, and bounding it on one of the lines of a tract of his own, admits that the land was vacant up to his line at the time of the survey; and having made a survey of the adjoining land for the plaintiff, he shall not afterwards be permitted to

[1] Stephens v. Baird, 9 Cow. 274.

extend his lines so as to include a part of the tract surveyed for the plaintiff, though the plaintiff had not obtained a grant.[1]

"In Heane v. Rogers,[2] Bayley, J., delivering the opinion of the court, says, "there is no doubt the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence against him; but he is not estopped or concluded by them, unless another person has been induced by them to alter his condition, and in that case the party is estopped from disputing their truth with respect to that person, (and those claiming under him,) and that transaction." In Pickard v. Spear,[3] the law was declared in nearly the same terms by Denman, C. J.

"The cases which have been adduced, and many analogous cases which might be cited, did not proceed on the ground of fraud, except perhaps the case from Bay; and in none was evidence of positive fraud required to charge a party with his admissions. By positive fraud, must be understood a wilful and corrupt purpose, and intention to deceive and injure. Fraud, in that degree, can seldom be proved; and if relief were confined to such cases, it would be too limited for any practical good. The law enjoins sincerity and candor in dealing. In giving practical effect to this injunction, the common law, as all human law, must be imperfect, for the sphere of morality is more extensive than the limits of civil jurisdiction. But to every extent, compatible with the interests and convenience of society, it enforces the duty of good faith. The law arrests not only bare-faced fraud, pursuing its object without disguise, but detects its agency in the effect, though the transaction wears an honest aspect. When wrong and injustice would be the result, without curious inquiry into the motives or direct imputation of an evil purpose, the transaction is treated as if it were fraudulent. The mis-

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[1] Tennant v. Terry, 1 Bay, 239.
[2] 9 Barn. & Cress. 577.
[3] 1 Ad. & Ell. 469.

chief is prevented or repaired without inquiring whether it was designed."[1]

§ 397. The court, though unanimous in regard to the law, were equally divided on the question whether the evidence was sufficient to sustain the verdict, and they decided therefore to order a new trial.

§ 398. The opinion in this case deserves commendation, not only for the exposition of the law applicable to the facts, but also for the high tone of its morality; but it may be doubted whether the principle involved "results from the rule, that parties to a suit are bound by admissions against their interest respecting the subject of the action." It seems rather to be nothing more than an application of that broad principle, which the common law has adopted as a maxim: *Nullus commodum capere potest de injuria sua propria.*

§ 399. The principle is recognised in Bird v. Benton, in which it was held, that a sale or pledge of property by one who has no title, in the presence of the owner, without objection on his part, estops the latter from impeaching the transaction, on the ground of his better title.[2]

In West v. Tilghman,[3] however, the authority of that case is denied, and it is said to have been overruled by Governor v. Freeman,[4] and Lentz v. Chambers.[5] But, without going into the subsequent decisions, we may hold on to the better doctrine of the old case, and we may assent to the position in Governor v. Freeman, that though a person who stands by and sees his property sold without making objection is precluded from setting up his title, yet his silence cannot be construed to be a tortious and illegal act as relating to the rights of third and absent parties.

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[1] 3 Strobh. (Law) Rep. 367. [2] 2 Dev. (Law) 179.
[3] 9 Iredell, 165. [4] 4 Dev. 472. [5] 5 Iredell, 587.

In Copeland v. Copeland, the court, after laying down the general rule, and citing many cases, say: In this position thus established, it must be observed, that several things are essential to be made out, in order to the operation of the rule; the first is, that the act or declaration of the person must be wilful, that is, with knowledge of the facts upon which any right he may have must depend, or with an intention to deceive the other party; he must, at least, it would seem, be aware that he is giving countenance to the alteration of the conduct of the other, whereby he will be injured, if the representation be untrue; and the other must appear to have changed his position by reason of such inducement."[1]

400. But this does not seem to be altogether satisfactory, for nothing more seems to be necessary than—1. That the person standing by has legal capacity to act; 2. That he knows he has a right, or knows the facts which give him a right which is tantamount,[2] since *ignorantia juris neminem excusat;* 3. That the purchaser is thereby deceived. If, therefore, B know the facts and A say that he has no title, the mistake or wilful misrepresentation of the law by A will not estop him,[3] unless it be fraud; that is, unless B had a right to rely upon his statement.

§ 401. It may, at first, seem to be a qualification of the general rule that a person will not be estopped by reason of misrepresentation or concealment of his title from setting it up against a mere volunteer; but it is in fact no qualification, since then the concealment or misrepresentation is but *damnum absque injuria.*[4]

§ 402. The law, however, will not permit an estoppel to be set up to defeat it. If, therefore, the law requires the legal ti-

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[1]28 Maine, 540. [2]Ib. 540.

[3]Brewster v. Striker, 2 Comstock, 19.

[4]See Jones v. Sasser, 1 Dev. & Bat. 452.

tle to property to be passed by deed, it cannot pass by parol estoppel.[1] In such case, the party deceived may maintain an action on the case and recover damages, if he had a right to rely upon the conduct or representations of the other party; or he may complain in Equity, which will treat the guilty party as a trustee, and compel him to convey the interest which he ought to have disclosed.[2]

§ 403. These estoppels bind all parties and privies, and unlike technical estoppels, need not be pleaded. But a party may be estopped in one capacity and not in another. Thus, a party who would be estopped as an administrator, would not be estopped as guardian.[3]

§ 404. In regard to the statute of limitations, the general rule is, that it does not commence running until the time when the right to the possession of the property arrives.[4] It seems, however, to be true that if a future interest in a chattel be given by will, and the title of the executor be barred by the statute of limitations before his assent to the bequest, the title of the party to whom such future interest is given is also forever barred.

The case of Moore v. Barry may be cited with advantage in this place. In that case General Moore loaned a slave to his son-in-law, the defendant, and afterwards bequeathed the slave to the plaintiff. General Moore died in 1822, and Dr. Moore and another person qualified as executors of his will. In June, 1823, the executors demanded the slave of the defendant, who refused to surrender her. The action was commenced in September, 1827, by Dr. Moore, as guardian *ad litem* of the legatee. There was no evidence that the executors had ever as-

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[1] See Ib., Pickard v. Sears *et al.*, 6 Ad. & El. 469; Knight v. Wall, 2 Dev. & Bat. 125; Smith v. Mundy, 18 Ala. 182.

[2] See Jones v. Sasser, 1 Dev. & Bat. 464-5.

[3] Yarbrough v. Harris, 3 Dev. 40.

[4] Davenport v. Prewett's Adm'r, 9 B. Mon. 103.

sented to the legacy; but it was contended for the plaintiff, that such assent was to be implied from the fact, that one of the executors had become guardian *ad litem* of the legatee for the prosecution of the action to recover the slave. And it was urged that the assent whenever given vested the title, by relation, at the time of the testator's death; and the legatee, being an infant, his title was not affected by the statute of limitations. Johnson, J., in delivering the opinion of the court, said: The only question involved in the present motion is, whether the right of the plaintiff to the slave in dispute is protected by the saving in the statute of limitations in favor of infants. The authorities all agree that the assent of the executor is indispensably necessary to give effect to a legacy of chattels, whether it be general or specific.—Co. Lit., 111*a*. Until he does assent, the right of possession necessarily abides in him, and he alone can maintain trover for the wrongful conversion.—Gordon v. Harper, 7 T. R., 11.

"The fact relied upon to show the assent of the executors to the legacy in question, and the only one, is, that Dr. Moore, by whom the plaintiff sues as guardian, is one of the executors; and hence his assent to the legacy is attempted to be inferred. Conceding, for the present, that it furnishes plenary proof of the assent, yet more than four years had elapsed between the convertion of the negro by the defendant, and the time of the assent. The right of the executors was then barred, for the reasons before stated, and all that they could assent to, was the right to bring a barren and unprofitable action.

"It is contended, however, that the legatee derives his right from the will, and not from the assent of the executor; and that upon the assent of the executor the right has relation back to the death of the testator; and hence it is concluded, that the title to the slave in dispute vested in the plaintiff at that time, and that being then, and still, an infant, he is protected by the statute.

"For many purposes, a legacy may well be said to vest in the

legatee by relation back to the death of the testator, although the possession and enjoyment is postponed until the assent of the executor is obtained. He is entitled, for instance, to the profits arising from it, and the executor is accountable to him for his management of it *ad interim;* and so for many other purposes. These are mere equities, and may well exist consistently with the legal rights of the executor. But to suffer it to operate by relation back, as an immediate investiture of the legal estate, is wholly inconsistent with the acknowledged rights of the executor and creditors. That it does not, for the purpose of barring the operation of the statute of limitations, is clearly settled in the case of Wych v. East India Company, 3 P. Wms. 309. There administration of the estate of the plaintiff's father was granted to A, until the plaintiff, then an infant, should arrive at twenty-one years of age, *ad usum et commodum* of the infant. The administrator neglected to sue on a contract, by which the defendants were bound to the intestate; but the son filed his bill against the defendants, within six years after he came of age, to which the statute was pleaded. In sustaining the plea, the Lord Chancellor remarks, that he "could not take away the benefit of the statute from the Company, who were in no fault, since their witnesses may die, and their vouchers be lost." And as to the trust, that was only between the administrator and the infant, and did not affect the Company. And he puts, by way of illustration, the case where there is an executor who neglects to bring his suit within the time prescribed by the statute; and Reg. Lib. B. 1733, fol. 448, is cited for authority, that the residuary legatee would be barred.[1]

§ 405. If the executor assent to the legacy, and the legatee accept it before the statute has barred the right of the executor

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[1] 1 Bailey (Law) 504. See same case for assent of executor, acceptance of legatee—506.

to recover it, then it seems that the statute would not commence running against him until the time for his interest to fall into possession had arrived.

§ 406. We come now to the alienation of future interests in chattels personal.

§ 407. And, first, of those that are vested. Such future interests may be conveyed by deed or will. A parol gift of such an interest would be invalid; but a parol transfer of such an interest, for a valuable consideration, and in compliance with the statute of frauds, would pass the legal title, though a Court of Equity would not enforce such a contract, if it were otherwise unobjectionable; unless the remedy at law were incomplete.[1]

§ 408. In Knight v. Leak, Gaston, J., in delivering the opinion of the court, said: We believe that the rule of law is, that all vested legal interests of the debtor which he himself can legally sell, in things which are themselves liable to be sold under a *fi. fa.*, may also be sold. Thus the goods of a pawner or of a lessor, in the hands of a pawnee or lessee, may be sold by the sheriff, subject to the present right of possession of the pawnee or lessee.—2 Tidd's Prac., 8th edit. 1042,(*a*). Such has been the common practice in our State, and although we are not aware of any of express adjudication affirming it, we have never heard of any judicial disapprobation of it, and we are not at liberty to hold it as against law. How the sheriff is to cause the possessor and temporary owner to produce the property at the day of sale, is an inquiry with which we need not now embarrass ourselves.[2]

§ 409. It seems, however, to be well settled principle that the officer selling any interest in chattels personal must have them

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[1] 2 Story's Eq., § 718. (*a*) (1003.)

[2] 2 Dev. & Bat. 135; Carter v. Spencer, 7 Iredell, 14.

in such a situation that the bidders can see them and have an opportunity of examining their quality and value *at the time of sale.*[1] The locality of the chattels is a question of fact; but whether they are *present* or not, is a question of law.[2] It follows from this necessity imposed upon the officer, that if he can levy and sell a future interest, he has a right to seize the property itself; for, *quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud.*

§ 410. But the general rule is not without qualification; for, as said by the court, in Gift v. Anderson, though it be unquestionable as a general rule, that personal property cannot be sold under process by a sheriff, or other officer, without its actual presence at the time of the sale, yet it is equally true that this restriction is intended for the benefit merely of the owner; and if he agree that it may be done otherwise, he is not injured, and has no cause of complaint.[3] The language of the court seems to be rather too strong in the assertion that the restriction is merely for the benefit of the owner, for there may be other creditors, and the restriction is doubtless for their benefit also;[4] but even in that case the complaint must be theirs, and not the owners, since *volenti non fit injuria.* The plaintiff in the execution himself would also seem to have a right to move that the sale be set aside, if he were not estopped by his consent.

§ 411. In this State, it is held that the purchaser takes a title under such sale, subject to be defeated only by the setting aside of the sale by the court from which the execution issued;[5] but in New York it is held that no title passes in such case.[6] The first seems to be the better doctrine.

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[1] Ainsworth v. Greenlee, 3 Mur. 470; Sheldon v. Loper, 14 Johns. 352; Smith v. Tritt, 1 Dev. & Bat. (Law) 241; McNeely v. Hart, 8 Ired. 492.

[2] McNeely v. Hart, Ib.

[3] 5 Hump. 577.

[4] See Foster v. Mabe, 4 Ala. 406.

[5] Ib.

[6] Sheldon v. Loper, 14 Johns. 352.

411*a*. The rule that a deed shall be construed most strongly against the grantor, is held to be inapplicable to a deed made officially by an officer, because his deed operates not by virtue of ownership, but by virtue of the execution, levy and sale. Therefore nothing can pass except what was subject to the execution—was levied on under it, and was sold under the levy.[1] If there be any case, said the court in Knight v. Leak, calling for the rigorous application of this rule, it is when reversionary interests—rights to future enjoyment—are disposed of by judicial sales. These are not the *usual* subjects of such sales. Their existence, nature, limitations, are not inquired into, unless attention be explicitly called to them. Without a distinct annunciation that such interests are exposed to sale, every one understands that the immediate ownership, limited or absolute, is that for which a price is demanded.[2]

But it does not seem to be satisfactorily settled by authority, that a future vested interest in chattels personal is liable to be levied on and sold under execution at law.

§ 412. The authorities referred to by Tidd do not sustain the position that goods may he sold subject to the right of a lessee, under an execution against the general owner.

§ 413. In Dyer it is said: In trespass, that beasts let for years cannot be taken in execution for a debt of the lessor, upon a recovery against him.—Br. Execution, 107. Unless it be in the case of the King, by Brian.[3] Comyn so lays down the law in his Digest, and cites Dyer as his authority.[4] In a note, however, it is said: But subject to the right of pawnee or lessee, the goods may, it seems, be taken in execution, and Bro. Abr., tit. Ex. pl. 107, is cited for authority.[5] This latter doctrine

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[1] Sheppard v. Simpson, 1 Dev. (Law) 240.

[2] Knight v. Leak, 2 Dev. & Bat. 136. [3] Dy. 67 *b*, note (20.)

[4] Comyn's Dig., tit. Ex. C, 4. [5] Ib. note (*y*.)

is also laid down in Bacon's Abr.,[1] and Strodes v. Caven[2] is there cited by the learned American editor, as an authority in support of the position.

§ 414. In Dargan and Bradford v. Richardson, there was a bequest of chattels personal to the testator's wife for life, remainder to his children. The executor assented to the legacy, and afterwards one of the children assigned his interest. Subsequently, by an agreement between the parties interested, the property was divided, and two negroes, Dinah and Bob, were allotted to John R. Singleton, the party who had previously transferred his interest. An execution against John R. Singleton had been lodged in the sheriff's office in 1828, and immediately after the allotment, it was levied upon Dinah and Bob, and they were sold by virtue of it. The assignees of John R. Singleton brought an action of trover. Butler, J. in delivering the opinion of the court, said: What was John R. Singleton's interest? He had an undivided and indefinite interest in personal chattels of which another had the exclusive right and dominion during life. The question now presents itself: Could this undivided interest in remainder be the subject of levy and sale under a *fi. fa.*, at any time before the date of the plaintiff's assignment? The court is of opinion it could not. In England such an interest would be regarded as nothing more than a trust in the one having the interest for life, for those in remainder. Mrs. Singleton would be regarded as a trustee, with the legal interest in her, holding the undivided interest in her for the benefit of the children. If so, it would be a mere equity which might be assigned, but which could not be levied on and sold under a *fi. fa.* The writ of *fi. fa.* is an execution at common law, directed to the sheriff, commanding him of the goods and chattels of A B, to levy, &c.; the essential words of which are "*quod*

[1] Tit. Ex. C, 4. [2] 3 Watts, 258.

fieri facias de bonis et catallis." To make a levy under such a writ, the sheriff must take into his own proper possession the goods and chattels, otherwise he would have no such title in himself, as to enable him to make a delivery to a purchaser at a public sale. Delivery is essential to perfect the sale of any personal chattel; and it is as much so in the case of a sale by a sheriff as by any one else; and perhaps more so. A *fi. fa.* can have no lien on any interest in personal property, unless it be of such an inforcible character as to authorise the sheriff to make a levy and take the chattel into his possession, with an ability to make sale and delivery of it to a purchaser. These elementary principles are fully sustained, not only by English authorities, but by the adjudications of our own State. In the case of Devon v. Kemp, decided May Term, 1837, Mr. Justice Earle lays down this position: "There can be no lien on a mere right which cannot be levied on and sold." In this case, one Hall rented to Bing a part of a field for one year, reserving to himself one-half of the produce of Bing's field; before the crop was gathered, Hall assigned to plaintiff his interest in Bing's crop: held, that this interest was not the subject of levy and sale, the legal title being in Bing till severance. Before severance, however, the plaintiff took an assignment, which prevailed against the sheriff's claim under a *fi. fa.* lodged before the assignment. This decision is applicable to the case under consideration, in another point of view, which I shall notice presently.

"In the case of Collins v. Montgomery, 2 N. & Mc. 392, it was decided that a sheriff could not sell personal property until it has been reduced into possession; and a sale made by the sheriff, when the property was not present at the sale, was held void; sustaining the position that to perfect such a sale, there must be an actual delivery.

"Apply these principles to the case under consideration. John R. Singleton had no present interest in the property at the time the execution was lodged. He had no immediate dominion over

the negroes; and if he had taken them off and sold them, he would have been a trespasser. And can the sheriff occupy a better position? Singleton had a mere right to the negroes, depending on the death of Mrs. Singleton for its enjoyment and possession. At any time before plaintiff's(*a*) assignment, the tenant for life had the legal estate and exclusive possession. It follows, then, if her right for the term was exclusive, it would have been a trespass for any one to have invaded it by laying hands on the negroes. The sheriff during the time had no right to levy; and of course the execution had no lien.

"But it is said that the lien attached as soon as Mrs. Singleton surrendered her life estate, and upon the severance, by which it was ascertained what was John R. Singleton's interest in the *residuum*. There is no doubt but that, at this time, the lien under the *fi. fa.* could have attached, if Singleton had not been legally divested of his lien before that time.

"But the plaintiffs in this case contend that before this severance, or the surrender of the life estate, John R. Singleton had divested himself of all interest in the negroes in controversy, by his assignment to them; and if so, there was nothing on which the execution could attach. And it seems to me that this is undeniable. For although he had not a perfect legal title at the time, he had an assignable right, which he transferred to the plaintiffs, and which gave them a perfect title as soon as the life estate determined, and when Singleton had a present interest in, and right of possession to, the negroes. This view is fully sustained by the opinion of Mr. Justice Earle, in the case of Devon v. Kemp. It has been decided in this State that an interest in remainder in lands is the subject of levy and sale. That decision proceeds on the ground that a sheriff can only transfer lands by deed; but that he cannot by levy either take possession himself or put a purchaser in possession of lands."[1]

(*a*) Should be *Singleton's*.

[1] Dudley 1 Part 62.

§ 415. The reasoning of this case does not in part, at least, seem to be satisfactory. The fact that the interest in remainder was joint, cannot of course be supposed to have made any difference, since it is every day's practice to sell an undivided present interest under execution. The objection, then, simply was that the interest was not a present interest in possession. It is said, that John R. Singleton's interest was merely an equitable interest; but it seems to be well settled that such an interest is a legal interest, If, however, it were but an equitable interest, the assignment could not have transferred any other than an interest of that kind, except by way of estoppel. If the assignees had but an equitable interest, they could not maintain an action at law. If they resorted to estoppel for a legal title, then it must have passed through the assignor, and there the lien of the execution would have attached to it. It must be confessed, however, that there is much force in the remark that the sheriff cannot in such case occupy a better position than the defendant himself, and that as it would have been a trespass in the defendant in execution to have taken possession of the property, so also must it be a trespass if a sheriff take possession of it. Yet the sheriff cannot sell without the property be present, without, as before said, there be consent; and the conclusion of the court may therefore seem to be correct.

§ 416. There can be no doubt, however, that future vested interests may be subjected to the payment of debts by proceeding in equity, and the same end ought to be attainable at law, if it can be done without subverting principle.

If A and B are joint owners of a chattel, a sheriff, by virtue of an execution against B, may levy upon his interest, and take the whole chattel into his possession, and by virtue of the levy, he may sell the interest of B. That case, however, is not exactly analogous to the one under consideration, for the possession

of A is the possession of B, but the possession of a quasi particular tenant is not the possession of the *quasi* remainder in the same sense.[1] *Sed quaere.*

§ 417. We may postpone the consideration of the doctrine of equity in regard to the alienation of future vested interests, until we come to consider the alienation of future contingent interests. And so also may we postpone until that time the consideration of the alienation of such interests when vested in married women.

§ 418. The doctrine of election is applicable to future vested interests in chattels personal; for there is no difference so far as the principle is concerned between such interests, and present vested interests.

§ 419. The doctrine was applied in the case of Upshaw v. Upshaw *et als.* to a *quasi* remainder. The facts were these: John Hunt, being entitled to the reversion of a number of slaves after the death of his mother, Ann Upshaw, who was still living, made his will on the 28th of December, 1760, which consisted of the following bequest only: "I give and bequeath unto my sister Mary Ann Dillard, and Elizabeth Upshaw, all my negroes after my mother's decease to be equally divided, except one young negro *Cemp* to James Upshaw, to them and their heirs lawfully begotten forever." Elizabeth was, at the time, the wife of William Upshaw, who on the 17th of January, 1761, made his will, whereby he "lent to his said wife, Elizabeth Upshaw, the whole of his estate, both real and personal, during her widowhood, and after her decease, to the heirs of James Upshaw, to be equally divided amongst them," &c., and on the 1st of June, 1761, he annexed a codicil in these words: "N. B. The negroes

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[1] See question discussed by counsel in Leslie's Ex'rs v. Briggs, 5 Leigh 8.

in the possession of Mrs. Ann Upshaw, that *was gave* my wife by her brother, John Hunt, my part I desire may be equally divided amongst my uncle Forest Upshaw's three children at their mother's decease, Leroy, Milley, and John, to them and their heirs forever."

William Upshaw never reduced the negroes in possession, but died soon after the date of his will, leaving Ann Upshaw, who survived him about twenty-five years, and retained possession of the negroes until her death. Elizabeth Upshaw accepted the provision made for her by the will of her husband, and after being in possession of his whole estate for more than twenty years, she gave up part of it to those entitled in remainder in consideration of their enlarging her interest in the residue; and on the death of Ann Upshaw she took possession of a moiety of the slaves which had been bequeathed to her by her brother, John Hunt. Thereupon the children of Forest Upshaw, named in her husband's codicil, filed a bill against her, claiming the said moiety of the negroes, upon the ground, that by taking the property given by her husband's will, and receiving the profits of it for more than twenty-five years, as well as by the contract made with her husband's donees in remainder, she had made her *election* to submit to his will; and so it was held, upon appeal.

Judge Tucker, after discussing the doctrine of election and holding the case before the court to be a case to which the doctrine applied, said: In the case of Whistler v. Webster,[1] it is held, "that a clear knowledge of the funds being requisite to an election, no person shall be bound to elect without such previous knowledge." Many other cases[2] may be cited to the same effect; and the rule appears to me to be so reasonable, just and

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[1] 2 Ves. 371; 2 Fonb. 326 n. *l.*

[2] Wake v. Wake, 1 Ves. 385; Newman v. Newman, 1 Bro. C. Rep. 187; Boynton v. Boynton, ib. 445; Gibbons v. Caunt, 4 Ves. 849; Hindes v. Rose, 3 P. W. 125; Purcy v. Debouverie, ib. 316; Yate v. Moseley, 5 Ves. 480.

consonant with every principle of equity, that I think it ought to be adopted. In the present case, the compromise between the appellee (the widow) and the remaindermen may be considered as some evidence of such knowledge; and the nature of that compromise is such that it would seem that, in making it, she had determined her election. Otherwise, I should have inclined to think she could not have been considered as concluded of her election, until the death of Ann Upshaw put it in her power to ascertain the amount and value both of the property and estate bequeathed to her, and of that bequeathed from her by her husband's will. But taking all the particular circumstances of the case together, I am of opinion that the decree be affirmed, as to this particular point.

Upon this point, Judge Roane said: It is not necessary in this case to enquire into the extent of the rule that a party electing must have a clear knowledge of the situation and amount of the fund elected. In this case the compromise, made with the devisees-over, of the estate devised to the appellant under her husband's will, not only disabled her from electing the *other* interest; (she having thereby conveyed the absolute interest in part thereof to such devisees, and herself acquired the absolute interest in the residue;) but was made after so great a lapse of time, that she must have had a clear and undoubted knowledge of the value and actual situation of both the interests.[1]

§ 420. In regard to the alienation of future contingent interests—Every future contingent interest in chattels personal may be disposed of by will, if it be such an interest as would otherwise pass to the party's personal representatives.[2]

§ 421. It is said that in England: "Executory interests may

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[1] 2 Hen. & Mun. 381.

[2] 2 Fearne's Rem. § 752; Roe *d.* Perry v. Jones *et als.*, 1 H. Black's Rep. 30.

be bound by estoppel, even though merely created by an indenture; but they cannot be transferred by deed. Nor, indeed, can an executory interest, whilst it continues such, be directly, though it may be indirectly, transferred by a fine or recovery." This relates to executory interests in real property, and the distinction seems to be that an indenture never operates otherwise than as an estoppel, whilst a fine, or a recovery wherein the person entitled to the contingent interest comes in as voucher, has a double operation, first as an estoppel, and as an estoppel it runs with the land until the contingency happens, when it feeds upon the estate, and then by a legal metamorphasis, becomes the thing itself upon which it fed.[1]

§ 422. It is a well established rule that an estoppel binds parties and privies only, and not strangers; and that it binds only parties and privies *inter se*, for it must be reciprocal. The legitimate effect of an estoppel by deed seems, therefore, to be to pass the title *quoad* parties and privies and as to them only *inter se*. If, therefore, A by deed transfer a contingent interest to B, and the contingent interest after come into the possession of A, B can recover it, in an action at law, because the deed is evidence of his title, and A is estopped from denying it. But if the property come into the possession of C, then A can recover it at law, from him, because he is a stranger to the estoppel, beyond the operation of which the legal title is in A. It follows also from this, that B could not recover at law from the stranger, because he must show that the legal title is in him, and that he cannot do, since as to the stranger it is in A.

§ 423. These principles apply to deeds poll as well as to deeds indented; for though a grantor in a deed poll is not bound by any thing mentioned in the deed, yet if he claim title under

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[1] Fearne's Rem. (365-6;) 2 Ib. § 754; Doe v. Oliver, 9 Barn. & Cress. 181.

it, he cannot deny the grantor's title, and so neither shall the grantor deny the title of the grantee.

§ 424. A release of a future contingent interest operates sometimes by way of extinguishment, and sometimes also by way enlargement. Thus, whenever the person to whom the release is made would have the absolute property, but for the contingent interest, the release operates by way of extinguishment; as if there be a limitation of chattels personal to A forever, but if he should die without issue living at his death, then to B, and B release to A, B's interest is thereby extinguished, and A's interest is absolute. But whenever the person to whom the release is made has but a partial interest in every event, then the release operates by way of enlargement; as if there be a limitation of chattels personal to A for life, with contingent *quasi* remainder to B, and B release to A, B's interest is thereby extinguished, and when the contingency happens, A's interest is thereby enlarged.

§ 425. It seems that a release may also operate by way of estoppel; thus, if a release be made to a person in whose hands it cannot operate as a release, it would perhaps be construed to be a conveyance, and like a conveyance estop the party who made it.

§ 426. A release to one of two joint tenants seems to enure to both in case it operates by way of extinguishment; but when it operates by way of enlargement, it seems to enure to the benefit of him alone to whom it is made.[1] These general doctrines are applicable to both real and personal property.

§ 427. It is scarcely necessary to say that a parol conveyance of future interests in chattels personal cannot operate by way of estoppel, for there is no parol estoppel except there be fraud

[1] See Wat. Con. (Prest. Ed.) 186.

actual or constructive. It may be added, in conclusion, that if each party be estopped, the estoppels cancel each other, and the matter is at large.

§ 428. The doctrine of election, which we have perhaps sufficiently considered when treating of the alienation of partial interests *in præsenti*, is applicable in like manner to the interests now under consideration.[1]

§ 429. In equity, assignments of future contingent interests are valid, and they are treated as executory agreements, which will be enforced or not, according to the doctrines of the court. They will be enforced against volunteers, even when made in consideration of love and affection, but not against creditors,[2] or subsequent purchasers without notice, or even with notice.

§ 430. The doctrine of the Court of Equity in regard to sales of reversionary interests of real estate, is also the doctrine of that court in regard to sales of future interests in chattels personal, whether vested or contingent. It is said, that a Court of Equity will set aside such contracts, whenever they are made under the pressure of some necessity, and the price is inadequate; and that the court will presume, from the fact that such a sale has been made, not only that the price was inadequate, but also that the sale was made under the pressure of some necessity, unless such sale was made at public auction, conducted in the ordinary manner and with the usual precautions.

§ 431. But even those facts do not render the sale necessarily valid; they change the *onus* merely, and devolve upon the other party the burden of showing inadequacy of price, and the pressure of some necessity. It follows from the terms of the exception that if a sale by auction be resorted to merely as an expedient to cover a private bargain, it will operate nothing. So if it were announced in the particulars, that the sale would

[1] 2 Story's Eq. § 1095. [2] See Fearne's Rem. (549,) *et seq.*

be without reserve, it seems that the parchaser would be thrown back upon the general rule.

§ 432. "The court, in awarding relief in a suit to set aside a contract executed, will have due regard to the conduct of the parties; and therefore, if the vendor apply in reasonable time, will not only set aside the contract but direct accounts between the parties, and if the purchase money and interest shall appear to have been overpaid, will decree the surplus to be refunded: but when the vendor is under no disability, conuzant of all the facts, and acquiesces for a long period, the court will not direct accounts. Under such circumstances to call on parties to refund by a retrospective decree to account, might ruin them, for a mistake encouraged by the *laches* of the vendor,—a course of rigor inconsistent with the temperate disposition, which the justice of a Court of Equity administers." The general rule, however, is that equity regards the transaction as a mortgage, which it will set aside upon payment of principal, interests and costs.

§ 433. It seems that where the bill is filed by a purchaser for a specific performance, and the bill is dismissed, the plaintiff must pay the costs; and when the bill is against him, and he has been guilty of fraud, he ought not to have his costs, though the cases seem to conflict in regard to it.[1]

§ 434. In determining the question whether the price paid was adequate, the court looks to the value of the interest at the time of the sale, and not to the value of it according to subsequent events.

§ 435. The value is determined by evidence like the value of present interests, and the question of adequacy is without a

[1] Peacock v. Evans, and *vice versa*, 16 Ves. 512; Gowland v. DeFiara, 17 Ves. 20; Moroney v. O'Dea, 1 B. & B. 109; Lord Portmore v. Taylor, 4 Sim. 182.

definite rule, and has to be resolved in each case by the conscience of the court.

§ 436. Time furnishes no ground to induce a Court of Equity to enforce such an agreement at the instance of the purchaser; though it is sufficient ground to induce the court to refuse to set it aside, unless the circumstances of the party excuse it; as that he was not cognizant of his rights, as in Murray v. Palmer.[1]

§ 437. The rule of the court, in regard to *laches* in other cases, seems also to be the rule in cases of this kind, in determining whether a vendor or one claiming under him has slept too long upon his rights.

§ 438. Such agreements, however, are held in equity to be capable of confirmation; but acts to have the effect of confirmation must be done by one who is cognizant of his rights, must be purely voluntary, and done with intent to ratify that which he was entitled to disaffirm. They must be done when the pressure of necessity is gone, for as said in Gowland v. De Faria,[2] "it is only when he is relieved from that distress, that he can be expected to resist the performance of the contract."

In King v. Hamlet, Lord Brougham said: "If the heir flies off from the transaction, and becomes opposed to him with whom he has been dealing, and repudiates the whole bargain, he must not, in any respect, act upon it so as to alter the situation of the other party, or his property; at least, that if he does so, the proof lies on him of showing that he did so under the continuing pressure of the same distress, which gave rise to the original dealing."[3]

§ 439. There is an exception to the general rule in regard to these sales, and that is, where the person having the interest in possession joins with the person having the vested interest

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[1] 2 Sch. & Lef. 474. [2] 17 Ves. 25. [3] 2 My. & K. 456.

expectant in selling, for then it is said not to be the sale of a future interest, but of an interest in possession, and must therefore be governed accordingly. If the party himself have a present vested interest with an expectancy, the question would seem to be whether the expectancy was the substantial part of the contract.

§ 440. There is said to be another exception. It is laid down by Lord Brougham, in King v. Hamlet, that the extraordinary protection given in the general case must be withdrawn, if it shall appear that the transaction was known to the father or other person standing in *loco parentis*—the person, for example, from whom the *spes successionis* was entertained, or after whom the reversionary interest was to become vested in possession—even though such parent or other person took no active part in the negotiation, provided it was not approved by him, and so carried through in spite of him.[1]

§ 441. There is still another exception found in the cases, and that is when the interest is dependant on contingencies which, in the opinion of the court, do not admit of valuation; as if the interest depend upon a dying without leaving issue.[2]

§ 442. The policy of the doctrines of equity in regard to the sales of such interests has been, it is said, frequently and most justly condemned by equity judges, as it is obvious that these doctrines have no effect in preventing such bargains, although they tend materially to augment the hardness of them, it being necessary for the purchaser of reversionary interests to take additional precautions, and to make the vendor pay for the contingency of the bargain being set aside. Notwithstanding this, instead of throwing in the whole weight of authority against a

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[1] 2 My. &. K. 456.

[2] Atk. on Tit. 199, referring to Bent v. Baker, 1 Rus. & My. 224; Nichols v. Gould, 2 Ves., sr., 422 See also note (*d*) Atk. Tit. 201.

doctrine so pregnant with evil consequences, the courts have gone on, multiplying refinements, and branching out new distinctions in every direction. "I am aware," said Lord Eldon, in Davis v. the Duke of Malborough,[1] "that during my whole time, considerable doubt has been entertained, whether that policy with regard to expectant heirs ought to have been adopted; and although Lord Thurlow repeatedly laid it down, that this court does shield heirs expectant, to the extent of declaring a bargain oppressive in their case, which would not be so in other cases, and imposes an obligation on the parties dealing with them to show that the bargain was fair, yet he seldom applied the doctrine without complaining that he was deserting the principle itself, because the parties dealing with the heir expectant insured themselves against that practice, and therefore the heir made a worse bargain; but he certainly, like his predecessors, adhered to the doctrine, though not very ancient. It is not the duty of a judge in equity to vary rules, or to say that rules are not to be as fully settled here as in a court of law." And in Shelly v. Nash,[2] Sir J. Leach says: "The principle and policy of the rule may be both equally questioned. Sellers of reversions are not necessarily in the power of those with whom they contract, and are not necessarily exposed to imposition and hard terms; and persons who sell their expectations and reversions from the pressure of distress are thrown by the rule into the hands of those who are likely to take advantage of their situation, for no person can securely deal with them."[3]

§ 443. But notwithstanding all that has been said against the rule, it seeems not to be without defence. It has a foundation in the heart—in sympathy with him who has been plundered in his distress; and in a sense of justice, which cannot see a Shylock groveling among unjust gains, and gloating and trembling

[1] 2 Swans. 163. [2] 3 Mad. 236.
[3] Atk. on Titles, (181,) note (*m.*)

over the spoils of misfortune. If it be true, that such persons alone will deal with expectants, then let equity in its turn deal with them. But is it true, that the rule drives expectants to seek relief from such a source? It is so asserted, and the reason given is, that no person can securely deal with them. But is not every sale of an expectant interest which is made for a price not inadequate as binding as a sale of a present interest? Then why cannot those who are willing to buy even with a reasonable profit, deal securely in the purchase of expectancies?

The rule does not require the exact value to be paid, but merely a fair price; as in Headen v. Rosher,[1] where the actuary's valuation was £928 8s. and the price given was only £630. which it appeared by evidence was about the utmost that could be had for such interests.

§ 444. The objection to the rule seems rather to be that it affords no relief to him who having bargained in his distress is yet too conscientious to ask a release from his bargain, whilst it relieves him alone who finds in the pressure of necessity an excuse for a violation of his contract.[2]

§ 445. We come now to consider the husband's power of alienating the future interests, in chattels personal, to which his wife is entitled.

§ 446. It seems now to be settled in England that every assignment of such interests by a husband, whether voluntarily made or made *in invitum*, is liable to be defeated by the survivorship of the wife.

The point was so decided in regard to a contingent interest in

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[1] McClel. & You. 89 stated; Atk. on Tit. (212.)

[2] Upon the subject generally, see 1 Story's Eq. § 337, *et seq.;* Jenkins *et al.* v. Pye *et al.*, 12 Peters 241; Atk. on Titles (179,) *et seq.;* Earl of Chesterfield v. Janssen, 1 White's L. C. in Eq. (344,) and note; Batten on Spec. Per.

Hornsby v. Lee;[1] and it was so decided in regard to a vested interest in Purdew v. Jackson.[2] The principle of the one case is the principle of the other. The first case "excited considerable inquiry in the profession," and when the question was again presented in the second, it recieved a most elaborate discussion from both the bench and the bar. The question was again presented in Honner v. Morton,[3] and the Lord Chancellor decided in accordance with the two previous cases, and said that the decision was in accordance with principle.

§ 447. The principle is thus stated by Sir Thomas Plumer in Purdew v. Jackson: "Reduction into possession is a necessary and indispensable preliminary to the husband's having any right of property in himself, or to his being able to convey any right of property to another. If he dies without having been able or willing to perform this condition, the right of the wife continues unaltered, exactly as if she had never married. If the husband himself could not perform the condition on which his property in this personal chattel was to depend, how could any act of his alter the nature of the thing? How could his assignment have any such effect? The nature and operation of such an instrument is to pass to another the right which the assignor has. The assignee may in some cases have a better and more extended right than the assignor has: but could the thing assigned be totally changed in its nature? could he confer an absolute right to the property wholly freed from the wife's contingent right? Could the assignment of a future right of action give a present right of action? Could it give a present right of possession? Could it authorize the assignee to reduce immediately into possession what did not become due till ten years afterwards? By changing hands, could that which was a contingent and future right of action, become an absolute and immediate right of pos-

[1] 2 Mad. 16. [2] 1 Rus. 1. [3] 3 Rus. 65.

session? How could the assignee take the property or any part of it from Isabella Purdew during her life? In other words, how could he accelerate the possession any more than the husband himself could have done? To call this assignment a constructive reduction into possession—a possession in some sense—tantamount to possession, &c., is to suppose two things to be the same, which are directly opposite to each other: it is to suppose a chose in action to be a thing constructively reduced into possession: it cannot be both: no construction can make things opposite in their nature to be the same. The phrases which are employed to gloss over this contradiction are all equally inapplicable to the subject, being borrowed from cases where there is an immediate right of possession, and where (as after a judgment, but before execution,) the property may be considered changed and the condition substantially fulfilled."

§ 448. One cannot but be surprised after reading this opinion to find it said in Shuman v. Reigart: "The foundation of his argument is, that marriage gives the husband a distinct but inchoate title of his own; and that, when he assigns her chose before reduction of it to possession, he assigns, not her title to it as the instrument of her power, but his own inchoate title, and no more; the fallacy of which is proved by the fact that he must join her in an action to recover it. If he had a separate title to the thing, he could recover separately on it; but as he cannot recover without joining her, as he would in an action for a wrong purely personal, he recovers on her right, not his own. Sir Thomas seemed to think in Purdew v. Jackson, that reduction to possession enlarges the husband's ownership, and bars the wife's survivorship, by some sort of technical legerdemain, as a common recovery bars an entail, and for reasons not less inexplicable.[1]

§ 449. Now, it seems clear that the opinion in Purdew v.

[1] 7 Watts & Serg. 168.

Jackson did not rest upon the foundation attributed to it. It rested upon the grounds, that the wife's title to her chattels personal remained unaltered after the death of the husband in the lifetime of the wife, unless he or his assignee reduced them into actual or constructive possession; that a transfer of them by the husband gave his assignee the power which he himself had, and no more, of reducing them into possession during the coverture; and that there could not be a constructive possession without an immediate right to actual possession.

§ 450. If the wife has a vested *quasi* remainder, and the prior interest becomes vested in her, the husband or his assignee may reduce the whole into possession, and thereby defeat the wife's right of survivorship.[1] But it seems that a Court of Equity will not lend its aid to consummate a transaction by which it is attempted to vest such prior interest in the wife, and thus attempt to defeat her right of survivorship; nor indeed permit a future interest belonging to the wife to be defeated by the operation of merger.[2]

§ 451. But a distinction has been taken between those future interests of a married woman, which might have been reduced into possession during the coverture, and those which could not have been reduced into possession during that time, and it is said that when the husband has, for a valuable consideration, assigned a future interest belonging to his wife, and it has been possible for the husband or the assignee to reduce it into possession during the coverture, a Court of Equity will imply a reduction into possession in favor of the assignee.[3] But this distinction is denied,

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[1] But see Moye *et als.* v. ———, 2 Haywood 186.

[2] See Bell on Prop. Hus. & Wife (91,) citing Whittle v. Henning, before Cottenham, Lord Chancellor.

[3] Honner v. Morton, 3 Rus. 68.

and the better opinion seems to be that it is not well taken, and two later cases are against it.[1]

§ 452. It is a general rule, that a married woman cannot do any act during coverture, which will be binding upon her after the coverture is ended, and therefore her consent to the alienation of her future interest, given in court, or her joining with her husband in the conveyance, will not affect her right of survivorship.

§ 453. Another point connected with this matter is whether the husband can release his wife's future interest in chattels personal so as to defeat her right of survivorship? It is laid down as safe doctrine, that a release by the husband of such interest will not defeat the wife's right of survivorship, in case the interest does not fall in, or the contingency happen during the coverture.[2]

§ 454. The American Courts have differed in regard to the husband's power to defeat the wife's right of survivorship to her future interests in chattels personal, by the alienation of such interests for a valuable consideration.

§ 455. In Woelper's Appeal, Gibson, C. J., said: "There has been a general error, here and abroad, in receiving the evidence of a thing as the thing itself, which has complicated this part of the law with arbitrary distinctions. The true foundation of the husband's title is his power over his wife's choses, coupled with an exercise of his will, of which reduction to possession is a particular indication, but not a conclusive one. He may apply his wife's choses to his own use, by parting with them for value; or he may leave her title to them intact, even where they are in his possession, if the presumption of ownership, from the ordi-

[1] Ellison v. Elwin, 13 Sim. 309; Ashley v. Ashley, 1 Jac. & W. 479.
[2] Bell on Prop., Hus. & Wife (96.)

nary badge of it, be rebutted by circumstances. It is his assumption of the title, and not the form of the act, by which it is indicated, which is the criterion."[1] In accordance with this theory, it is held in Pennsylvania that any act of ownership by the husband with intent to convert the wife's choses to his own use, is sufficient, without reduction into possession, to defeat the wife's right of survivorship.[2]

§ 456. But is that theory true? If it be, then the conveyance, by the husband, of the wife's future interests in chattels personal, and of her present *choses* in action, without valuable consideration, must defeat the wife's right of survivorship, as effectually as when made for a valuable consideration. If it be, whence the necessity, in any case, of joining the wife in an action for the recovery of her *chose* in action? If it be, why cannot the husband dispose of the wife's *choses* in action by will so as to defeat her right of survivorship? The maxim of the common law is: *Vir et uxor sunt quasi unica persona, quia caro una et sanguis unus.* The legal existence of the wife is not merged *civiliter* in that of the husband, but it is united to his, and ceases upon marriage to be *separate.* The husband, however, by the marriage, does not lose his separate legal existence. Hence it is, that when a man marries a woman who is indebted, the creditor must sue the husband and the wife; and hence it is, that if he does not obtain a judgment against them during the life-time of the husband, the debt survives against the wife alone, and not against the executor or administrator of the husband.

§ 457. The legal existence of the wife, then, is not destroyed, but is united, and in subordination, to that of the husband. He alone, therefore, can take legal steps. He alone can institute a suit for a recovery of the wife's *choses* in action, which were hers

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[1] 2 Barr, 73.

[2] Ib., Siter's case, 4 Rawle, 468; Shuman v. Reigart, 7 Watts & Ser. 168.

dum sola, but he must join his wife in the action, because the legal title is in the wife. The cases which have established that he may sue alone for *choses* in action accruing to the wife during the coverture, seem to have departed from principle. But without going upon contested ground, we may assume, what all admit, that the wife's *choses* in action survive to her, if the husband exercise no power over them; and that is sufficient to show that the legal title does not pass to the husband by the marriage. Then what does pass? It seems that marriage is a conveyance of the wife's chattels personal to the husband. Assent on the part of the person to whom a transfer is made, is necessary to pass the title to him. Hence it is, that if the husband take the chattels personal belonging to the wife into his possession as husband, his title becomes perfect. But the legal title to a *chose* in action cannot be transferred, and hence it is, that his assent to the transfer of such a *chose* cannot pass to him the legal title. Possession under a parol gift is necessary to perfect the legal title, and hence the necessity that the husband should obtain possession of the wife's *choses* in action. But the husband may transfer such *choses* in action as are assignable at law, and thereby defeat the wife's right of survivorship; and this is in accordance with, and in confirmation of, what has just been said.

§ 458. The theory then, is, that marriage is an assignment to the husband of the wife's chattels personal, that his assent as husband is necessary to perfect his title to her *choses* in possession, and his reduction into possession of her *choses* in action as husband, is necessary to perfect his title to them.

§ 459. It may be said that if this theory be true, then the transfer by the marriage of the wife's chattels personal must be a transfer either for a valuable consideration, or without a valuable consideration. If it were for a valuable consideration, then as *choses* in action are assignable in equity, that court ought to assist the representatives of the husband to recover them after

his death, though they had not been reduced into possession by him. But here it may be said that though marriage is a valuable consideration, when made as a consideration of a contract, yet in the absence of a contract, the chattels of the wife pass by gift, and not by sale,[1] for the wife before the marriage, and after the contract, may dispose of her chattels in any way she pleases, provided the disposition does not amount to a fraud upon her intended husband. If, then, the transfer by marriage is a transfer without valuable consideration, why is it not held that the chattels which belonged to the wife are subject to the debts which she owed *dum sola*. It was held at one time in equity, that the husband was liable to the extent of her fortune even after her death, but the rule was changed, because as the husband was liable during the coverture for all her debts contracted *dum sola*, though she had no chattels personal, it was thought fair that he should not be liable to judgment beyond the coverture, even when she had an ample fortune. It was certainly no fraud, the only ground which a creditor could have taken, because the fortune of the wife was not only liable in the hands of the husband, but his fortune became also liable, and therefore the gift by marriage could not be impeached, either at law or in equity.

§ 460. But it may be said, that though the husband cannot alien a future contingent interest of the wife so as to defeat her right of survivorship, yet he may so alien her vested *quasi* remainder, since the possession of the person having the prior interest is the wife's possession. It is true that the wife in such case has the legal vested interest, and so also has she, if A. B. is indebted to her in the sum of one thousand dollars, payable twelve months after her marriage. She has a present right to the future possession and enjoyment of the property. The pos-

[1] Since writing the sentence, I have found it so laid down by Ruffin, C. J., in Logan v. Simmons, 1 Dev. & Bat. 15.

session of the person having the prior interest, is not adverse; but in what other sense can it be said that the possession of such person is the possession of the *quasi* remainder-man? It certainly cannot be said that a *quasi* remainder-man has either an actual or constructive present possession. It would seem therefore to be theoretically true, that the husband's alienation of such an interest by virtue of his marital right, would not defeat the wife's right of survivorship.

§ 461. But, as we said before, the American authorities differ upon the effect of the husband's alienation. Chancellor Kent says, the doctrine that the husband may assign the wife's *chose* in action for a valuable consideration, and thereby bar her of her right of survivorship, but subject, nevertheless, to the wife's equity, has been frequently declared, and is understood to be the rule best sustained by authority.[1]

§ 462. In Knight v. Leak, the Court said: "We also understand the law to be, that the husband, *jure mariti*, has such a dominion over the vested legal interest of his wife, in a chattel, real or personal, of which a particular estate is outstanding, that he can sell such interest, so as to transfer it completely to the purchaser, and that the law can transfer it for his debts. We understand the effect of an assignment by the husband, of his wife's equitable interest in a chattel, in which she has not the right of immediate enjoyment, to be different; for such assignment will not prejudice her right, should he die before her, and before the period allotted for such enjoyment to take effect."[2] This, however, is but a *dictum*, and it seems contrary to the broad principle of former adjudications in that state; as appears from the case of Johnston & Wife v. Pasteur,[3] where the previous cases are reviewed and the result declared to be, that the

[1] 2 Kent's Com. (137.)
[2] 2 Dev. & Bat. 135.
[3] Conference's Rep. 464.

husband must reduce the property into possession. The same general proposition is asserted in Casey v. Fonville.[1] But in none of those cases does the effect of the husband's assignment seem to have been decided. In subsequent cases, the general proposition that the expectant interests survive to the wife, unless the husband assign, release or reduce them into possession, is established. In McBryde v. Choate *et als.*,[2] it was held that a husband could not defeat the wife's right of survivorship in a *quasi* vested remainder, by making a disposition of it by will. In Burnet v. Roberts, Ruffin, C. J., said: "I believe that at law the rule is, that the husband may assign every chattel interest of the wife, whether immediate or expectant, which from its nature would be legally transferrable, were the interest the husband's in his own right, with the exception of property so limited to the wife, as that it cannot possibly fall into possession during the coverture. It is so laid down in the best authorities.—3 Thomas' Coke, 333, n. (m.); 1 Rop. on Prop. 236."[3] In Allen v. Allen,[4] it is said that if the husband assign even to his wife, after marriage, a distributive share accruing to the wife, without valuable consideration, when he is insolvent, it is a fraud upon his creditors, and they may subject it in equity, though without such assignment they could not have reached it, but it would have remained subject to the wife's right of survivorship. In Barnes v. Pearson *et al.*, Pearson, J., in delivering the opinion of the Court, said: "The husband is not entitled absolutely to a legacy given to his wife. It becomes his if he reduces it into possession, or he may dispose of it, if it be such an interest as he can presently reduce into possession. But if he dies without doing so, the wife is entitled to it."[5] And, he

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[1] N. C. Law Repos. 287.
[2] 2 Iredell's Eq. 610.
[3] 4 Dev. (Law) 83.
[4] 6 Iredell's Eq., 293—see Jacobs and Sloman, adm'rs, v. Perryclear, Riley's Ch. Ca. 47, *contra*.
[5] 6 Iredell's Eq. 483.

adds, that a Court of Equity will not compel the husband to apply the legacy to the payment of his debts.

§ 463. But let us turn to another State. In Caplinger v. Sullivan, Felts bequeathed certain slaves to his wife for life, and at her death to his daughter Ann, wife of Sullivan. Sullivan having purchased the life estate, sold and delivered the slaves to Caplinger, and died, leaving the tenant for life, and Ann, his wife, surviving, and it was held that on the death of the tenant for life, the slaves belonged to Ann. The court assert the general principle laid down by Judge Story, that "no assignment by the husband of reversionary choses in action, or other reversionary equitable interests of the wife, even with her consent and joining in the assignment, will exclude her right of survivorship," for the reason that the assignment "is not, and cannot from the nature of the thing, amount to a reduction into possession of such reversionary interests."[1] And in regard to the effect of the husband's having become the owner of the life estate upon which his wife's *quasi* remainder was expectant, Reese, J., in delivering the opinion of the court, said: The wife had no interest in the husband's purchase; he stood in the place of tenant for life. The tenancy for life still continued, and the reversionary interest, unaffected by such purchase, could not commence in possession till the life estate terminated. The husband possessed the slaves, but he possessed them as purchaser, not as *husband*, and his title and possession were of, and commensurate with the life estate, and that only. Here was no merger of estates. * * * If the husband, having assigned, had continued to live till the life-time estate had terminated, then indeed, as a Court of Chancery views such assignment as an agreement to assign when in his power, and considers that also as done which ought to have been done, the assignee, for a

[1] Story's Com. Eq., § 1413.

valuable consideration, would in equity have been entitled to the property.[1] But this last proposition is but a *dictum*, and, though in accordance with what was said by Lord Lyndhurst in Honner v. Morton, it cannot be received as the better doctrine.

In Goodwin v. Moore, Smith bequeathed a life estate in slaves to his wife Catherine, and the remainder to his daughter Nancy. Heaton married Nancy, and the *quasi* tenant for life surrendered her interest to him. Heaton died, and Nancy married Moorely, and thereafter Catherine died, and then Moorely. The contest was between the administrator of Heaton and the administrator of Moorely, and it was held that the surrender of the life estate by Catherine could have no other effect than a sale under similar circumstances, and that the slaves having survived to Nancy, became the property of the second husband after the death of the *quasi* tenant for life.[2]

§ 464. In Thomas, &c. v. Kennedy, the Court say that it has long been a vexed question, whether the husband can defeat the wife's right of survivorship by an assignment of her *chose* in action. Able authorities, say they, are arrayed on both sides of this question, and it is regarded at this day as not fully settled. After citing authorities, they add: "And our conclusion upon the whole matter is, that the current of modern decisions is against the power of the husband. But this Court, in the case of Meriwether v. Booker & Wife, (5 Littell, 258,) determined, without much apparent consideration or research of authorities, that the husband might bar her right by a sale of her interest in remainder in slaves. And a dictum to the same effect is to be found in the case of Upshaw v. Upshaw *et al.*, 2 Hen. & Mun. 389. We do not deem it necessary, in this case, to overrule or affirm the principle settled in the former case, and intimated in the latter."[3]

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[1] 2 Hump. 548. [2] 4 Hump. 221. [3] 4 B. Monroe, 236.

§ 465. In Browning v. Headley,[1] Allen, J., recognised the doctrine laid down in Purdew v. Jackson, and Honner v. Morton.

§ 466. In Matheny v. Guess *et als.*, the cases of Purdew v. Jackson, and Honner v. Morton are recognised; and the distinction taken by the Lord Chancellor in the latter case, between the assignment by the husband for a valuable consideration, of such interests of the wife as might be reduced into possession by the husband, or the assignee during the coverture, and such as are not so reducible, is there asserted to be a sound one.[2]

§ 467. In Upshaw v. Upshaw *et als.*, it is said that a husband, dying in the life-time of his wife, cannot bequeath her reversion, or remainder in slaves, though he may sell it in his life-time for a valuable consideration.[3]

§ 468. In Pitts v. Curtis, a testator gave to his son a slave until the slave attained twenty-one years of age, remainder to his daughter, a married woman. The Court said: "It is of no moment that the actual occupancy or right to the present possession for an ascertained period was in another, that is nothing more than exists in every bailment, and no principle is better ascertained than that the possession of the bailee is the possession of the bailor. The rule of law is, that the general property of a chattel draws to it the possession. The special property being in the plaintiff in error, his possession of the slave was consistent with, and was in law the possession of the tenant in remainder, who had the general property in the slave.

"Such being the law, the right of the husband was perfect upon the assent of the executor to the legacy, which is shown in this case. He might have sold and transferred it before the particular estate was at an end; upon his death before his wife, it

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[1] 2 Robison, 340.

[2] 2 Hill's Ch. Rep. 66.

[3] 2 Hen. & Mun. 381.

would have gone to his representatives, and by necessary consequence, having survived his wife, the title vests in him."[1]

§ 469. A distinction is taken in some of the books between such expectant interests as belonged to the wife at the time of her marriage, and such as accrued to her during the coverture, and it is said that if such an interest accrue to the wife during coverture, it vests in the husband absolutely,[2] but the distinction seems to be illy taken. It is contrary to principle and to the better authority, and ought not therefore to be tolerated, unless it has become a rule of property.

§ 470. In conclusion, it may be added, that the theory which is herein asserted to be the better one may seem to be in conflict with adjudged cases in regard to chattels personal of the wife, which are outstanding by bailment for hire at the time of the marriage, and which are not reduced into possession by the husband during the coverture. Thus, in Whitaker v. Whitaker,[3] a slave belonging to a *feme sole* was, before her marriage, hired for a year, and the husband having died before the expiration of the year, it was held that the slave did not survive to the wife, but belonged to the personal representatives of the husband. The reason of this ruling is, that the possession of the bailee is the possession of the bailor, and therefore the chattel is a *chose* in possession. But the wife has neither the actual possession, nor the right to the immediate actual possession. How then can it be said that the husband's title is perfect by the marriage, since delivery of possession is necessary to perfect a title by parol gift, and since actual possession neither was, nor could be obtained by the husband during the year? It is said that the constructive possession of the wife passed to the husband. If this be true, then the ruling may be held to be in ac-

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[1] 4 Ala. 350.
[2] 3 How. (Miss.) 394, and cases cited.
[3] 1 Dev. 310.

cordance with the theory. But is there not some falsity in that idea of a constructive possession, when another person has the possession, and the exclusive right to the possession? In what sense does such a possession differ from the possession of a *quasi* remainder-man?

§ 471. In Putnam v. Wiley, the court recognise the principle that the owner of a chattel cannot maintain trespass for taking it, unless he had actual or constructive possession of it at the time, and assert that he has not such constructive possession unless he had the right to the immediate actual possession.[1] So in Lotan v. Cross, Lord Ellenborough held that a gratuitous permission to a third person to use a chattel does not, in contemplation of law, take it out of the possession of the owner, and he may maintain trespass for any injury done to it while it is so used; but if there had been a letting for a certain time to such third person, the possession would be in the latter, and he alone could bring the action.[2] These cases seem sufficient to establish the position that constructive possession in its legitimate acceptation cannot exist, unless there be a right to immediate actual possession.

§ 472. The theory seems, indeed, to be inconsistent with the position, that a husband dying before he has reduced into possession or done some act tantamount to it, can transmit to his representatives a chattel loaned by his wife whilst a *feme sole;* since marriage is said to be a revocation of such bailment,[3] and the thing would then seem to be merely a *chose* in action.

§ 473. But whatever may be the true principle, it is said in Bacon: "But where the goods of a *feme sole* are in the possession of another by trover or bailment, and she marries, the property

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[1] 8 Johns. (435.)

[2] 2 Camp. 464.

[3] Story on Bail. (190,) § 277.

which continued in the wife is vested in the husband, and he alone may bring detinue for them."[1]

§ 474. The theory seems also to conflict with the cases which hold that the assignment for valuable consideration, by the husband of his wife's *choses* in action, presently reducible into possession, defeats the wife's right of survivorship, whether the assignee reduce them into possession during coverture, or not. But this was not the earlier and it seems the better doctrine; for, in Burnett v. Kinaston,[2] the Lord Keeper said: "If a husband assign a bond belonging to his wife for a valuable consideration, this assignment will not bind the wife, if she survives."[3]

§ 475. It seems necessary that something should be said in regard to the effect of marriage upon the future interests of the wife, in chattels personal, in case the husband should survive the wife, and they should still remain future interests at the death of the wife.

§ 476. By the common law, an administrator was not bound to distribute the surplus of the intestate's goods after payment of his debts. By statute the common law was changed, and administrators were compelled to distribute; but husbands, administering on the estates of their deceased wives, were excepted, and therefore they were entitled as at common law. It was held that the husband was entitled to administration, and consequently the equitable title to the surplus of the wife's goods after payment of her debts *dum sola* vested in him. But we need not go into this matter, since it is well asserted that the husband's title to his wife's *choses* not reduced to possession at her death is derived alone from his right to administration, and not from the marriage. And this is confirmatory of the theory

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[1] Bac. Abr. 22, (note,) (Bouvier's edit.)

[2] Prec. Chan. 121; Freem. 241. [3] Stated Clancey's Hus. & W. 150.

that we have asserted to be the better one, in regard to the effect of marriage upon the property of the wife.

§ 477. The next subject for consideration is the transmission of future interests in chattels personal. The general rule is, that every future interest which survives its owner is transmissible to his representatives, like interests in *præsenti*.[1]

§ 478. The transmission in each case is from the dead to the living; according to the feudal maxim, *le mort saisit vif*.[2] In cases, therefore, of *commorientes*—of persons perishing by the same calamity, as by the foundering of a ship at sea, the sensible rule seems to be that the property shall be transmitted to the representatives of him who was last the owner before the calamity; unless it is proven that the other person who would next have been entitled was the survivor. By showing ownership and death, the case of the representatives is made out, and the burden of proving the survivorship rests necessarily upon those who claim by virtue of it. The civil law, in the absence of testimony, presumed that the stronger survived, but it seems to be a better rule, in such case, to hold that the representatives of him *who had* shall take, rather than the representatives of him who *might have had*.

§ 479. But take a case illustrative of the general rule. In Pinbury v. Elkin: One makes his wife executrix, and gives her all his goods and chattels; provided that if *she shall die without issue by the said testator, then after her decease* 80*l.* shall remain to the testator's brother, J. S. The testator died, then J. S. died, and then the wife died without issue, and one question was, whether the legacy to J. S. did not become void by reason of his death before the happening of the contingency? The court

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[1] M'Meekin, adm'r, v. Brummet, 2 Hill Ch. Rep. 642.

[2] Hub. on Suc. (194.)

said they were of opinion this possibility would go to the executors of the legatee. That it was true in *Swinburne*, 461–2, &c., some cases were put which seemed to import the contrary; but those cases were so darkly put, and with so many inconsistencies as to be all overbalanced by the opinion of Lord Nottingham, in 2 Vent, 347, where a man devised 100*l.* to A, at the age of twenty-one years, and if A died under age, then to B. B died in the life-time of A, and afterwards A died under age, yet decreed that the executors of B should have this 100*l.*[1]

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[1] P. W. (564.)

CHAPTER THE SIXTH.

OF THE RESPECTIVE RIGHTS OF PERSONS HAVING PRIOR AND SUBSEQUENT INTERESTS, AND OF THEIR REMEDIES.

§ 480. The first question that presents itself here is in regard to the right of a person, to whom a partial interest is given, to have the possession of the property in which his interest exists. The general rule is that he is entitled to possession, as well as to the enjoyment, of the property during the time for which it is limited to him. If any one, therefore, takes the property unlawfully out of his possession, or unlawfully detains it from him, he can maintain any action for its recovery which a general owner could maintain. If he brings trover, his damages ought to be computed according to his interest,[1] for otherwise it would be necessary to hold that the interest of a *quasi* remainderman in the property was destroyed, and that he must look to his interest in the damages.

§ 481. But the general rule is not without exception. In every case in which the property is wholly or in part of a perishable nature, and there is not an intention that the first taker shall have the property *in specie*, a Court of Equity will direct it to be sold, and the proceeds invested for the benefit of the parties respectively entitled. The party entitled to the partial interest will be entitled to the interest of the money until his limitation expires, and the party entitled to the subsequent absolute interest will be entitled, when his limitation takes effect, to the fund itself.

§ 482. When articles of a perishable nature are given specifically to one person for a limited period, and afterwards to

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[1] Strong v. Strong, 6 Ala. 345.

another person, the court holds that the first taker is entitled to the possession of the property. But where there is a general or residuady gift of such chattels, the presumption in England is that the intention was that the property should be sold, and the proceeds invested, so that each object of the donor's bounty may be the recipients of it. The leading case seems to be that of Howe v. the Earl of Dartmouth. In that case the Lord Chancellor said: "It is given as all his personal estate, and the mode, in which he says it is to be enjoyed, is to one for life, and to the others afterwards. Then the court says, it is to be construed as to the perishable part, so that one shall take for life and the others afterwards; and unless the testator directs the mode so that it is to continue as it was, the court understands, that it shall be put in such a state, that the others may enjoy it after the decease of the first; and the thing is quite equal; for it might consist of a vast number of particulars: for instance, a personal annuity, not to commence in enjoyment till the expiration of twenty years from the death of the testator, payable upon a contingency, perhaps. If in this case, it is equitable that long or short annuities should be sold to give every one an equal chance, the court acts equally in the other case; for those future interests are for the sake of the tenant for life to be converted into a present interest; being sold immediately in order to yield an immediate interest to the tenant for life. As in the one case, that in which the tenant for life has too great an interest is melted for the benefit of the rest, in the other, that of which, if it remained in specie, he might never recieve anything is brought in; and he has immediately the interest of its present worth.[1]

§ 483. In the late case of Morgan v. Morgan, the Master of the Rolls said: "Now the rule of law as applicable to these

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[1] 7 Ves. 147.

cases is not, I think, open to doubt, although the application of the rule to particular cases may be, and frequently is, a matter of very considerable difficulty." After asserting the rule laid down in the preceding case, he adds: "This rule has been since affirmed as often as it has been referred to, and is unquestionably the law. But the testator may take the case of any particular bequest out of this rule; and the effect of the latter cases has been to allow small indications of intention to prevent the application of the rule. The question here, as in similar cases, is one of construction, whether the testator has, in his will, expressed his intention, that this rule shall not apply to this particular case.

"It is urged by the petitioners, that the burden of proof does not lie upon them more than on the respondents, and that being a question of construction, it is for the court to look into the will and discover the testator's real meaning. In one sense, this is certainly true; but still, in my opinion, the rule of law is, that, unless there can be gathered from the will some expression of intention that the property is to be enjoyed *in specie*, the rule in Howe v. The Earl of Dartmouth is to prevail. It is therefore incumbent on the persons contesting the application of that rule, and on the court which forbids that application, to point out the words in the will which exclude it, and if this cannot be done, the rule must apply."[1]

§ 484. Let us look now to some of the cases which involve the question whether there is sufficient indication of intention to take the bequest out of the rule, for "the reported decisions on the subject are useful, as they form a guide to enable the court to ascertain what directions contained in a will are properly considered to be an expression by the testator of his intention that this rule is not to apply." In the case last cited, the testator

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[1] 7 Eng. Law & Eq. Rep. 221.

bequeathed all his money, securities for money, money in the funds, household furniture, cattle, and all other his personal estate and effects, unto two trustees, upon trust to pay his debts and legacies, and subject to the payment of a legacy, to stand possessed upon the trusts after mentioned. He then devised his freehold estates to trustees, upon trust, to permit his wife to reside at his house, and to use the household furniture, plate, linen, and china therein for her life, and to pay the rents and profits of his real estate, and the interest, dividends and proceeds to arise from his said money, and securities for money, money in the funds, and personal estate thereinbefore bequeathed to her for life, and, after her decease, to sell his real estate, and divide and pay the purchase moneys; and to pay, assign or transfer his said money and securities for money, money in the funds, and personal estate unto his children. He impowered his trustees from time to time, to alter, vary, and transpose any of the stocks, funds, or securities upon which any part of his personal estate might be invested. The testator died possessed of long annuities and leaseholds, and the contest was in regard to them. The Master of the Rolls, addressing himself to the point under consideration, said: "In no case that I have been able to find, has the mere absence of any direction to convert his property been construed to mean that it should be enjoyed *in specie* by the legatees in succession; and the contrary must have been decided, though not exactly so stated in Johnson v. Johnson, 2 Coll. 441.

"There are several cases in which the court held, that the rule was excluded, where the testator has fixed the period of conversion; as for instance, where he has given the property to one for life, and after the death of that person has directed the property to be sold and divided. The case of Goodenough v. Tremamodo, 2 Beav. 512, was decided on the word "rents," and Alcock v. Sloper, 2 M. & K. 699, turned on the direction to convert, being after the death of the tenant for life; but this rests on an obvious rule of construction, that the direction as to

the time when the property is to be converted, excludes the inference that it is to be converted at an earlier period.

"The case of Hunt v. Scott, 1 De Gex & Sim. 219, is the nearest to the present, of all the cases to which I have been referred, or which I have been myself able to discover; but in that case, besides an absence of any direction to convert, as applicable to the property to be enjoyed *in specie*, there is a direction to convert contained in the will applicable to other property, which, in my opinion, distinguishes it from this case, and from the case of Johnson v. Johnson decided by the same judge.

"I think, therefore, that the absence of this direction cannot be treated as an expression of intention on the part of the testator, that his property was not ever to be converted; it would, I think, be unreasonable if it were so held. By law, the property must be converted; a testator may not unreasonably be supposed to be cognizant of that law, and to have given no direction on the subject, because he may have supposed that it would be mere surplusage so to do. This also is consistent with the opinion expressed by Vice Chancellor Wigram, in Cafe v. Bent, 5 Hare, pp. 34 and 35, which is very material to this part of the case.

"But still this is a circumstance not wholly to be rejected, and the rest of the will must be examined, in order to discover the intention of the testator. The rest of the will here confirms my opinion, that the testator had not supposed the whole of his property was to remain unconverted. The residuary clause runs thus: he gives "all his money," &c., "household furniture," &c., &c., "to trustees, upon trust, in the first place, to pay thereout all his just debts, funeral and testamentary expenses, and legacies." Some portion of his estate must have been sold to pay the debts and legacies. Which portion did he intend to apply for that purpose? If a part was to be sold, why not the whole?

"In the subsequent enumeration of the residuary estate, he omits the words "household furniture and cattle." It is to be inferred, therefore, that as to those at least, he supposed they would have no specific existence as a part of his estate when it was to be divided. This is, it is true, but a trifling matter, and but little weight is to be attached to it; it removes, however, the force of the observation, that the various parts of his residuary estate are repeated in the same exact words; this is not so, as two of the enumerated items most likely to perish are not repeated.

"Again: The power to vary securities, at the close of the will, is only intelligible on the supposition that the property had been converted. This clause is also important in another point of view. If the testator intended his widow to enjoy the long annuities *in specie*, could he have permitted his trustees to defeat that intention, as undoubtedly they might do, if, under this clause in the will, they turned the long annuities into three *per cent.* consols, or invested the produce on mortgage.

"The directions respecting the great Staughton estate are also important. I accede to the argument, that if the testator had intended the whole property to be enjoyed *in specie*, he would not have considered it necessary to direct that the household furniture, plate, linen, and china at Great Staughton should be enjoyed *in specie* by the wife during her life.

"It was urged, that this observation would have a two-fold operation, because, as he has directed the estate at Great Staughton to be sold, it is to be inferred, that if he wished the rest of the property to be sold, he would have given similar directions. But the circumstance that the Great Staughton was a property of which the testator had the fee, and could not be sold, unless the will contained some direction for this purpose, removes the force of this observation.

"The circumstance that the residue is given to two of the executors as trustees, and not to the three executors, does not

weigh with me, as to the construction to be given to the rest of the will.

" The general scope and effect of the whole will and the passages to which I have referred would, without considering any particular expressions, lead me to the conclusion, that the testator did not intend the property to be enjoyed *in specie ;* still, this may be varied by the force of particular expressions used by the testator, and accordingly, the counsel for the petitioners refer to several expressions contained in the will, as being consistent only with their construction of the will ; and they support their view by many authorities.

" There is certainly a great variety of cases, where the court has laid hold of various small expressions, as indicating the testator's intention, that the property was to be enjoyed *in specie ;* but all, or nearly all, of them are, I think, referable to a particular mode of management of the property or payment out of it, which management or payment could not take place unless the property remained unconverted.

" For instance, in Pickering v. Pickering, 2 Beav. 31, and 4 M. & C. 289, and Goodenough v. Tremamodo, 2 Beav. 512, the rents are directed to be paid to the legatee ; and there was no property producing rents except leaseholds. In this will, the word " rents " is used ; but it is confined to the freeholders. In Cafe v. Bent, 5 Hare, pp. 34 and 35, the testator directed a per centage on the receipt of the rents of the leaseholds to be paid to his son John. In Burton v. Mount, 2 De Gex & Sm. 383, a mixed property, consisting of freeholds and leaseholds, was given to trustees, in trust, out of the rents, to pay annuities, with a power of sale given to them, which showed, that until sale, the leaseholds should be enjoyed *in specie.*

" I do not go through all the cases, which are very numerous ; but each, when examined, will be found to possess the character I have already referred to.

" In this will, I look in vain for any such expression. The

word on which the petitioners mainly rely, is the word "assign," which, they say, is properly applicable only to leaseholds; but this word might apply to mortgage securities, upon which, under the general power at the end of the will, the testator probably considered that he had authorized his trustees to advance money; and the words *reddendo singula singulis*, in their order, so far from supporting, would exclude the supposition, that the word "assign" was intended to apply to leaseholds remaining unconverted. The passage in the will runs thus: "pay" "my money," "assign" "my securities for money," and "transfer" my "money in the funds and personal estate."

"There are other cases, such as Bethune v. Kennedy, 1 M. & C. 114, Collins v. Collins, 2 M. & K. 703, where the testator has expressly pointed to the property by name, as unconverted, or has described his property as remaining in the manner in which it was situated when he died. These cases have no reference to the present, as this will contains no such expressions.

"Upon the whole, therefore, I am of opinion that the testator has not given his property to be enjoyed *in specie*."

§ 485. The object of the rule ought also to be considered in determining a case, for even where there is no indication of an intention that the property should be enjoyed *in specie*, still the case may not fall within the reason of the rule which requires a conversion to be made. As was said in Pickering v. Pickering: "Great injustice would be done, if where there is nothing in the will but a tenancy for life and a remainder, it is always to be held that the property is to be at once converted."[1] Thus, if part of the legacy be judgments against insolvents the court ought not to order them to be converted, for though a trifling sum might be obtained for them, yet as neither party would be

[1] 4 My. & Cr. 303.

injured by reason of the non-action of the court, they might both be much injured by its action.

§ 485. The general rule prevails in this country. Thus in Cairns *et als.* v. Chaubert and Wife, a testator gave the rents and profits of his real estate and the income of his personal property to his wife for life, and after her death to Mrs. Cairns; and after the making of his will acquired the right to the profits of a toll-bridge for a term of years. The Chancellor said: "As the bridge was not in existence, nor in the contemplation of the testator, at the time of making his will, two years before the passage of the act authorizing him to build it, upon no principle of construction can this be considered as a specific bequest of successive life estates to his wife and Mrs. Cairns in this particular property. The case, therefore, falls within the general principle, that where an estate for life, or any other interest short of absolute ownership, is given in the general residue of the testator's personal estate, terms for years, and other perishable funds or property, which may be consumed in the using, are to be converted and invested in such a way as to produce a permanent capital; the income or interest of which permanent capital alone is to go to the owner of the life estate, or other particular estate in the testator's residuary personal property."[1]

§ 486. In Harrison *et al.* v. Foster *et al.*, the general rule was laid down, but it was held to be controlled in that case by the intention of the testator. For the residue was given to the widow for life, or during widowhood, to use in any necessary or lawful way, to sell for a valuation, or to dispose of all or any part for her convenience or necessary use, and the terms of the gift were, therefore, totally irreconcilable with the idea that the residue was to be converted.[2]

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[1] 9 Paige Ch. Rep. 160. [2] 9 Ala. 955.

§ 487. In Dunbar's Ex'rs v. Woodcock's Ex'r, a Virginia farmer gave the residue of his estate, real and personal, to his wife for life, and after her death, he gave the same, as well the land as all the other property remaining at her death, to D and wife. The residue consisted of land, including the farm on which the testator lived, slaves and live stock thereon, furniture, farming utensils, and crops of grain. It was held that the widow was entitled to enjoy the property *in specie*, except so much of the crops of grain as was not necessary for use on the farm and in her family during the year ensuing her husband's death.[1]

§ 488. In Evans *et al.* v. Iglehart *et al.*, Loper gave all his real estate to his wife, and declared: "After her death, I will the tract of land H, together with all the personal property which may belong thereto at her death, to E and her heirs forever. *Item*,—I give to my wife, for life, all my personal property not hereinbefore disposed of, together with all the money of which I may die possessed; after her death, I give the one half part of all my said personal property to the children of J. C. and B, to be equally divided among them; and the same shall be immediately, or in a convenient time after the death of my said wife; the other half shall go to and be vested in whomsoever my wife shall by last will direct." The widow appointed two to take under her power over the moeity of the personal property after her death. Some of the residuary legatees in remainder of Loper filed a bill against the executors of Loper and his wife, and E, the appointee of his wife, for an account and distribution of Loper's personal estate among the parties entitled. The court said: "Whether the widow of James P. Loper ought to enjoy his personal estate specifically, or to recieve nothing more than the interest on its value, is purely a question as to the intention of the testator, in conformity to which his will must

[1] 10 Leigh 628.

be executed; there being no unbending principle of law to control such intention, whether it be in the one way or the other. The testamentary law of Maryland, then, looking to the distribution of the deceased's personal estate in kind, amongst legatees and distributees, and the practice of executors and administrators having been always conformable thereto, ought we not to presume that the testator had a knowledge of this law, and the usage under it, and that he made his will in reference thereto, contemplating and intending its execution accordingly? The same reasons, which prompted the introduction of this chancery rule in England, do not urge its adoption here. We have no three *per cent.* stock in this country, as in England, in which it is the policy of the government that all investments by the authority of the chancery court should be made; nor have we any stock, judicially regarded, of such pre-eminent security as to be the exclusive object of such investments.(*a*) The nature of our personal property, too, differs materially from that which is the subject of the testamentary disposition in England. A considerable portion of our personalty consists of slaves, born in our families, humanely treated, faithfully serving us, and warmly attached to their masters and their connexions. To part with such property, even when under the influence of pressing necessity, is a severe trial to the feelings of the master. But voluntarily, and uninfluenced by any such necessity, to subject them by will to sale under the hammer, perhaps in foreign bondage, whilst his farms to which they belonged were distributed amongst his connexions and relatives, is conduct, the idea of which rarely if ever entered into the imagination of a

(*a*) This is a misconception of the ground of the principle. The reason why a Chancery Court in England directs investments to be made in a particular kind of property, is totally foreign to the reason why it directs the conversion of perishable property when it is limited generally to persons in succession.

Maryland land-holder. We cannot, therefore, for one moment, suppose that where the testator gave all his real and personal estate to his wife during her life, that contrary to his express words thus used, his intention was not to give her any part of his personal property, but that his executors should sell and invest the same, and pay to her its annual income for life. If such had been the meaning of the testator, he would have used appropriate terms to convey it to his executors.

"Is it natural to suppose, that it entered into the contemplation of James P. Loper, that after his death, his widow should forthwith abandon his mansion at Loper Hall, that his favorite system of husbandry should be discontinued, his farms placed in the hands of impoverishing unsparing tenants, all his slaves, not even excepting his own body servant, or the waiting maid of his wife, sold, (and probably in foreign servitude,) and that not an article of his personalty (his carriage and horses excepted) should be specifically enjoyed by those objects of his bounty and affection, on whom he had so explicitly bestowed it. But the limitation over to Elizabeth Evans, of all the personal property that might belong to Loper Hall farm at the death of the widow, is conclusive evidence that the testator did not intend that the general residue should be sold and invested; as in that event, no part of his personal property could by possibility belong to Loper Hall at the death of his wife.

"If the surplus or residue thus bequeathed consists of money or property, whose use is the conversion into money, and which it could not for that reason be intended should be specifically enjoyed nor consumed in the use, but be by the executor converted into money for the benefit of the estate; as for example, a quantity of merchandize, a crop of tobacco or the like, an investment thereof must be made by the executor in some safe and productive fund, or it must be put out on adequate securities, and most properly under the authority and direction of the Orphans' Court or a Court of Equity, so as to secure the dividends,

interest or income to the legatee for life, and the principal after his death to the legatee in remainder."[1]

§ 489. We are led, then, to this remark, that instruments are to be read by the light of surrounding circumstances. In the absence, therefore, of evidence furnished by the instrument itself it must be presumed, that a man intended that his property should be taken and enjoyed in accordance with the customs and feelings of the community in which he held and enjoyed it himself.

§ 490. The next point for consideration is the time at which the donee, &c., of a partial interest *in præsenti* is entitled to enter into the enjoyment of it. If he is entitled to the enjoyment of the chattel *in specie*, and the gift be by deed, there is generally no difficulty in determining the point, for the deed itself furnishes the answer.

§ 491. If the gift is by will, then the general rule seems to be that the legatee is entitled to the possession of the chattel at the time when the executor ought to make distribution of the estate. In England the Courts Ecclesiastical, and following them, the Courts of Equity allow to the executor one year for the settlement of the estate. In this country a statutory rule prevails in the several States. In this State, the time fixed is eighteen months; but in Williamson & Wife v. Mason, Ex'r, &c.,[2] the court say: "There is one case, however, in which distribution may be required before the lapse of eighteen months, as we understand the statute—that is, the case of a report from the administrator that the estate is solvent." It seems that even where a petition is filed for distribution within the time that a demurrer will be sustained, even though it be alleged that there are no debts.[3] The same statute applies to executors.

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[1] 6 Gill & John. 195. [2] 18 Ala. 87. [3] Ib.

§ 492. But the executor may assent to the legacy at any time, and then the legal title of the legatee is perfected, and he may recover the possession.

§ 493. In Finch *et al.* v. Rogers, McKinney, J., in delivering the opinion of the court, said: "It is certainly true, as a general rule, that the assent of the executor is necessary to perfect the title of the legatee to a bequest of chattels, whether personal or real, and whether specifically or generally bequeathed; and without such assent, possession of the chattel cannot be taken by the legatee. This is for the protection of the executor, upon whom the law devolves the personal estate for the payment of the debts of the deceased, and who is responsible to creditors to the extent of the whole personal estate. But the title of the legatee is derived from the will, and is not created by the assent of the executor; consequently, such assent has only the effect of perfecting the title derived from the will; or in other words, such assent is only necessary to entitle the legatee to demand or sue for the recovery of the chattel, if it be in the possession of another who wrongfully withholds it. From these principles it would seem to follow, that in a case like the present, where the legatee was placed in possession of the chattel specifically bequeathed by the testator in his lifetime, and there are other assets sufficient for the payment of debts, the assent of the executor is not absolutely necessary in order to a complete legal title in the legatee. In such case, the legatee being actually in possession, and that, too, by the act of the testator in his lifetime, the reason of the rule, which requires the executor's assent, does not apply.[1] The executor, in the case stated, would not be chargeable with such chattel; it would not be assets in his hands; nor could he maintain any action against the legatee for its recovery, except in the event of a deficiency of

[1] See Lowry v. Mountjoy, 6 Call. 55.

assets to discharge the debts of the estate, after having fully administered the residue of the personal estate.

"But, again, it is well established, that a person appointed an executor, may assent to a legacy before he proves the will; and having once assented, he cannot retract such assent afterwards, unless, perhaps, the presentation of debts unknown at the time such assent was given, should occasion a deficiency of assets."[1]

§ 494. The doctrine, however, that the assent of the executor is not necessary to vest the legal title to a chattel in a legatee when it was delivered to the legatee by the testator in his lifetime, and specifically bequeathed, and there is a sufficiency of assets without it, cannot be relied on; for the true doctrine seems to be that in every case in which a claim to a chattel is *under a will*, there must be an assent of the executor or administrator *cum testamento annexo*.[2]

§ 495. But note here, if a chattel be delivered by a testator to a person, it may be a *donatio mortis causa*, though specifically bequeathed in the will; and so no assent of the executor would be necessary, because in that case the legal title would not pass to him.

§ 496. And here it may be added that if a legacy be given to an executor, or to one of two or more executors, such executor may assent to his own legacy even before administration. But he must, either expressly or by implication, elect to take as legatee, otherwise he will be held to have taken as executor.[3]

§ 497. It seems to be true in all cases, where the gift is by will, that the legatee for a limited period ought to sign an inventory of the property, acknowledging that the chattels are in his possession for the limited time, and that afterwards they are to

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[1] 1 Hump. 563. [2] Wentworth's Ex. 409.
[3] Ib. 66; 2 Shep. Touch. 335; 31 L. L.

be delivered and remain to the use of the subsequent legatee, or the personal representatives of the testator, as the case requires. The inventory so made ought to be delivered to the legatee in remainder or to the executor for his use. If there is no limitation over, or if the executor is entitled to the property after the expiration of the first limitation, or if the limitation over is to a person not in *esse* or not ascertained, or it seems if it be otherwise contingent, then the inventory ought to be delivered to the executor. It is the duty of the executor to require such an inventory, and he is not bound to deliver the chattels without such an inventory be delivered, and hence is this a qualification upon the legatee's right to the legacy at the time when he is entitled to the possession of it.[1]

§ 498. When the legatee is not entitled to the enjoyment of the legacy *in specie*, or when it is a money legacy, then the legatee is entitled to the enjoyment at the time prescribed by the statute of limitations in this country, and in England, at the expiration of one year from the death of the testator. What he is entitled to in such case, in the intermediate time, will come up for examination in another place.

499. We must now look to the manner of the partial limitee's interest. And here the general rule is, that if he is entitled to the enjoyment of the chattels *in specie*, that he is entitled to enjoy them for the time limited in the same manner in which general owners ordinarily enjoy them. But suppose the gift be by will, and the executor has received profit, or ought to have received profit from the legacy prior to the time when he was bound to deliver possession to the legatee, then who is entitled to such profit as he has received, or as he is personally chargeable with by reason of his duty and his omission? It seems that

[1] See Kinnard v. Kinnard, 2 Watts 109; Luke v. Bennet, 1 Atk. 471; Bell v. Kinaston, 2 Atk. 82; Foley v. Burnell, 1 Bro. Ch. Rep. 279.

the partial legatee is entitled to such profit, if it be not needed as assets in the due course of administration. This conclusion appears to result from the position that an executor is a trustee, first, for the creditors of the estate, and then for the legatees—that his detention of the chattels is for a specific purpose, apart from which the legatee is entitled from the death of the testator.

§ 500. This matter was before the court in Turnage v. Turnage. In that case a reference was made to the master in the court below, who reported that assets to an amount exceeding $6000 in good promissory notes, bearing interest, due the testator, came to the hands of the executrix, upon which sum he has charged interest up to the 8th of October, 1849; in all $7041 40. He has credited the executrix with two notes specifically bequeathed, and $1200 in other good notes given to her, and with various pecuniary legacies paid by her, and has *allowed* interest from the dates of the several payments up to 8th of October, 1849; and he has also allowed vouchers for payment of debts and funeral expenses, amounting to $129 32, upon which he has given interest from the date of the several payments to the 8th of October, 1849.

The plaintiff, alias Turnage, filed two exceptions, which raise the question whether the executrix was entitled to the allowance of interest on the legacy to her of $1200 in good notes, and on the pecuniary legacies, until after the expiration of two years from the probate of the will. As she is charged with interest on one side of the account, it is right that she should be credited with interest on the other side, provided the legacies were not paid before they were due. That raises this question; as the executrix had funds in hand and there were no debts against the estate, was she at liberty to pay the legacies forthwith and settle the estate? Or was it her duty to keep the fund at interest for two years merely for the benefit of the residuary legatee? The statute allows executors and administrators two years to settle

estates, upon the supposition that many estates are complicated and cannot well be settled in less time. This, however, is intended as an indulgence to them, and was by no means intended to confer on the residuary legatee the right to have the fund put out at interest for his benefit. In this case, as no time is fixed on for the payment of the legacies, they were payable forthwith; and as the condition of the estate did not require delay, the executrix was not only at liberty, but it was her duty, to pay them as soon as she had funds in hand. In fact, the legatees might have sued within the two years, and under the circumstances the court would have decreed the legacies to have been paid."[1]

§ 501. The fact that the legatee might or might not have sued within that time, does not seem in anywise to affect the principle, since that is but a postponement of the remedy for the administration of the estate.

§ 502. If an executor retains possession after he ought to deliver the chattels to the legatee, and they are injured or depreciated in value, the executor is answerable *de bonis propriis* to the legatee for such injury or depreciation.[2] The principle is the same as in detinue.

§ 503. If the chattels in which a partial interest is created be such as increase their numbers, then the question arises, how is the *quasi* particular tenant entitled to such increase? The general rule is, that the partial legatee is entitled absolutely to such increase as is made during the continuation of his particular estate, subject, it is said, to the liability of keeping up the original stock.[3] The qualification, however, is denied, and the rule is said to be absolute.[4] The true question, in such cases,

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[1] 7 Iredell's Eq. 129. [2] Chaworth v. Beech, 4 Ves. (556.)
[3] Ryan v. Bull, 3 Strobh. Eq. 86. [4] Lewis v. Davis, 3 Mo. 133.

seems to be, is the increase profit or is it principal? if profit merely, it belongs to the *quasi* particular tenant; if principal, it passes to the party subsequently entitled. The determination of the question depends upon circumstances. If the gift be of a flock of sheep for life, the profit consists of the shearing, and such increase as is not necessary for keeping up the original stock. So it would be in the hands of a general owner, and so it ought to be in the hands of a partial owner.

The same rule ought to govern in case of a partial gift of a stock of hogs, or a herd of cattle; for the same reason applies to them. But if a brood mare be given to A for five years, it seems clear that A would be entitled to the colts foaled during the five years. The principle seems to be clear enough, but there is difficulty in applying it, as there is indeed of all principles to particular cases.

§ 504. There is a difference of judicial opinion in regard to the increase of slaves.[1] Some courts hold that the *quasi* particular tenant is entitled absolutely to such increase as accrues during his limitation;[2] others hold that he is not so entitled, but that upon the expiration of his limitation the increase passes to the party subsequently entitled.[3] We assert the latter to be the better doctrine, and we say that, in principle, there is a difference, in this respect, between slaves and flock, or herds. The ordinary way of deriving profit from a flock of sheep is by shearing them, and by eating and selling a certain number every year; but the ordinary way of deriving profit from slaves is by using their services, and not by shearing them, or by eating

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[1] Bequest of slaves and all increase, children born before the death of the testator, do not pass, because a will speaks from death. Turnage v. Turnage, 7 Iredell's Eq. 128.

[2] Sommerville v. Johnson, 1 Har. & McHen. 352; Conklin v. Haven, 12 Johns. 314.

[3] Wilkes' Adm'r v. Greer *et al.*, 14 Ala. 427—cases cited.

and selling a certain number of them annually. A gift, therefore, of slaves for a limited time is a gift of their services and of the services of their increase during the time of the limitation. And so we conclude that the increase of slaves is not profit but an accretion to the capital, and ought therefore to pass with it.

§ 505. And here it may be added, that in England when an extraordinary dividend is declared among the holders of bank stock, it is held that a *quasi* particular tenant of such stock is entitled to such extraordinary dividend only as he is entitled to the original stock; and this because it is not considered as profit, but as an accretion to the capital.[1]

§ 506. The doctrine, as we have asserted it, carries out the intention of the donor, for it is in accordance with the common understanding of those unacquainted with the interpretations of law, and therefore it is a good one.

§ 507. The idea advanced by the Provincial Court of Appeals of Maryland, "that the issue ought to go to the person to whom the use is limited; otherwise, having no interest worth regarding, he might not take care of the issue,"[2] cannot be tolerated for a moment, since it has no other basis than inhumanity. If, however, there is anything in the idea, who is to take care of the slaves originally given, who, during the tenancy for life, may all have become old and valueless? Their care and support must fall back as a charge upon the donor's estate;[3] but it seems

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[1] Brandon v. Brandon, 4 Ves. (800;) Paris v. Paris, 10 Ib. (185.)

[2] Dobson v. Scott, as stated Sommerville v. Johnson, 1 Har. & McHen. 353.

[3] See Mooney v. Evans, 6 Iredell's Eq. 363. It was held in that case, that the acceptance of the remainderman, who was a minor, could not be presumed, because the remainder was a burden. In the absence of evidence, such presumption could not be made in the case of an adult.

hard that, that which went out as a bounty should return as a burden. There may indeed be no estate upon which they can be thrown back, for during the continuance of the *quasi* tenancy it may have been scattered to the winds, and thus the superannuated slaves would *become a burden* upon the county. But even if there were sufficient remaining, would those into whose hands it had passed be more certain to minister to their wants, than would the *quasi* tenant to the wants of the issue? Is it not apparent that the children have a better chance of being cared for, even upon the concession of inhumanity, since they have their fathers and mothers to care for them? Besides, children become valuable in a few short years; and is a *quasi* tenant of slaves, for a limited period, an exception to the rule that "man thinks all men mortal but himself"? And this is applicable, for generally such limitations are for life.

§ 508. The same rule in this respect that is applicable to bailments is applicable to partial interests, and it would certainly do violence to the understanding of every owner of slaves to hear it asserted, that the child born of a slave during the year for which she was hired did not at the end of the year return with its mother to her master. Does this present no question of humanity? The same case might occur in case of a partial interest, and it could not happen otherwise, if there were children, than that they should be separated from their parents, unless there were interest or humanity to induce a purchase; or unless the doctrine contended for be allowed to prevail.

§ 509. It seems, therefore, upon the whole, that the court in Concklin v. Haven,[1] had no cause for self-gratulation, except that the case, under the total misapplication of a general rule, furnished occasion for a judicial jubilee. The court there evi-

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[1] 12 Johns. 314.

dently made haste to reach a conclusion, and having reached it, to grasp it with an exultation which might well have been omitted.

§ 510. When the chattels are such as are consumable in the use, there can be no question, if it be held that the *quasi* particular tenant is entitled absolutely. If entitled to use them and his interest be not absolute, still he is entitled to use them in the ordinary way, even though such use result in their entire consumption. If the donor declare his intention to be that the *quasi* particular tenant may enjoy such articles *in specie*, but that he shall account for their value to the subsequent owner, the intention, of course, would prevail. So, if a plantation, stock, farming utensils, corn, &c. be given for life, or years, the particular tenant is entitled to the use of every thing, but as he is bound to good husbandry, he must leave the plantation in a husbandman-like manner. Subject to that duty, he is entitled to the profits accruing during his limitation, and if he be tenant for life and die after the crop is planted and before it is gathered, his representatives are entitled to the emblements, after deducting a year's provision. In Poindexter v. Blackburn *et al.*, however, it was held that the tenant for life was entitled to the increase of stocks of horses, cattle, &c. and to the crops left by her as the fruits of her industry, and to the growing crops likewise as emblements.[1] But the doctrine as stated above seems to be the better doctrine, for it cannot be supposed that a testator intended that he in remainder should enter into possession of a plantation, stripped of all provision.

§ 511. When the gift is of money, it is the duty of the executor to invest it, and then the *quasi* particular tenant is entitled to the interest during his limitation; or, in this country he may have the money itself upon giving satisfactory security, but not otherwise. The executor would render himself liable by paying

[1] 1 Iredell's Eq. 289.

it over without taking the security, however solvent the *quasi* particular tenant may be.[1] The English cases do not recognise the right of the *quasi* particular tenant to have the money itself, even upon giving security, but in this country, at least, the rule seems to be a good one.

§ 512. When the chattels are not to be enjoyed *in specie*, but are to be converted into money, then it is the duty to convert them within the time prescribed for distribution to be made, and if not converted in England at the end of the first year, a Court of Equity holds them to be converted, upon the principle that what ought to be done is done. In this country the statute of distributions furnishes the rule, unless the duty of the executor according to the usual course of administration requires an earlier conversion.

§ 513. The same principles apply to the money when converted, that apply to the money when it is given in the first instance, viz: that the *quasi* particular tenant is entitled to the interest of the money when invested, during the time of his limitation; or to the money itself, in this country, upon giving satisfactory security.

§ 514. If a *quasi* particular tenant dies before a dividend of stock, or before an annuity becomes payable, his representatives are not entitled; but if he dies on the very day of payment, they would be entitled to the amount due.[2] But his representatives would be entitled to the interest which had accrued at the day of his death, upon the money invested; otherwise in this country, when the legatee has the money upon security, it would be necessary to hold his estate chargeable with interest from the end of the year preceding his death, unless he happened to die

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[1] Kinnard v. Kinnard, 5 Watts, 110—citing Eichilberger v. Barnitz, 17 Serg. & Rawle, 293.

[2] Paton v. Sheppard, 10 Sim. 186.

on the very last day. Interest, unlike rent, accrues day by day, and that is the reason of the thing.

§ 515. There is difficulty, however, in determining what the partial legatee is entitled to during the time that the property remains unconverted and yielding a profit. In Morgan v. Morgan, the Master of the Rolls said: "The later authorities on this subject concur in this:—that the legatee for life is to take something; but they are not, as it appears to me, reconcileable as to the extent of the interest which the legatee for life is to take, although the subject has been much agitated.

"Sir Anthony Hart, in La Terriere v. Bulmer, 2 Sim. 18, decided that the income of the testator's property during the first year, so far as it was derived from investments such as the court would sanction, belonged to the legatee for life of the residue; but that so far as it was derived from property not so invested, formed a part of the general residuary estate; and this rule was commended by Vice-Chancellor Sir James Wigram, in Taylor v. Clark, 1 Hare, 161, although he considered himself bound by authority not to follow it. It does not appear to me, however, to be scarcely reconcileable with Gibson v. Bott, 7 Ves. 89, and not at all with Angerstein v. Martin, Turn. & R. 232. In the former of these cases, Lord Eldon directed that a value should be put on the leasehold estate, and that the legatee for life should receive four per cent. on that value, from the death of the testator, and in the latter of those cases, he made a decree, under which the legatee for life took the income of Russian stock, part of the estate which was directed to be sold and laid out in the purchase of land. The rule so laid down by Sir A. Hart appears to me to be open to this objection, that the income of the residuary legatee depends upon the mere will of the executors, who may, from negligence, caprice, or enmity, fail to convert the property of the testator, until one year after his death shall have elapsed, and thereby deprive the residuary legatee of all

income during that year. The decision of Sir A. Hart has not been followed, and in Dimes v. Scott, 4 Rus. 195, Lord Lyndhurst laid down the rule to be, that the legatee for life of the residue was entitled, during the first year of the testator's death, to the dividends on so much three per cent. stock as would have been produced by the conversion of the property at the end of that year.

"There is some inconvenience in this rule, which requires a different inquiry to be made, in every case, as to the value of the property at the end of one year; nor does it seem, in principle, at least, to be quite consistent with Lord Eldon's observation in Gibson v. Bott, that "the whole practice of the court is against special directions as to the value at the time of the death." The only cases cited appear to have been Angerstein v. Martin, and Hewitt v. Morris, Turn. & Russ. 241. This question subsequently came before Lord Langdale, in Douglass v. Congreve, 1 Keen, 410, who, after reviewing all the previous authorities, in an elaborate judgment laid down as the rule, that the legatee for life of the residue is to be allowed the income actually produced by that residue until conversion, or until the end of one year, which of those events should first happen. The result of that rule is this:—if the conversion take place before the end of the year, till that period of conversion, the legatee for life will take the income actually arising, and after conversion, the interest of the converted fund: in this case, no inquiry as to the value will be necessary. If, on the other hand, the conversion takes place after the end of one year, then the legatee for life will take the income actually arising during the year that has elapsed after the death of the testator; and, after that year, so much as the residue, if converted and invested at that time, would have produced. In this case, an inquiry becomes necessary to ascertain what was the value of the property at the termination of the first year, and what amount of consols it would have produced if then invested.

"This decision of Lord Langdale's has been commented upon and commended by Mr. Jarman, and seems to have been followed by Lord Langdale, in Mehrtens v. Andrews, 3 Beav. 72, and in Robinson v. Robinson, 11 Beav. 371.

"This rule also seems open to considerable objections. Sir James Wigram, in Taylor v. Clark, 1 Hare, 161, points out the inconvenience which might arise from it, where the larger portion of the property of the testator consisted of rents of leasehold which would expire in one year. It seems difficult, also, to distinguish income which expires in one year from that which expires in less than a year; and yet if a testator died just before the last payment of dividends on the long annuities, or of an annuity on the life of any other person, it could scarcely be contended that this formed part of the income of the residuary estate. It is also open to the objection I before referred to, as applicable to the rule in La Terriere v. Bulmer, 2 Sim. 18, that the executors, from favor to the residuary legatee, might delay till after the year had elapsed the conversion of perishable property producing a larger income. All the authorities were reviewed by Sir James Wigram, in the case of Taylor v. Clark, 1 Hare, 161, and he considered himself, although reluctantly, bound to follow the decision of Lord Lyndhurst in Dimes v. Scott.

"This decision was also followed by Vice-Chancellor Sir James Knight Bruce, in Sutherland v. Cooke, 1 Collyer, 498.

"In this state of the authorities, I consider myself bound to follow the decision in Dimes v. Scott; and, upon the whole, it appears to me to be that least open to objection; and I shall adopt that rule accordingly, until I may be controlled by some higher authority."[1]

§ 516. But there is another class of cases which require no-

[1] 7 Eng. L. & Eq. Rep. 224.

tice here, and it is that class in which a Court of Equity would generally direct a conversion of the property, but in which a part or the whole of the property cannot be converted. Thus, in Pickering v. Pickering, the Lord Chancellor said: "It is often very difficult to carry out the principle of Howe v. Lord Dartmouth. Here was an annuity for many years not paid; the tenant for life got nothing from it. It was not saleable; for the party liable to pay it was supposed to be insolvent. Suppose it had been foreseen that it would ultimately be recovered, still a sum of money payable thirty years hence cannot be much relied on. All that time the tenant for life gets nothing.

"The only way in which justice could be done would be to take the facts as they ultimately turned out, and see what was the value before, because that was all that the remainder-man was entitled to, namely, the value of the property convertible thirty years hence."[1]

§ 517. A case worthy of notice here, is Morgan v. Morgan. In that case a testatrix gave a legacy to A, with the accumulations of interest from her death, upon a contingency, and gave the income of the residue of her estate to H for life, with remainders over. Some years after the death of the testatrix, it was ascertained that the contingency never could happen; and it was held that H was entitled to the interest of the legacy from the death of the testatrix until that time.[2]

§ 518. We have seen, when the gift is a money legacy, that the general rule in England is that it bears interest after the lapse of one year from the death of the testator; and that the rule results from another which fixes the time of payment of such legacy at the end of the first year after the testator's death. The origin of the latter rule is said to be that the Ecclesiastical Court allowed that time to the executor to get in the estate and

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[1] 4 My. & Cr. 303. [2] 1 Eng. Law & Eq. R. 35.

pay the legacy before he should be compelled to account. In Sullivan *et ux.* v. Winthrop *et al.*, Judge Story says, that whatever may be its origin, it is irrevocably fixed as a general rule, and is not now open to controversy, and that it was doubtless founded in the convenience of having a fixed period applicable to cases in general.[1] But why is it that interest in England is generally payable upon such legacy from the end of the first year? It is because the legacy is then payable. That, then, is the general rule, and it renders it necessary, therefore, as we have said, in each state to inquire when the executor is bound to distribute, and that is the time from which interest is ordinarily chargeable.[2] But we assert the reasonable rule in this country to be, if profit accrue to the estate by reason of such detention, and be not needed by the general assets, that it passes as an adjunct to the legatee, or if the executor were bound to make profit and neglected it, that he is personally chargeable with what he ought to have made, and that then the amount so charged passes as if it had actually been made.

§ 519. An exception to the general rule, that interest does not accrue till after the legacy becomes payable, exists when no profit accrues to the estate, whenever an intention appears that it shall be payable, for the general rule after all is founded upon presumed intention. An implied intention is held to exist in every case, unless rebutted, in which a legacy is bequeathed to a minor, whom the testator was under a moral obligation to support, and for whom no support was provided, in the meantime; because it is presumed that the testator intended to fulfil a moral obligation.[3] A grandson, therefore, as a grandson merely, is not entitled to interest on a legacy from the death of the testator. The reason of the exception and the exception itself in

[1] 1 Sum. C. C. Rep. 12.

[2] Hallet & Walker, ex'rs, v. Allen, &c., 13 Ala. 554.

[3] Dawes v. Swan *et al.*, 4 Mass. 215.

favor of the minor extend beyond the legacies *in præsenti* which are regularly payable at the time of distribution, to legacies payable at a future day, as to a son payable at twenty-one.[1]

§ 520. The rate of interest in this country is determined by the statutes of the several States, though the English rule of four per cent. seems to have been adopted in Mississippi.[2]

§ 521. When the *quasi* particular tenant has a power to dispose of the property absolutely for a particular purpose, then, of course, that enlarged measure of enjoyment is governed by the terms of the gift, and must be justified by the facts.[3]

§ 522. We may now proceed to enquire as to the rights of the party entitled *in futuro*. In the first place, he is entitled to have an inventory of the property, as we have already said in another place, and if it be not given he can obtain it by a bill in chancery; and if the property be at any time in danger of being lost, destroyed or carried out of the State, he is entitled to an injunction and to security for its forthcoming at the time when he shall be entitled to the possession. And in Hinson & Wife v. Pickett, it is said that the defendant in such case cannot defeat the jurisdiction of the court by setting up a paramount title in one of the plaintiffs.[4]

§ 523. In Cordes *et als.* v. Adrian *et al.* there was the following bequest: "I give and bequeath to my son, Thomas Evans Cordes, the following negroes: Molly, &c., together with the present and future issue of the females; and should he die without lawful issue, the said negroes shall return to my other sur-

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[1] Walker *et al.* v. Walker's Ex'r, 17 Ala. 396; See Sullivan *et ux* v. Winthrop *et al.*, 4 Sum. C. C. Rep. 1, where many cases upon the subject are collected.

[2] 12 Ala. 559.

[3] Scott v. Perkins, 28 Maine 22.

[4] 1 Hill's Ch. Rep. 44.

viving children." Two of the negroes were levied on and sold under an execution against the legatee, and were purchased by the defendant Adrian. The court said: "It has been the constant course of the court to require security for the production of slaves at the termination of the life estate, or any other contingency, when the rights of remaindermen spring up, whenever those rights appear to be in danger. They appear to be in danger in this case, as Mr. Thomas E. Cordes is in debt and embarrassed, and the property is not only in danger of being sold and scattered for his debts, but it has actually occurred with respect to two of the slaves now in question."[1]

§ 524. In Clark & Wife v. Saxon & Wife, the wife of the defendant had a separate estate for life in some, and an undivided interest as tenant in common in others, of the slaves in question, all of whom were in the possession of the defendants, who were about to remove out of the State. The bill was filed to compel her and her husband to give security for the forthcoming of the slaves, and it was held that she was trustee for those claiming in reversion, that she could not plead her coverture in abatement; and on the proof it was ordered that she and her husband give security not to remove the slaves beyond the State.[2]

§ 525. In Lee v. McBride, Nash, by deed, conveyed to his daughter Judith two slaves, Sam and Harry, for life, with remainder to the plaintiff, reserving to himself the use of the negroes during his life. The donor died, and shortly afterwards the defendant purchased the interest of Judith in the slaves, took them into his possession, carried them beyond the State and sold them. The bill further alleged that McBride was insolvent, but still had in his hands the money obtained for the negroes, and that the plaintiff believed that he would lose his

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[1] Id. 157. [2] Id. 69.

interest in the negroes unless McBride should be compelled to give security for their value. The court said: "To what extent the plaintiff would be entitled to relief, if the defendant had sold the whole property in the slaves or had carried them to parts unknown to the plaintiff, with the intent to baffle his search for them and defeat his right, it is not necessary at present to say, nor, in some cases which might be supposed, would it be very easy to say. As the case stands, it is not established that the defendant professed to sell the negroes absolutely; but the contrary is to be inferred. The bill does not distinctly charge, nor does the decree find an absolute sale, but only in general terms that the defendant sold the negroes. As the bill is thus vague, it is not seen how the court could declare such absolute sale—thereby going beyond the allegations of the party. But, the defendant has answered, assuming the bill to contain that allegation; and he denies it explicitly, and says that he sold the negroes as he bought them, that is, until the plaintiff should come of age. There is nothing to contradict that, or to bring it into doubt, but the single fact that the defendant carried them to the adjoining State of Virginia and sold them. We are not prepared to say that in any case that circumstance by itself would be sufficient to establish that the sale was of a greater interest than belonged to the seller. But it cannot have that effect here, in opposition to the positive averment in the answer, and where the price received, as stated in the answer, (which the plaintiff admits to be true, in that respect, by taking his decree for the sum,) was much less than the value of the whole property, and only a fair price for the real interest of the seller. It ought not, therefore, to be assumed that the defendant sold the negroes for more than the term for which he owned them, nor a decree made upon that hypothesis, but the contrary. Then, if the defendant sold only the right he had, it cannot be questioned that he would have been justifiable in making it, had he made it to an inhabitant of this State, and not

upon a concerted purpose that the vendee should carry them out of the State in such a manner as to place them out of the knowledge and beyond the reach of the remainderman. Does the mere act of carrying them out of the State and selling them entitle the remainderman to redress against the particular tenant? The sale even of the absolute property does not displace the remainder, and the person entitled to it may, upon the falling in of the particular estate, recover the negroes themselves. We will not lay it down that the remainderman may not have an immediate action on the case at law, or be relieved in equity, as upon an injury to his rights as a remainderman by reason of the destruction of the property of which he is entitled to the remainder. But without pursuing that idea so as to ascertain in detail the different remedies and their extent in such a case, it may be safely laid down, that it is not in law or in equity an injury by the particular tenant to the remainderman, simply to move slaves to another State, or thus to remove them and sell nothing more than his own interest in them. For if the remainderman knows the slaves and where they are, he has, against the purchaser, by way of securing his enjoyment of the slaves when his estate comes into possession, a right to the same remedy he had here against the particular tenant, and it must be supposed that he will there get due redress according to his right. If, indeed, the remainderman sees that the particular tenant is about to remove the slaves out of this State, he may anticipate that purpose, and upon his application the court will restrain the execution of the purpose and secure the forthcoming of the property. But where the remainderman lies by, and the other party does nothing more than part from his right to a person in another State, it is not seen that the remainderman has any cause of action therefor against the former tenant of the particular estate, or any ground for requiring him in equity to be responsible for the production of slaves over which he has no longer a control, and which the law did not prohibit him from

alienating. It is plain, therefore, that, after a sale by a particular tenant, the right to redress against him in either court depends upon the intention to injure the remainderman by the sale, and upon an injury to him resulting in fact therefrom. Now that cannot be assumed when it does not appear that the slaves, though in another State, are not known to the remainderman, and as accessible to him as they were here before the sale. Here the bill states only, that a few days before the suit commenced, the defendant sold the negroes beyond the limits of this State; and it does not allege that the plaintiff did not know where they were, and could not trace them and have adequate remedy there by having their production duly secured; nor does it seek any discovery of the defendant's vendee, nor state any reason whatsoever for not following the property. Therefore, as the defendant was entitled to the interest sold by him, the court cannot hold that he had not a right to make the sale, though to a person out of the State, and that it was a fraud in him so to do; since the plaintiff neither charges nor proves that the slaves were thereby placed beyond his knowledge or reach, or that he has been otherwise defrauded, or in fact injured in the premises."[1]

§ 526. In Lyde *et als.* v. Taylor *et als.*, the court said: "The fact that the slaves have been conveyed absolutely to the different individuals who assert absolute title to them and deny the right of the complainants, constitutes a sufficient ground to warrant the interposition of the court in favor of the complainants, and to make such order and decree as will secure to them the future enjoyments of their rights."[2]

§ 527. In Medley v. Jones, Jones had, by deed, conveyed to Elizabeth Rogers certain slaves for her life, and afterwards he

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[1] 6 Iredell's Eq. Rep. 533.

[2] 17 Ala. 276; see also Ramey *et als.* v. Green, Adm'r, 18 Ala. 771.

filed a bill praying for a *ne exeat* and injunction to prevent the tenant for life from removing the slaves from the State until security should be given for their production to him at her death. The chancellor decreed that the security should be given, and further decreed that if bond and security according to the prayer of the bill were not given within three months from the end of the term, the slaves in question should then be delivered into the custody of Jones, to be by him held as his own goods and chattels during the life of Elizabeth Rogers, or until such bond and security should be given as aforesaid; that in the event of their being delivered to the complainant, he should account for the annual profits thereof to Elizabeth Rogers during her life, or until such bond and security should be given, &c.[1] This case is cited to show the practical working of the remedy.

§ 528. In Bonner & Wife v. Bonner, the general rule was recognised, but it was held that the court would not exact security for property which had been received by the *quasi* tenant for life in exchange for the property limited.[2] But this is contrary to principle. The true doctrine was laid down in Cheshire v. Cheshire *et als.*, where it was held, that when the particular property has been converted into another species of property by the tenant for life, or those who claim in privity with him, the remainderman may elect to follow and take the fund in its changed form; for instance, when it has been removed out of the State and sold, he may claim the proceeds of the sale.[3] The same court in which Bonner & Wife v. Bonner was decided, held, in King *et al.* v. Sharp, that if a tenant for life sell the property absolutely to a third person, such third person becomes a *quasi* trustee for the remainderman;[4] and consequently that he is liable to the remainderman as fully as the tenant for life.

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[1] 5 Mun. 98. [2] 7 Hump. 436.

[3] 2 Iredell's Eq. 569. [4] 6 Hump. 55.

§ 529. In McDougal *et als.* v. Armstrong, it was held that if a purchaser of a chattel under an execution against a tenant for life claim the entire interest, a Court of Equity would be authorized to require such purchaser to give security for the forthcoming of the chattel at the expiration of the life interest;[1] and this seems also to be true if the *quasi* particular tenant were to claim the absolute ownership himself.

§ 530. In Alexander *et als.* v. Espy, a limitation was made to a A for life, with remainder to B; B died in the lifetime of A, and the next of kin of B filed a bill to have security for the forthcoming of the property, and the bill was dismissed without prejudice, because the administrator of B was not a party. The court said: "Creditors have the first claim upon the property; and the administrator, their trustee, as well as that of the next of kin, and the only representative of the deceased, must be before the court. The title of complainants is too remote."[2]

§ 531. In Ramey *et als.* v. Green, Adm'r, it is said that possession of chattels by a wrong-doer claiming the absolute property is sufficient ground to authorize a Court of Equity to interpose in behalf of the remaindermen for the protection and security of the property.[3]

§ 532. It seems very clear upon principle, that a party having a future vested interest in chattels personal may maintain an action on the case for an injury done to his interest, either by a prior holder of the chattels or by a stranger.

532*a*. But in order to maintain an action at law it is necessary, of course, that the party should have the legal title. Now, where the gift is by will, the assent of the executor is necessary in order to pass the legal title; but it is a general rule that an assent to a particular interest will inure to him

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[1] 7 Id. 428. [2] 7 Id. 157. [3] 18 Ala. 771.

to whom the limitation over is made. The exception to the general rule is, that where anything remains to be done, after the expiration of the particular interest, by the executor to give effect to the intention of the testator, there an assent to a particular interest will inure to the limitation over.[1]

§ 533. The time at which the person having a future interest in chattels is entitled to possession is generally determined by the terms of the instrument. The proposition, however, is not universally true, as appears by the case of Black v. Beattie. In that case, A being an unmarried woman, conveyed a slave, by deed, to B, upon condition that B was not to take the slave out of her possession, or deprive her of the use and benefit of the slave until her death, or until she might see proper to surrender him to B. A then married C, who placed the slave in the possession of D, where he remained until C's death. A survived her husband, took possession of the slave and delivered him to B, from whom he was taken by D. B brought trover for the slave, and it was held that he could not recover, because the life interest which A retained vested upon marriage in her husband, and after his death passed to his representatives, and therefore A could not assent to the delivery of the slave to B.[2]

§ 534. The enjoyment of a future interest does not commence until the time limited, except in the case of the moral obligation mentioned, when treating of the enjoyment of partial interest *in præsenti*.

§ 535. We come now to enquire what the party having the future interest is entitled to when his interest falls into possession or enjoyment.

§ 536. If money be the subject and he is a *quasi* tenant in

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[1] Lenoir v. Sylvester. 1 Bailey 645.

[2] 2 Mur. 240; S. C. N. Car. L. Reps. 96.

fee, he is entitled to the money, unless a trust prevent it; if he is a *quasi* particular tenant, then he is entitled in the same way that *quasi* particular tenants *in præsenti* are entitled.

§ 537. In Silbury v. McCoon it is laid down that so long as property wrongfully taken retains its original form and substance, or may be reduced to its original materials, it belongs to the original owner, without reference to the degree of improvements made upon it; and it seems that this rule holds good against an innocent purchaser from the wrong-doer. But it seems that if the property so wrongfully taken afterwards come into the hands of an innocent holder, who, believing himself to be the owner, converts the chattel into a thing of a different species, so that its identity is destroyed, the original owner cannot reclaim it. This distinction, however, does not exist in favor of a wilful wrong-doer. He can acquire no property in the goods of another, either by the wrongful taking or by any change wrought in them by his labor or skill, however great that change may be, provided it can be proved that the improved article was made from the original material. And it is said that the civil and the common law seem to agree upon this point.[1]

§ 538. According to the doctrine so laid down, a party entitled to a future interest in a chattel is entitled against the prior taker or his representatives to the chattel, although its form and nature be entirely changed, provided he can prove that the new chattel was made out of the old one. Thus, if a silver cup be given to A for life, remainder to B, and A have the cup made into spoons, B will be entitled to the spoons; or if he prefer it, he may recover the value of the cup. But if A were to sell the cup to a person having no notice of the subsequent interest, and without such notice the purchaser were to convert it into spoons,

[1] 3 Com. 379; see also Driver v. Riddle, 12 Ala. 590.

B could not recover the spoons, though he could recover the value of the cup. If, however, the purchaser had notice, he would be precisely in the same situation that his vendor would have been.

§ 539. If a third person should wrongfully take the chattel out of the possession of A and convert it into another chattel, and A were then to die, B would be entitled to recover the chattel into which his had been converted, provided he could prove that the converted chattel was made out of his chattel. If B should prefer the value of his chattel, he may recover it, instead of the chattel converted.

§ 540. If the party having a future interest is entitled to the possession upon the death of the prior taker, and the property be taken and claimed by his administrator or executor, as a part of the assets of the estate, the action must, of course, be against the executor or administrator personally, and not in his representative character.

§ 541. When the conveyance is simply for a limited period, with or without a gift over, and the property is to be converted, there is no principle necessary to be known in taking the account, except what has already been stated in treating of the rights of the partial owner; except in case of an incumbrance, or except the property be lost. In regard to the discharge of an incumbrance, we need not say anything now, as we shall take up that subject regularly after a little while. If the property be destroyed, or the fund on security be lost, then the case falls under the ordinary principles which govern trustees.

§ 542. If the particular tenant has the power of appropriating the principal to some particular purpose, it is a mere question of fact how much has been appropriated; though it is a mere question of law whether the appropriation was justified by the terms of the conveyance.

§ 543. If the property is to be enjoyed *in specie*, then unless there is something in the terms of the conveyance varying the rights of the parties, or something in the nature of the property which varies their rights, then the party entitled to the future interest is entitled to the property as it is at the termination of the particular interest, if the particular tenant has not been guilty of some act unauthorized by his partial ownership by which the property has been lost, destroyed, or injured, and then the party having the future interest is entitled against him to the value of such property at the time the future interest fell into possession.

§ 544. The terms of the conveyance may vary the mode of taking the account, as in Upwell v. Halsey, where the gift was: "I make my wife whole and sole executrix of all my personal estate; and my will is, that such part of my personal estate as she shall leave of her subsistence, shall return to my sister," the court held that she was entitled to dispose of so much of the principal as was necessary to her subsistence, over and above the interest, and decreed the account to be taken according to that construction of the will.[1]

§ 545. And so in every case must the account be taken according to the construction of the instrument creating the interests.

§ 546. In Harrison *et al.* v. Foster *et al.*, there was a gift to the wife during life, or widowhood, of a general residue of property, consisting of negroes, stock, provisions, &c., to use in any necessary or lawful way—to sell for a valuation, dispose of all or any part thereof for her conveniency, or necessary use, with a limitation over, and upon the question of account, the court held that her executors were not chargeable with the perishable articles, except so far as they came to their hands, or so far as

[1] 10 Mod. (442.)

sold by her, *not for her convenience or necessary use.*[1] This would have been unsatisfactory had not the court previously said: "It is clear, we think, that the testator intended his wife should have the entire use of all his chattels, and that this use was to be in accordance with the custom of the country."

§ 547. In Finley v. Hunter, Dargan, Ch., in delivering the opinion of the Court, said: "Thomas Finley, by his will, gave out of nineteen negroes, (one of them old and a charge,) six of said negroes and a considerable portion of his household goods, to his wife, Jane Finley, to her, her heirs and assigns forever. And that she might have a comfortable support and maintenance, he gave her the tract of land on which he lived, together with all his other negroes and property of every kind whatsoever, that he should die possessed of, for her use during her natural life. At his death the surviving wife, under the last mentioned clause, took into her possession, and has enjoyed all the property given to her for life; consisting (besides the land and negroes) of $283 in cash, and of various articles of personal property, generally possessed by a planter of his means, living on his farm; namely, of horses, cattle, hogs, sheep, carriage, wagons, agricultural implements and provisions. Jane Finley being dead, her personal representative is called upon to account to the remainderman for the various articles of personal property, of which by the will she was to have the use during her life. And some of the articles being consumable in their use, and having been consumed, and some of them having been totally worn out by the wear and tear incident to their use, and the operation of time, and others, though remaining, having become deteriorated in value from the same causes, the question is, upon what principle is the estate of the life tenant to account?

"This court discovers in the will itself a solution of this question. The second clause of the will is as follows:—"After the

[1] 9 Ala. 955.

death of my wife, Jane, and after the payment of the several legacies, &c., I give and bequeath to Reuben Finley, of the State of Tennessee, &c. the aforesaid tract of land, together with all the negroes, and *all the other property belonging to my estate*, of what kind soever, real and personal, *at the death of my said wife, Jane*, to him and his heirs forever." The court is of opinion, that the testator intended to give to his wife the use and benefit of the property, specifically, for life, with all the rights and privileges incident to its possession and enjoyment. *All the property belonging to his estate at the death of his wife, he gave to Reuben Finley, after the death of his wife.* Such as the property remained *at the* death of his wife, in the condition it was after her specific and legitimate use of it during her life, it was to go over to Reuben Finley. It follows from this, that her estate is not responsible for articles that were consumable in their use; nor for the horses, mules, or oxen that died from disease or old age; nor for the destruction of articles that were worn out and went to decay in their lawful use; nor for the deteriorated value of those that remain, whose value has been impaired by the abrasions of time. In regard to the articles that are forthcoming, as well as those that are not, the question will be, whether they have been rightfully used and enjoyed by the tenant for life. If this be decided in the affirmative, the estate of the life tenant is not liable, and the remainder-man must take the articles that remain, in the condition in which he finds them. In regard to the cash, the principal must be accounted for; and as to the live stock, in flocks or herds, the rule is, that the original stock must be kept up or accounted for. These are reproductive, and with good management, perpetuate themselves. Yet even in regard to this kind of property, the life tenant will be permitted to show that they have been destroyed or diminished without neglect or default on her part."[1]

[1] 3 Strobh. Eq. 84.

§ 548. The nature of the property may vary the mode of taking the account. Thus, if the property limited be a stock of hogs, it seems to be the better doctrine that the party having the future interest is entitled to the number of the original stock, unless the particular tenant, or those claiming under him, can show that they were diminished without default on the part of the particular owner. If the property limited be slaves, the future owner is entitled, as we have before asserted, to such of the original number as still live, and to such increase as there may have been. If the property be such as is consumable in use, and it is not a case of actual or constructive conversion, then if the party in remainder is entitled to any thing, he is entitled at least to so much of the property as specifically remains, though it seems that he ought to be entitled to so much as ought to have remained, because the party entitled to the first interest ought not to use the property otherwise than according to the usual and ordinary way of using such property.

§ 549. But let us take the opinion of a court upon the subject. In Robertson *et als.* v. Collier & Wife, Harper, J., in delivering the opinion, said: "An extract from the opinion of Judge Nott, in the case of Devlin v. Patterson, will, I think, put the matter upon its true footing: "There is another view of the subject which deserves consideration, and which is somewhat peculiar to the situation of this country. Lands are sometimes given to one for life, together with the slaves, stock of horses, cattle, plantation tools and provisions, with a limitation over. In such case, the perishable articles cannot be considered as belonging absolutely to the tenant for life; neither can they be sold, because they are necessary for the preservation of the estate. The tenant for life must therefore be considered as a trustee for the remainder-man, and must preserve the estate, with all its appurtenances, in the same situation in which he received it. He may therefore be required to give an inventory of the pro-

perty, or security for its preservation, according to circumstances. The tenant for life will be entitled to the increase of the stock and the rents and profits of the land; but he must keep up the stock of cattle, horses, provisions, and instruments of husbandry, in the condition in which he received them. For, although some of the articles may be consumable in the use, and others are wearing out by the attrition of time, yet when taken altogether, being reproductive, the estate must be made to keep up its own repairs." These views are so full and explicit, that little need be added to them. The principle is the same, though extended in its application, by which a tenant for life in England is forbidden to waste the estate, and is required to make ordinary repairs, or any other tenant is required to treat the estate in a husband-like manner, or the legatee for life of a flock or herd, while he takes the increase, is required to keep up the original stock. The tenant for life is entitled to the use of the estate; but it is such use as a prudent proprietor would make of his estate. The profit of an estate is the nett income after defraying all necessary expenses; and to renew a plough that is worn out, or replace a horse or mule that dies, comes under the head of necessary expenses. Thus, the relative rights of the tenant for life and remainder-man will be the same, whether the estate be sold and the proceeds vested, or retained in kind. If, at the termination of the life estate, all the articles of the sort mentioned are not in as good condition as when he received it, the tenant must make good the deficiency."[1]

§ 550. The last sentence seems to be objectionable, for the tenant is entitled to the legitimate use of the articles, being bound, however, to make such repairs as good husbandry requires. The opinion calls for another remark, since it may well be denied that there is anything in such a gift "peculiar to the situation of

[1] 1 Hill's Ch. Rep. 347.

this country." The same general principle must be held to govern the account between a particular tenant and him in remainder of land, stock, provision, &c., whether the land is to be cultivated by slaves or by "helps."

§ 551. In Hayle and Burrodale, a farmer bequeathed his stock, consisting of corn, hay, cattle, &c., to his wife for life, and after her death to the plaintiff; and the Master of the Rolls said, "if any of the cattle were worn out in using, the defendant was not to be answerable for them; and if any were sold as useless, the defendant was only to answer the value of them at the time of the sale;" and an account was decreed to be taken accordingly.[1] The latter part of the decree is correct, and so may that part of it have been in regard to the cattle worn out in using, but as a general rule, it is in contradiction with other cases of at least as high authority.

§ 552. In Flowers v. Franklin[2] a testator devised a farm, and bequeathed the stock, provisions, farming utensils belonging to it, to his wife during her life, *to be improved for the use of the family*, with a limitation over. The wife survived her husband, and about ten years afterwards died, having lived upon the farm and cultivated it until her death. One question was, whether those in remainder were entitled to the stock and grain which were on the farm at her death?

Kennedy, J., in delivering the opinion of the court, said: "It has, however, been objected against the claim of the plaintiffs, that the property is not identically the same with that given by the will to the widow; that it is only the product or increase from it, and therefore does not fall within the terms of the bequest over to the plaintiffs, after the death of the widow. This objection, unless supported by what may reasonably be considered to have been the intention of the testator, ought not to pre-

[1] 1 Eq. Ca. Abr. 361, § 8. [2] 5 Watts, 265.

vail. The great object of the testator, in giving his wife the farm whereon he had lived himself with his family as the head of it, and the personal property already specified with it, was that she might continue to live thereon during the remainder of her life, in the same manner, as nearly as possible, that she had done with himself previously thereto. This is made in some degree apparent from his furnishing her with the means, appropriated by him expressly, too, to that end, of keeping the family together around her upon the farm as long as she lived: and, still further, from the circumstance of most of the personal property given to her being immediately connected with the farm, and almost indispensably necessary to a proper and advantageous enjoyment of it, so as to afford the family the same comfort and convenience which they had been accustomed to during his life. Beside, a great portion of the property being stock, composed of horses, cows, sheep, and swine, such as is usually kept on a farm, and without which the accommodation expected to be derived from the occupation of it could not be obtained; and being also not only of a perishable nature, but a portion of it such as could only be used by consuming it, the testator therefore knew perfectly well that the identical property which he was giving, with the use of the farm, to his wife, for the use of herself and the family, would not likely be in existence at her death; and hence it is not likely that it was that, or that alone, which he intended to give over to the plaintiffs. But he knew also, that in the usual economy and management of a farm, various kinds of stock suitable to carry on the business of it, and to make it capable of being used so as to produce the requisite comfort and support for the family residing thereon, that every year more or less of those things would be consumed, lost or worn out, but their places would of course be supplied by others, in fact, though looked upon generally as the same stock or property. New implements of husbandry would be obtained, from time to time, to supply the want of those lost, broken or worn

out; horses dying, or becoming from any cause unfit for the requisite service, would be replaced, either by others raised from the old stock, procured in exchange for those becoming unfit, or purchased with the proceeds of the farm; and uniformly the place of cattle, swine or sheep used for the purpose of being converted into beef, pork, or mutton, are supplied by the annual increase or progeny from the original stock; thus filling up and occupying the same space, and in reality, while kept upon the same farm and held by the same person, regarded generally as the same property. It is also manifest from the provisions of the will of the testator, in favor of his wife and family, that he intended nothing more than a comfortable support and maintenance for them, at most; and that he knew that what he was about to give could not be made use of as a capital or stock from which anything beyond that could be derived. It appears therefore to be more in accordance with what would seem to have been the intention of the testator, to conclude that he intended every thing of the same kind with that given by his will to his wife, for the use of the family, and supplying the place of what had been consumed, worn out, lost, or disposed of in any way at the death of his wife, should go over to the plaintiffs. If he did not so intend it, to whom, I would ask, does the property in question belong, which is called the increase; but, more properly speaking, that which, according to the necessary course of events in every such case, has been substituted for and taken the place exactly of the original, which has either perished or been consumed? Certainly not to the next of kin of the testator, as property that he died possessed of, without having disposed thereof by his will, because all the right and authority he had over it he clearly intended to part with by his will. Neither can it belong to the next of kin of the widow, for it is perfectly manifest, the gift was not to her absolutely for her own use, but as trustee for the use of herself and family during her life merely. And it can scarcely be imagined, I apprehend, that the surviv-

ing members of the family, for whose use, in common with the widow, it was holden by her during her life, can have any claim to it, because their interest, as well as that of hers, was to terminate, as has been pretty clearly shown,(*a*) by her death."[1]

§ 553. The comment which this case requires is, that a better argued case can scarcely be found.

§ 554. In Horry & Trapier v. Glover *et al.* it is said that as a tenant for life of slaves is a trustee for the remainderman, he is bound to account, and the burthen of the proof is on him to show the increase or diminution of the original number; and in default of accounting, he shall be charged with the value of such number as the original stock may reasonably be supposed to have increased; subject, however, to evidence of peculiar circumstances, accident, or mortality.[2] The general rule is also asserted, in that case, that if the bailee refuses to deliver property after demand made, and the property is injured or destroyed, or afterwards perishes, he is liable for its value; and it is there said that the rule extends to particular tenants holding over, and to volunteers and purchasers without notice claiming under them. And it was therefore held in that case, that a volunteer claiming under a tenant for life was liable for value of slaves who died after the filing of the bill by the remainderman to compel a specific delivery(*b*) of them.[3]

§ 555. In regard to incumbrances, the old rule was that a tenant for life was bound to pay one-third of the amount, and the remainderman was held bound to pay the residue. But that

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(*a*) In a previous part of the opinion not quoted.

[1] 5 Watts, 270.

[2] 2 Hill's Ch. Rep. 520.

(*b*) When specific delivery of slaves is enforced by chancery—see Baker v. Rowan, 2 Stew. & Port. 361; Hardeman v. Sims, 3 Ala. 747.

[3] Id. 538. It was also hold that hearsay coming from the negroes was evidence of pedigree.

rule has long been abandoned, and now, as the Master of the Rolls said in Penrhyn v. Hughes, "it is perfectly established that the rents and profits during the estate for life must be applied to the reduction of any interest accrued prior as well as subsequent to the commencement of that estate. The ground is, that the estate in the hands of the tenant for life is liable to incumbrances, is in the first place answerable, and may be made so by an application by the reversioners, to all the interest accrued upon incumbrances prior to that estate for life." He added: "It is very hard, I admit. He may lose all his interest. But it must always be remembered, that both the tenant for life and the incumbrancers have a right to have the estate sold; and if so, then the tenant for life will have his interest in what remains of the money produced by the sale; and it will be divided, as the law provides, in the proportions their interests bear to the estate."[1]

§ 556. In White v. White, the Master of the Rolls, in speaking of the old rule, said: "It was a most unreasonable and absurd rule; for it being admitted that every person is to contribute according to his interest, a man of the age of eighty-four, with perhaps not a year to live, must be said to have as much interest as one of twenty-one."[2]

§ 557. In Warley v. Warley the court recognised the rule as laid down in Penrhyn v. Hughes, and said: "But if the debts are to be paid off, so much of the estate must be sold as is necessary to pay them; or if it be not divisible, the whole must be sold, and the surplus invested so that the tenant for life may receive the interest during his life."[3]

§ 558. In Peck and Wife v. Glass *et al.*, it was held that if a tenant for life pay off incumbrances out of his own means, he

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[1] 5 Ves. (107.) [2] 4 Ves. 33. [3] 1 Bailey's Eq. 411.

becomes a creditor to the estate for the amount paid; and he has a right to have so much of the estate sold as is necessary for its payment. But in stating the account, the profits of the estate must be charged with the interest of the debts.[1]

§ 559. The court, however, in that case seems to have adopted a very unsatisfactory practice in directing an inquiry as to the value of the life estate. The only way in which justice can be done is by selling so much of the estate as may be sufficient to pay the debts, and then charging the interest of them to the time of sale upon the profits recieved by the tenant for life.

§ 560. When a particular tenant pays off an incumbrance he is *prima facie* a creditor of the estate, and the true ground of inference, in favor of tenant for life paying off an incumbrance, is the scantiness of his estate.[2] But the presumption may be rebutted, and then it will be held that the payment was in exoneration of the estate.[3] In Jones v. Morgan the Lord Chancellor said, "the smallest demonstration that he meant to pay it off, will prevent his representative from coming for the money. Here he paid *interest* much beyond what the profits of the estate would have discharged, which is a demonstration, *prima facie*, that though tenant for life, he meant to discharge the estate."[4] And in Reddington v. Reddington, it was said "that Morgan v. Jones and Shrewsbury v. Shrewsbury were argued at the bar, and considered by Lord Thurlow, on the presumed intention of the tenant for life, as the case stood at the time of his death; that is the period at which the conclusion upon the facts must be drawn. Although, therefore, the tenant may at one time have intended that the payment should be in exoneration of the estate,

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[1] 6 How. (Miss.) 195.

[2] Shrewsbury v. Shrewsbury, 1 Ves. 233.

[3] Reddington v. Reddington, 1 Ball & Beat. (142.)

[4] 1 Bro. Ch. Rep. (218.)

yet his subsequent change of intention will entitle either himself or his representatives to repayment, since he had the whole period of his life to determine the matter."[1]

§ 561. When it appears that the tenant for life intended that the payment should be a charge upon the estate, no lapse of time will avail to exonerate it; but it seems that the lapse of time will in the absence of testimony be sufficient to rebut the presumption that arises from the scantiness of his estate.[2]

§ 562. It is not necessary for the tenant for life to take an assignment of the debts in order to constitute himself a creditor with a lien upon the estate; for the payment of the debts, without more, entitles him by substitution to repayment.[3]

§ 563. The general rule in regard to real property limited in succession is, that if the tenant for life expend his money or labor in improvements upon the land, which are beneficial to the estate in remainder, such expenditure shall be a charge upon the estate, but for necessary repairs there can be no charge, for *qui sentit commodum sentire debet et onus.*[4] No case occurs to mind now in which the principle could be applied between a partial and subsequent owner of chattels personal.

§ 564. The same principles of equity which govern the discharge of incumbrances between a particular tenant and a *quasi* remainderman seem equally applicable to other parties having present and future interests in chattels personal.

§ 565. There are points, decided in Bentley and Bradley v. Long *et al.*, that deserve a notice here. In that case the testator

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[1] 1 Batt. & Beat. (142-3.)

[2] See Jones v. Morgan, 1 Bro. Ch. Rep. (218-9;) Redington v. Redington, 1 Ball and Beat. (143.)

[3] See cases last cited.

[4] See Hibbert v. Cooke, 1 Sim. & Stu. 552.

gave to his wife the whole of his real estate and personal property during her life or widowhood, with remainder to his children, and declared: "Should my wife have anything to spare out of my estate previous to her death or marriage, I wish her to give it to those of my children who may marry or settle off—the amount to be valued and kept as an account to be deducted from their equal shares; and whenever the amount of my estate is to be divided according to the above conditions, I desire and wish that each of my children shall select a person disinterested, and that the said persons may equally divide my estate, and that the whole of my said children may, by lot, receive their equal share." The widow afterwards, in pursuance of the power, gave a negro to Reuben, one of the children, which was valued by persons selected for that purpose at $550, and another negro valued in like manner at $225 to Laura, another child. Bentley, a creditor of Ben.'s, another child, sued out a *ca. sa.* against him, and Ben. being arrested, assigned to Bentley his interest in his father's estate. Bentley then procured the sheriff to advertise the interest so assigned to him, but the sheriff having had executions in his hands against Ben. at the time of the assignment by him to Bentley, advertised and sold as well to satisfy the debt of Bentley amounting to $50, as to satisfy the executions, which he stated had been levied on the said interest. Bentley became the purchaser for $500, and the whole amount was applied by the sheriff to the executions in exclusion of Bentley's claim. The sheriff, however, did not take the property sold into possession, nor was it present at the sale. The life estate of the widow had been sold, and part of the negroes had been removed beyond the limits of the State. Bradley then filed a bill claiming that he was entitled, as the representative of Henry, one of the children, to his interest in the estate, and there being ten children, that his interest would be one-tenth of the value of the whole property at the termination of the widow's interest. The court held that the widow had

legitimately exercised the power given her by the will, and therefore the value of the negroes, and not the negroes themselves, which she had given to the children, should be taken on the final distribution. The court further held that the assignment to Bentley was valid to the amount of his debt; that the sale under the executions was void, because such an interest was not subject to creditors except in equity; that though the sale under the executions was void, yet Bentley having paid the $500 was entitled to be substituted in the place of the execution creditors and subrogated to all their rights; and that as there was danger of the property being removed he was entitled to security from the defendant claiming under the tenant for life for the forthcoming of the property at the termination of the partial interest.[1]

§ 566. The case of Upshaw v. Upshaw *et als.* contains matter pertinent to this place. In that case a married woman was entitled to a vested remainder in slaves, her husband bequeathed property to her and bequeathed her vested remainder to A, B and C, and died before the remainder came into possession. After his death the widow paid a sum of money to relieve the slaves from sale for the debts of her brother, who had given her the remainder, and whilst they were still in the possession of the tenant for life; and after the death of the tenant for life she took the slaves into her possession and kept them until it was decreed that by *election* her interest had passed to the legatees of her husband. The Chancellor decreed that the legatees should pay her the amount of the debts which she had paid to relieve the slaves from sale, and that she should account for the profits of the slaves during the time of her possession, and that she should deliver the slaves together with their increase to the legatees. The whole court, upon appeal, held that she was en-

[1] 1 Strobh. Eq. 42.

titled to interest upon the amount paid by her to relieve the slaves from sale, and that she was entitled to a just and reasonable allowance for the support and maintenance of such of the said slaves as were aged, infirm, or children, or were otherwise expensive or unprofitable to her; and also for such taxes, doctors' bills, and other reasonable expenses paid or incurred by her on their account as she should be able to prove. And so the decree below was modified.[1]

§ 597. Now, it is very clear that the tenant for life was the person who was primarily liable for the interest accruing during the tenancy for life, and if the legatees were liable to the widow for such interest, the representatives of the tenant for life were liable over to the legatees for the amount.[2]

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[1] 2 Hen. & Mun. 381.

[2] See 4 Kent's Com. 74-75.

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