IRELAND.

ERROR FROM THE COURT OF EXCHEQUER CHAMBER.

JONES, *d.* JOSEPH HENRY—*Plt. in Error.*
WILLIAM HANCOCK, and ANN his Wife, and others ..... } *Defts. in Error.*

AND

LONG, *d.* JOHN JOSEPH HENRY—*Plt. in Error.*
WILLIAM HANCOCK, and ANN his Wife, &c. ..... } *Defts. in Error.*

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DEVISE VOID FOR UNCERTAINTY, &c.

TESTATOR devises his estates to his eldest daughter A. for life, remainder to her first and other sons in tail male—remainder to his daughter F. for life, remainder to her first and other sons in tail male—remainder to the first and every daughter of A., remainder to the first and every daughter of F., and then annexes this proviso or condition.

"But I give, devise, and bequeath all my said estates, above-"mentioned, to my eldest daughter A. on this proviso, and "express condition, that she marry a man really and *bonâ* "*fide* possessed of a property at least equal to, if not greater "than the one I leave her—and if she marries a man with "less property than that, in that case I leave her only as "much of mine as shall be equal to the property of the "man she marries, and all the remainder of my property "shall immediately pass over, and be given up to my second "daughter F., to whom in that case I bequeath it."

Held by the House of Lords, concurring in the unanimous opinion of the Judges, that the devise over was void for the uncertainty—the specific portion or share so given over not appearing on the face of, or from the instrument itself.

May 4, 1786. Will of John Henry.

JOHN Henry, Esq., being seized in fee of an estate in the County of Galway, of considerable

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value, on the 4th day of May in the year 1786 duly made and published his last will and testament, in writing, in the presence of three credible witnesses, who attested the same, which, so far as is material to the present case, was as follows: "I give and bequeath unto Hugh Henry, Esq. my brother, for "civilities shewn me, the sum of 200*l.* sterling, "besides 500*l.* and the reversion hereinafter mentioned for the trouble he will have in the executorship to which I appoint him. I bequeath unto "Mrs. Ann Magan my sister, for civilities shewn "me, the sum of 200*l.* sterling; and I bequeath "unto Daniel M'Gusty of Ship Street, Esq. the "the sum of 50*l.* sterling, and chargeable with said "legacies. I give, devise, and bequeath all my estates "in the Kingdom of Ireland to my eldest daughter, "Ann Henry, begotten by me on the body of "Susannah Egar, the said Ann being born on the "23d of September, 1783, for and during her natural life; and after her death I bequeath the said "estates to her first and every other son in tail male, "the elder to take before the younger; and in "default of such issue male, I give and bequeath all "my said estates above mentioned to my second "daughter Frances Henry, begotten by me on the "body of the said Susannah Egar aforesaid, the "said Frances being born on the 6th of December, "1785, for her natural life; and after her death, I "bequeath my said estates to her first and every son "in tail male, the elder to take before the younger; "and in failure of such issue male, I bequeath all "my said estates to the first and every daughter of "my eldest daughter Ann Henry above mentioned,

" the elder to take before the younger; and in failure May 1, 5, 10,
" of such issue, I bequeath all my said estates to 1815. June 12, 19,
" the first and every daughter of my second daugh- 1816.
" ter Frances Henry above mentioned, the elder to
" take before the younger.

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" *But I give, devise, and bequeath all my said*
" *estates above mentioned to my eldest daughter Ann*
" *Henry aforesaid, on this proviso and express con-*
" *dition, that she marries a man really and* bonâ
" fide *possessed of a property at least equal, if not*
" *greater, than the one I leave her; and if she mar-*
" *ries a man with less property than that, in that*
" *case I leave her only as much of mine as shall be*
" *equal to the property of the man she marries,*
" *and all the remainder of my property shall imme-*
" *diately pass over and be given up to my second*
" *daughter, Frances Henry, to whom in that case I*
" *bequeath it.*

" And it shall also be necessary for the man my
" eldest daughter Ann marries, in order to be entitled
" to the aforesaid property, to take the name and
" arms of Henry, unless he be a Lord, or possessed
" of property of more than double the value of mine.

" I devise and bequeath to my second daughter,
" Frances aforesaid, an annuity of 300*l.* sterling,
" chargeable out of all my estates, to be paid her
" every year out of my said estates, in two equal
" and even payments to her and her issue; in failure
" of such issue, at her death said annuity shall
" revert back again and return to my eldest daughter,
" Ann Henry and her issue. All I have said in
" regard to my eldest daughter and her marriage as
" above mentioned, I mean and intend shall stand

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" good in regard also of my second daughter Fran-
" ces Henry, in case by the death of her eldest
" sister Ann she shall before she marries come to
" be possessed of my estates as aforesaid, and also
" the rents, issues, and profits of all my aforesaid
" estates, except such parts as shall be necessary
" for a genteel maintenance and education of my
" two daughters abovementioned, shall be put out
" at interest till a proper sum be collected for a
" purchase, and advantageous opportunity of pur-
" chasing land with it shall be found, which land
" shall be added to my other estates, to the use
" of my eldest daughter Ann Henry, which pur-
" chased estates shall be considered as a property I
" leave her, in regard to the marriage she shall
" make as before mentioned.

" And I will and devise, that in case my two
" daughters die without issue, that my estates shall
" then go to my brother Hugh Henry, Esq. whom I
" nominate and appoint as guardian to my children
" and executor of my will."

Frances Henry died in testator's lifetime.

After the making of the said will, the said Frances Henry, one of the devisees therein named, died on the 1st day of May, 1789, in the lifetime of the said testator; and the said John Henry died on the

Testator died September 17, 1790.

17th day of September, 1790, without having altered or revoked the said will, and without leaving any lawful issue; but leaving two brothers, namely, Joseph Henry his heir, and Hugh Henry his second brother, and the said Defendant Ann, his illegitimate daughter.

Testator's eldest brother

The said Joseph Henry, the testator's eldest brother, died on the 7th day of November, 1796,

leaving John Joseph Henry his eldest son and heir at law, who is also heir at law of the testator.

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Hugh Henry, the younger brother of the testator, died on the 10th February, 1802, leaving Joseph Henry his eldest son and heir at law.

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The said Ann Henry, after the death of the said John Henry, entered into the possession of the said estates, and was thereof seized under and by virtue of the said will, and being so seized on the 4th day of April, in the year 1803, intermarried with the Defendant William Handcock, at which time the said Ann was of the age of nineteen years and six months.

died November 7, 1796. Testator's younger brother died Feb. 10, 1802. Ann Henry seized of the devise estates, and married Defendant Handcock, April 4, 1803.

At the time of the marriage of the said Ann Henry, with the said William Handcock, he was possessed of a personal property of the value of 6,400*l.* sterling in the whole, and of no other property.

Value of testator's estates, as found by the verdicts.

With respect to the value of testator's estates, and the comparative value of Mr. Handcock's property, the special verdict hereinafter mentioned finds as follows, namely, that the estates devised by the testator were, at the time of the said marriage, of the yearly value of 1638*l.* 19*s.* 4*d.* and the fee simple of the said lands was of the gross value of 38,856*l.*

That an estate in the whole of the said lands for life of the said Ann Henry, was of the value of 12,952*l.* sterling, at the time of the marriage, and that an estate in one-sixth part of the fee simple of the said lands was equal in value to the whole of the property of the said William Handcock, at the time of the said marriage, and an estate for the life

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of the said Ann Henry, in one-half of the said lands, was equal in value, at the time of the said marriage, to the whole of the said property of the said William.

Easter term 1807. Ejectment brought by Plaintiff in error.

Upon the said marriage taking effect, on the 4th day of April, in the year 1803, the said John Joseph Henry, the heir of the said Joseph and of the said testator, as of Easter term 1807, brought his ejectment upon the title, in the Court of King's Bench, for the recovery of all the estate of the said John Henry; to which ejectment defence was taken in the name of the said William Handcock, Ann his wife, the Honourable Robert Day, John Pratt, and John Sealy Townsend, Esquires, and the cause came on to be tried at the summer assize 1807, when the Jury, under the direction of the Judge, found a special verdict, submitting the law arising from the facts to the judgment of the Court of King's Bench, in which cause, upon the argument of the special verdict, judgment was given as of Hilary term 1809, for the Plaintiff; from which judgment a writ of error was brought by the Defendants to the Court of Exchequer Chamber, upon which, after the cause had been argued at great length, the judgment was reversed. The Plaintiffs then brought their writ of error in the House of Lords.

Special verdict.

Judgment for Plaintiff in the King's Bench.

Reversed in the Exchequer Chamber.

FIRST CAUSE.

Case of the ultimate devisee,

Mr. Holroyd (now Justice Holroyd, for Plaintiff in Error, Lessee of Heir of Hugh Henry). Consider what would be the effect of the will if the

testator had died immediately after making it, or if things had been in the same state at the time of his death, as they were at the time of making his will. In *Doe v. Underwood*, Willes, 293, it was held that this was one of the rules for ascertaining the intention of a testator, and the effect of a will. In the first place then, the intent is to prevail, unless it be contrary to the rules of law; and next, in endeavouring to ascertain the intent, we are to consider how things stood at the time when the will was made. Then how would matters stand if there had been no proviso? Ann would have a life estate with remainder to her first and other sons successively, in tail male; remainder to Frances for life, with remainders to her first and other sons successively, in tail male; remainder to the first and every other daughter of Ann, without limitation: so that they would take an estate for life, or, in consequence of some future words, an estate tail, it is not material which; but there would be a vested remainder in Hugh Henry in fee. What then has the testator done? He has devised the whole away. No part is vested in the heir at law, but the whole, from first to last, is given away from him. Then, suppose the estate for life ends by nature, or by the surrender of tenant for life to the remainder man in fee, the latter becomes immediately entitled, and the heir cannot step in here; nor, if it ends by forfeiture, as the whole fee is parted among them, does the heir at law step in during the residue of the estate of tenant for life. So it is in the case of the issue. Suppose it to be given on the death of the heirs male, and there are no heirs male, yet, in-

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asmuch as the whole fee is divided among them, the heir does not step in, but the remainder man. Now, what difference does the death of Frances in the life-time of the testator make? Every devise to her is lapsed, and to her children, as she died unmarried. Then the estates would go to Hugh on failure of issue of Ann. It may be said, that she takes an estate tail by implication. But, speaking of it without the condition; whether Ann took an estate for life, or in tail, still the fee is parted among them. The whole fee is given to the devisees; and, where there are no objects to take by the intermediate devise, the next remainder man takes, and here takes the whole fee. As to the question of entry or claim, there could be none on the death of Frances in the testator's life-time, and none since, as Ann is alive. Then what is the effect of the provision in restraint of marriage. This is not a general restraint of marriage; and a partial restraint is legal, *Perryn v. Lyon*, 9 East. 170. And in the Court of Chancery, lately, a case was decided on the same ground. The proviso is—

Perryn v. Lyon, 9 East. 170.

"But I give, devise, and bequeath, all my said "estates abovementioned, to my eldest daughter, "Ann Henry, aforesaid," (this goes to whatever is given by the will, whether she took an estate for life or in tail, it is *all my estates*), "on this pro- "viso and express consideration only, that she "marry a man, who is really and *bonâ fide* pos- "sessed of a property at least equal, if not greater, "than the one I leave her. And if she marries a "man with less property than that, I, in that case, "leave her only as much of mine, as shall be equal

"to the property of the man she marries: and all "the remainder" (this is material) "of my pro- "perty shall immediately pass over and be given "up to my second daughter Frances Henry, to "whom, in that case, I give, devise, and be- "queath it." So that Ann had a life estate in the whole of the testator's property, if she married a man of equal or greater fortune, and, if not, then she had an estate for life in so much of the testator's property as would be equal to that of her husband; and the rest was to go to the second daughter for life, with remainder to her sons successively in tail male as before. Ann took an estate, not on condition, but with a conditional limitation over in the whole property till she married; and on her marriage with a person not of equal fortune, the surplus was gone as if she were dead. By her marrying one of inferior fortune, there was an end of her life estate in the surplus, which went over, as if there had been a regular termination of the life estate; and the heir could not step in. This being an estate with a conditional limitation over, there is no difference whether the life estate ends by regular surrender, or forfeiture, or by the act of the party herself in breach of the condition; the heir does not step in, but the other estate. So I say that, as to the surplus, there is an end of the estates given to Ann and her issue by the will, and Frances being dead without issue, and the whole fee being divided between Ann and Hugh Henry, he steps in immediately. The law was so considered in one or two cases, which I shall cite. In Lady Ann Fry's case, 1 Vent. 199. a testator de-

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2 Lev. 21.—3 Keb. 19.—1 Ch. Ca. 142.—1 Mod. 86. 300.

vised to his wife for life, and, after her death, to his grandchild in tail, provided she married with the consent of certain persons in the will named; and if she married without such consent, or died without issue, then over. It was held that this was not a condition on the breach of which the heir might enter; but that the marriage of the grand-daughter, without such consent, determined her estate tail, and cast the possession immediately over. Therefore, though an estate tail was given to the grand-daughter, with a conditional limitation over, in case she married without consent, or died without issue, it was held that she had an estate tail, *quamdiu* she remained unmarried, and on her marriage without the appointed consent, the remainder over directly took effect. This is very applicable to the present case. Whether Ann had an estate for life, or in tail, is equally the same to my purpose. She had only an estate in the surplus till her marriage, and then Hugh Henry takes the whole, according to the reason of this case. So in a case 2 Mod. 7. where one devised lands to A. his heir at law, and other lands to B. in fee; and that if A. molested B. by suit or otherwise, he should lose what was devised to him, and it should go to B. After the testator's death A. entered on the lands devised to B. and claimed them; and this was held to be a limitation, which, by the breach of the condition, determined the heir's estate, and cast the possession on B. without entry. Here, likewise, Ann's estate in the surplus being determined by her marriage, the possession was immediately cast on Hugh Henry, the ultimate re-

Shuttleworth v. Barber, 2 Mod. 7.

mainder man. The case of *Goodright v. Cornish*, too, is material. That was a devise to A. for fifty years, if he should so long live, remainder to the heirs male of the body of A., remainder over. A. died without issue, and it was held that the estate went immediately over to Richard, the next devisee. The cases in Cruise's Digest, 505-6, and *Evelyn, or Avelyn v. Ward*, 1 Ves. 420. proceeded on the same principle. In the present case, though the proviso was that the surplus should go immediately over to the second daughter, it was not meant that, in case she should not be living, it should not go over at all. They argue that it was given over to Frances personally; that it was personal to her as if Ann had been bound to pay her 5,000*l*., and that, they said, would not go to Hugh Henry. I admit that, for nothing in that case would be given to Hugh Henry. But this is a very different case. The intent was that, on failure of the preceding estates in any way, Hugh, the ultimate devisee in fee, should immediately take; especially, when the rule in *Willes* is applied, of considering, with a view to the intent, the state of things as they stood when the will was made. Your Lordships will observe then what is material in this will against their argument. The proviso does not extend merely to Ann's marriage, but also to that of Frances; and Frances, in case she lived, would be subject to it, and the remainder to Hugh Henry would take place under the same clause as before; which shows that the testator did not mean to exclude Hugh Henry. If it should be argued that the subsequent limitation over, in case of the daughters dying without issue,

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Goodright, or Goodwright v. Cornish, 1 Salk. 226.—4 Mod. 256.—12 Mod. 52.—1 Ld. Raym. 3, &c.

Avelyn v. Ward. 1 Ves. 420.

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gave an estate tail by implication to Ann, still I submit that it could never be the intent of the testator in the event which happened, that the issue of Ann should have the surplus, and that by the default of issue is meant such issue as could inherit, that is, inherit the surplus. The words are large and strong, "*all my estates*," and extend to the subsequent estate tail, as well as to the life estate. And the effect of the whole is this, that the estate tail as to the surplus is gone by her marriage. In *Loddington v. Kime*, 1 Salk. 224. where there was a devise to one for life, and if he had issue male, then to such issue and his heirs; and in several other cases, it was held that the subsequent devise to the issue did not give an estate tail to the ancestor. So here the subsequent words did not give Ann an estate tail, or if they did, it was subject to the proviso. The contingent remainders were destroyed as to the surplus by her marriage. Then the surplus is to be taken in proportion to the value of the fee simple, or of the estate given to Ann. Suppose she had an estate for life, with the remainder in tail eventually, and, Frances dying, an estate tail immediately; this is nearly equal to the fee simple, as she might have barred the entail, and it would be in effect a fee simple, and if she died it would go to her family. Then supposing the value of the fee simple, or of the estate which Ann would have taken, to be about 36,000*l.*, the heir at law of Hugh Henry would take what would be equal in value to five-sixths of that sum. If the proportion is to be taken according to the value of the life estate only, then he would take rather better

Loddington v. Kime. 1 Salk. 224.—1 Lord Raym. 203.—3 Lev. 431.

than half, or as twenty-five to twenty-four. The lessor of the plaintiff, the heir at law of Hugh Henry, ought therefore to recover five-sixths of the whole, or at least, an undivided moiety.

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Lord Eldon (C.) The rule of the House is, that the defendant in error must go on, as the plaintiff has been heard, unless the parties consent to a different arrangement.

Mr. Hart (for Defts. in error). The question is whether, as Ann married a man of inferior fortune, Hugh Henry shall be permitted to shut out the limitations to the issue of the two daughters. I apprehend that on the face of the will there appears a specific contingency on which it must depend whether Hugh Henry could take. Under the previous limitations the daughters would only take life estates. But then the testator adds a clause, which by necessary implication gives the daughters themselves estates tail. The words, "in case my two daughters "die without issue," must be construed so as to give estates in tail general to the daughters, because if they took only estates for life, the devise over on a general failure of issue would be too remote. By necessary implication then, estates tail are interposed between the daughters and Hugh Henry. Taking that to be the case, the testator intended that Hugh should take only on failure of issue of his two daughters. The benefit of the penalty to which Ann was subjected by the proviso was confined to Frances personally, and the gift over to her is as if it had not been on the face of the will, she having

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died in the testator's lifetime. Suppose this case, that Frances were living, and that Ann had married a man of equal fortune; her issue male would then inherit, but her issue female would not till after failure of issue male of Frances. Then suppose Frances to have married a man of inferior fortune, and prevented her issue male from taking an estate in the surplus—Would it then go to Hugh Henry? No; but to the issue female of Ann; and the condition as far as regards Hugh Henry might be defeated by a common recovery. Frances died in the testator's lifetime without issue; but the estates are given to Hugh Henry only in one event, viz., the death of both daughters without issue; and, Ann being alive, that event has not happened upon which he could take. Unless then, new words should be introduced into the will, so as to convert a condition of two dying without issue into a condition of one dying without issue, the heir of Hugh cannot take. There is a difficulty too in the form of the proceeding. It is an ejectment to recover one does not know what. When parties go into equity that difficulty must be dealt with; but a person bringing an ejectment must predicate what proportion he claims, and where are the words in the will which show the precise proportion? But if that difficulty could be got rid of, the devise over could carry only a proportion of Ann's life interest, for even, if Frances had survived, she could take nothing in prejudice of Ann's issue male. But as Frances did not live to claim even that interest in the surplus, the devise failed for want of an object.

Mr. Richardson (for Defts. in Error). In *Foster v. Lord Romney*, 11 East. 594. and in the cases there cited (*Denn d. Briddon v. Page*, and *Hay v. Lord Coventry*), it was admitted that, "in default "of issue" generally, the Court would imply an estate tail, though it would not in these particular cases where the words were "in default of *such* issue." Hugh Henry was to take only upon a general failure of issue of the two daughters, as it was plainly the object of the testator that he should be postponed until the families of the two daughters were discussed. That failure had not yet happened, and therefore he could not take. But in order to effectuate the intent of the testator in the limitation over to Hugh, it was necessary that Ann and Frances should take estates tail, and a conditional limitation over after an estate tail was nugatory and could not take effect as it might be so easily defeated, *Gulliver v. Shuckburgh Ashby*, 4. Bur. 1929. In the devise over on breach of the condition Hugh was not even named, and the surplus was given only to Frances who was not alive to take advantage of the devise. Though Ann should lose part of the estates by an inconsiderate marriage, it was not the intent of the testator that the estates to the innocent issue should be defeated, and no such intent can be implied, as appeared in the above cited case of *Gulliver v. Shuckburgh Ashby*, 4 Bur. 1929.—Hugh could only take by excluding the innocent issue of Ann, and though such a proviso as this may not be contrary to law yet it is not to be favoured, and they ought to come strictly within its words who claim by it. Mr. Holroyd argues that

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this is a case of a series of limitations in which when one fails another is let in. But not one of the cases which he cites show that a person shall take who is not named. The cases of *Goodright v. Cornish*, and *Avelyn v. Ward*, were quite different. Suppose Ann married a man of competent estate and had only issue female, Frances if alive would then take on her death. Then suppose Frances married a man of inferior fortune, it could not be intended that Hugh Henry should come in to the exclusion of Ann's daughters. This shows the contradiction to the testator's intent which would take place in case the construction contended for by Mr. H. were to prevail. The fact is that the testator never contemplated any thing further than that Ann might marry so as to make the estates go over to Frances. The rest is only conjecture.—As to the point of form—under a claim of the entirety, a fractional part at least, as appears from the old real actions, may be recovered. But then it must be shown what is the entirety and what the fraction. The husband may have personal estate to meet the real estate of the wife, and how can it be ascertained in ejectment how much of the real is to be taken. It is such an undivided interest as was never heard of before in a Court of law. At any rate the Jury have not given the materials on which to found a judgment. Mr. H. says that Hugh may take five-sixths, as the fee and the estate tail were convertible. But there would be a wide difference in the market between a clear fee simple and such an interest as this. The extreme difficulty of dealing with this at law shows that the jurisdiction belongs

to another Court, to ascertain how much land is equivalent to a given sum of money.

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Den v. Purvis, 1 Bur. 326.—Doe v. Wippell, 1 Esp. N. P. R. 360.

Mr. Holroyd (in reply). *Denn v. Purvis*, 1 Bur. 326. was a case where the Plaintiff in ejectment demanded a half and recovered a third, and in *Doe v. Wippell*, 1 Esp. N. P. Rep. 360. Lord Kenyon held that an undivided moiety might be recovered in a suit for the entirety. Then suppose I am right in that, sufficient is found on the special verdict to enable me to recover some proportion. Suppose Ann took an estate tail, and that estate should be considered as equal to the fee simple, then I recover five-sixths of the whole; if she took only a life estate, the Jury have found that value. But whether she took an estate for life or in tail, I am at all events entitled to recover a moiety, with liberty in another action to recover what I may be entitled to beyond that. Then putting that out of the case I proceed to the question on the will. If Ann took an estate tail, still I submit it was one in possession immediately on the death of the testator, because the matter stood in this way—(the lapsed devise to Frances being as if it had never been)—an estate tail in Ann with a subsequent vested limitation to Hugh in fee in case she died without issue. An estate for life was given to Ann; but where there is a life estate and remainder over in default of issue, that is an estate tail. But if Ann had had a son before breach of the condition, it would have been an estate for life in her, and an estate tail in her first son, with remainder in tail to Ann. But as it happened, the matter stood as if there had

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been a default of issue of Ann; and the limitation to Hugh took place. So, suppose Ann took an estate tail liable to be opened by the contingencies as they arose, then, upon breach of the condition what estate would Frances have taken if alive? It must be the estate forfeited, and that (the estate tail) was the estate forfeited. But it is alleged that this was a devise to Frances personally, and that by her death it was gone. I submit however, that it was the testator's intention that, on breach of the condition, it should go to whoever had the next estate in remainder, and that Frances being out of the question, it went to Hugh. See the consequence if not. Did the testator mean to put it in the power of Ann by a prohibited marriage, to deprive Hugh of the ultimate remainder? Then all the preceding estates as to the surplus, Ann's estate tail and the contingent remainders depending upon it, being gone, the surplus went to Hugh. It was expressly given from Ann. A case is put that if after the breach Ann had had a daughter, she would have inherited as heir of entail of Ann, notwithstanding the breach. No: for as appears in the case already cited of *Gulliver v. Shuckburgh Ashby*, 4 Bur. 1929. and *Jermyn v. Arscot*, cited 1 Rep. 85. b. an estate tail cannot be forfeited in part and continued as to the residue. It was an estate tail then in Ann, and on the breach must be gone *in toto*, and Frances being out of the way, it passed to the next, as if it had been spent in the natural way, and both daughters had died without issue before the breach. I submit then that whoever was entitled to the next vested remainder was the one to take advantage of the

Gulliver v. Ashby, 4 Bur. 1929.— Jermyn v. Arscot, 4 Leon. 83.— 1 And. 186.— 2 And. 7.— Moore, 364. and in 1 Rep. 85. (Corbet's case).

breach. As to Frances it is clear, and she being out of the way the estate goes to Hugh Henry, as manifestly appears from the clause making the same condition as to Frances, on breach of which by Frances, Hugh would take; and so in the events which happened he must take it on the breach of the condition by Ann, otherwise she would have the power to deprive him of it, which was never intended to be given her. They say the ultimate remainder cannot take effect after an estate tail; I submit it by no means follows. The very moment the estate tail or life estate is gone the remainder takes place. Suppose Ann had died in the testator's life-time, leaving issue; still the estate tail would be lapsed, and then the ultimate remainder takes place immediately, and on this principle that the whole was given away from the heir at law, otherwise there would be two different fees. It has been stated that the devise to Frances was not a revocation of the estate to Ann, but a method of preserving it to be enjoyed by Frances. That is directly contrary to the words of the will. The life estate to Ann, being given on condition, cannot be considered on breach of that condition as still existing in Frances. Suppose that after the breach it had gone to Frances and she had died, would it revert to Ann? No.—But it is said that a conditional limitation over cannot take effect after an estate tail, and *Gulliver v. Shuckburgh Ashby*, is cited. I say it may be limited so as to go over before the natural end of an estate tail, as in Lady Ann Fry's case, and the case in 2 Mod. 7. before cited. What was the case of *Gulliver v. Ashby*, as applied to

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this? In that case lands were devised to several persons successively in tail "provided always and "this devise is expressly upon this condition, that "whenever it shall happen that the said estates shall "descend or come to any of the persons herein-"before named, that he or they do and shall "change their surname, and take upon them and "their heirs the surname of *W.* only, and not other-"wise:" but there was no limitation over on breach of that condition. The question there was whether it was to be considered as a conditional limitation, and the Court held that it was not, for it was not so expressly, the estate not being made to cease or go over upon breach of it, and it was not necessary to effectuate the testator's intention that such a limitation should be implied; for that would strip the issue of the tenant in tail, which could not be the testator's intention, and it was held to be a condition collateral and subsequent which was destroyed by common recovery. In the present case had Frances lived, Ann would only have had an estate for life with a remainder in tail, and could not have destroyed the condition, and here it must be considered as a conditional limitation, as there is an express devise over on breach of it. (*Lord Eldon* (C.) Suppose Ann and Frances had outlived the testator, and Ann had made an imprudent marriage, what estate would Frances have taken?) She would have taken an estate for life with contingent remainders to her first and other sons in tail male. But I submit the operation of this proviso is changed by the change of circumstances. In consequence of the death of Frances

the estate which Ann took was an estate tail, which was forfeited by breach of the condition, otherwise she would keep it contrary to the intent of the testator. She had not a remainder in tail but an immediate estate tail, so that no estate tail stood between her estate and that of Hugh Henry; and her whole estate was forfeited, for an estate tail cannot go over in part and subsist in part.

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SECOND CAUSE.

Sir S. Romilly (for Plaintiff in error, heir at law of testator). This is a question purely of intention. —1st, What was the intent of testator?—2d, Whether his intent can take effect by the rules of law? The intent must be collected by looking at the circumstances as they stood when he made his will, and as if both daughters were alive. It is admitted that the condition is not against law, but it is said, that it is not one to be favoured. I cannot allow that; if it be consistent with law and the intent is clear, the Court has merely to see how the object can best be carried into execution. But I cannot conceive why it should not be favoured, the object being to guard the daughters against persons who would marry them merely for their fortunes—an object which, as the testator thought, would be best secured in this way.—Now whether this is to be considered as a condition, or a conditional limitation, the heir at law of the testator is entitled. I submit, however, it is to be considered as a conditional limitation, or if it be a condition, that it is one subsequent and not precedent. The objections

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to the claim of the heir I take to be of this kind,—that Ann took an estate tail in remainder, by implication, which in the events which happened was immediately vested in possession. If they cannot succeed in that, then I must show that Hugh did not take.—1st, Ann did not take estate tail by implication but an estate for life, &c. with the ultimate remainder to Hugh, after an indefinite failure of issue of Ann and Frances, and the effect of the marriage was to give the surplus over to Frances in fee.—If Ann and Frances took estates tail, it must be by implication, and that is only permitted where it is necessary to effectuate the general intent of the testator, and never where there is a doubt to whom the estate is intended to go, and in what order. In the case of *Bamfield v. Popham*, 1 P. Wms. 54. there was a devise to A. for life, remainder to his first and other sons in tail male, and for want of issue male of A., remainder over; and it was contended that the tenant for life took an estate tail by implication, and that the codicil removed all doubt on the subject; but the Court held, that A. did not take an estate tail by implication, as it was not necessary to effectuate the intent of the testator. In the case of the *Attorney General v. Sutton*, 1 P. Wms. 754. a testator gave an estate for life to Sutton, remainder to his first and second sons (without going further) in tail male, and in case of Sutton's death without issue male, then over; and it was held, that Sutton took an estate tail by implication, on the principle that it was necessary to effectuate the testator's intention.

2 Vern. 427. Colles. P. C. 1. 8.

2 Bro. P. C. 382. 8 Mod. 257.

But in the present case, the implying an estate tail, instead of effectuating the manifest general

intention of the testator, would disappoint his favourite object. If, however, such an estate is given, to whom and in what order it is given? and who takes first? If the breach took place before Ann's estate tail, then Frances would take first, and afterwards Ann. Can there be any case of more serious difficulty in this respect? But I say it is against the intent of the testator. In the other cause it was said that Ann had an estate tail which was forfeited. Then consider the intent of the testator; when he made his will he could not mean to give an estate tail at first to Ann. But it was argued that, in the event, as Frances was out of the way without issue, Ann took an estate tail on the death of the testator; but the intent clearly was, that they should take estates for life successively. The consequence of implying an estate tail in Ann would be this, an estate for life is given to Ann and then to Frances, then an estate tail to Ann. If Ann, during the life of Frances, married a man worth nothing against the condition, all the estates would go over to Frances; and if Frances were out of the way, Ann would take an estate tail, that is, the absolute dominion over the whole property. So that the effect would be, not that Ann would be punished for breach of the condition, but that she would take a larger estate, with power to defeat all the provisions made for her own children. This, then, is not a case where an estate tail can be implied.—2d, It was contended that Hugh took a vested remainder in fee in the events which happened. But if there was a fee before, the subsequent devise must be a contingent fee. The words of the will are, that the estates are to go to

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Hugh in case the daughters die without issue. Now the testator says, "I bequeath all my estates to the "first and every daughter of my eldest daughter, "Ann Henry, the elder to take before the younger." I submit they cannot take estates tail as the interest is not described. Then it may be said that they take for life; that would answer our purpose. But why for life? The words, "I give all my estates," are sufficient to pass a fee; and if this is a fee, Hugh could not take a vested remainder.—3d, In the event of Ann marrying a person of less fortune, the surplus passed over to the other daughter in fee.—Stronger words could not be used to pass a fee except the word—*heirs*.—"All the remainder of my "property shall immediately pass over," that is, all the remaining interest in the property, all that was not disposed of. There are a variety of cases in which such words have been held to pass a fee. But it may be said that, though the words would be sufficient to pass a fee, it was the testator's intention to give the surplus to Frances in the same manner as he had given her the estate before, in case of the death of Ann without issue. That is not the case, for then he would have annexed the same condition. But he has expressly given it to her in a different manner; so that there is nothing in the will to show that she would have taken an estate for life only in the surplus. The improbability of his intending that the property should pass over to Frances in fee is not such as the Courts will allow to outweigh the express words. He has in other respects expressed what nobody would ascribe to him, unless he had so expressed himself; and yet the Courts would not

meddle in opposition to the expression, though one cannot see the object of it. Then he directs that the rents, &c. shall be suffered to accumulate, without saying for what period, and estates to be purchased, "to the use of my eldest daughter, Ann "Henry, which purchased estates shall be consi-"dered as a property I leave her in regard to the "marriage she shall make as before mentioned."—Probably he intended that they should go according to the course of disposition with respect to his other estates; but he did not so express himself, and it would be too much for the Courts to say that he so intended. I apprehend the estates to be purchased with the accumulations would, upon breach of the condition, be considered as not disposed of at all. These, however, are not now in question, and I only mention them to show the difficulty of construing this will. And if the Courts do not adhere to the words, or manifest intention of the testator, but decide on the ground of probable intention, they will go farther than any Court has ever yet done.—Suppose then, Frances would have taken the surplus in fee if now living, that devise is lapsed, and the heir at law must take, not because he alone can take advantage of the condition broken, but because the fee is given to one who cannot take, and therefore he must take.—They say that, on failure of issue of Ann, or breach of the condition, Frances being out of the way, it must go over to him who has the next vested remainder, and for that they cite Lady Ann Fry's case, 1 Vent. 199. But that case has no resemblance to the present, for there it is so given over in exact words, and that is no authority for an in-

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ference that it shall so go over where no such thing is expressed. So in the case, 2 Mod. 7. the estate is expressly devised over in the event which happened, and I apprehend these do not at all make out the proposition. I do not trouble your Lordships on the question argued below, whether this is a condition, on breach of which the heir alone could enter, or a conditional limitation. The reason why I do not trouble your Lordships with that is, that in the present case, it is clearly a conditional limitation. But the heir at law is not here attempting to avail himself of a condition broken, but says that he must take because the fee is devised to one whose devise is lapsed.

Vid. Dr. Butt's, case (cited), 10 Rep. 41. b. —Dyer 127. —Scholastica's case, Plowd.

Mr. Leach (for Plt. in Error—the heir at law of the testator). The heir claims all that is not given from him by plain expression, or necessary implication, as the Courts will not conjecture an heir at law out of his rights. The express intent always prevails with some qualification, and an expression is to be taken according to its plain import, unless on the whole instrument, it appears to be inconsistent with the general intent. So that there are cases where the plain import of an expression may give way to the general intent, but then it is only in one sense—that is, because the testator has not used the expression in its ordinary acceptation, but has manifestly attached to it a meaning of his own. I beg leave then to lead your Lordships, attending to these general rules, through the words of the will, and I hope that no particular difficulty will be found in the construction of it, having regard to the

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principle, that the heir at law is not to be conjecctured out of his rights. The testator begins &c. (Reads the will down to the words immediately following, inclusive) "*And all the remainder of my* "*property shall immediately pass over, and be* "*given up to my second daughter, Frances Henry,* "*to whom in that case I bequeath it.*" It is to this that I wish first to call your Lordships' attention. Suppose the will had finished here, what estate would Frances have taken in this property? The plain import of the words is that she took an estate in fee. *Property* is a word of quantity and interest, and may carry a fee. (*Lord Eldon* (C.) Then what interest had Ann in the property she was to keep?) She of course would take what interest she would have at any rate. The devise of the surplus is substantive. Then why is not the plain import of the words to prevail? Is it to be said that Frances takes it, subject to the same limitations, as if the eldest daughter had died in the life time of the testator? Why conjecture this? The part that was to pass over might be the bulk of the testator's property, and it might be only a shilling; and can it be contended that he intended to subject this uncertain part of his property to the same limitations? Is it to be said that Frances would only take an estate for life, in this property, and that her life was substituted instead of Ann's life? Who then is the next in remainder? Is it Ann, or her son? Is he to take before Frances's son? If we depart from the plain import of the words, we are involved in difficulties which we cannot get rid of. It is singular, if the testator meant to prefer the son

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of a prohibited marriage. Suppose then Frances's son takes—who is next, if he fails? The next is the daughter of Ann, and is the property to go to the daughter of a prohibited marriage, in preference to the daughter of Frances? Still difficulties. Then suppose the will does not finish here, for the import of the expression may be affected by what comes after, as well as by what goes before. "And it "shall also be necessary for the man my eldest daugh- "ter marries, &c. and to take the name and arms "of Henry, &c. I devise and bequeath to Frances, "an annuity, &c. to be paid every year, out of my "estates, in two equal and even payments, to her "and her issue; in failure of such issue, at her "death, the said annuity shall revert back again, "and return to my eldest daughter, Ann Henry, "and her issue." Now we come to an important part of the will: "*All I have said in regard to my "eldest daughter, and her marriage, as above men- "tioned, I mean and intend shall stand good in "regard also of my second daughter, Frances "Henry.*" In what event is it so to stand good? "*In case, by the death of her eldest sister Ann, she "shall, before she marries, come to be possessed of "my estate as aforesaid:*" the plain meaning of which is, that if Frances, by the death of Ann, should stand in Ann's place, and enjoy the whole, then she was to be subject to the same condition as Ann. But suppose she does not take the whole, but only a portion, not by the death of Ann, but by Ann's prohibited marriage—is that portion subjected to this marriage prohibition? Then we must add the words, "or a portion of my estates." But the

testator has expressly said that it is only if she takes the whole of his estates that she is to be subject to the condition, and has left her entirely unfettered as to the portion; so that this is strongly confirmatory of the plain import of the expression, which must prevail, otherwise the heir at law will be conjectured out of his right. Then let us see the rest: "And "also the rents, issues, and profits of all my afore- "said estates, except such parts as shall be neces- "sary for a genteel maintenance and education of "my two daughters above mentioned, shall be put "out at interest, &c." Now we come to a most important part of the will: "*And it is my will* "*and desire that in case my two daughters die* "*without issue, that my estates shall then go to my* "*brother Hugh Henry.*" All my estates—and in what event? "In case my two daughters die without issue." Why so? Because the bulk of his property was to pass to the issue of his daughters, according to the first series of limitations. Then is it not plain that what he gives to Hugh is not a surplus or portion, but that he looks only to the event in which the whole would continue united. So that whether Hugh's remainder is contingent, or vested, the testator looks only to this course, and to the whole coming to Hugh. He is not here looking at all to a divided estate, once separated from Ann, but to the whole going over in the event of the failure of issue of his daughters. Has he given any remainder to Hugh Henry of a broken part? No. Then is the plain import of the words passing a fee in the surplus to Frances, contradicted by any part of the will? No; but confirmed. Then if this

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construction is to prevail, the effect is clear. The estate is given to Ann for life, with a conditional limitation over to Frances in fee. That is a devise in a particular form. The devise fails; but the death of Frances cannot alter it, in this respect. The surplus passed from Ann, and would go to Frances; but she is dead, and then it is a common case that it vests in the heir at law. But suppose I cannot rest with confidence in this view of the case, and that I may be mistaken, when I say that the surplus passed to Frances in fee. Ann cannot keep the 'surplus after the prohibited marriage—that is clear. The words are "if she marries a man with "less property than that, in that case I leave her "only as much of mine as shall be equal to the "property of the man she marries, and all the re-"mainder of my property shall immediately pass "over, &c." If she says that she takes the whole, then she must contend that it shall not pass over—and how does she reason this? In her printed case she says nothing about an estate tail by implication. That is a new reason urged at the bar here. That however may be the result of more consideration. But on the general principle, this part of the case is clear. An estate tail can only be implied to effectuate the general intent of the testator. Is it then to be implied that she has an estate tail, notwithstanding her prohibited marriage t Is that according to the general intent of the testator? This as to the principle. But how is it on the particular form of expression in the will? Is it an estate for life or in fee that is given to Ann's daughters? If it is a fee, then no remainder can be limited after it, though a

a contingent fee may. The words are large enough for a fee. But they say it was not so intended. Is that clear? The words are: "In failure of such "issue male, I bequeath all my said estates to the "first, and every daughter of my eldest daughter, "Ann Henry, above mentioned." Suppose he had rested there, would not this be a joint tenancy in fee to all the daughters? Then follows the words: "the elder to take before the younger;" which show that he did not intend a joint tenancy, but that the eldest should take the whole. The words are sufficient to carry a fee. But suppose there were some doubt here, the next consideration is, whether they took a larger estate than an estate for life. It could not be an estate tail, for mere words of taking in succession could never have that effect. Assume then that it is a life estate "to the first and "every daughter of my eldest daughter, &c., and in "failure of such issue"—that is, in failure of such daughters, "I bequeath all my said estates to the "first and every daughter of my second daughter, "Frances, &c." What estates do the daughters of Frances take, vested or contingent remainders? Does he mean that if Ann has no daughters, the daughters of Frances shall take—or that if she has, and all of them should die? He must mean—if there be no daughters of Ann, and in that event, these are contingent remainders to the daughters of Frances. Then what if Frances's daughters fail also? We must look to him who is the object of the testator's bounty after his daughters and their issue; "it is "my will and desire, in case my two daughters die "without issue, that all my estates shall then go to

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"my brother, Hugh Henry." We bring up these words to the last failure of issue, and then they mean not a general failure of issue, but a failure of such issue; that is, of daughters, and then this is a contingent fee to take effect on failure of daughters of Ann and Frances. There cannot be a limitation after a general failure of issue, without implying an estate tail in testator's daughters. But an estate tail cannot be implied, except to effectuate the testator's intention, and here it would not effectuate, but defeat it, as it would give the daughter and her issue a larger estate, in the event of a prohibited marriage, than she had before.

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The effect of the Defendant's construction would be this, that if Frances had been alive, Ann would have only an estate for life, but that Frances being dead, she took an estate tail immediately by implication. But did the testator mean to give Ann a bounty on the death of Frances, contrary to the penal consequences of the prohibited marriage? (*Lord Eldon* (C.) What estate did Ann take in the part to which she remained entitled, and with what remainders over?) If there were no breach, the remainders would apply to the whole, and if part is excepted from the consequences of the breach, it of course remains subject to the remainders. (*Lord Eldon*. (C.) What were the remainders after those to Ann's first and other sons?) I submit that the daughters took a fee. A gift to the first and every daughter would make them joint tenants; but the further words, "the elder to take before the "younger," show that the eldest was to take the

whole in fee. If your Lordships do not follow that construction, it cannot be an estate tail, as these words cannot have that effect. Then they must be life estates, and the next remainder is contingent, "in case my two daughters die without issue, &c." The words are contingent; and a devise over, after a general failure of issue, is too remote and void, unless an estate tail can be implied. But it is enough that the remainder is contingent. I was about noticing an argument in the Court below, founded upon Dr. Butt's case, that the condition was destroyed by the remainder; but I feel a difficulty in understanding what the proposition is. The devise to Frances was not a remainder, but a conditional limitation; and if she took in fee there could be no remainder over. That then is not the way in which Ann points her argument. But suppose that the devise is not spent in Frances but applies to the whole series, then all the remainders must be conditional limitations, and so I do not understand how the doctrine in Dr. Butt's case applies. There was another point relied on below, and it is rather remarkable that it is not in the printed papers; that the condition is a condition subsequent, and that it does not take effect unless there is a devise over, and there is none here after the death of Frances. One cannot readily admit that no condition subsequent can be effectual except there be a devise over. But if that were the case, it does not apply here, because there is a devise over to Frances. The case of *Gulliver v. Ashby*, has been cited, and Lord Mansfield, in saying that the condition is *in terrorem* where there is no de-

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vise over, does seem to lean to such a ground of decision. I cannot help thinking, however, that in a Court of law that could never be a proper ground of decision, though in equity it might. In that case there was a much better ground, viz. that it was an estate tail, and that the condition as to marriage was collateral and destroyed by the common recovery. But suppose the Judge below right, that a condition subsequent cannot be enforced unless there is a devise over. For what reason? Because it is considered as a desire and recommendation, unless there be a devise over. But the intention of the testator must be collected with reference to the circumstances as they stood when he made his will, as a devise is in the nature of a conveyance. Has he then merely recommended it to Ann not to marry a man of less property? "And if she mar-" ries, &c. I leave her only as much of mine as shall " be equal to the property of the man she marries." That is no recommendation, but the interest is made to cease so far. But it is not enough for the heir at law of the testator to show that Ann is not entitled; he must show that *he* is, and therefore I must notice the case of Hugh Henry. They say that the effect of the breach and events is merely to accelerate the remainders. The first answer is that this is a conditional limitation in fee to Frances, and that the testator, in limiting these remainders, was looking to an undivided estate. But suppose the remainders were only accelerated, and that they apply to the separate property, the question is whether they are vested remainders. If the daughters of Ann took a fee, there cannot be remainders over.

If they took only a life estate, the subsequent remainders were contingent. But the main argument is that from the words, "in case my two daughters "die without issue," the remainder to Hugh must be contingent, unless previous estates were given to all the issue, as it depends on a circumstance which may or may not happen. The only way to give it effect is to imply an estate tail in testator's daughters, which cannot be done consistently with his intention. (*Lord Eldon.* (C.) Suppose Ann had not disparaged herself, and Frances had lived.) There would be much more reason to imply an estate tail in that case, as there would not be a clear intent to the contrary. But we say that none of the limitations apply to the separate estate. If they do, and an estate tail is implied, then a bounty is given on the breach of the condition. We cannot look at the case now as if it stood without breach of the condition.

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Mr. Hart (for Defts. in Error). The testator himself never contemplated the events which happened, and could have no intention respecting them. Then the only way of collecting the intention is to consider what he would have prescribed if the whole circumstances had been before him; and that is what is meant when we speak of the general intent of a will, and reject the particular where it is inconsistent with the general intent. Then let us look at the whole series of anterior limitations, and see who are the chief objects of the testator's bounty. His object seems to have been to create a family, and to perpetuate his name, and to limit the estate so as to

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render it inalienable as far as the rules of law would permit. He gives his daughter Ann an estate for life, remainder to her first and other sons in tail male, so as to take by purchase from him, with a contingent limitation over till they came in *esse*: but the male issue was in no event to be disappointed. The next object of his bounty is Frances, to whom he gives an estate for life, with a vested remainder to her first and other sons in tail male as before. The female issue is the secondary object of his bounty; and it is asked what estates the daughters of Ann and Frances would take. That requires exposition from the context, for the terms render it doubtful. It is clear that Ann's daughters take in preference to Frances's daughters.

Then see what he has done with a view to prevent intestacy. After the provisions respecting accumulation, &c., he comes to this devise; "my "will and desire is, in case my two daughters die "without issue, that all my estates shall then go to "my brother Hugh Henry." The Courts are bound by the intent where it can take effect consistently with the rules of law; and the law has said that a limitation over on a general failure of issue is too remote and void. But there is no difficulty now in such cases, as the Courts will imply estates tail in the anterior devisees; and if not implied here, the general intent and scheme must fail, as the heir will come in where the testator has said in express terms that he should not. I am here arguing as if there had been no conditional clause in the will. In no event could Hugh Henry take till failure of issue of the two daughters, and by necessary implication,

to render the devise to him of any avail, the life estates of the daughters must be enlarged to estates tail. So that on failure of issue there are general estates tail in the two daughters successively. True, there is no expression of intent as to the series in which the estates tail are to take effect, and Sir S. Romilly says that, in that case, estates tail cannot be implied. But the intent as to the series may be collected from the context. If an estate tail could be implied in one only daughter to whom an estate for life is first given, why not imply the same preference as before expressed between the two daughters with respect to the estates for life. Ann has an estate for life, remainder to her issue male in tail male, remainder to Frances for life, remainder to her issue male in tail male, remainder to Ann's issue female for life, remainder to Frances's issue female for life, and then the only next thing he could do in order to effectuate his general intent, was to give estates tail to his daughters in the same order and succession as before. Then by this means the general intent is perfected. The testator had as much attachment to the estate, as to the individuals who were the objects of his bounty. The daughters were less the objects of his bounty than their sons, to whom a larger estate was given. Then it is stated in argument, that the effect of this would be, that the breach of the condition would destroy Ann's life estate, and give her an estate tail. If the necessary effect of this construction were, that the testator intended that the forfeiture of Ann should extend to her issue male, &c., and vest an estate tail immediately in Ann, there would be a difficulty. But

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it was an event which he never foresaw, and he did not consider that the younger daughter might go to the grave before the elder. But when they argue in this manner to show that there was no estate tail in Ann, they themselves argue that an estate in fee was given to Frances, destroying all the limitations to the male issue of Ann and the rest. So that if the matter depends on incongruity, that would be a strong argument against Frances taking the entire fee. On what principle is it that Ann's issue male should take a less estate for breach of the condition by Ann? And why should Frances take in fee? If the language were more strong than it is, that absurdity would be rejected. But when we look at the language here, we must be convinced that it never could be the testator's intention that Frances should take the surplus in fee in the event which happened. The words are "and all the remainder "of my property shall pass over and be given up to "my second daughter Frances, &c." It is said that, though there are no technical words of inheritance, *all my estates* apply to quantity of interest as well as to qūantity of property, and I do not deny that, if not qualified by any other expressions, they might carry a fee in a will. But we must look at other words to see whether this means quantity of property or of interest in law. Your Lordships see that he is apportioning his property. The words in which he leaves to Ann as much of his property as should be equal to that of the man she married, might as well be considered as giving the absolute fee. But could it be contended with success that Ann took a fee in that? And yet the word *property* must

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be understood in the same sense as when the estate is given to Frances. But if the words are to be controlled with respect to Ann, they must be also controlled with respect to Frances, who therefore has not the absolute interest. If these words carry a fee, a still greater absurdity might be the consequence; for then, if Ann married a man worth within 100*l.* of the whole of the testator's property, she would have the fee in the whole except that 100*l.*, and cut off all the subsequent limitations. This bequest over I consider as a penalty on Ann, and a bounty to Frances. The testator, leaving the general frame and scale of his devises untouched, meant to impose a particular obligation on Ann, and not on her issue. The limitation over then depended on the double contingency that Ann should commit a breach of the condition, and that Frances should be alive. And then if Frances was not alive, that provision could not take effect. Without that, every object of it was defeated. Where is the inconsistency in supposing Frances more the object of the testator's bounty in certain events than Ann? He takes from Ann, on breach by her of the condition, a particular proportion of his property, and gives it to Frances. But the gift to Frances was personal; and there is nothing in the will to show that it was the intent of the testator, if Frances did not live, to take the property from Ann. Frances had no immediate benefit under the will beyond 300*l.* a-year. But if Ann, to whom the bulk of his property was given, disparaged herself by her marriage, then a proportion was given over to her sister for life. The purpose of its going over was subor-

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dinate to that of Ann marrying a man of great property, and as Frances to whom it was to go was dead, that purpose failed. And as he had not passed it over to any other person in case of Frances's death, his intent was that, in that event, it should not go over at all. It was argued below that there was a devise over: but I conceive upon this ground the rule of law is that, on a condition broken, the heir alone shall enter. But the heir cannot enter on a partial interest; and the Courts adopted another rule, that of a conditional limitation: for if it should be considered as a condition for which the heir could enter, that would destroy the remainders over; but if it is a conditional limitation, who is to enter? There is no rule for that. But the heir can only enter on two principles; on a condition broken so as to have the old estate, or on failure of a devise. Then he cannot enter on the conditional limitation, Hugh remaining capable of taking. In no sense can the heir at law take, unless Frances took the entire fee; a construction which would defeat the whole intent of the testator. There is an end then of the heir at law's case. So I submit that the penalty depended on a double contingency, and, that not happening, the provision failed. I do not deny that we do not thus complete the partial intent of the testator; but that must yield to the general intention.

Mr. Richardson (for Defts. in Error.) In the first place, how do the estates stand independent of the proviso, "I give, devise, and bequeath all my "estates," which is a phrase continued throughout, whether he gives for life, in tail, or in fee. The effect

is to give Ann an estate for life, with contingent remainders to her first and other sons; then to Frances for life, with contingent remainders to her first and other sons; then there are contingent remainders to the daughters of Ann *in succession*, which is material to show that they did not take a fee; and then he says, "I give, &c. "all my said estates to the first and every daughter "of Frances, &c.," which last words show that life estates were meant, as these words, applied to estates in succession, are not so strong as if applied to a singular estate, which might be a fee. And why give a fee to the daughters more than to the sons? and why in succession, as the elder would have a fee, and so might defeat the rest? I take the words, "failure of such issue," to mean failure of daughters of Ann, as in *Foster v. Lord Romney*, where estates were given to sons, and "in default "of such issue," then over; the words, "such "issue," were considered as meaning such son or sons. But I think it immaterial whether the daughters of Ann took for life or in tail, provided they did not take a fee, and they cannot take a fee. The testator clearly intended that his younger brother, Hugh, should take in preference to the heir; and, Hugh not taking till an indefinite failure of issue of A. and F., he cannot take at all, except estates tail are implied in A. and F. Sir S. Romilly says estates tail can only be implied to effectuate the testator's intention. True; but they have been implied in such cases as this. Bamfield v. Popham in P. Wms. was quite distinct; and the point was not raised there, as the estate was given over on failure of the issue male. In *Att. Gen. v. Sut-*

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Bamfield v. Popham, 1 P. Wms. 54. 1 P. Wms. 754.

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Langley v. Baldwin, 1 Eq. Ca. Abr. 185. pl. 29.

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ton, an estate tail was implied, except as to the trust property: so, also, in *Langley v. Baldwin*, 1 Eq. Ca. Abr. 185. pl. 29. But the case I would particularly cite, is *Doe, d. Bean, v. Halley*, 8 T. R. 5., where Lord Kenyon particularly relied upon *Robinson v. Robinson*, 1 Bur. 38, which had been discussed for 50 years in all the Courts. Though the expressions in that case of *Doe v. Halley* strongly favoured an estate for life, they were extended in order to effectuate the general intent of the testator, and the reason given by Lord Kenyon was, that the general intent was to exhaust one branch of the family before the estate should go over; and such is the case here. Then consider what is the effect of all this in the events which happened. The words of the proviso are—(reads them). Now the principal point of their argument is, that these words pass a fee, and that F. took the residue in fee. I am surprised at this, as it was not suggested below, nor is it in the printed cases. But possibly the words might carry a fee, if that were necessary to effectuate the intention of the testator. *Effects* and *property* may carry a fee; and it was said, by Lord Thurlow I think, that *all I am worth* would carry a fee. In *Doe, d. Andrew, v. Lainchbury*, 11 East. 290., *property* and *effects* were applied to real estate, such appearing to be the testator's intention; and a great number of other cases were there cited, to show that effects would, when necessary to effectuate the intention, carry the realty. But so to construe *property* here, would defeat the general intent. He did not mean that A. or F. should have the power to disinherit their issue. "And all the remainder, &c. shall pass

Doe, d. Andrew, v. Lainchbury, 11 East. 290.

"over, and be given up, &c." It could not pass over and be given up, unless previously vested in Ann. Now Ann had not the fee, and so a fee could not be given up. (*Lord Eldon* (C.) In one of your printed cases the finding is this; that the lands and tenements in the within written declaration mentioned were, at the time of the said marriage, of the yearly value of 1683*l.* 19*s* 4*d.*; and that the fee simple of the said lands was of the gross value of 38,856*l.* In the other printed case, and the difference is material, it is stated that the lands and tenements devised were of the yearly value, &c., without the words "in the within "written declaration." The difference is material in this way. The verdict finds that John Henry was seized of the lands and tenements in the within declaration mentioned, amongst others, in his demesne, as of fee, &c. In one way of putting the case, Ann would take as much of these lands, &c. as would be equal to 6,400*l.*; and this is represented as a sixth in two ways. In the one way it was a sixth of the lands in the declaration mentioned. In the other, it was a sixth in the lands devised by the testator; that is, not merely in the lands in the declaration, but in the whole real estate devised. And then the value was not to be calculated according to the value of the premises in the declaration, but according to the value of the whole.) That is a repugnancy in one point, for they intend to include the whole. (*Lord Eldon* (C.) Do you mean to say, that any judgment of this House can be given except on the record as it stands?) I do not allow that an ejectment can be sustained on this

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vague sort of interest. *Sir S. Romilly.* It is consented that no such objection is to be taken, as the parties wish for a decision on the merits. The value can be ascertained afterwards. (*Lord Eldon* (C.) We cannot admit that on our record.) *Mr. Holroyd.* Enough appears on this special verdict to show that a certain proportion is recoverable. If the value of other lands is to be taken, the Plaintiff will have a larger proportion. But, under the verdict as it stands, he may recover a certain porportion; and it is no answer to say that he ought to recover a larger. *Mr. Richardson.* The answer of Mr. H. is not satisfactory, for, unless the whole is before the Court, I cannot conceive how a proportion is to be recovered. But, however, I do not press the point of form. Returning, then, to the merits, I say the testator could not mean to give a fee to Frances, as his object was to settle his property according to the course and scheme of succession mentioned in the will. Mr. Leach admitted that what remained was so settled; and why should not that which was given over to Frances? The effect of the proviso is merely to make a conditional limitation over to Frances. Now, where there can be no conditional limitation over, the previous estate is not displaced; and *Gulliver v. Ashby* is an authority for that proposition. It was held there that, for want of a limitation over, the previous estate was not displaced; but continued in the tenant in tail, who was capable of suffering a recovery; and the grounds upon which the previous estate was not displaced was the want of a limitation over. So I argue here that, if there is no person to take under

4 Bur. 1929.

the limitation over, the previous estate is not displaced. The devise over was personal to Frances, and the heir at law cannot take advantage of it, unless he can make out that this was a condition for breach of which the heir might enter; and so it was contended below to be. But, when they were pressed with the limitation over to Frances, they said it would be a conditional limitation if Frances were alive; but that, she being dead, it was a condition. It must be construed, however, as if she were alive; and, at any rate, the limitation to Hugh would be enough to prevent the entry of the heir as for a condition broken: and so it was decided in Dr. Butt's case. But even if the heir could enter for the condition broken, he cannot succeed, as he has not stated a sufficiently precise interest for a recovery by ejectment; and the judgment of the Court of K. B. below could not be sustained, even if your Lordships should on the other grounds be against us.

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10 Rep. 41. (Mary Portington's case.)

Sir S. Romilly (in reply) particularly insisted that no estates tail could be implied in the daughters Ann and Frances, because the order in which they were to take did not appear; and because such an implication would frustrate the intention of the testator; that Frances took a fee in the surplus; and that it was only in the event of her succeeding to the whole, that she was made subject to the condition; and that, the devise to Frances having lapsed, the heir at law took the surplus as undisposed of. (*Lord Eldon* (C.) Whether the interest given over is an interest of which possession could be de-

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livered under an ejectment, or whether the devise over is not void for uncertainty? That is a conclusion which the House never comes to, if it can be avoided. *Lord Redesdale.* There is certainly a difficulty in that respect, as I find no distinct portion expressed in the will itself; and there is no writ by which a portion can be delivered, without mentioning the portion. If an ejectment is brought to recover two tenements, A. and B., there may be Guilty as to the one, and not Guilty as to the other; and the judgment to recover the one may be good. But I know of no instance of such a proceeding held good, without the portion's being mentioned.)

Lord Eldon (C.) stated the will and facts found on the special verdicts, again adverting to the difficulty that appeared to arise from the facts not being found with sufficient precision in the special verdict to enable the Court to give judgment upon them; and then observing, with reference to the proviso in the will, that the first consideration was, whether the subject of the devise over was described so clearly that the possession of it could be delivered under an ejectment, either as an entirety to be fixed by the proportion which the husband's property bore to that of the testator, or as some undivided aliquot part of the whole to be settled by a similar proportion, and to be held, by the person entitled, as tenant in common with Ann. And he proposed that the following questions should be put to the Judges.

Questions to be put to the judges.

1st. Whether, having regard to the facts and circumstances of the case and to the true intent and

construction of the testator's will, Ann, and her husband in her right, or Joseph Henry, the heir of Hugh Henry, or John Joseph Henry, the heir at law of the testator, are or is entitled to any and what estates or interests, estate or interest, in the lands and premises devised by the said will, or in any and what parts or portions, part or portion, thereof?

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The second question was whether, having regard to the facts in the special verdicts, if either of the Plaintiffs was entitled to any part or portion of the lands and premises, he could support the ejectment; and what judgment ought to be given in such ejectment?

The case was this day (June 12, 1816) argued again by one counsel on each side, upon the point whether the subject of the devise over, in case of Ann's marriage with a man of inferior fortune, was stated or described in the will with sufficient certainty.

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Lord Eldon (C.) The Counsel will begin, who contends that it is given over with sufficient certainty.

Mr. Leach (for the heir at law). The Jury have made it sufficiently certain, and Ann will be entitled to an undivided sixth part or moiety of the whole, as tenant in common with the person entitled to the surplus. There is no physical impossibility as to making the devise certain, and, if it is void for uncertainty, that must depend on legal and technical principles. But it is difficult to conceive how legal and technical principles should be applied to pre-

Argument on the point, whether the devise over was not void for uncertainty.

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vent the intention of the testator from being followed, which is the great guide in the construction of wills; though in a conveyance such legal and technical principles must govern. These gifts of undistinguished portions are of two classes. They may be described by quantity or value. One seized of 500 acres may give 100 of them, without describing which. One having 500*l.* a year rent out of lands may give 100*l.* a year out of these lands without describing out of which of the lands in particular. First as to the undistinguished portions described by quantity, the result of all the authorities is this,—that it is no such uncertainty as in itself avoids the devise, but that it is in its nature sufficiently certain, the person to whom the gift is made having a right to elect. Where such gifts have been held void for uncertainty, the uncertainty has been in the manner of the gift. For example in Vin. Abr. Tit. *Election*, I find this first article: "If A., seized in fee of "100 acres, enfeoffs B. of eighteen acres of the 100 "acres, without assigning which of the 100 acres "he enfeoffs him of, to hold to B. and his heirs, at "the election of B. and his heirs when he pleases, "this is a void feoffment, so that this cannot be "made good by any election, *because a livery "cannot operate* IN FUTURO *but ought to pass the "freehold presently or never, and therefore the "feoffment void.*"

Bullock v. Burdett, Dyer, 281. A.—Moore (Sir F.) 81, 2. pl. 215.

The principle then is plain; a feoffment is nothing without livery, which must operate immediately, and there cannot be an election to make the gift good. The same doctrine appears in the notes to Dyer. Rep. 281. a.—in Moore (Sir F.) 82. and in

Dyer, 8vo. Ed.

Viner. Abr. Tit. *Fine*, and also in Vin. Abr. T. Grants, 91. R. "If a man seized of forty acres "makes a feoffment of twenty acres to the use of "his son and wife for a jointure, this is good. So "a fine of twenty acres where the conusor had 100 "acres is good, and the conusee shall choose; and "if a man levy a fine of fifteen acres of the manor "of D. it is good by election." (Arg. Moore, 82.) Why is the conusee to have his election? Because the use need not be immediately executed. The subject might be made certain, and then the use arises. So in the case of a devise, (Grace Marshal's case in a note to *Bullock v. Burdett*, Dyer, 281. A.) "A devise of two acres out of four is good, "and the devisee shall elect." These authorities prove that there is no objection to the nature of the gift; the objection is to the mode, not to the substance.

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12 Rep. 86. Stockdale's case.

2d. So it is when the subject of the gift is described not by quantity but by value; where it is described by quantity the certainty is effected by election; where it is described by value, the certainty is effected not by election but by valuation; and then the same consequences follow. Where the gifts are void, it is on account of the manner and not the substance, and so the authorities stand. The first authority *Woodhouse v. Futter*, is found in Dyer, 281. A. in a note to the case of *Bullock v. Burdett*, and also in 1 Roll. R. 187. "A man seized of lands of "500*l.* value, covenants by indenture to assure "lands of 100*l.* value for a jointure, and makes "feoffment of all the lands to the use of the inden-

Woodhouse v. Futter, 1 Roll. R. 187.

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" ture. This is void for the uncertainty." And *per* Cooke and Dodderidge, " If a man covenant " by indenture to make a feoffment to the use of " the indenture generally of lands of the value of " fifty marks, and does not particularly assign the " land, more shall not pass than the place itself " where livery was made." How could the land pass by feoffment and livery unless it was certain what was to be delivered? And in the case of a feoffment it could not be made good by subsequent valuation. In the several cases referred to in Vin. Abr. Tit. *Grants*, the same distinction was taken. So it was also in the case of *Thomas v. Kenn or Morgan*, Hetley, 67. Dyer, 281. A. where " a fine was " levied to the use of the conusees to be seized of " so much land as should be worth 30*l. per annum*, " to be assigned and set out in several by J. S. " adjudged, as no assignment was made, that it was " void; otherwise if the assignment or valuation had " been made." The next case, *Gibbon v. Warner*, was in the note in Dyer, 281. A. and in 2 Roll. R. 425. " Sir T. F. devised his manor of —— to his " executors, in trust that they should be seized of 100 " marks of that manor to the use of one, and of " another part of the value of 20*l.* to the use of " another, and that a division should be made by the " executors, and that the whole manor should be " valued at 100*l.* and no more. Adjudged that this " was sufficiently certain, and that the *cestui-que-uses* " shall be tenants in common immediately without " division. But this case was put by Richardson in " the argument in *Thomas v. Morgan*, and agreed to " be law, that it is to be taken that the value of the

Thomas and Kenn's case, Arg. Litt. Rep. 217.—Hetley, 67, 97.

Gibbon v. Warner, 2 Roll. Rep. 425.—Dyer, 281. A. N.

Flet. 67. 97.

" manor was expressed in the will, and that he said " was the reason of the judgment." True, the value of the manor was expressed in the will, but the particular portions must still be rendered certain by valuation. If Richardson was right there, all the other authorities are wrong. The result of the whole is, that the portion here may be set out, or that the lands may be held in common, and that in either way the devise may be made certain, though the latter is the more convenient.

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The case was argued on the same grounds for the heir of Hugh Henry, the ultimate devisee; and Sir Walter Hungerford's case, Leon. 30. pl. 36., and Calthorpe's case, Dyer, 334. B., Moore 101. 247. were cited. (*Lord Eldon* (C.) If the remainder man had the election here, could he support the ejectment?) Yes, because the election may be made at any time, and he may elect the whole and recover *pro tanto*.

Sir Walter Hungerford's case, Leon. 30. pl. 36.— Calthorpe's case, Dyer, 334. B.— Moore 101. 247.

Mr. Hart (for Defts. in error.) The ejector must make out to what he is entitled as a distinct and definite proportion, though to be held in common. They have produced a great deal of ancient learning as to grants and devises; but they pass very cursorily over the point as to what distinct portion they claim. These are authorities to show that what is indefinite may be made definite. That is quite a common maxim, *id certum est quod certum reddi potest*. But how do they bear upon this case? Cases of this kind must be determined on the language of the instrument. The whole of their principle is to be found in *Bullock v. Burdett*, Bullock v.

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Dyer, 281. A. and in the notes of Ch. J. Treby, which are authorities themselves, independent of the authorities there referred to. A grant is to be taken most strongly against the grantor, but if uncertain it is void. It is admitted that in *Gibbon v. Warner*, the proportion was pointed out; all the ratios were there ascertained, and in these the devisees were tenants in common. The case of *Bullock v. Burdett*, does not depend on the livery, but on the wide principle that the feoffment was void for the uncertainty. But it has no bearing on this case. Who is to elect here? The question here is merely whether the testator has described with sufficient certainty what he meant to pass. The testator gave Ann the rents and profits of the estates from the time of his death, and he describes her as having been born in 1783, and at the time of making his will she was an infant of three years of age. Then he gave her a life estate, and then there was a minority of about fifteen years after the death of the testator before she could be capable of contracting. He goes on to Frances, and presuming a failure of issue, he gives, as we say, an estate tail to Ann after failure of the intermediate male issue. Of such a species of property, depending on so many contingencies, it is difficult to ascertain the value. The testator has not in the devise over expressed whether he meant the value of the life estate and its contingencies, or included the benefits before given to the issue of Ann. Is the value to be estimated at the time of the marriage? or is the Court to have a retrospect to the hour of the testator's death, and include the rents and pro-

fits from that time? The testator has given over, one cannot conjecture what. The portion cannot be found by quantity or value if left to be ascertained by the will, so that the devise is in its terms uncertain and cannot have effect.

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Leach (in reply.) If I understand the argument of Mr. Hart, he says, that it is difficult, and even impossible here to ascertain the portion, though, in general, it may be done. I submit it may be done in this case; and there I must leave it.

Gibbs (Ch. J. C. B., delivering the opinion of all the Judges.) The first question put to us is, whether, having regard to the facts and circumstances of the case, and to the true intent and construction of the testator's will, Ann and her husband in her right, or Joseph Henry the heir of Hugh Henry, or John Joseph Henry the heir at law of the testator, are or is entitled to any and what estates or interests, estate or interest, in the lands and premises devised by the said will, or in any and what parts or portions, part or portion thereof. It will not be necessary to state the record of the case, as the whole has been so recently before your Lordships. But we are all of opinion, upon the facts and circumstances stated in this record, that Ann is entitled to all the lands, during the term of her natural life; and that neither Joseph Henry, nor John Joseph Henry, have or has any estate or interest in the lands and premises mentioned, nor in any part or portion thereof. This being our opinion on the first

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question, it is unnecessary to give any opinion on the second.

The point on which the first question turns, arises on the proviso giving over some part of the estates, in the event of the marriage of Ann Henry to a man with a fortune inferior to that which was left her by the testator. The proviso is in these terms: —"But I give, devise, and bequeath all my said "estates abovementioned to my eldest daughter "Ann Henry aforesaid, on this proviso and express "condition, that she marries a man really and *bonâ* "*fide* possessed of a property, at least equal, if not "greater, than the one I leave her. And if she "marries a man with less property than that, in "that case, I leave her only as much of mine as "shall be equal to the property of the man she "marries; and all the remainder of my property "shall immediately pass over and be given up to "my second daughter Frances Henry." This aims at creating a conditional limitation over, on the event of Ann's marrying a person of inferior fortune;

The devise void for uncertainty.

but we think the devise over is void for uncertainty, and that the proviso cannot have effect, though the event in which it was to operate has taken place.

In what the uncertainty consists.

The uncertainty is this. The will gives over an uncertain part, not specifying the lands if to be held in severalty; or, if this should be considered as an undivided portion in the whole, it cannot be discovered from the will what that portion is. It has hardly been contended, that any thing was given over in severalty; but it was contended, with more colour, that the person to take the excess, beyond the husband's property, would be tenant in com-

mon with Ann, of a moiety or some other given share. June 12, 1816.

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It is impossible to put the case upon any other ground than this. A portion is given over, and it cannot be a portion to be held in severalty. The only way then is, that the person to take the excess shall have some undivided portion of the whole; and if the devise defines what that interest is, it will be sufficient to give its objects the benefit of it. But we think that the devise does not define any specific interest which the objects of it can take.

The only ground upon which this can be contended to be a tenancy in common, which supposes some specific share, is, that it may be left to a jury to decide according to the values. The inconvenience and confusion which would result from this is obvious: different juries would set different values on the respective properties of the husband and wife; and the valuation must be made too at the period of the marriage, and at any distance of time, a jury might be called upon to say what was the value of the property. It would not only be difficult, but in some cases impossible, to ascertain the value in this way.

Our opinion, however, does not rest on the inconvenience and confusion, but on the principle of law, that such a devise is not sufficient to create a tenancy in common. If it were so, it must be upon the marriage of Ann; and all the consequences of a tenancy in common must then have taken place. The parties must at that point of time be tenants in common, and then they would be so without the possibility of saying what is the share

Unless the specific interest or share appears on the face of the will, the devise is not sufficient to create a tenancy in common.

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of each. It has been said that this is no objection; but I wish that a case had been mentioned of a tenancy in common, without the possibility of knowing from the instrument creating it of what specific share or portion each was tenant in common. Great industry has been evinced on the part of the Gentlemen at the Bar, but no such case has been produced.

I have stated that if this be a tenancy in common it must be on the marriage of Ann; and then they must have been subject to all the calls and consequences to which tenants in common are legally liable; they must have been capable of being separately sued in all real actions, and in actions of ejectment, a modern proceeding, which has come in the place of real actions. Now, in every real action, though we do not know from the writ, it must appear in the declaration what is the specific interest in question, how the title is derived, and what the precise interest is; but here there is no such thing. At the time of Ann's marriage it could not be collected from the will what the specific interest was.

If they were in the situation of tenants in common, see how they could answer. A creditor, who has a demand against one of them, institutes his suit, and proceeds to get the lands by *elegit*. He has judgment for a moiety of the share, and the sheriff is directed to deliver a moiety. But the share must appear in order to enable the sheriff to deliver the moiety; and no case has ever occurred, where the difficulty has been cast on the sheriff to ascertain the share. And there is no instance of a

tenancy in common, where the extent of the interest could not be ascertained from the instrument creating it.

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This difficulty too presents itself. Tenants in common have each a right to a writ of partition. The writ does not state the share, but in the declaration the precise interest is stated. I have looked at a great number of such declarations, and I have found none which does not state the title; and which does not state in precise terms what the specific interest is, and does not state the interest as so specifically appearing on the face of the instrument creating the tenancy in common.

With these inconveniences then, and upon these principles, we are of opinion, that this will does not sufficiently point out what each is to take; and that the specific interest, or share of each, does not appear from the will or instrument which aims at creating the tenancy in common.

The will does not sufficiently point out what share each is to take.

We have bestowed some industry upon this case, and we have found some authorities, but not many. Thomas and Kenn, or Morgan's case, is referred to in a note in Dyer, 281. A. and the argument is given in Hetley, 67. 97. and more at length in Littleton's Reports, 217. The roll has been searched, and it appears that on a special verdict the judgment was for the Defendant. It was argued for the Defendant in this way: "If they are tenants in com-" mon they might have partition, which they can-" not have here, for it is impossible to declare the " fifth part in certain, and the jury cannot make it " certain; for one jury may value at one rate, and " another at another." I do not mention that as

The authorities examined.

Dyer, 8vo. ed.

Le jury ne poet faire *certainty*. Litt. R.

June 12, 1816.

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authority, but refer to the report merely for the facts of the case. It was a deed to lead the uses of a fine, the conusees to be seized of so much land as should be worth 30*l.* per annum. It was insisted, on the one side, that this was sufficient to create a tenancy in common, and for the Defendant it was contended that it could not be a tenancy in common, because no certain specific share appeared. Neither in Hetley nor in Littleton is the judgment mentioned; but on searching the roll, it appears to have been for the Defendant on a special verdict. There were other points in the case, and it does not appear what the particular ground of the judgment was; but how it was understood appears from the history of another case which I shall mention.

Dyer, 281. a.

Without considering the principal case of *Bullock v. Burdett*, I refer to the marginal notes, which are always to be regarded with deference, coming from an authority so considerable as Ch. J. Treby,

Gibbon v. Warner.

where the cases of Gibbon and Warner, and Thomas and Kenn, or Morgan, are stated and compared.—

" Sir Thomas Fulmerston devised a manor to his
" executors, in trust that they should be seized of
" 100 marks, part of that manor to the use of one,
" and of another part, to the value of 20 marks, to
" the use of another; and of another part, to the
" value of 20*l.*, to the use of another:—and that a
" division should be made by the executors, and
" that the whole manor should be valued at 100*l.*,
" and no more. Adjudged, that this was suffici-
" ently certain, and that the *cestui-que-uses* shall
" be tenants in common immediately without divi-
" sion. But this case was put by Richardson in the

" argument in Thomas and Morgan, and agreed to June 12, 1816.
" be law; that it is to be taken, *that the value of*
" *the manor was expressed* in the will, and that, he DEVISE VOID FOR UNCERTAINTY, &c.
" said, was the ground of the judgment. Thomas
" and Morgan was the case of a fine levied to uses,
" the conusees to be seized of so much land as
" should be worth 30*l.* per annum to be assigned,
" and set out in several by J. S. Adjudged, as no
" assignment was made that this was void for the
" uncertainty; and that the conusees should not
" enter, nor be tenants in common with others, to
" whom the residue was limited."

What is the fair result then from these two cases? that if a man seized of lands devises part of the lands to the value of 30*l.* in money, and the whole is valued at 60*l.*, no doubt the devisee takes a moiety as tenant in common, as the proportion is clear; that is the case of *Gibbon v. Warner*. But suppose it had been a part to the value of 30*l.* without mentioning the value of the whole land, it would be impossible to say what precise interest or share he takes till the value is ascertained.

The principle of our decision then is, that the interest or share must appear on the instrument itself. In the case of Gibbon and Warner it did so appear, and that was held good. In the other case it did not so appear, and that was adjudged to be void for the uncertainty.

Principle of the decision, that the interest or share must appear on the face of the instrument, creating the tenancy in common.

Apply that principle to the present case. What is here given over is the difference between the fortune of the husband and that of the testator. We cannot find from the instrument what that interest or

The devise void for uncertainty.

June 12, 1816.

share is, and so we are of opinion, that the devise is void for uncertainty.

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Lord Eldon (C.) In the very particular circumstances of this case, I should propose to allow a few days for consideration before the final decision. It is a very important case in principle, and very important to the parties in point of value, and it has been argued below principally upon grounds other than those upon which the opinion of the Judges has now been delivered. That point, indeed, hardly occurred to them at all below, but was suggested here. The House has heard the argument at the bar, and I have to say, that I have received a great deal of information from the bar and from the Judges. But I cannot state that I am so fully satisfied in my own mind upon the whole of the case as to advise your Lordships to proceed immediately to final judgment.

The point of uncertainty first suggested in the House of Lords.

June 19, 1816. Judgment.

Lord Redesdale. (After mentioning the parties and stating proceedings), the question is, whether the devise over in the will of John Henry can take effect in favour of the ultimate devisee or heir at law.

The will.

The testator gave the estates in this way: after bequeathing some legacies, he gave and devised the estates in question to his elder illegitimate daughter, Ann Henry, for life, and after her death to her first and other sons in tail male; and in failure of such issue male, to his second illegitimate daughter, Frances Henry, for life, and after her death to her first and other sons in tail male; and on failure of

such issue male, to the first and every daughter of Ann, and then to the first and every daughter of Frances.—And then came the clause on which the question turns:—"I give and devise, &c. all my "estates above-mentioned to my eldest daughter, "Ann Henry, aforesaid, on this proviso and express "condition only, viz. that she marry a man who "is really and *bonâ fide* possessed of a property, at "least equal, if not greater, than the one I leave "her: and if she marries a man with less property "than that, I in that case leave her only as much "of mine as shall be equal to the property of the "man she marries; and all the remainder of my "property shall immediately pass over, and be given "up to my second daughter, Frances Henry, &c." And then he gave an annuity of 300*l.* a-year, charged on the estates, to Frances and her issue, &c.—(States the remainder of the will *prout ante.*)

June 19, 1816.

DEVISE VOID FOR UNCERTAINTY, &c.

Proviso on which the question arose.

The facts were, that Ann survived the testator, and that Frances died in his life time without issue; and he died seized of the estates in question, leaving his daughter, Ann Henry, his heir at law; Joseph Henry, and the ultimate devisee, Hugh Henry, him surviving. Joseph Henry died, leaving John Joseph Henry his heir at law; and Hugh died, leaving Joseph Henry his heir at law.

Ann married Hancock, whose fortune was inferior in amount to that which was left her by the testator, and the excess or surplus was claimed by the respective heirs of Joseph Henry, the heir at law, and of Hugh Henry, the ultimate devisee. John Joseph Henry insisted that the disposition to

Marriage of Ann.

June 19, 1816.

DEVISE VOID FOR UNCERTAINTY, &c.

Facts in the verdicts.

Hugh did not carry the fee, or that if it did, it was only in case both the daughters died without issue.

The facts were found by special verdicts in these two ejectments, and it was stated in the verdicts that at the time of the marriage of Ann Henry with Hancock he was possessed of a personal property of the value of 6,400*l.* in the whole, and of no other property; that the estates devised were at the time of the yearly value of 1,638*l.* 19*s.* 4*d.* and that the fee simple was of the gross value of 38,856*l.* The verdict also found that an estate in one-sixth part of the fee simple of the whole lands was equal in value to the whole of Hancock's property at the time of the marriage; and that an estate for life of Ann Henry in one-half of the said lands was equal in value, at the time of the said marriage, to the whole of Hancock's property, intimating, that if the fee simple was to be the subject of calculation, then one-sixth of the whole was to be retained by Ann and her husband; and if the estate for life was to be the subject of calculation, then one-half was to be retained. The verdict further found, that at the time of the marriage, John Joseph Henry, the heir at law of the testator, entered upon and became seized of the lands, and demised them to Long, and that Long entered and took possession of the lands until ejected by Hancock and Ann his wife, and the other parties mentioned; and then they submitted the questions arising in the cause to the Court.

The case was argued in the Court of King's Bench, and judgment was given for Long, the lessee of the heir at law, for the excess above the

fortune of Hancock at the time of the marriage; and the Court was of opinion, that judgment ought to be entered for the Defendants, as to one undivided sixth part of the lands, and the Plaintiff for the other five-sixths. Upon error brought in the Exchequer Chamber, the judgment of the Court of K. B. was reversed, and thereupon the Plaintiff brought his writ of error in this House.

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The question in both the ejectments is the same in derogation of the title of Ann. The disposition made by this will gives the legal estate in the whole lands to Ann for life, and the first question arose upon the operation of the clause, giving over the excess beyond her husband's property from Ann in case she married a man of inferior fortune.

After argument, two questions were put to the Judges; and the answer given by the Judges was, that Ann was entitled to all the lands for her life at least, and that neither John Joseph nor John Henry are entitled to any estate or interest in the same; and that it was not necessary to give any opinion on the second question. The effect of this is, that as Ann is entitled for life to all the lands, neither of the ejectments can be supported, and that the judgment of the Exchequer Chamber ought to be affirmed. The ground of this opinion was, that, by the disposition over, in case Ann married a man of inferior fortune, which, as was contended, created a tenancy in common, Ann, and the person to take along with her, must from the nature of a tenancy in common each have in certainty their respective portions, and that the portions were not distinguished with sufficient certainty in the will; and

Effect of the answer of the Judges to the questions.

Ground of the opinion of the Judges.

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that the will did not offer a ground on which to determine with sufficient certainty what should go over. And the law not admitting that uncertainty in the disposition of property, the will must be considered as, so far, void for uncertainty. That is sufficient to determine the ejectments.

Grounds of the judgment below.

It seems, however, that this point hardly came under the view of the Courts below, and they decided upon the construction of the whole will. And the Court of Exchequer Chamber was of opinion that John Henry could not support his claim, as the event of the daughter's dying without issue had not happened, and John Joseph could not support his claim, as, if Ann's issue failed, the next estate must take effect, and the next estate was an implied estate tail in Ann.

Ann has the whole for life, whatever becomes of the question afterwards.

It is not necessary for us to go farther than the Judges have done, that is, farther than to say, that the devise over did not affect the devise to Ann for her life, without saying any thing as to what may be the effect of the will after her death. No ejectment then can be sustained during her life, whatever may be the effect after her death; and Ann being entitled to hold the whole estate during her life, the ejectments cannot be sustained, and therefore the judgment must be affirmed in both cases.

Lord Eldon (C.) It had occurred to me at first that the facts as found upon the special verdict were not sufficient to enable the Court to give judgment on the ejectments; but on further consideration I thought they were sufficient. I was anxious to take full time to consider the case, as the point upon

which the Judges have given their opinion hardly occurred to them at all in the Courts below: I think, however, that the opinion of the Judges is well considered, and well founded, and that the judgment ought to be affirmed. And I should be disposed, independent of the opinion of the Judges as to this point, to consider, upon the whole of the case, the judgment of the Court of Exchequer Chamber as the better judgment. And I say further, suppose it were not the better judgment on the principles stated in the Court below, that yet under the very particular words of this will it would be very difficult to support either of the ejectments.

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The Lord Chancellor concurs in the ground of judgment stated by the Judges here, and, independent of that, is of opinion that, on the whole case, the judgment of the Ex. Ch. below was the better judgment.

Judgment of the Court of Exchequer Chamber in both cases *affirmed*.

Agent for Plaintiff in error, PINKETT.
Agent for Defendant in error, LANE.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

STACPOOLE (WILLIAM)—*Appellant*.
STACPOOLE (GEORGE) and others—*Respondents*.

AND

STACPOOLE (GEORGE)—*Appellant*.
STACPOOLE (WILLIAM) and others—*Respondents*.

Administration taken out in 1771. Distribution to a certain extent made, but a large sum retained on unfounded pre-

March 4, 6, 8; June 26, 1816.