13FED.CAS.—15

Case No. 7,138.

JACKSON v. KIP.

{2 Paine, 366.}[1]

Circuit Court, S. D. New York.[2]

WILLS—HOW CONSTRUED—INTENTION OF TESTATOR—HOW COLLECTED—TECHNICAL WORDS—LAPSED DEVISE—EXECUTORY DEVISE.

1. In the construction of a will, the intention of the testator, when it can be satisfactorily discovered, is to be carried into effect when it can be done consistently with the rules of law.
2. The intention of the testator is to be collected from the whole will and not from detached parts; and effect must be given to all the words in the will without rejecting or controlling any of them, if it can be done by a reasonable construction not inconsistent with the manifest intent of the testator.
3. When any technical words are used in a will, the meaning of which has been settled by usage and sanctioned by judicial decisions, they are presumed to be used in the sense the law has appropriated to them, and must have their technical effect, unless a contrary intention is manifest. When, however, such intention is plain, it will control the legal operation of words, however technical.
4. When there is a lapsed devise, for the want of a devisee answering the description in the will, or when there is an irreconcilable repugnancy or uncertainty in the disposition made by the testator, so that his real intention cannot be ascertained, the estate will descend to the heir-at-law.
5. But a devise is never construed absolutely void for uncertainty, except from necessity. If there is a possibility to reduce it to certainty, the devise is held good, so that the intention of the testator may be carried into effect.
6. The word "or" may be read "and" when it becomes necessary for the purpose of carrying into effect the clear and obvious intention of the testator.
7. The testator devised his estate, real and personal, to his two sons and three daughters, their heirs and assigns forever, share and share alike, as tenants in common, and in case any of his daughters died without leaving lawful issue of their bodies, the share of such daughter was to belong to his surviving children in fee simple. One of the daughters having died in the lifetime of the testator, he made a codicil to his will by which he devised in fee to his granddaughter, the only child of his deceased daughter, the part, share and proportion of his estate which he had devised to her mother, and then added: "But in case my said grand-daughter should die without lawful issue of her body then living, then and in such case I give, devise and bequeath the part, share and proportion of my estate hereinbefore devised to her, to and among my surviving children or their lawful representatives, share and share alike." *Held,* that this was a good executory devise, depending upon the contingency of the grand-daughter dying without lawful issue at the time of her death, and that this event having occurred, the executory devise took effect; that the executory devisees named and intended, were such of his children as should be then living, and the children of such as should be dead; and that all the children of the testator having died without leaving issue, except the oldest son, the children of the latter became the executory devisees, share and share alike as tenants in common.

In equity.

THOMPSON, Circuit Justice. The question in this case arises under the will of Jacobus Kip, dated 30th August, 1770, and a codicil thereto, dated 15th of January, 1772. The testator, when his will was made, had five children, Samuel, John, Catharine, Mary and Margaret; and by his will he devised a specific part of his farm at Kip's Bay, to each of his sons; and to his three daughters he devised another specific part, to them, their heirs and assigns forever, share and share alike as tenants in common. And then adds this clause: "Then I give, devise, and bequeath, all the rest, residue and remainder of my estate, real and personal, unto my said two sons, Samuel and John, and to my

said daughters, Catharine, Mary and Margaret, to have and to hold the same to them, their heirs and assigns forever, share and share alike as tenants in common, and not as joint tenants." And after charging the said residue of his estate with the maintenance of his sister, he adds: "It is my will that in case either or any of my said daughters shall die without leaving lawful issue of their bodies, that then and in such case the part, share and proportion of my estate hereinbefore devised to such daughter or daughters so dying, shall belong to, and he enjoyed, by my surviving children in fee simple." The premises in question are about eight acres of the residuary part of the estate. Catharine Teller, one of the daughters, died in the year 1771, in the lifetime of the testator; who thereupon added a codicil to his will, by which he devised in fee to his grand-daughter, Catharine Teller, the only child of his deceased daughter Catharine, that part, share and proportion of his estate which had been by his will devised to her mother, and then adds: "But in case my said grand-daughter, Catharine, should die without lawful issue of her body then living, then and in such case I give, devise and bequeath the part, share and proportion of my estate hereinbefore devised to her, to and among my surviving children or their lawful representatives, share and share alike." The testator died in October, 1777, leaving his two sons and two daughters, Mary and Margaret, and granddaughter alive. Catharine Teller, the granddaughter, died in July, 1824, intestate, and without ever having been married. John died in 1777, after the testator, and without issue. Mary Kip died in the year 1780, intestate and without issue. Samuel was the eldest son, and died intestate in the year 1804, leaving eight children, of whom the lessor of the plaintiff was the eldest son, and the defendant one of his brothers. Margaret survived all her brothers and sisters, and died intestate and without issue, in the year 1809.

Upon this statement of facts it is contended, on the part of the plaintiff, that if the executory devise in the codicil is valid and effectual, that James S. Kip, the lessor of the plaintiff, is entitled to the whole portion of the estate devised over, upon the death of the grand-daughter, Catharine Teller, without lawful issue of her body then living. But if the executory devise does not vest exclusively in James S. Kip, it is void for uncertainty, and that he is entitled to the whole of this portion of the estate as heir to Jacobus Kip, he being, as is contended, the person last seized. On the part of the defendant it is contended, either that the estate devised by the codicil to Catharine Teller, the granddaughter, was a fee-simple absolute, and passed by her deed to Samuel Jones, junior, and Nicholas W. Stuyvesant, (found in the special verdict,) or that if she did not take an estate in fee-simple absolute, then upon her decease it vested in the children of Samuel; and if so, according to the facts found in the special verdict, the plaintiff cannot recover, the premises in question having been on the partition set off to Samuel Jones, junior, and N. W. Stuyvesant, as trustees, as in the partition mentioned for all the children of Samuel Kip; and the lessor of the plaintiff having already in possession one-eighth, as found by the

special verdict. That the intention of the testator, where it can be satisfactorily discovered, is to be carried into effect, when it can be done consistently with the rules of law, has been so often laid down as a governing rule in the construction of wills, that a reference to authorities to establish it is entirely unnecessary.[3] And in applying this rule, the intention is to be collected from the whole will, and not from detached parts; and effect must be given to all the words in the will without rejecting or controlling any of them, if it can be done by a reasonable construction not inconsistent with the manifest intent of the testator. When any technical words are used, the meaning of which has been settled by usage, and sanctioned by judicial decisions, they are presumed to be used in the sense the law has appropriated to them, and must have their technical effect, unless a contrary intention is manifest; but when such intention is plain, it will control the legal operation of words, however technical. These are some of the rules which have been adopted and sanctioned by courts in the construction of wills, and in the application of the cardinal rule to seek for the intention, and which may have a bearing on the construction of the will in question.

The premises in question falling within that portion of the estate which is embraced by the residuary clause in the will, and which in the codicil is devised to the granddaughter, Catharine Teller, the first inquiry is, what estate she took under this devise. If, as contended on the part of the defendant in one branch of the argument, she took a fee-simple absolute, her estate passed by the deed to Jones and Stuyvesant, and the plaintiff can have no right to recover. If this construction of the devise is to prevail, it must be either because the executory devise over has failed for want of an executory devisee answering the description in the codicil, and resting on the construction that the executory devisees were the children of the testator who survived his grand-daughter, Catharine, and they all having died before the grand-daughter, there was no executory devisee, and the fee became absolute in her; or that Margaret, as the survivor of the children, took the estate as executory devisee, and which passed under her deed to Jones and Stuyvesant. But this construction necessarily involves a rejection of the words, "or their lawful representatives share and share

alike," which is inadmissible unless there is an irreconcilable uncertainty or repugnancy in the disposition made of the property. And there is no such uncertainty, in my opinion, as to warrant a rejection of these words; nor can the devise over be considered as vesting the estate in fee-simple absolute, in Margaret the survivor of the four children, for this would require the rejection of the tenancy in common, created by the words share and share alike. There can be no doubt but that where there is a lapsed devise, for the want of a devisee answering the description in the will, or where there is an irreconcilable repugnancy or uncertainty in the disposition made by the testator, so that his real intention cannot be ascertained, the estate will descend to the heir-at-law (Penn. Dec. 411); but a devise is never construed absolutely void for uncertainty, but from necessity. If there is a possibility to reduce it to certainty, the devise is held good; so that the intention of the testator may be carried into effect ut res magis valeat. This rule prevails both in courts of law and equity. Pyot v. Pyot, 1 Ves. Sr. 336. And I cannot think there is such uncertainty in this devise as to warrant the conclusion that it must be set aside as void, and the heir-at-law let in, on that ground, to take the estate. It is, I think, a valid executory devise. It has all the requisites to constitute such a devise, and which was to take effect upon the contingency of Catharine Teller, the granddaughter, dying without issue living at the time of her death. Upon that event, which has occurred, the devise over is to the surviving children of the testator, or their lawful representatives, share, and share alike; and, according to my view of the case, the question must turn upon the construction to be given to the words "lawful representatives," as here used.

On the part of the plaintiff it is contended, that the term "representatives" is to be construed "heirs," and its application to be governed by the rule of law existing at the date of the will (1770); and according to this construction, the estate will vest in J. S. Kip, the lessor of the plaintiff. On the other side it is contended, that these are words of purchase, and merely descriptive of the persons who were to take the estate; and that this designation must be applied to persons answering that description when the contingency happened, which was on the death of the grand-daughter Catharine, in the year 1824, at which time all the children of Samuel Kip were his lawful representatives, within the sense and meaning of the devise. The term "representative," when applied in the way here used, has not acquired any fixed technical meaning, nor have any judicial decisions been referred to which have given to it a settled and definite interpretation. It can, therefore, be considered only a word of description, and to be so construed as will best comport with the fair and reasonable intention of the testator. Any words of description, by which the devisee may be known and ascertained, are sufficient. 6 Term R. 679. In the case of Counden v. Clerke, Hob. 33, a devise to the stock, family, or house of A., held good, and the heir was considered the person intended, in order to effectuate the intention of the testator. So a devise to A.'s oldest son is good, though called William, when his name

was Andrew. 7 East, 799. So grandchildren may take under the description of "children," when it is clear, from the whole clause in the will, that the intention was to include the issue of those who should be dead. Royle v. Hamilton, 4 Ves. 437. So in the case of Goodright v. White, 2 W. Bl. 1010 (4 Dana, 516; 6 Cruise, Dig. 186; 4 Ed. 481), the devise was to the heirs of Margaret White, jointly and severally, and their heirs and assigns forever; the court held the devise good; and that Margaret's son took as a purchaser in her lifetime, although it was objected that nemo est heres viventis; that this was a good description of the person intended, to make the son of Margaret take, as her heir, living the mother; and the court observed, that this, though bad two centuries ago, had been good for a century past; that latterly, words had been taken in their popular sense; that the testator noticed that Margaret was alive, and meant a present interest should vest in her heir—that is, her heir apparent—during her life. 4 Dana, 598, § 29. These are some few among the numerous cases in the books, to show how far the court will go to effectuate the intention of the testator. Devises are held void for want of certain description of the devisee, only in very strong cases, as in Doe v. Joinville, 3 East, 172 (4 Dana, 597), where the testator devised the half of certain lands to his wife's family, and the other half to his brother's and sister's family, and the testator had two sisters' families, and it was altogether uncertain which was intended. A devise will generally be held void for the uncertainty of the devisee, when the description cannot come within the rule of certum est quod potest reddi certum.

It is not necessary, in this case, to say at what point of time you are to look for the interpretation of words, whether the date of the will, the death of the testator, or when the estate devised vests. If the words used have a fixed technical meaning, or the devise is in terms immediate, so that the testator may be presumed to have had in view particular persons, the date of the will, or the death of the testator, may, perhaps, be the proper time to look, in giving a construction of the will. But it is by no means certain that such should be the rule, where the estate is to vest upon some future unknown and uncertain contingency; if in such case the description of the persons who are to take is general, it may be quite as likely to carry into effect the intention of the testator, to

apply that description to persons coming within it at the time the contingency happens. 1 Ball & B. 449; Horn. Dig. 705. But to whatever period we look, in construing this devise, it must, in my judgment, receive the same interpretation as if the testator had used the word "children" instead of "representatives." The codicil, upon its face, and the occurrence which called for the making of it, show very satisfactorily that it was the intention of the testator to provide for his grandchildren as well as his children. The codicil he declares to be made for the purpose of making his intention, in his will, more manifest with respect to the devise to his daughter Catharine, and thereby to secure it to his grand-daughters, if she should die leaving lawful issue. When, therefore, he provides for the contingency of the grand-daughter dying without issue, and on that event devises it to his surviving children, or "their lawful representatives," it is reasonable to conclude he intended, as to this part of his estate, to substitute, in place of their parent, the children of any other of his sons or daughters who should die leaving any such children; and if such was his object, the term "representatives" is very appropriately used for the purpose of substituting the children in the place of their deceased parent; and this word being used in the plural number, and the creation of a tenancy in common by the words "share and share alike," show that more than one was intended to be embraced within it, and, of course, that no reference could have been had to the heir-at-law, to the exclusion of others falling within the description of "representatives," although the word "or" may be read "and" when it becomes necessary, for the purpose of carrying into effect the clear and obvious intention of the testator. But this does not appear to me to be such a case, but that the substitution of "and" for "or" would tend rather to obscure than elucidate: and, indeed, the change of "or" into "and" would involve an obvious incongruity in the reading, "Among my surviving children and their lawful representatives." But if the word "representatives" means "children," as I think it does, it is immaterial to what period the word "surviving" refers; for whether to the date of the will, the death of the testator, or the happening of the contingency, the estate would go either to the surviving children, if all were living, or to such as were living, and the representatives of such as were dead. And such, I think, is the construction to be given to this codicil. It is very clear, from the general scope of the will and codicil, that the testator intended to dispose of his whole estate under the various provisions of his will, and not leave any part of it to vest under the general rules of descent.

It seemed to be admitted at the bar, and indeed could not be questioned, that if this had been a bequest of personal property, the word "representatives" would have embraced all the children of Samuel Kip, and go according to the statute of distribution; and the residuary clause to which the codicil refers, embraces both real and personal estate, and the testator used the words "give, devise and bequeath," which properly apply to both real and personal property, which affords a pretty fair inference that the word,

"representatives" was used in reference to both species of property indiscriminately, in its general and popular sense, without any technical application to real property. Much stress was laid, in the argument, upon the word "lawful," as indicating an intention to qualify the term "representatives," and affix to it the interpretation of "heir-at-law." This, however, does not appear to me to be a fair and reasonable construction. If such had been the intention of the testator, it would have been a much more natural and easy form of expression to have said "heir-at-law." But it is, I think, very evident that the term "lawful" is here intended to be used in the same sense as "legitimate." Upon the whole, then, I have arrived at the conclusion that this is a good executory devise, depending on the contingency of Catharine, the granddaughter, dying without lawful issue living at the time of her death; that this event having occurred, the executory devise took effect; and that the executory devisees named and intended were such of his children as should be then living, and the children of such as should be dead. And all his children having died without leaving children, except Samuel, all his children became the executory devisees, share and share alike as tenants in common, which, according to the finding of the jury in the special verdict, will require judgment to be entered for the defendant.

NOTE. In construing wills, technical words are to be taken in their technical sense, unless a plain intention appear to the contrary. Kean v. Hoffecker, 2 Har. [Del.] 103; vide 3 Term R. 493; Doug. 341; 1 Yates, 343; 5 Ves. 401. 402; 2 Ball & B. 204; 11 Wend. 279, 293. Whenever the devise is to children and grandchildren, or to brothers and sisters, and nephews and nieces, to be equally divided between them, and the devisees are individually named, they take per capita and not per stirpes. Id. The words "equally to be divided," when used in a will, mean a division per capita, and not per stirpes, whether the devisees he children and grandchildren, brothers or sisters, and nephews and nieces, or strangers in blood to the testator. Id. The general rule is, that a will, as to the land, speaks at the date of it; and as to personal estate at the time of testator's death. Smith v. Edrington, 8 Cranch [12 U. S.] 66; Allen v. Harrison, 3 Call, 289. In the construction of wills, the first object is to gather the intention of the testator from the whole will; and this intention must prevail unless it violate some rule of law. Land v. Otley, 4 Rand. [Va.] 213; Calloway v. Langhorne, Id. 181; Berry v. Headington, 3 J. J. Marsh. 321; Covenhoven v. Shuler, 2 Paige, 122; Reno's Ex'rs v. Davis, 4 Hen. & M. 283. Where there are repugnant clauses in a will, the latter shall prevail. But repugnance in different clauses of the will shall

not be made out by the technical meaning of terms. For where a consistent intention appears in the context, it must prevail; and it shall be supposed the testator employed the words whose strict signification would make a repugnance, in an improper sense. Adie v. Cornwell, 3 T. B. Mon. 279. In the construction of wills, ambiguities are latent or patent. The former exists when the intention of the testator is dubious; the latter exists where the intention is certain, but the object on which the intention is to act is uncertain. In explaining a patent ambiguity, the will alone is to be resorted to; while in the latent class, evidence dehors the will may be called in aid of the will. Breckenridge v. Duncan, 2 A. K. Marsh. 51. Terms usual in a will drawn evidently by an unskilful man, shall be scanned by their popular, not their technical meaning. Harper v. Wilson, Id. 466. If two parts of a will are irreconcilable with each other, the last part is generally to be taken as evidence of the latest intention of the testator. But this rule is only applied to those cases where the two provisions are totally inconsistent with each other, and where the real intention of the testator cannot be ascertained, Covenhoven v. Shuler, 2 Paige, 122. Where the intention of the testator is incorrectly expressed, the court will carry it into effect by supplying the proper words. Id. The words of a will may be transposed in order to make a limitation sensible, or to effectuate the general intent of the testator. Id. Devises by implication are sustainable only upon the principle of carrying into effect the intention of the testator; and unless it appear upon an examination of the whole will, that such must have been his intention, there is no devise by implication. Rathbone v. Dyckman, 3 Paige, 9. An implication may be rebutted by a contrary implication which is equally as strong. Id. The clear literal interpretation of words in a will may be departed from if they will bear another construction, where other parts of the will manifest a different intention. Id. The strict grammatical sense of words in a will may be rejected to carry into effect the intent of the testator. Id. One name may be substituted for another in the construction of a will where it is manifest not only that the name used was not intended, but that a certain other name was necessarily intended. Connolly v. Pardon, 1 Paige, 291. Where it is clear, from the intention of the testator, that the word "or" is used instead of "and," and e converse the court interposes to change the word. O' Brien v. Heeney, 2 Edw. Ch. 242. Where, there is a plain and positive devise, the court will not raise an implied trust in executors, to favor a particular devisee. Hart v. Hart's Ex'rs, 2 Desaus. Eg. 57. The court construed "her," into "their," to give effect to the intent of the testator. Keith v. Perry, 1 Desaus. Eq. 353. In Brailsford v. Heyward, 2 Desaus. Eq. 18, the word "heirs" was construed children, to effect the testator's obvious intention. Grandchildren may claim a devise under the description of children, where there are no children. Ewing's Heirs v. Handley's Ex'rs, 4 Litt. [Ky.] 349. Where a testator having both freehold and leasehold lands in a particular place, a devise by him of all the lands in that place, only the freehold lands pass. Aylett's Ex'rs v. Aylett, 1 Wash. [Va.] 300. Where words in a will which would give an estate

tail in real property, would carry the absolute interest in personal property. Cudworth v. Hall's Adm'x, 3 Desaus. Eq. 259; Bailey v. Davis, 2 Hawks, 108. The term "children" is usually taken as a word of purchase, unless there be expressions in the will to show the testator intended to use the word as a word of limitation. In re Sanders, 4 Paige, 293. The disjunctive word "or" construed "and." Turner v. Whitted, 2 Hawks, 613; Britton v. Johnson, 2 Hill, Eq. 430. Construction of the word "appurtenances" in a will. Helme v. Guy, 2 Murph. 341. In construing a will, the court will look to the state of the testator's family, and to the kind and extent of properly he owned at the time of making the will. Edens v. Williams' Ex'r, 3 Murph. 27. Construction of the term "dying without issue." Brashear v. Macey, 3 J. J. Marsh. 91. The court will correct a mistake in a will describing a line bounding the estate devised. Kenny v. Kenny, 3 Litt. {Ky.} 302. Surplus land devised in the original will, held not to be included in the expressions "all other lands," and "estate not particularly pointed out," used in the codicil. Hickman v. Holliday, 6 T. B. Mon. 586. Wills must be construed liberally, so that the intention of the testator may take effect. Sams v. Mathews, 1 Desaus. Eq. 131. And the whole will must be taken together. Id. So, a will and codicil are to be taken and construed together as parts of one and the same instrument. Westcott v. Cady, 5 Johns. Ch. 343. And where there are two inconsistent bequests of the same property in the same will, the second revokes the first. Fraser v. Boone, 1 Hill, Eq. 367. Crops growing at the time of the testator's death, do not pass under the word "appurtenances." Shelton v. Shelton, 1 Wash. {Va.} 53. The term "land" in a bequest will be considered as synonymous with "give," unless it is manifest that the testator did not intend the legal estate to pass to the legatee. Hinson v. Pickett, 1 Hill, Eq. 38. Construction of the term "dying without issue." Brown v. Brown, 1 Dana, 41. And of the term "residue" in a will. Brailsford v. Heyward, 2 Desaus. Eq. 32. Construction of the term "families" in a will. Pringle v. McPherson, 2 Desaus. Eq. 524. Plate used in a family passes under a devise or conveyance of "household goods and furniture." Bunn v. Winthrop, 1 Johns. Ch. 339. Construction of the term "all his estate" in a devise. Cruger v. Heyward, 2 Desaus. Eq. 422. The word "increase" in a bequest of a female slave, is ambiguous. Reno's Ex'rs v. Davis, 4 Hen. & M. 283. See Bryson v. Nickols, 2 Hill, Eq. 114. Construction of the term "without issue" in a will. Newton v. Griffith, 1 Har. & G. 111. It is a general rule in the construction of wills, that the testator must be presumed to have used words in their ordinary and primary sense, unless it appears from the context that he probably used them in some other sense. Mowatt v. Carow, 7 Paige, 328. The word "children," in its ordinary sense, does not include grandchildren, but it may include them when it appears there were no persons who would answer to the description of "children" in the primary sense of the term. Id. When heirs take by purchase, they do not take as heirs, but as a class of persons to whom, by that means, the testator has selected to devise his property; and as they take in their own right, the distribution is to

be made per capita, and not per stirpes. Campbell v. Wiggins, Rice, Eq. 10. The testator devised as follows: "I lend to my daughter Nancy Gray, and Robert Gray, her husband, for their lives, one negro man named Peter, and one negro called Little Frank, and one negro woman called Sary, with all her increase, and one feather-bed and furniture, for their lives, and then be equally divided among their children; held, that the children of Robert and Nancy Gray took under the will a vested interest transmissible to their legal representatives. Donald v. M'Cord, Rice, Eq. 330. Under a bequest of a particular female slave by name, with all her increase, the children of the slave born before the making of the will do not pass. Seibels v. Whatley, 2 Hill, Eq. 605; Donald v. M'Cord, Rice, Eq. 330. Construction of the word "plantation" in a devise. Nash v. Savage, 2 Hill, Eq. 50. Construction of the terms "residue of all my estate." Williams v. Williams, 10 Yerg. 20.

In the construction of a will, the court, in endeavoring to arrive at a knowledge of the testator's intention, must take into consideration the circumstances as they existed at the time the will was made. Hoover's Lessee v. Gregory, 10 Yerg. 444.

When a bequest in a will is not clothed in language having a particular technical meaning affixed thereto, so as to control the intention in its construction, the intention snail prevail. Loving et al. v. Hunter, 8 Yerg. 4. Every will shall he so construed that it shall rather stand than fall if such construction can reasonably be put upon it. Davis' Heirs v. Taul, 6 Dana, 53. Bequests of personalty are generally construed according to the principles of the civil law. Wood's Adm'x v. Georges Adm'r, 6 Dana, 343. The words "movable property" in a will have no technical import; they mean in a will as in ordinary use, something substantive which has locality, and may move or be moved; they embrace money and bonds for money, but not a debt merely as such. Id. A bequest by an officer in these words, "all my stock and movable property," does not embrace his claim for half-pay. Id. A latent ambiguity, as to the subject-matter of a will, may be explained by extraneous evidence. Overton's Heirs v. Woolfolk, 6 Dana, 376. Construction of "vested remainders." Bowling's Heirs v. Dobyns' Adm'rs, 5 Dana, 434. The heir being favored in law, there should be no strained construction to work a disherison where the words are ambiguous. Deakins v. Hollis, 7 Gill & J. 311. Where the intention of the testator is ascertained, a word manifestly omitted by mistake may be inserted, but no word may be added to defeat the apparent intention of the testator. Id. The terms used in a will are in general to be understood according to their popular import, but where it appears from the will itself that the testator understood the technical import of the terms he employed, and evidently used them in some parts of the will in their technical sense, they should be so understood wherever occurring in the same clause. Hazlerig v. Hazlerig's Ex'rs. 3 Dana. 48. It is a general rule in giving effect to wills, that general legacies must yield to specified bequests, but the rule that the will must be so construed as to give effect to every part of it, and carry the intention of the testator into effect, is paramount and universal. Cameron v. Boyd's Adm'r, 4 Dana, 549. Where a testator directed all his property to remain on his plantation under the care of his wife until the youngest son should attain full age, and then gave the plantation to that son and another, the wife takes by implication a term in the plantation during that period. Bradshaw v. Ellis, 2 Dev. & B. Eq. 22. Parol evidence is not admissible to affect the construction of a will, but it is admissible when its introduction is required by considerations extrinsic of the will, and which necessarily depend upon such evidence. Gallego v. Chevalle [Case No. 5,200]. The construction of devises of legal interests in land is a legal question, and belongs to the tribunals of the law, and not to those of equity; and the obscurity of the will furnishes no sufficient reason for applying to equity; for, if the obscurity be not so great as to render the disposition altogether unintelligible, the devise will be valid at law, so far as it can be understood; and, if it be so vague and uncertain as not to amount to a designation of any corpus, it necessarily follows that no court can help it, but that it must be ineffectual. Hough v. Martin, 2 Dev. & B. Eq. 379. Two different tracts of land half a mile apart, which were cultivated by a testator

together as one farm, will both pass by his will under the description of "my plantation." Bradshaw v. Ellis, 2 Dev. & B. Eq. 20. In a devise of a certain farm, and "all stock on the the same," the words "all stock" will comprehend only the animals used with, supported by, or reared upon the farm, and will not include the plantation tools and the gathered crop that may be on it. Graham v. Davidson, 2 Dev. & B. Eq. 155. The expression, "if he shall get married and have a family," in its ordinary sense in a will or settlement, means to get married and have issue of such marriage, and not merely to get married and have a family by becoming a housekeeper. Spencer v. Spencer, 11 Paige, 159. A will provided that the female children of E., which she then had, or might thereafter have, at the age of twenty-three, should be free. Held, that the grandchildren of E., born before their mothers arrived at twenty-three, were slaves; the rule "Partus sequitur ventrem" applying. Esther v. Akin's Heirs, 3 B. Mon. 60.

In the construction of wills, it is not proper to interpolate or supply an ellipsis unless it be rendered necessary in consequence of an apparent inconsistency in the context, or unless there be something in the sentence to show that there is an ellipsis which may be supplied by the insertion of words found elsewhere in the sentence. Barclay v. Dupuy, 6 B. Mon. 92. A clause added to a devise of a fractional part of certain land, that it is to be taken by the devisee "where he shall choose or select, at its just or proportionable value," does not constitute a condition precedent to the vesting of the estate devised; but the devisee, on the death of the devisor, becomes tenant in common, with a right of selection or not, at his will. Brown v. Bailey, 1 Metc. [Mass.] 254. Cases of construction of wills depending merely upon their phraseology, and not deemed necessary to be noticed in full. Lane v. Vick, 3 How. [44 U. S.] 464. The term "lands," in a will, is synonymous with "real estate"; and, unless restrained by something else, embraces future and contingent, as well as present freehold estates in land. Pond v. Bergh, 10 Paige. 140. In the state of New York, where a will was made before the Revised Statutes went into operation, but the testator died afterward, the validity of the trusts and provisions of his will must be determined by the law, as it existed at the time of his death. De Peyster v. Clendining, 8 Paige. 295. A testator having a son and five daughters, all infants, gave the residue of his estate to trustees, with directions to pay the annual income to his six children, in equal proportions during their lives, at the death of either of them without lawful issue, his or her share to continue as a part of the residue, the income of which was to be equally divided among the surviving children; and, if either of his children should die leaving issue, his or her share should be equally divided among his or her children. One daughter died without issue; then another died, leaving one child, a son; and then two other daughters died without issue. Held, that the words "surviving children," were to be construed other children, and that the son of the deceased daughter was equally entitled to share with the testator's surviving children, the proportions of the daughters who died after the decease

of his mother. Carter v. Bloodgood's Ex'rs, 3 Sandf. Ch. 293. The word "survivors" may be construed "others," upon the context, and the other clauses of the will, showing the intent of the testator. Id. And the court will supply words to support the intent, when that is apparent upon the whole of the will taken together. Id. In the principal case, the bequest over to the grandchildren, in the shares of the children who died without issue, whether before or after the death of the parents of such grandchildren, is raised by implication, from the testator's general intention. Id. A granddaughter was married at the time a testator made his will; and he had, as to a full share of his estate, placed her on a footing with his children. He also bequeathed a legacy of $6,000 to each of his grandchildren as were under age and unmarried, and living at the time of payment. There were other grandchildren, and who were under age. Held, that this grandchild, (thus of age,) did not take such legacy. Hone v. Van Schaick, 3 Edw. Ch. 474. Great grandchildren do not take under the designation of grandchildren, unless where it plainly appears that such was the intention. Id. Where land was devised by the testator to his two sons, with a limitation over to the survivor, if either of

them should die without issue: and both joined in a conveyance to a purchaser, for a valuable consideration, and one of them afterward died, without issue, in the lifetime of the other; held, that the purchaser was entitled in equity to the land devised to the brother who died first, and which afterward came to the survivor, under the executory limitation over to him. Varick v. Edwards, 11 Paige, 289. A will directed that if trustees should be reduced by "death, or removal from the United States, or otherwise," to the number of two or one, then the parties in interest were authorized to nominate three or more freeholders, out of which the remaining trustees were to accept one or more, to be joined with them; and failing such nomination, the remaining trustees were authorized to nominate respectable freeholders to be joined with them; and then the securities were to be assigned by the remaining trustees to themselves, and such additional trustees, upon the same trusts, &c. Held, that a refusal to act authorized the appointment of another person under the words "or otherwise,"—in fact, that these words were broad enough to authorize an appointment after removal from office for cause, resignation or refusal to serve. Cruger v. Halliday, 3 Edw. Ch. 565. Although the intention of a testator is the governing principle with the court when looking at his will, yet the court is bound by precedents and authority, and will not proceed on arbitrary conjecture in settling its construction. Kingsland v. Rapelye, 3 Edw. Ch. 1.

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [The date is not given. 2 Paine includes cases decided from 1827 to 1840.

[3] [See note at end of case.]