ENGLAND.

APPEAL FROM THE COURT OF EXCHEQUER.

ST. BARBE TREGONWELL—*Appellant.*

JOHN SYDENHAM, Elder, and JOHN SYDENHAM, Younger . . . . . } *Respondents.*

May 2, July 27, 1814. July 7, 11, 1815.

HEIR AT LAW.—RESULTING TRUST.—PERPETUITY.

WHEREVER land, or any interest in land, which would descend to the heir at law, is devised for purposes which the law will not permit to take effect, the heir at law shall have the benefit of the interest so devised as undisposed of, whether the testator intended that he should have it or not; for there is this distinction between the case of a devisee and that of an heir at law, that the devisee takes by force of the intent of the testator, and can only take what is given him by the will; whereas the heir at law takes whatever is undisposed of, not by force of the intent, but by the rule of law. Therefore where A. devised lands to his son B. for life, remainder to the first and other sons of B. in tail male, remainder to the second, third, and other sons of A. successively in tail male: and in case there should be no such issue male of A.'s body, or the same should become extinct, then to trustees for a term of 60 years, to retain the rents, &c. and apply them in the purchase of lands to be conveyed to such person as should then be in possession by virtue of his will of certain other estates therein mentioned, for life, with such remainders as would continue the estates as long as possible in the testator's name and blood; and after the trusts should be executed, or the term expired, the estate was limited to C. for life, with remainders over: and it happened that the person so in possession at the time when the conveyance could have been made of the lands to be purchased as above was one not in existence at the time of A., the testator's, death, and the uses were considered as in the event too remote and void—It was held by the House of Lords, reversing a decree of the Court of Exchequer, that the consequence of the failure of the intermediate devise was, not that the next devisee became entitled as if there

had been no such intermediate devise, which was the opinion of the Court of Exchequer, but that the trusts of the lands to be purchased as above resulted to the heir at law.

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The Court of Exchequer appeared to consider the trusts of the term under the above circumstances as void in their creation. Lords Redesdale and Eldon seemed to consider them as only void in event.

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THIS was a bill by two devisees under the will after mentioned against the heir at law, and the executor of the survivor of the trustees named in the will, to have it declared that the trusts of a term of 60 years created by the will were void, as being too remote under the circumstances, and that the Plaintiffs, as next in interest, were entitled to the lands comprised in the term discharged of the trusts.

Bill filed, T, T. 1802.

The bill stated in substance that Humphrey Sydenham by his will, dated February 25, 1737, devised and bequeathed his estates in the parish of Astington, in the county of Somerset, to trustees upon certain trusts and to certain uses; and amongst others, upon the determination of certain terms therein mentioned, to the use of his son, St. Barbe Sydenham, for life; and, after the usual remainder to preserve the contingent remainders, remainder to the first and other sons of St. Barbe Sydenham in tail male; remainder to the eldest daughter of St. Barbe Sydenham, and the heirs of her body; with like remainders to the second and other daughters of St. Barbe Sydenham; remainders over, with the ultimate remainder in fee to the testator's right heirs.

Will of Humphrey Sydenham.

Astington estate.

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Dulverton estate.

The testator then devised his estates in the parishes of Dulverton and Brushford, in the said county, to the same trustees; to the use of several termors and persons who had estates for life given them by the will, and amongst others to the said St. Barbe Sydenham for life, with remainder to his first and other sons successively in tail male, remainder to the second and other sons of the testator in tail male; and in case there should be no such issue male of the testator's body, or the same should become extinct, then as to that part of these estates called Coombe, the Clawes, Andrews Bill, &c. to the use of the testator's brother, Floyer Sydenham, for life, remainder to his first and other sons in tail male; and, after several other remainders for life and in tail, remainder to the Plaintiff, John Sydenham the elder, for life, remainder to his first and other sons in tail male, with the ultimate remainder in fee to the right heirs of the testator.

Limitations of the Dulverton estate in case of failure of issue male of testator's body.

FIRST PART.

SECOND PART.

Term and Trusts.

"And as to all the rest of his manors of Dulver-
"ton and Brushford Sydenham, and all other his
"estates in the parishes of Dulverton and Brushford,
"to retain the same in their hands and custody, for
"and during the term of 60 years; and during the
"said term to receive the rents and profits thereof;
"and to grant leases for one, two, or three lives,
"until they should have received thereby the sum of
"17,500*l.*, which his will was they should apply to
"the uses following, viz.: when they should have
"received 2,500*l.*, to lay out the same, together
"with such interest as they should have made there-
"from, or from any part thereof, in some real estate
"in some or other of the parishes and counties

" therein mentioned; provided the same be not in
" tithes appropriations, or tithe-free lands (from the
" purchasing or keeping of which he thereby
" earnestly exhorted all his posterity and kindred
" that should receive any estate by virtue of his
" will); and at the same time to settle the same
" estate, so purchased, on such person for life, as,
" by virtue of his said will, should then be in pos-
" session of his estate at Astington; or in case, by
" suffering a common recovery or otherwise, his said
" Astington estate should be in other hands, then on
" such person as would, in case no such common
" recovery or other thing had been suffered or done
" for the disinheriting such person, have been in
" possession of the same by virtue and according to
" the intent of his will; and so, from time to time,
" as soon and as often as the further sum of 2,500*l.*
" should be raised, as therein before directed, until
" the whole sum of 17,500*l.* should be so raised,
" should lay out the same, together with its several
" interests as therein mentioned, in some or one of
" the parishes therein before directed, to be settled
" on the several persons for life as should be, or
" should have been, in case no such common reco-
" very or other thing had been suffered or done, on
" each of the said times, in possession of his Asting-
" ton estate in pursuance of that his will; with such
" remainder that on each of the said several settle-
" ments the said estates to be settled be so settled in
" pursuance of that his will as might continue the
" said estates, so long as it should please God, in the
" blood and name of the said St. Barbes. And after
" the said 17,500*l.* should be so raised, then to raise

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" the further sum of 2,500*l.*, to be laid out in some " real estates in some or one of the parishes of Dul- " verton, Brushford, East Ansley, Baddleton, or " Baddington; and at the same time to settle the " said estate, so purchased, on such person for life " as, by virtue of that his will, should then be in " possession of the estate of Dulverton; or in case " of suffering a common recovery, or otherwise, his " said Dulverton estate should be in other hands, " then, on such person as should, in case no such " common recovery or other thing had been suffered " or done for the disinheriting such person, have " been in possession of the same by virtue and ac- " cording to the intent of his will, with such re- " mainder as might continue the same, as long as it " should please God, in the name and blood of the " Sydenhams. And after the said two sums, amount- " ing to 20,000*l.* and expenses, should be raised for " the said uses, or determination of the said term of " 60 years, then to the use of his said brother " Floyer Sydenham for life, with the remainder to " his eldest and other sons in tail male:" and, after such other remainders as he had limited with respect to the first part of the Dulverton estate, remainder to the elder Plaintiff for life, remainder to his first and other sons in tail male, &c. with the ultimate remainder in fee to the testator's right heirs.

The bill further stated that Humphrey Sydenham, the testator, died in 1757, without having altered his will, leaving only one son, the said St. Barbe Sydenham, and two daughters; that St. Barbe Sydenham entered on the estates so limited to him for life, and had two daughters, Ellery and Katharine, but no

male issue; that Ellery died unmarried in her father's life-time; and Katharine, who intermarried with Lewis Dymock Grosvenor Tregonwell, also died, leaving only one son, St. Barbe Tregonwell (the Defendant); that St. Barbe Sydenham died in 1799, leaving the said St. Barbe Tregonwell his grandson and heir at law, and as such heir at law of the testator; that St. Barbe Sydenham, Floyer Sydenham, and the several intermediate devisees, having died in the testator's life-time, or without issue male, the Plaintiff, John Sydenham the elder, became entitled to an estate for life in possession in the premises of Coombe, the Clawes, Andrews Bill, &c.; and the Plaintiff, John Sydenham the younger, to an estate tail in remainder therein; that the said St. Barbe Tregonwell was tenant in tail of the Astington estate; and that as to the second part of the Dulverton estate, one of the trustees of the term had died, and the same had become vested in the other trustee, Lucas, alone, but that the trusts had not been executed. And the Plaintiffs insisted "that "the limitations of the estates and premises, so "directed to be purchased by the money to be raised "by means of the said term of 60 years, were too "remote, and were beyond the limits allowed by law "for the limitations of estates by devise; and that the "trusts declared by the said will of and concerning "the said term of 60 years were contrary to the law "and policy of this realm, and therefore wholly void "and of no effect, as tending to create a perpetuity."

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Failure of issue male of testator.—St. Barbe Tregonwell, not in existence at death of testator, tenant in tail of Astington estate.

And the said bill prayed "that the trusts declared and "expressed in and by the said will, concerning the "said term of 60 years, might be declared void, and

Prayer of the bill.

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" that the Defendant, Robert Tristram Lucas, " executor of the surviving trustee named in the " will, might be declared to be a trustee thereof, or " of the remainder thereof, for the benefit of the " Plaintiffs, according to their respective rights and " interests as aforesaid; and might be decreed to " transfer or assign the same for the remainder of " the said term of 60 years to the complainants " (Respondents); or as they should appoint for their " use and benefit, according to their estates and in- " terest in the premises."

To this bill St. Barbe Tregonwell, the heir at law, then an infant, answered by his father and guardian, submitting his interests to the protection of the Court. After issue joined, and proof by witnesses for the Plaintiffs of the material allegations in the bill, the cause came on to be heard: and on May 15,

Decree, May 15, 1814.

" 1807, the Court " declared that the trusts of the " 60 years' term were void, and that the Defendant " Lucas was a trustee thereof for the benefit of the " Plaintiffs according to their respective interests: " and decreed " that the said Lucas should convey and " assign the estate and premises comprised in the " 60 years' term to the Plaintiffs, or as they should " appoint, for the remainder of the said term, to " attend the inheritance of the said estate and pre- " mises, &c."

From this decree the Defendant, St. Barbe Tregonwell, the heir at law, appealed.

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For the Appellant it was contended, 1st. That the trusts of the term might be executed by applying the doctrine in *Humberston v. Humberston*, 1 P. Wms.

332. 2d. If they could not, they resulted to the heir at law as undisposed of. *Arnold v. Chapman*, 1 Ves. 108.—*Grosvenor v. Hallam*, n. to *Wright v. Row*, 1 Bro. Ch. Ca. 61. In *Jackson v. Hurlock*, Amb. 487, a distinction was taken; but no such nicety existed here. How could the devisees take what never was devised to them, and what was never intended to be given them?

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Humberston v. Humberston, 2 Vern. 737.—Pre. Ch. 455.—Gibb. Eq. R. 128.—Grosvenor v. Hallam, Amb. 642.

For the Respondents it was argued, with reference to the first point, that the person who was to take a vested interest must come into *esse* within a life or lives in being, and 21 years and some months after. Here he could not be ascertained till failure of issue male of the body of the testator, which might not happen for two centuries after. The case of *Humberston v. Humberston* had no application whatever where the object of the testator was to render the property unalienable as long as by the rules of law he could; and the Court, to effectuate the intention as far as possible, executed the will *cypres*. But here the Court could not execute. The testator had left it undefined who should take. There will be some one in existence to take the interest, he says; but whether you find him a month after my death, or a century after, is uncertain. The longest period within which an executory interest must vest is for a life or lives in being, and 21 years and some months, allowing for the period of gestation. *Duke of Norfolk's Case.—Lamb v. Archer.—Phipps v. Kelynge*, &c. cited by Fearne, 6th Ed. 435, 468, 470, 532, 616. so that if the devise may transgress the limits

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permitted by the rules of law, it is void. Here the limits might be transgressed before the trust could be executed, and it therefore fell within the objection as to perpetuities. (*Lord Eldon* (C.) Do you mean to contend that the mere circumstance of uncertainty who is to take after an estate tail, where a recovery may be suffered, and all behind it goes, renders the limitation void?)—Though an executory devise might be shaped so as to make the devisee uncertain, till the instant appointed for the rising of the executory estate, yet it must be limited by the rules of law. Here before the interest could be vested, the trustees must enter, the money must be raised whatever might be the value of the estate, the purchase must be made, and the lands settled. Might not the vesting of the interest be thus suspended beyond the limited period? besides, how could the trust be executed? were they first to raise 2,500*l.* in the course of 20 years, and purchase and convey the lands to one person, and then wait for another 20 years, and purchase and convey the lands to quite a different person, who might come in *esse* after the proper time? This point was but little relied upon below by the other side.

Vid. Fearne. 6th Ed. (n.)

Then as to the second question, which was chiefly relied on below, the distinction was well defined in the cases. If it be a devise of a certain portion, giving over another, and that other cannot take effect, it cannot go to the devisee, because the devise to him is so far limited, and it results to the heir at law; but if it be a devise burthened with a charge which cannot be executed, the charge sinks for the benefit of

the devisee. In *Arnold v. Chapman*, the devise was made *minus* a certain portion, and the devisee could only take what was given. The case of *Cruse v. Barley*, 3 P. Wms. 20. proceeded on the same distinction, being in unison with *Arnold v. Chapman*, where the devise was *minus* what had been previously taken out of it. The case of *Jackson v. Hurlock* was that of a devise coupled with a charge, which could not be executed, and it was held that the charge sunk for the benefit of the devisee. So in *Wright v. Row*, 1 Bro. Ch. Ca. 61. and *Barrington v Hereford, ib. cit.*, proceeded on the same principle. If this distinction prevailed, it disposed of the argument as to the intention of the testator; in the cases stated, it was not the intention of the testator that the charge should go to the devisee, but the Court would not raise the charge for a purpose which he as little intended, viz. for the heir at law; but the testator had said that, after the money should be raised for the said uses, the estate should go to the next devisee, and the uses being void, the devisee became immediately entitled. And where a term was created for certain purposes, when the Court said that these purposes could not be executed, it could not create other purposes. Here lands were devised subject to a charge of 20,000*l.* for certain trusts, which could not be executed; and on the principle of *Jackson v. Hurlock*, and *Wright v. Row*, the charge was not to be raised at all, but must sink for the benefit of the next devisee. The term itself could not arise, unless the trusts could be executed. It must rise for this purpose, or not at all.

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In reply it was insisted that the principle of the

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case of Humberston was applicable. It was admitted in the decree that the term was well created. The only question was whether the trusts of it could be executed. As to the other point, this was not the case of a charge. The trustees had the legal estate till a certain period arrived, and if the trusts could not be executed, they must result to the heir at law as undisposed of. The cases cited on the other side were those cases where the whole was first devised, and then an exception made for an illegal purpose, which being void the devise became absolute. But this was a distinct interest.

Romilly and *Leach* for Appellant; *Hart* and *Roupell* for Respondents.

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Lord Eldon (C.) If I were under the necessity of giving a decided opinion upon this cause now, I should be disposed to advise your Lordships to reverse this decree of the Court of Exchequer; but though I think I should be justified in that, yet, considering the great authority of the Court from which the cause came, and that we have had no opportunity of ascertaining with accuracy the grounds upon which its judgment proceeded, I think it my duty to advise your Lordships to allow this cause to stand over.

Lord Redesdale. I concur in that, and the more readily, because the cases cited in support of the decree have not satisfied my mind; and the result of the whole is an impression different from that which was produced on the Court below. But it is due particularly to the very able Judge at the head of that Court, to consider well the nature of the question,

and the result of all the cases, where the view entertained of them is different from his. This is, besides, a case of great importance with respect to other decisions; a very ruling case with respect to the rights of real property, and it is of great consequence, that whether reversed, or affirmed, it should be decided on very sufficient consideration.

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Lord Redesdale (after stating the case).—The effect of this decree it to put the term of 60 years entirely out of the will, as if it had never been there, and to give up the lands to the next tenant for life, as if he had been the immediate devisee. I confess my mind does not in that respect accord with the decree of the Court of Exchequer; it appears to me impossible to hold with the Barons, that the trusts are void as to the term of 60 years; I do not apprehend that the trusts are altogether void, but only that the conveyances of the lands to be purchased are in certain events what the law will not permit to take effect, and so far only the trusts are void; but I do not see the reason why the trusts, as to the raising of the 17,500*l.* and 2,500*l.* should be void. The raising of these sums, and the application of them in the purchase of lands, were perfectly legal, and the only thing to be quarrelled with is, his having directed the lands when purchased to be conveyed to such uses. These are uses which, in certain events, the law would not perfect. The defect is in the disposition of the lands when purchased, and not in raising the money, and applying it in the purchase of lands when raised, or in the limitations made of the purchased lands in all events. But supposing the trusts to be

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The trusts of the term not void, but only the conveyance of the lands to be purchased with the trust fund are, in certain events, such as the law will not permit to take effect.

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void, the decree admits, and it cannot be denied, that the term was well created; and the only question is, for whom Lucas is trustee. In the will the trust is said to be for raising certain sums, amounting together to 20,000*l*., and after that should be raised, or the term determined, to the use of those to whom he had devised the other part of the Dulverton estate; so that he has expressly excluded them from taking any benefit from this devise till the money should be raised, or the term determined.

The subsequent devisees expressly excluded till the purposes of the term should be answered, or the term determined.

I take it to be perfectly clear that, where that is devised by will which would otherwise descend to the heir, whatever is not given to some devisee goes to the heir at law, and that what it is impossible for the devisee to take belongs to the heir; and the question always is, where a purpose pointed out by the testator fails, whether the interest is expressly, or by necessary implication, given to some devisee; if not, the heir must take. Now in this case, there are no words by which the next devisees can take, till the 20,000*l*. have been raised. It strikes me then, in that view of the case, that we cannot affirm this decree consistently with the law as decided in other cases, that where the testator has not pointed out another to whom the benefit is to go, the heir at law must have it.

Where that is devised which would otherwise descend to the heir, whatever is not given to some devisee, and what the devisee cannot take, goes to the heir at law.

But I do not see any ground upon which it can be maintained, that the trusts of the term were originally void. They are legal as far as the raising of this sum of 20,000*l*. The laying out the money, when raised in the purchase of lands, is a perfectly legal trust. The directions for the conveyance of the lands so purchased are legal, as applicable to cer-

The conveyances, &c. perfectly legal as applicable to certain persons.

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tain persons. The point at which the illegality commences is where the testator limits for life to persons not in existence at the time of his death, as these could not be made tenants for life, at least not with remainders to their first and other sons, but must take a larger estate, so that I am strongly impressed with the idea that the trusts were not originally void, and that the directions to purchase were good.

The illegality commences where he limits for life to persons unborn at the time of his death.

Now the present case is to be considered in two ways; first, the right of the heir to the land devised, so far as he is not disinherited. But he is not disinherited in favour of those, who, according to the decision of the Court of Exchequer would be entitled; for they cannot take, because the interest is not given them until the 20,000*l.* be raised: the consequence necessarily is that, if there is a failure as to the whole of the devisees, the heir must take till the 20,000*l.* is raised; or if that cannot be raised within 60 years, then he must take the beneficial interest for the whole of the 60 years' term. The next consideration is, what is the effect of the disposition of the lands when purchased with the money raised, the manner of settlement not being what the law will permit to take effect. It has been established in many cases that, where land is directed to be turned into money, or money is directed to be laid out in land, both shall be considered as that species of property into which they are directed to be converted. This was distinctly stated by Sewell, M. R. in *Fletcher v. Ashburner*, and accordingly we find, in the several cases, that to be the clear and uniform decision. Then considering the 20,000*l.* as land, the disposition not being capable of being carried into effect, who is to take? the heir at law must take. If the testator had

The heir at law takes as far as he is not disinherited; and he is not disinherited in favour of those devisees, &c.

Where money is directed to be turned into land, or land into money, they shall be considered as that species of property into which they are directed to be turned.

1 Bro. Ch. Ca. 497, 499.

And failing the devise, the heir must take.

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directed 20,000*l.* to be paid out of the personal estate, and lands to be purchased, these lands, on failure of the intended purpose, would go to the heir at law. The personal representative could not take, as the money was converted into land. Here the purpose intended by the testator was not capable of being carried into effect beyond the direction that the money should be laid out in land, and in the events which had happened, none but the heir at law could take.

The remainder to his right heirs showed his intention that, failing the devise, the heir should take.

In a case where the ultimate remainder is to the testator's own right heirs, it is somewhat curious to say that he intended to disinherit his heir as to so much of his property as he left undisposed of; for when his devises should fail of effect, he himself has declared that his heir should take.

Cases examined.

The only case that appears materially to affect the question is that of *Jackson v. Hurlock*, decided by Lord Northington.

Amb. 487.

In that case the testator had given his real estate to a lady whom he intended to marry, and afterwards did marry, reserving to himself a power to charge the land with a sum not exceeding 10,000*l.*, and this power he afterwards executed to the amount of 6000*l.* for the benefit of charities. This was void, and Lord Northington decided that the money sunk for the benefit of the devisee; but there the whole interest had been previously given to the devisee.

Amb. 643.

In *Grosvenor v. Hallam*, Lord Camden held that a rent charge given to a charity, being void by the statute, went to the heir at law; and the reason was, that though the gift to the charity was void, yet the rent charge was severed from the devise, and must therefore go to the heir. So here the interest in the term was severed from the devise, the devisee not being to take till after the 20,000*l.* were raised, and

therefore it must go to the heir till then. That is conformable to the decisions in the other cases, where the Courts have constantly held that, when a disposition cannot take effect, and there are neither express words, nor necessary implication, to show the testator's intention that the interest should go to a devisee, there the heir must take. In the case of *Arnold v. Chapman*, a copyhold estate was devised to Chapman, he causing 1000*l.* to be paid to the executors, and then the testator gave all the residue of his estate, real and personal, after payment of debts and legacies, to the Foundling Hospital. Lord Hardwicke there said that, in *Roper v. Ratcliffe*, it was resolved that whatever is taken out of the real estate shall be considered as real; and this would be taking so much out of the real estate for the charity, which therefore shall not go to it. The legacy was well laid on the real estate, but not well disposed of, by reason of the Act, and it was decreed to the heir, and not to the devisee. So here the charge is well laid on the real estate, but in the events which happened not well disposed of, and therefore resulted to the heir at law, as not effectually disposed of by the will. I submit then that the benefit of the trusts of this term does not belong to the subsequent devisees, but must go to the heir at law, and that the decree of the Court of Exchequer ought therefore to be reversed.

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Case of the Foundling Hospital, 1 Ves. 108.

Roper v. Ratcliffe, 9 Mod. 171.

Lord Eldon, (C.) The way in which I consider the case, is this: Where land, or interest in land, such as would descend to the heir at law, is undisposed of by the will, the heir at law shall have

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It is a general rule that the heir at law takes whatever interest in land is not effectually disposed of, and *pro tanto* he is not disinherited.

the benefit of all that is not disposed of; and if the testator has disposed of the legal interest, but not the beneficial, then the heir at law shall take by a resulting trust all the beneficial interest which is so undisposed of. I do not say that this is universally true, because particular circumstances in certain cases may make a distinction. But that is the general rule, and it amounts to this, that *pro tanto* the heir is not disinherited. It follows then that, when a devise fails, the interest goes to the heir at law, unless there appear in the will express words, or necessary implication, to the contrary. In case a devise fails, then the interest must generally go to the heir at law, as not being disposed of by the will, because, generally speaking, such an interest cannot pass from the heir, except by express words, or necessary implication. The general principle is that an heir can only be disinherited by express words, or necessary implication; and if there is a doubt whether it is intended for the devisee or heir, or in case what is given by the will to another should not have effect, then it goes to the heir. But if a gift over is clearly expressed, or necessarily implied, then it goes as the testator intended it should go. As for instance, land is devised to A., charged with a legacy to B., provided B. attain the age of 21. There the devise is absolute as to A., unless B. attains the age of 21; if he does, then he is to have the legacy; but his attaining 21, is a condition upon which alone he is to have it, and if he does not attain that age, then the will is to be read as if no such legacy had been given, and the heir at law does not come in, because the whole is absolutely given to the devisee; but a gift which fails must be clearly

An heir at law can only be disinherited by express words or necessary implication.

Where a devise is made subject to be reduced to a certain extent on the happening of a given event, the happening of the event is the condition or ground of the reduction, and if the event never happens, the

intended, upon the failure of the condition, to be for the benefit of the devisee, otherwise he cannot take advantage of that failure, as he being devisee can only take what is given him by the will. The case of *Arnold v. Chapman*, mentioned at the bar, proceeded on that principle. There one *Emerson* devised a Copyhold to *Chapman*, he causing 1000*l.* to be paid to his executors, and then the residue of all his estates (after payment of debts and legacies), freehold, copyhold, leasehold, plate, rings, stock, &c. he gave to the Foundling Hospital. The land was prohibited to be given to such a charity, and the question was what was to become of the 1000*l.* It was not made applicable to the payment of the debts and legacies, and then the next of kin claimed it, but the Court said No, it was not given to them. Then the devisee insisted that it should not be raised at all, and that it was the same as if the condition had been to pay it to the charity, which was an unlawful act, and therefore void, and the estate absolute. But to this it was answered that the testator had no intention to give it to him; that the estate was given to him, he causing 1000*l.* to be paid out of it; that the 1000*l.* could not go to the devisee, for his paying it was a condition upon which the estate was given him. And Lord Hardwicke said that, in as much as the heir might enter for breach of the condition, and in as much as the hospital could not by law take it, and the devisee could not take it because it was not given him, the 1000*l.* must go the heir; whether it was intended for him or not signified nothing, as he did not take by force of the intent, but by the rule of law.

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ground of reduction is gone and the devise remains entire and absolute.

Cases examined.

Case of the Foundling Hospital, 1 Ves. 108, 110.

The devisee takes only what is intended to be given him.

The heir takes what is undisposed of, whether it is intended for him or not, as he takes not by force of the intent, but by the rule of law.

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Amb. 643. *vid.* also Wright v. Row, (n). 1 Bro. Ch. Ca. 61.

So in the case of *Grosvenor*, or *Gravenor v. Hallam*, also mentioned at the bar, where one Goldsbury by his will gave a messuage in Ipswich to his executors, subject to a charge of 10*l.* out of the same for ever, to certain charities, the estate to be sold, and after payment of debts residue to some persons named, the question was, what was to become of the 10*l.*? Lord Camden said that the land was given to the devisees, subject to the payment of 10*l.* a-year, that the 10*l.* was severed from the devise, and being void as given to a charity, it went to the heir at law, as not effectually disposed of. There was no declaration of intention, express or implied, as to its going in a way permitted by law, and not being effectually disposed of *ex consequentia* it went to the heir at law.

2 P. Wms. 361.—3 Bro. P. Ca. 412.

The case of *Carrick v. Errington* was decided on the same principle. Edward Errington there, by lease and release, settled lands to himself for life, remainder to his first and other sons successively in tail male, remainder to Thomas Errington, a Papist, for life; remainder to trustees during the Papist's life, to preserve contingent remainders; remainder to the Papist's first and other sons in tail male; remainder to William Errington, a Protestant. The remainders were void as to the Papist, but the effect was held to be, not that the subsequent remainders were accelerated, but that the rents and profits belonged to the heir during the life of the Papist.

Ca. Temp. Talbot 44.—1 Atk. 597.

Upon the same ground in the case of *Hopkins v. Hopkins*, where estates were limited by will to certain persons, on their attaining the age of 21, with an allowance for maintenance in the mean time, out

of the rents and profits; the surplus rents and profits, remaining undisposed of till they attained the age of 21, were decreed to the heir at law. So likewise in *Stonehouse v. Evelyn*, the decision was upon the same ground in favour of the heir, and this shows how careful the Courts are, not to disinherit an heir at law, unless it is clearly the intention of the testator that the property should go in another direction. There one devised a rent charge to a trustee, to be sold to pay legacies, amounting to 800*l.* and if the rent charge should sell for 1000*l.* then to pay a further legacy of 200*l.* The rent charge sold for less than 1000*l.* but for more than 800*l.*, though not for 200*l.* more. The question was, who should take the surplus above the 800*l.* It was contended that the legatees should take in proportion to their legacies. But "no," said the Court, "for in that way we "should be making the will instead of the testator," and it was held that the surplus resulted to the heir at law.

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3 P.Wms.251.

To disinherit an heir at law, there ought to be a clear intention that the property should go in another direction.

As to the charity cases where the gifts rendered void by the statute did not go to the heir, they all seem to have been decided on one or other of these grounds, that the heir at law was completely disinherited, or that his claim was barred under an intention of the testator, express or clearly implied.

Grounds of decision in those charity cases where, though the devises to the charities were void, the heir did not take—either that the heir was completely disinherited, or that his claim was barred by express words, or necessary implication.

The case of *Jackson v. Hurlock* appears to have been decided on the first of these principles. This was a devise of the whole estate, subject to the payment of such sums not exceeding 10,000*l.* as the testator should appoint, not doubting the devisee's honour and integrity in the performance of the will. Several sums, amounting to 6000*l.*, were appointed to

Amb. 487.

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charitable and superstitious uses. It was argued there that the heir at law ought to have this sum, as the estate was given to the devisee subject to the payment; but the Court said, and rightly said, "No." The testator gave the devisee the whole interest in the land, reserving only a power of appointment, and if he abstained from appointing, or made an appointment which was void, he did not diminish the whole interest which was given to the devisee, and the heir was altogether disinherited. That points to the very distinction noticed by Lord Camden, in the case of *Gravenor v. Hallam*, where the estate was given to the devisee, subject to certain rent charges which he created by his will, severing the rent charge from the devise, and thereby manifesting an intention that it should not go to the devisee, and the uses being void, the rent charges went to the heir at law. That was Lord Northington's decision; and the decision in *Barrington v. Hereford* proceeded upon the same principle.

Vid. Cruse v. Barley, 3 P. Wms. 20.

1 Bro. Ch. Ca. 61. (n.)

Now see what this case is: and here I must distinguish between this and a case lately decided in the Court of Chancery, where a term was created for raising portions, and no portions were subsequently mentioned. It was there contended that the heir at law was entitled to the beneficial interest as undisposed of. But the Court, looking at the intention as collected from the whole of the will, was of opinion that, as the testator had not mentioned any portions, he had merely stated what he proposed in case he had chosen to express it: but as he had not mentioned any portions, the will was so framed that that part could have no application; and it was de-

cided that the principle was clear that the devisee should take, subject to these portions if they were to be raised; if not, then absolutely; and so the term was assigned to him to attend on the inheritance. But that was a different case from the present. If the term there, for instance, had been for 90 years, in order to raise 20,000*l.* for charities, and after the sum had been raised, then the lands to go to certain devisees; in that way of putting it, the question would be whether the devisees could take any thing till the money had been so raised. And according to the cases which I have mentioned, of intention manifested that the devisees should take short of that, they had no right to say that the interest was included in the devise to them, as they could only take according to the intention.

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There could be no doubt but that in this case the term was well created. It was admitted to be so in the decree which directed that it should be assigned to attend the inheritance: and here I must intimate that though these trusts have been considered as too remote, it is difficult to say that they were so in all events; but as the case had not happened in which they could be carried into effect, and as the money was to be raised out of land, and the devisee could not take it because it was not given to him, it must go to the real representative. It appears to me then that the question is narrowed to this:—suppose the trusts were too remote, was it the intention of the testator that in such circumstances the devisee should take the beneficial interest in the term? A question which must be considered with reference to the fact, that there is an express direction to the trustees to

Difficult to say that the trusts were in all events too remote.

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get together the rents, profits, and fines, for the purpose of raising 20,000*l*., and that the lands were given over so and so expressly from and after the raising of the said sum of 20,000*l*. for the said uses. Some stress was laid in argument on these last words, "for the said uses," the uses being void as too remote. But suppose it had been a devise to the use of a charity, which the law would not permit to take effect, the cases authorize me to say that the beneficial interest in the term would not go to the devisee, unless it clearly appeared that such was the intention of the testator. Here the interest is given *minus* in value 20,000*l*., and only with a deduction of that sum. The testator then has said that the devisees shall not take it. The policy of the law will not permit the uses for which the testator intended it to take effect; and in such a case, in the absence of any expression of intention on the part of the testator with respect to a purpose which the law will allow, the doctrine of law is this, that he shall take the interest, who takes independent of all intention, and on whom the law casts it. On these grounds I agree with my noble friend that the money must be raised and applied for the benefit of the heir at law, and not of the devisees.

The judgment was in these terms:—

July 11, 1815. Decree of the Court of Exchequer reversed.

"Ordered and adjudged that the decree complained of be reversed: and it is declared and adjudged "that, on the failure of the issue male of the body "of the testator Humphry Sydenham, the manors "of Dulverton and Brushford Sydenham, and all

" other the testator's estates in the parishes of Dul-
" verton and Brushford, except the capital farm at
" Brushford called Combe, and the Clowes, Andrew
" Bill, and the moiety of the church of Brushford,
" were by the testator vested in the trustees therein
" named, for the term of sixty years, upon trust, to
" raise the two sums of 17,500*l.* and 2,500*l.* and to
" apply such two sums in the purchase of real estates,
" according to the directions contained in the said
" will; and that no interest in the estates comprised
" in the said term was devised to the testator's
" brother Floyer Sydenham, and the several persons
" to whom the said estates were limited in remain-
" der, after the death of the said Floyer Sydenham,
" until the said two sums of 17,500*l.* and 2,500*l.*
" amounting together to 20,000*l.* and the expenses
" of the trust, should have been raised, unless the
" said term of sixty years should have expired be-
" fore such sums should have been raised under
" the trusts of the said term. And it is hereby
" further declared and adjudged that, in the events
" which have happened at the time of failure of
" issue male of the body of the testator, such of the
" uses which the testator by his will directed, the
" estates so to be purchased should be conveyed, as
" would otherwise have been capable of taking effect,
" were too remote, and therefore void; and that
" therefore the trusts of the real estates, directed
" by the testator's will, to be purchased with the
" said two sums of 17,500*l.* and 2,500*l.*, resulted to
" the heir at law of the testator, as undisposed of by
" the testator's will. And with this declaration and
" judgment it is ordered that the cause be referred

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" back to the Court of Exchequer, to do what shall " be fit to be done therein, according to such de- " claration and judgment."

Agent for Appellant, SANDYS, HORTON, and ROARKE.
Agent for Respondents, PARRY.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION, (1ST DIV.)

DAVISON—*Appellant.*
ROBERTSON AND OTHERS—*Respondents.*

April 19, July 4, 1815. BILLS OF EXCHANGE.—PARTNERS.

A. and B. are partners, and goods are purchased on the partnership account. A. gives one bill for the price, B. gives another, and each accepts for the firm. One of the bills comes into the hands of C., the other into the hands of D., and both raise their actions against A. and B. the acceptors.

A. and B. raise a process of multiplepoinding, and by the Court below are found liable in only once and single payment, and the matter is reduced to a competition between the holders of the two bills.

C.'s bill has been indorsed by E., *per* procuration of F., and it being denied that E. had any power so to indorse, proof is offered of acts of agency by E. for F., which would lead the world in general to believe that E. had such power; but the evidence is not allowed by the Court below to be gone into, and D.'s bill is preferred.

C. appeals from this last judgment; but there is no appeal from the judgment in the multiplepoinding.

It was said *arguendo* by Lord Eldon (Chancellor) and Lord Redesdale, that a power of indorsing *per* procuration did not require a special mandate, but might be proved by inference from facts and circumstances; and though there might be fraud by E. upon F., that was no answer to a *bonâ fide* holder for *val. con.*