

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

COLCLOUGH and others—*Appellants*.GAVEN and others—*Respondents*.

UNDER the words in a will, “to pay to each of my said
 “(younger) children (three daughters) as and for their re-
 “spective portions, a sum equal to one fourth of what shall
 “remain to my said (eldest) son William—payable to my
 “said daughters respectively, at her or their respective ages
 “of twenty-one, or marriage, &c.” held that all the daugh-
 ters were only entitled to a sum equal to a fourth of what
 remained to the eldest son, or each of them to one seventh,
 (such appearing to be the testator’s intention), and that the
 time of the testator’s death was that at which the amount
 of his property, and the proportions of the shares were to
 be computed and estimated.

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LUKE GAVEN, Esq. being possessed of personal
 property to the amount of about 5000*l.* and seized
 of Freehold Estates in the Counties of Meath, Sligo,
 &c. of the value of about 1700*l.* a year, on January
 11, 1790, made his will, which was executed and
 attested, so as to pass real estates; and thereby, after
 directing payment of his just debts and funeral ex-
 pences, he devised and bequeathed all his messuages,
 lands, tenements, hereditaments, and all the personal
 estates of which he should die possessed, to the

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honourable Simon Butler (since deceased), and to Oliver Nugent and Henry Cope, and the survivors and survivor of them, and the heirs, executors, and administrators of such survivor, to the use, intent, and purpose, that the several persons therein mentioned should receive and take the several Annuities thereby given: and the will then proceeded in the following words: “ And to and for this further use, “ intent, and purpose; and subject to the aforesaid “ uses, intents, and purposes, that they the said “ Simon Butler, Oliver Nugent, and Henry Cope, “ and the survivors and survivor of them, and the “ heirs, executors, and administrators of the sur- “ vivor of them, do and shall, out of the rents, “ issues, and profits of my real, freehold, and per- “ sonal estates, apply a reasonable sum to and for the “ maintenance and education of my children, Wil- “ liam Gaven, Mary Gaven, Elizabeth Gaven, and “ Julia Gaven, and any other child or children, my “ said wife Mary Gaven, otherwise Walsh, may have “ during my life, or be ensient with at my death; “ and that they do and shall place out at interest, in “ the funds of government, the remainder (if any) “ of my personal estate, and the remainder of the “ rents, issues, and profits of my real and freehold “ estate, until out of this fund there shall be raised “ a sum sufficient to pay to each of my said chil- “ dren, Mary, Elizabeth, and Julia, and any other “ child, or children, my said wife Mary Gaven, “ otherwise Walsh, may have during my life, or be “ ensient with at my death, as and for their respec- “ tive portions, a sum equal to one fourth of what “ shall remain to my said son William, or such son

“ or sons becoming an eldest son, as my said wife
 “ Mary Gaven, otherwise Walsh, may have during
 “ my life, or be ensient with at my death, payable to
 “ my sons respectively, at his or their respective age
 “ or ages of twenty-one years, with power to the
 “ said Simon Butler, Oliver Nugent, and Henry
 “ Cope, and the survivors and survivor of them, and
 “ the heirs, executors, and administrators of such
 “ survivor, during the respective minorities of my
 “ said sons, to pay the whole or part of their
 “ respective portions, in order to apprentice or other-
 “ wise advance them respectively in life, and payable
 “ to my said daughters respectively, at her or their
 “ respective ages of twenty-one years, or marriage
 “ with the consent in writing of the said Simon
 “ Butler, Oliver Nugent, and Henry Cope, or the
 “ survivors or survivor of them, which shall first
 “ happen. But if any such daughter or daughters
 “ shall happen to marry before the age of twenty-
 “ one years without such consent, then such daugh-
 “ ter or daughters shall not receive her or their
 “ respective portion or portions, but only the re-
 “ spective legal interest of the same during her or
 “ their respective life or lives, to be paid to her or
 “ them by half-yearly payments, for her or their
 “ respective sole use, without the intermeddling of
 “ her or their respective husband or husbands; and
 “ after the respective death or deaths of such daugh-
 “ ter or daughters, her and their respective portion
 “ or portions shall be equally divided among such of
 “ her or their respective children as shall attain the
 “ age of twenty-one years;” with directions respect-
 ing the interest of his said daughters’ portions, and

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with benefit of survivorship: and, subject to the aforesaid charges, the testator devised his said estates to the use of his said son William Gaven, his heirs, executors, administrators, and assigns, for ever.

The testator died on May 12, 1790, without having altered or revoked his will, leaving his widow and the four children named in the will, which was proved by the executor Butler, who took upon himself the management, and misapplied or embezzled a great part of the property, and died insolvent. The other executors were then prevailed upon to interfere, and act in the trusts of the will. Mary Gaven, one of the daughters of the testator, intermarried in 1802, with the Rev. Dudley Colclough; and on May 27, 1803, Colclough and his wife filed a bill in the Irish Chancery against William Gaven, the testator's son, and other proper parties, praying that the trusts of the will might be carried into execution, and the property of the plaintiff Colclough and his wife might be ascertained and paid. Answers having been put in, and the parties having submitted their rights under the will to the judgment of the Court, the cause was heard on bill and answer, on July 12, 1804, before the then Master of the Rolls, who decreed that the trusts of the will should be carried into execution, and that an account should be taken among other things of the whole amount of the value of the testator's estates at the time of his death, after deducting debts, &c.; and that Colclough and his wife were entitled to one fourth of such value, with interest from the time of the wife's attaining the age of twenty-one years.

Bill filed, May
1803.

Decree, July
12, 1804.

After various proceedings under this decree, and

when the Master was about to sign his report, William Gaven, the son, on November 30, 1808, petitioned the Lord Chancellor for a re-hearing; submitting that, by the true construction of the will, Mary Colclough and the other daughters were all of them only entitled to a fourth, or each to a seventh of the testator's property; and that the loss by Butler ought to be rateably borne by the daughters or younger children, and the petitioner. On March 8, the cause was re-heard before the Lord Chancellor, and it was contended for the younger children that, supposing the decree of July 12, 1804, to be erroneous as to the proportion of one fourth given by it to Mary and her husband Colclough, it was also erroneous in fixing the period of the testator's death for the computation of the value of the property and amount of the shares, instead of the time of distribution. The Lord Chancellor on March 8, 1810, decreed that the decree of July 12, 1804, should be varied so far as respected the proportion to be paid to the younger children, and that, according to the true intent and meaning of the testator, each of the younger children was entitled to a proportion equal in point of value to one fourth of what remained of the testator's property to the eldest son, after providing for the several bequests, charges, and incumbrances upon the estates; and that, in order to ascertain the amount of the testator's property at the time of his death, it should be referred to the Master to take an account, &c. and that the younger children were each entitled to a sum equal to one seventh of the net value of the real estates, computed at the time of the testator's death,

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Re-hearing.

Decree,
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the same to be paid out of a fund, to be formed, with the surplus, if any, of the personal estate, and the rents, issues, and profits, of the real estates. In effect, the decree was made according to the prayer of the petition, except as to the loss by Butler, with respect to which no opinion was then given. From this decree, Colclough and his wife, and Elizabeth and Julia Gaven, appealed, so far as it related to the time at which the amount of the testator's property and value of the shares were to be estimated, admitting the construction put upon the will by this latter decree to be in other respects correct.

Leach and *Roupell* (for the Appellants) contended that according to the intent of the testator, as it was to be collected from the whole will, the proportion and shares were to be computed according to the amount of the property, not as it stood at the time of the testator's death, but as it stood at the time of distribution.

Romilly and *Bell* (for the Respondents) asked what was the time of distribution? The distribution was only to take place as each became entitled, and according to that construction they would take in different proportions; and as to the time of vesting and distribution, Mr. Bell cited *Roebuck v. Dean*, 4 Bro. Ch. Ca. 403. 2 Ves. 265.

Leach. The time is arbitrary, and there is no rule but the testator's intention.

Appeal dismissed, and decree *affirmed*.

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Agent for Appellants, DEARE.

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Agents for Respondents, SHAWE, LE BLANC, and SHAWE. Judgment.

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SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

ROBERTSON—*Appellant*.

GRAHAM—*Respondent*.

IN an action between General Robertson of Lude, and the Duke of Athol, General Robertson's Counsel introduced a charge of deception and fraud, or rather contended that such a charge must be implied from the reasoning on the other side, against a person nearly connected with the Duke of Athol; and Graham, the Duke's agent, supposing he was pointed at, complained to the Court, and the passage containing the charge was ordered to be expunged with costs to be paid by General Robertson. This being appealed from, the Lord Chancellor stated that, for the purposes of justice, great latitude of allegation must be allowed to counsel in pleading; and though a charge of fraud and deception might turn out to be unfounded, yet if it were pertinent, he doubted extremely whether it ought, merely because it might be unfounded, to be expunged as scandalous—and the judgment was remitted for review.

Nov. 18, 1814,
July 5, 1815.

PLEADING.—
COUNSEL.

IN an action between the Duke of Athol, and General Robertson of Lude, relative to the division of the Common of Glentilt, a proof was taken, and in order to shorten the proof, the parties by a judicial minute dated April 28, 1806, admitted that

Minute of
April 1806.