conclusion ; for every arrest is a restraint and detainment ; and it would be strange, if the party could, under the allegation of a restraint, recover a loss from which the underwriter is expressly exempted by an unambiguous exception in the policy. On the whole, the court are of opinion, that the judgment of the circuit court must be affirmed.

Judgment affirmed.

Smith and others *v.* Edrington. (*a*)

Wills.—After-acquired lands.

Under the statute of Virginia respecting wills, it is necessary, in order that lands acquired after the date of the will, may pass by the will, that the intention of the testator should clearly appear upon the face of the will.

This was an appeal from the Circuit Court for the district of Virginia, sitting in chancery. The bill sought to charge the lands of Christopher Edrington, in the hands of his son and heir-at-law, W. P. Edrington, with a debt due by his father, Christopher Edrington, to the complainants, by simple contract.

It was contended, that the lands passed, by the will of Christopher Edrington, to his son, W. P. Edrington, charged with the payment of the debts of the testator, *although the lands were acquired by the testator after the date of the will. The will expressed a desire that all the just debts of the testator should be paid by his executors, as soon as the means in their power should permit. It also authorized his executors to dispose of and convey any of his property that might be necessary for payment of his debts ; and afterwards, it had these expressions, "should my son, William P. Edrington, to whom I bequeath the whole of my property, after the payment of my debts, and provisions above made, die under the age of twenty-one years, I then give," &c. The testator then proceeded to make certain pecuniary bequests, in the event of his son's so dying, and concluded, by disposing of the residue of his property. [*67

At the date of the will, the testator had no lands. Those which the bill sought to charge were purchased a short time before his death.

By an act of the legislature of Virginia, in force at the date of the will (1 Rev. Co. P. P. 160), it is enacted, "that every person, aged twenty-one years and upwards, being of sound mind, and not a married woman, shall have power, at his will and pleasure, by last will and testament in writing, to devise all the estate, right, title and interest in possession, reversion or remainder, which he hath, or, at the time of his death, shall have, of, in or to lands," &c.

The court below dismissed so much of the complainants' bill as sought to charge the lands, in the hands of the heir, and they appealed to this court.

E. J. Lee, for the appellant.—The only question in this case is, whether the lands passed by this will to the devisee, W. P. Edrington. For if they did, he took them subject to the debts of his father, by the terms of the will. By the statute, they would pass, if such was the intention of the tes-

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(*a*) February 9th, 1814. Present, all the judges.

tator. *That such was his intention, is to be inferred from the following facts which appear in the case :

It is evident, from the will, that he meant to dispose of his whole estate ; and that his just debts should be paid, at all events. He bequeaths to his son, his whole property, after payment of his debts, and certain specific legacies. In the summer of 1803 or 1804, the testator offered to convey this land in payment of his debt to the complainants, which shows that he looked to the land as a fund for that purpose, and that he did not mean to cheat his creditors, by converting his personal estate into lands. The intention of the testator is to be collected not only from the words of his will, but from his acts. *Kennon* v. *McRoberts*, 1 Wash. 96 ; *Shermer* v. *Shermer*, Ibid. 266.

Taylor, contrà.—Under the statute of Hen. VIII. (of wills), it has always been holden, in England, that no after-purchased lands can pass by a will. This will must have the same construction as if the devise had been to a stranger, instead of the heir-at-law. It must have been the intention of the testator, at the time, to devise what he had, not what he had not. It does not appear, that he even contemplated a purchase of lands. Under the first part of his will, it is clear, that he alludes only to personal estate. In the case of *Hamersly* v. ———, 3 Call 289, it is said by the court of appeals of Virginia, that the intention to devise after-acquired lands must appear by expressions applicable to that kind of property.

February 23d, 1814. Washington, J., delivered the opinion of the court, as follows :—This was a bill filed on the equity side of the circuit court for the district of Virginia, by the appellants, in order to charge the real estate of Christopher Edrington, in the hands of his son and heir-at-law, William P. Edrington, with the payment of a debt due to the appellants
*69] *by Christopher Edrington, the father. The appeal being taken from that part of the decree of the circuit court which dismissed the bill so far as it seeks to subject the real estate in the hands of Wm. P. Edrington to the payment of the appellants' demand, the only question now to be considered is, whether the will of Christopher Edrington can be so construed as to charge his real estate with the payment of his debts ?

The clauses of the will relied upon by the appellants' counsel for this purpose, are that which expresses the desire of the testator that all his just debts should be paid by his executors, &c., so soon as the means in their power should permit ; also, another, which authorizes his executors to dispose of and convey any of his property that might be necessary for payment of his debts ; and a third, which is still stronger, and is expressed as follows : " Should my son, William P. Edrington, to whom I bequeath the whole of my property, after the payment of my debts and provisions above made, die under the age of twenty-one years, I then give," &c. The testator then proceeds to make certain pecuniary bequests, in the event of his son's so dying, and concludes by disposing of the then residue of his property.

At the time that this will was made, it is admitted, that the testator was not possessed of or entitled to any estate in land, but that, afterwards, and a short time previous to his death, he purchased the tract of land which this bill seeks to charge. By an act of the legislature of Virginia, passed in the year 1785, and long before the date of this will, it is declared, " that any person, aged twenty-one years and upwards, being of sound mind, and not a

married woman, shall have power, at his will and pleasure, by last will and testament in writing, to devise all the estate, right, title and interest, in possession, reversion or remainder, which he hath, or, at the time of his death, shall have, of, in or to lands," &c. The circumstance, therefore, that the land in question was acquired after the execution of the will, presents no difficulty in this case, if it appears that it was the intention of the testator to devise it to his son; because if it passes at all under the will, it may readily be admitted, that the devisee took it subject to the payment of the testator's debts; the parts of the will above recited being *strong to impose such a charge. [*70

But although a testator may, under the above law, dispose by will of after-puchased lands, it is nevertheless necessary that his intention to make such a disposition should clearly appear upon the face of the will. The rule in England, as well as in Virginia, at the time this law was passed, was, that a will, as to land, speaks at the date of it, and as to personal estate, at the time of the testator's death. The law created no new or different rule of construction, but merely gave a power to the testator to devise lands which he might possess, or be entitled to, at the time of his death, if it should be his pleasure to do so. The presumption is, that the testator means to confine his bequests to land to which he is then entitled; and this presumption can only be overruled by words clearly showing a contrary intention.

In this will, there are no expressions which indicate an intention to devise, or in any manner to charge, lands which the testator might afterwards acquire. It does not appear, that the testator contemplated, at the time he made his will, the purchase of any land, and the words, "estate" and "property," to be found in it, may be fully satisfied, by applying them to the personal property of which he was possessed. It is, therefore, the opinion of the court, that there is no error in the decree of the circuit court, and that the same ought to be affirmed, with costs.

Judgment affirmed.

Beale *v.* Thompson and Morris. (*a*)

Deposition de bene esse.

It is a fatal objection to a deposition taken under the judiciary act of 1789 § 30, that it was opened out of court.

Error to the Circuit Court for the district of Columbia.

On the trial in the court below, the defendant, Beale, offered in evidence, the deposition of Tunis Craven, taken before the judge of the district court of the United States for the district of New Hampshire, under the 30th section of the judiciary act of September 24th, 1789 (1 U. S. Stat. 88), which, after prescribing the mode of taking *depositions, directs that "the depositions so taken shall be retained by such magistrate, until he deliver the same, with his own hand, into the court for which they are taken; or shall, together with a certificate of the reasons aforesaid of their being taken, and of the notice, if any, given to the adverse party, be, by him, the said magistrate, sealed up and directed to such court, and remain under his seal, until opened in court." [*71

(*a*) February 18th, 1814. Absent, Washington and Johnson, Justices.