Craig *v.* Leslie *et al.*

Legacy.—Equitable conversion.

R. C., a citizen of Virginia, being seised of real property in that state, made his will: "In the first place, I give, devise and bequeath unto J. L.," and four others, "all my estate, real and personal, of which I may die seised and possessed, in any part of America, in special trust, that the afore-mentioned persons, or such of them as may be living at my death, will sell my personal estate to the highest bidder, on two years' credit, and my real estate on one, two and three years' credit, provided satisfactory security be given, by bond and deed of trust: In the second place, I give and bequeath to my brother T. C." an alien, "all the proceeds of my estate, real and personal, which I have herein directed to be sold, to be remitted to him, accordingly as the payments are made, and I hereby declare the aforeside J. L." and the four other persons, "to be my trustees and executors for the purposes afore mentioned:" *Held*, that the legacy given to T. C., in the will of R. C., was to be considered as a bequest of personal estate, which he was capable of taking for his own benefit, though an alien.

Equity considers land, directed, in wills or other instruments, to be sold and converted into money, as money; and money, directed to be employed in the purchase of land, as land.[1]

Where the whole beneficial interest in the land or money, thus directed to be employed belongs to the person for whose use it is given, a court of equity will permit the *cestui que trust* to take the money *or the land, at his election, if he elect, before the conversion is made.[2]

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But in case of the death of the *cestui que trust*, without having determined his election, the property will pass to his heirs or personal representatives, in the same manner as it would have done, if the conversion had been made, and the trust executed in his life time.

The case of Roper *v.* Radcliff, 9 Mod. 167 examined; distinguished from the present case; and, so far as it conflicts with it, overruled.

This was a case certified from the Circuit Court for the district of Virginia, in which the opinions of the judges of that court were opposed on the following question, viz: Whether the legacy given to Thomas Craig, an alien, in the will of Robert Craig, is to be considered as a devise, which he can take only for the benefit of the commonwealth, and cannot hold; or a bequest of a personal chattel, which he could take for his own benefit?

This question grew out of the will of Robert Craig, a citizen of Virginia, and arose in a suit brought on the equity side of the circuit court for the district of Virginia, by Thomas Craig, against the trustees named in the will of the said Robert Craig, to compel the said trustee to execute the trusts, by selling the trust-fund, and paying over the proceeds of the same to the complainant.

The clause in the will of Robert Craig, upon which the question arose, was expressed in the following terms, viz: "In the first place, I give, devise and bequeath unto John Leslie" and four others, "all my estate, real and personal, of which I may die seised or possessed, in any part of America, in special trust, that the afore-mentioned persons, or such of them as *may be living at my death, will sell my personal estate to the highest bidder, on two years' credit, and my real estate on one, two and three years' credit, provided satisfactory security be given, by bond and deed of trust. In the second place, I give and bequeath to my brother, Thomas Craig, of Beith parish, Ayrshire, Scotland, all the proceeds of my estate, both real and personal, which I have herein directed to be sold, to be remitted unto him accordingly, as the payments are made; and I hereby declare the aforesaid

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[1] Seymour *v.* Freer, 8 Wall. 202; Hawley *v.* James, 5 Paige 318; s. c. 16 Wend. 61.

[2] Smith *v.* Starr, 3 Whart. 62; Rice *v.* Bixler, 1 W. & S. 445.

John Leslie" and the four other persons, "to be my trustees and executors for the purposes afore mentioned."

The attorney-general of Virginia, on behalf of that state, filed a cross-bill against the plaintiff in the original suit, and the trustee; the prayer of which was, to compel the trustee to sell the trust-estate, so far as it consisted of real estate, and to appropriate the proceeds to the use of the said commonwealth, by paying the same into its public treasury.

The will of Robert Craig was proved in June 1811, and the present suit was instituted, some time in the year 1815.

February 20th. *Nicholas* (Attorney-General of Virginia), argued, that most, if not all nations, have imposed some restrictions upon the capacity of aliens to hold property within the territory of the nation. The law of England and the law of Virginia being the same in this respect, there is no want of reciprocity, and there is a peculiar fitness in extending the same rule to British subjects in this country, as is imposed on American *citizens in England. By the law of England, an alien cannot take a [*566 freehold by inheritance; he may take by purchase, but cannot hold: it escheats to the crown, upon an inquest of office. Nor is this incapacity confined to a freehold interest: it extends to leaseholds, and any the smaller interest in lands. Co. Litt. 2 *b*, Harg. notes; *Calvin's Case*, 7 Co. 18 *b*. The severity of this rule has been relaxed only for the benefit of commerce, and that very partially. An alien merchant may take a lease for years of a house for habitation, but not of lands, &c. And no other alien can even take a lease of a house for habitation. Ibid. The rule may be considered as illiberal, and inconsistent with the enlightened spirit of the age; but its wisdom may be vindicated on many grounds; and it can only be dispensed with by the legislative will, or by compact with foreign nations. As Lord Mansfield said of the laws against the Papists, "whether the policy be sound or not, as long as they continue in force, they must be executed by courts of justice, according to their true intent and meaning; the legislature only can vary or alter the law." *Toone* v. *Blount*, Cowp. 466.

The property in question consisted of real estate, which remained in specie, at the time of the devisor's death. The devise of a trust in lands cannot operate for the benefit of an alien. No equitable fiction can change the specific quality of the property. It is the settled doctrine of the common law, that an alien *cestui que *trust* can only take for the king's use. [*567 *King* v. *Holland*, Sty. 20; Alleyn 14; Roll. Abr. 154, 534; *Attorney-General* v. *Sir George Sands*, 3 Ch. Rep. 33; Hob. 214; 1 Mod. 17; Hardr. 495; Cro. Jac. 512; Gilbert on Uses and Trusts 243; 1 Com. Dig. 300; 1 Bac. Abr. tit. Alien, C. 132; *Harrison's case*, Mr. Jefferson's correspondence with Mr. Hammond, State Papers (Waite's ed.) vol. 1, p. 374. All the reasons of policy which incapacitate him from holding a legal estate in lands. equally apply to disable him from holding an equitable estate in the same species of property; it is the usufruct, of which the law aims to deprive him, Trust estates are governed by precisely the same rules as legal estates. "The *forum* where it is adjudged," says Lord Mansfield, speaking in a court of equity, "is the only difference between trusts and legal estates. Trusts here are considered, as between the *cestuis que trust*, and trustee (and all claiming by, through or under them, or in consequence of their estates),

as the ownership and as legal estates, except when it can be pleaded in bar of this right of jurisdiction. Whatever would be the rule of law, if it was a legal estate, is applied in equity to a trust estate." *Burgess* v. *Wheate*, 1 W. Bl. 160. Again, speaking of the case of *Banks* v. *Sutton*, he says, "So that I take it, by the great authority of this determination, on clear law and reason, *cestui que trust* is actually and absolutely seised of the freehold, in consideration of this court; and that, therefore, the legal consequence of an actual seisin of the freehold, shall, in this court, follow, for the
*568] benefit of one in the **post.*" Ibid. 161–62. The *cestui que trust*, in the present case, takes an interest which extends to the whole estate, with an election to take it as land. Nobody but he can compel the trustees to sell, and they may hold the trust, and apply it for the benefit of the *cestui que trust* for ever. This is precisely the mode in which the monastic and other ecclesiastical institutions perverted the invention of uses, in order to evade the statutes of mortmain, and they might be applied in the same manner to evade the disability of aliens to hold a legal estate in real property. Even supposing this to be a personal trust; it is a devise of the profits growing out of land, which would, until a sale, accumulate for the advantage of an alien, and is equivalent to a devise of the land itself to an alien. 1 Salk. 228; 1 Eq. Cas. Abr. 98; 1 Ves. 41; Co. Litt. 46 *a*; Cro. Eliz. 190. There is nothing compulsory upon the trustees to sell, and by collusion between them and the *cestui que trust*, the sale might be postponed for ever, whilst an alien enjoyed the profits of the lands, and transmitted them to his representative.

But this devise of the proceeds of the sale of lands was, in effect, a devise of real property. The leading case on this subject, *Roper* v. *Radcliffe*, 9 Mod. 167, 181, is strongly fortified by subsequent decisions. *Attorney-General* v. *Lord Weymouth*, Ambl. 20; *Davers* v. *Dewes*, 3 P. Wms. 46; *Hill* v. *Filkins*, 2 P. Wms. 6; 10 Mod. 483; *King* v. *Inhabitants of Wivelingham*, 2 Doug. 737. In *Roper* v. *Radcliffe*, it was solemnly deter-
*569] mined, *that lands given in trust, or devised to pay debts or legacies, shall be deemed as money in respect to creditors, but not in respect to the heir-at-law or residuary legatee, in respect to whom they shall be deemed in equity as lands: and that, consequently, the residue, in that case, being devised to persons incapable of holding an interest in lands, the devise was void. The application of this principle to the present case is obvious. Nor can the consequence of forfeiture be avoided by the *cestui que trust* electing to take the property as money. The exercise of the right of election for such a purpose was denied in *Roper* v. *Radcliffe*, and in the *Attorney-General* v. *Lord Weymouth*.

The rights of the commonwealth may be enforced in a court of equity, because the disability of an alien to hold lands for his own benefit, is not considered as a penal forfeiture, but arises merely from the policy of the law. It has, therefore, been adjudged in equity, that he cannot demur to the discovery of any circumstances necessary to establish the fact of alienage. *Attorney-General* v. *Duplessis*, Parker 144; 5 Bro. P. C. 91.

Wickham, contrà, argued, that this was a mere question as between the heirs and personal representatives. If the property in question be real property, in the view of a court of equity, it is admitted, that an alien can-

not hold it. But on the other hand, if it be personal property, it cannot be denied, that he may take and hold it. If, as between citizens, *it be personal property, it must be so as respects aliens. A court of law [*570 can only look to the legal quality of the property; at law, the interest is vested in the trustee; but a court of equity takes notice of the title of the *cestui que trust*, as beneficially interested, and regards the quality of the estate as respects his interest only. It is incontestible, that there may be personal trusts of real property. Such are the familiar instances of trusts for the payment of debts, and legacies charged on land; trusts for raising portions, and bankrupts' estates; in all of which the property goes to the personal representatives, without any question as to the citizenship or alienage of the *cestui que trust*. It is an elementary principle, which lays at the very foundation of the doctrines of equity, that land directed to be sold and converted into money, and money directed to be employed in the purchase of land, are considered as that species of property into which they are directed to be converted. *Doughty* v. *Bull*, 2 P. Wms. 323; *Attorney-General* v. *Johnston*, Ambl. 530; *Yates* v. *Compton*, 2 P. Wms. 303; *Fletcher* v. *Ashburner*, 1 Bro. C. C. 501; *Ackroyd* v. *Smithson*, Ibid. 503; *Berry* v. *Usher*, 11 Ves. 87; *Robinson* v. *Taylor*, 2 Bro. C. C. 589; *Williams* v. *Coade*, 10 Ves. 500; *Biddulph* v. *Biddulph*, 12 Ibid. 160. And it is immaterial, in what manner the direction is given, whether by will or deed; or in what state the property is found, in land or not. *Edwards* v. *Countess of Warwick*, 2 P. Wms. 171; *Biddulph* v. *Biddulph*, 12 Ves. 160; *Thornton* v. *Hawley*, 10 Ibid. 129. The argument on the other side, that the alien having the *right to elect that the property should not be sold, therefore, it must he considered as land, may be answered by another, [*571 equally good: that having the right to say it shall be sold, it must, therefore, be considered as money. But it is denied, that an alien has an election to make it real property. As an infant cannot make an election, for want of capacity (*Seely* v. *Jago*, 1 P. Wms. 389; *Earlom* v. *Saunders*, Ambl. 241), so an alien cannot elect to take, because he cannot hold real property. The right of election is a benevolent principle, applying for the benefit, not for the injury of parties. *Grimmitt* v. *Grimmitt*, Ambl. 210. The *cestui que trust*, in this case, has elected to take it as money, by his bill praying for a sale. But supposing him to have been silent, the elementary writers lay down the rule, that it remains personal property. As the party who has his election, may determine to take the property as land, to be sold for his benefit, or money to be invested in land, the question can only arise between the heirs and personal representatives. Some cases, which appear to be exceptions to the rule, confirm it. Such are the cases of a resulting trust to the heir, where the purposes of the trust are fulfilled, or at an end (*Hewitt* v. *Wright*, 1 Bro. C. C. 86; and see 16 Ves. 191; 18 Ibid. 174; 1 Ves. & B. 272); the cases where the union of title to the estate, as real and personal, extinguishes the demand (*Pulteney* v. *Lord Darlington*, 1 Bro. C. C. 226), and the cases where the intention is obscure. The rule extends to all cases where the quality of money *is imperatively fixed on land by the will or deed. [*572

As to *Roper* v. *Radcliffe*, its analogy to the present case is remote; it has always been considered a very questionable case; and it is not to be put in competition with the more direct authorities already cited. By the act of parliament, under which that case was determined, a Catholic cannot even

purchase; but at common law, an alien may not only purchase, but hold against all the world, except the crown. That case is not confirmed by Lord Chancellor KING, in *Davers* v. *Dewes*. On the contrary, he says, that if the point "were *res integra*, it would be, indeed, very questionable." 3 P. Wms. 46. Its reasoning is also questioned by Lord MANSFIELD. *Foone* v. *Blount*, Cowp. 467. The case of the *Attorney-General* v. *Lord Weymouth*, Ambl. 20, does not fortify it, and has no analogy to the case now before the court. Here is no devise of the annual perception of profits, but the *cestui que trust* is entitled to the proceeds of the sale of the land, as a sum in gross, and there is no precedent for confiscating profits of an estate purchased by an alien, which profits were actually received before office found. Nor can the argument, that, by collusion between the trustee and the alien *cestui que trust*, the latter may go on for ever receiving the profits of land, be supported; because it is arguing against a right, from its possible abuse (always an unsound mode of reasoning), and because the same thing may
*573] happen between an alien and any *ostensible owner of land. All that a court of equity, in any case, could do, would be to refuse to decree the land to the alien, and compel him to relinquish his claim, unless he took money. But equity will not aid to enforce a confiscation. Thus, where the testator directed money to be laid out in land, the money not having been laid out, Lord ROSSLYN held, that the crown, on failure of heirs, had no equity against the next of kin, to have it laid out in real estate, in order to claim by escheat. *Walker* v. *Denne*, 2 Ves. jr. 170.

The *Attorney-General*, in reply, admitted, that in considering the legal operation of the devise, the national character of the devisee was to be laid out of view; and that the estate which its terms would pass, could not be varied by any consideration of that character. As an alien is capable of taking (though not of holding) a direct fee in the lands, he is also capable of taking any lesser estate than a fee, under any modification of trust, express or implied. There is nothing, therefore, in the character of an alien, to repel, or even to narrow, the legal operation of the terms of the devise. Whatever estate they would pass to a citizen, the same they will pass to an alien. What estate then would pass to a citizen? It is said, a personal estate only, because, the testator having directed the land to be sold, has stamped upon it the character of personal property. But this is not the whole effect of the terms of the devise. They give to the legatee the
*574] option of taking the land; and *in so doing, they give him an interest in the land itself. This option, thus cast upon the legatee, is not the effect of any act to be done by him. To create the right of election, it is not necessary that he should actually elect, or that he should be able to elect. The mistake on the other side results from confounding the right of election with the exercise of that right. The right to choose is the legal effect of the devise, and stamps a character on the estate. The fact of electing, is a subsequent act, which may or may not take place; but which, whether done or not, cannot alter either the character of the devise, or the option which it casts upon every one capable of taking under it, or the legal estate in the lands which this option creates. The option thus given to the devisee, by the terms of the will, is an operative principle, which, whether exercised or not, still gives *eo instanti* that the will takes effect, an interest

in the lands, which, if the devisee be incapable of holding, they pass to the commonwealth. So far is the effect of this option from awaiting an act of election to be done by the devisee, and depending on such act, that it has been decided, where a subsequent election had been made to take as money, by persons disabled to hold the interest in land, that the act of election came too late to change the character of the devise, which, by virtue of the option it carried with it, had thrown upon the devisee an estate in the lands, the instant the will itself began its operation. It is true, that the decision in *Roper* v. *Radcliffe* is founded on a particular act of parliament against papists: but this is no objection, *if the act of parliament creates precisely the same disabilities in respect to the Catholics which the common law had created in relation to aliens. For if their respective disabilities as to land be the same, a devise of lands to one, will receive precisely the same construction as a devise of lands to the other. The object of the statute of 11 & 12 Wm. III., ch. 4, was to render papists, aliens, in regard to lands in England. The stability of the government being supposed to depend upon this policy, "the design of the maker of this law," says Lord Chief Justice PARKER, "was, first, to get the lands of this kingdom out of the hands of papists." "And, secondly, to prevent them from making any new acquisition." 9 Mod. 191. The first object does not relate to aliens; but the second applies precisely to them, and the provisions of the act, as to papists, are substantially the same with those of the common law as to aliens. It is not, however, the disabilities of either which are to effect the construction of this devise: that construction is first to be made on the terms of the devise itself, and then, whatever legal consequence would result from the disability of the one, will equally result from that of the other. In *Roper* v. *Radcliffe*, it was held, that though lands devised to be absolutely sold for the payment of debts and legacies, were to be considered as money, so far as creditors and legatees were concerned, yet, as to the residuary devisee, they were to be considered as lands, because of his option to prevent the sale, by paying the debts and legacies, or his *option to have a decree for the sale of so much only as the debts and legacies should require; and it was determined in that case, that the *residuum* devised to the papists should be considered as land, and therefore, within the prohibition of the statute. The authority of this case has been repeatedly recognised in subsequent decisions, all of which concur to show, that though a devise of lands to be sold, is considered as personal estate, as to creditors and specific legatees, yet it is considered as land in respect to the heirs and residuary legatees. *Hill* v. *Filkins*, 2 P. Wms. 6; *Davers* v. *Dewes*, 3 Ibid. 46; *Carrick* v. *Fergus*, 2 Ibid, 362; 2 Bro. P. C. 412; 2 P. Wms. 4; *Attorney-General* v. *Lord Weymouth*, Ambl. 20; *King* v. *Inhabitants of Wivelingham*, 2 Doug. 737. And where none of it is wanting for the payment of debts and legacies, the whole may be retained as land. This doctrine is founded on the right of election, resulting from the devise. But no actual election need be made, to produce the legal effect; it is the same, though the parties are disabled to elect: they cannot defeat its operation, by electing to take as money; and where nothing is done, indicative of an election, the principle still operates.

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March 11th, 1818. WASHINGTON, Justice, delivered the opinion of the court.—The incapacity of an alien to take, and to hold beneficially, a legal

or equitable estate in real property, is not disputed by the counsel for the
*577] plaintiff ; and it is admitted by the counsel for the state of *Virginia, that this incapacity does not extend to personal estate. The only inquiry, then, which this court has to make is, whether the above clause in the will of Robert Craig is to be construed, under all the circumstances of this case, as a bequest to Thomas Craig of personal property, or as a devise of the land itself?

Were this a new question, it would seem extremely difficult to raise a doubt respecting it. The common sense of mankind would determine, that a devise of money, the proceeds of land directed to be sold, is a devise of money, notwithstanding it is to arise out of land ; and that a devise of land, which a testator by his will directs to be purchased, will pass an interest in the land itself, without regard to the character of the fund out of which the purchase is to be made. The settled doctrine of the courts of equity correspond with this obvious construction of wills, as well as of other instruments, whereby land is directed to be turned into money, or money into land, for the benefit of those for whose use the conversion is intended to be made. In the case of *Fletcher* v. *Ashburner* (1 Bro. C. C. 497), the Master of the Rolls says, that "nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this, in whatever manner the direction is given." He adds, "the owner of the fund, or the con-
*578] tracting parties, may make land money, or money *land. The cases establish this rule universally." This declaration is well warranted by the cases to which the Master of the Rolls refers, as well as by many others. (See *Doughty* v. *Bull*, 2 P. Wms. 320 ; *Yeates* v. *Compton*, Ibid. 358 ; *Trelawney* v. *Booth*, 2 Atk. 307.)

The principle upon which the whole of this doctrine is founded is, that a court of equity, regarding the substance, and not the mere forms and circumstances of agreements and other instruments, considered things directed or agreed to be done, as having been actually performed, where nothing has intervened which ought to prevent a performance. This qualification of the more concise and general rule, that equity considers that to be done which is agreed to be done, will comprehend the cases which come under this head of equity. Thus, where the whole beneficial interest in the money, in the one case, or in the land, in the other, belongs to the person for whose use it is given, a court of equity will not compel the trustee to execute the trust, against the wishes of the *cestui que trust*, but will permit him to take the money, on the land, if he elect to do so, before the conversion has actually been made ; and this election he may make, as well by acts or declarations, clearly indicating a determination to that effect, as by application to a court of equity. It is this election, and not the mere right to make it, which changes the character of the estate, so as to make it real or personal, at the will of the party entitled to the beneficial interest.

*If this election be not made, in time to stamp the property with
*579] a character different from that which the will or other instrument gives it, the latter accompanies it, with all its legal consequences, into the hands of those entitled to it in that character. So that, in case of the death of the *cestui que trust*, without having determined his election, the property

will pass to his heirs or personal representatives, in the same manner as it would have done, had the trust been executed, and the conversion actually made in his lifetime.

In the case of *Kirkman* v. *Mills* (13 Ves. 338), which was a devise of real estate to trustees, upon trust to sell, and the moneys arising, as well as the rents and profits till the sale, to be equally divided between the testator's three daughters, A., B. and C.; the estate was, upon the death of A., B. and C., considered and treated as personal property, notwithstanding the *cestuis que trust*, after the death of the testator, had entered upon, and occupied the land, for about two years prior to their deaths; but no steps had been taken by them, or by the trustees, to sell, nor had any requisition to that effect been made by the former to the latter. The Master of the Rolls was of opinion, that the occupation of the land for two years was too short to presume an election. He adds, "the opinion of Lord Rosslyn, that property was to be taken as it happened to be at the death of the party from whom the representative claims, had been much doubted by Lord Eldon, who held, that without some act, it must be considered as being in the state in *which it ought to be; and the Lord Rosslyn's rule was new, and not according to the prior cases. [*580

The same doctrine is laid down and maintained in the case of *Edwards* v. *The Countess of Warwick* (2 P. Wms. 171), which was a covenant, on marriage, to invest 10,000*l.*, part of the lady's fortune, in the purchase of land in fee, to be settled on the husband for life, remainder to his first and every other son in tail-male, remainder to the husband in fee. The only son of this marriage having died without issue, and intestate, and the investment of the money not having been made during his life, the Chancellor decided, that the money passed to the heir-at-law; that it was in the election of the son to have made this money, or to have disposed of it as such, and that, therefore, even his parol disposition of it would have been regarded; but that something to determine the election must be done.

This doctrine, so well established by the cases which have been referred to, and by many others which it is unnecessary to mention, seems to be conclusive upon the question which this court is ealled upon to decide, and would render any further investigation of it useless, were it not for the case of *Roper* v. *Radcliffe*, which was cited, and mainly relied upon, by the counsel for the state of Virginia. The short statement of that case is as follows: John Roper conveyed all his lands to trustees and their heirs, in trust, to sell the same, and out of the proceeds, and of the rents and profits till sale, to pay certain debts, and the overplus of the money to be paid as he, the said John Roper, by his will or otherwise *should appoint, and for want of such appointment, for the benefit of the said John Roper and [*581 his heirs. By his will, reciting the said deed, and the power reserved to him in the surplus of the said real estate, he bequeathed several pecuniary legacies, and then gave the residue of his real and personal estate to William Constable and Thomas Radcliffe, and two others, and to their heirs. By a codicil to this will, he bequeathed other pecuniary legacies; and the remainder, whether in lands or personal estate, he gave to the said W. C. and T. R. Upon a bill filed by W. C. and T. R. against the heir-at-law of John Roper, and the other trustees, praying to have the trust executed, and the residue of the money arising from the sale of the lands to be paid over to

them ; the heir-at-law opposed the execution of the trust, and claimed the land as a resulting trust, upon the ground of the incapacity of Constable and Radcliffe to take, they being papists. The decree of the court of chancery, which was in favor of the papists, was, upon appeal to the house of lords, reversed, and the title of the heir-at-law sustained ; six judges against five being in his favor.

Without stating at large the opinion upon which the reversal took place, this court will proceed, 1st. To examine the general principles laid down in that opinion ; and then, 2d. The case itself, so far as it has been pressed upon us as an authority to rule the question before the court. In performing the first part of this undertaking, it will not be necessary to question any one of the premises laid down in that opinion. They are, *1. That land devised to trustees, to sell for payment of debts and legacies, is to be deemed as money. This is the general doctrine established by all the cases referred to in the preceding part of this opinion. 2. That the heir-at-law has a resulting trust in such land, so far as it is of value, after the debts and legacies are paid, and that he may come into equity and restrain the trustee from selling more than is necessary to pay the debt and legacies ; or he may offer to pay them himself, and pray to have a conveyance of the part of the land not sold, in the first case, and the whole, in the latter, which property will, in either case, be land, and not money. This right to call for a conveyance is very correctly styled a privilege, and it is one which a court of equity will never refuse, unless there are strong reasons for refusing it. The whole of this doctrine proceeds upon a principle which is incontrovertible, that where the testator merely directs the real estate to be converted into money, for the purposes directed in his will, so much of the estate, or the money arising from it, as is not effectually disposed of by the will (whether it arise from some omission or defect in the will itself, or from any subsequent accident, which prevents the devise from taking effect), results to the heir-at-law, as the old use not disposed of.[1] Such was the case of *Crewe* v. *Bailey* (3 P. Wms. 20), where the testator having two sons, A. and B., and three daughters, devised his lands to be sold to pay his debts, &c., and as to the moneys arising by the sale, after debts paid, gave 200*l.* to A. the eldest son, at the age of 21, and the residue to his four younger children. A. died before *the age of 21, in consequence of which, the bequest to him failed to take effect. The court decided, that the 200*l.* should be considered as land, to descend to the heir-at-law of the testator, because it was, in effect, the same as if so much land as was of the value of 200*l.* was not directed to be sold, but was suffered to descend. The case of *Ackroyd* v. *Smithson* (1 Bro. C. C. 503) is one of the same kind, and establishes the same principle. So, likewise, a money provision, under a marriage contract, to arise out of land, which did not take effect, on account of the death of the party for whose benefit it was intended, before the time prescribed, resulted as money to the grantor, so as to pass under a residuary clause in his will. (*Hewitt* v. *Wright*, 1 Bro. C. C. 86.)

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But even in cases of resulting trusts, for the benefit of the heir-at-law, it is settled, that if the intent of the testator appears to have been, to stamp upon the proceeds of the land described to be sold, the quality of

[1] Wilson *v.* Hamilton, 9 S. & R. 424 ; Wood *v.* Cone, 1 Paige 471.

personalty, not only to subserve the particular purposes of the will, but to all intents, the claim of the heir-at-law to a resulting trust is defeated, and the estate is considered to be personal. This was decided in the case of *Yeates* v. *Compton* (2 P. Wms. 308), in which the Chancellor says, that the intention of the will was to give away all from the heir, and to turn the land into personal estate, and that this was to be taken as it was at the testator's death, and ought not to be altered by any subsequent accident, and decreed the heir to join in the sale of the land, and the money arising therefrom to be *paid over as personal estate to the representatives of the annuitant, and to those of the residuary legatee. In the case of [*584 *Fletcher* v. *Ashburner*, before referred to, the suit was brought by the heir-at-law of the testator, against the personal representatives and the trustees claiming the estate, upon the ground of a resulting trust. But the court decreed the property, as money, to the personal representatives of him to whom the beneficial interest in the money was bequeathed, and the Master of the Rolls observes, that the cases of *Emblyn* v. *Freeman*, and *Crewe* v. *Bailey*, are those where real estate being directed to be sold, some part of the disposition has failed, and the thing devised has not accrued to the representative or devisee, by which something has resulted to the heir-at-law.

It is evident, therefore, from a view of the above cases, that the title of the heir to a resulting trust can never arise, except when something is left undisposed of, either by some defect in the will, or by some subsequent lapse, which prevents the devise from taking effect; and not even then, if it appears, that the intention of the testator was, to change the nature of the estate from land to money, absolutely and entirely, and not merely to serve the purposes of the will. But the ground upon which the title of the heir rests is, that whatever is not disposed of remains to him, and partakes of the old use, as if it had not been directed to be sold.

The third proposition laid down in the case of *Roper* v. *Radcliffe* is, that equity will extend the same privilege to the residuary legatee, which is allowed *to the heir, to pay the debts and legacies, and call for a conveyance of the real estate, or to restrain the trustees from selling [*585 more than is necessary to pay the debts and legacies. This has, in effect, been admitted in the preceding part of this opinion; because, if the *cestui que trust* of the whole beneficial interest in the money to arise from the sale of the land, may claim this privilege, it follows, necessarily, that the residuary legatee may, because he is, in effect, the beneficial owner of the whole, charged with the debts and legacies, from which he will be permitted to discharge it, by paying the debts and legacies, or may claim so much of the real estate as may not be necessary for that purpose.

But the court cannot accede to the conclusion, which, in *Roper* v. *Radcliffe*, is deduced from the establishment of the above principles. That conclusion is, that in respect to the residuary legatee, such a devise shall be deemed as land in equity, though in respect to the creditors and specific legatees, it is deemed as money. It is admitted, with this qualification, that, if the residuary legatee thinks proper to avail himself of the privilege of taking it as land, by making an election in his lifetime, the property will then assume the character of land. But if he does not make this election, the property retains its character of personalty, to every intent and purpose. The cases before cited seem to the court to be conclusive upon this point;

and none were referred to, or have come under the view of the court, which
*586] *sanction the conclusion made, in the unqualified terms used in the case of *Roper* v. *Radcliffe.*

As to the idea that the character of the estate is affected by this right of election, whether the right be claimed or not, it appears to be as repugnant to reason, as we think it has been shown to be, to principle and authorities. Before anything can be made of the proposition, it should be shown, that this right or privilege of election is so indissolubly united with the devise, as to constitute a part of it, and that it may be exercised in all cases, and under all circumstances. This was, indeed, contended for, with great ingenuity and ability, by the counsel for the state of Virginia, but it was not proved to the satisfaction of the court. It certainly is not true, that equity will extend this privilege in all cases to the *cestui que trust.* It will be refused, if he be an infant. In the case of *Seeley* v. *Jago* (1 P. Wms. 389), where money was devised, to be laid out in land in fee, to be settled on A., B. and C., and their heirs, equally to be divided: on the death of A., his infant heir, together with B. and C., filed their bill claiming to have the money, which was decreed accordingly as to B. and C.; but the share of the infant was ordered to be put out for his benefit, and the reason assigned was, that he was incapable of making an election, and that such election, if permitted, would, in case of his death, be prejudicial to his heir.

In the case of *Foone* v. *Blount* (Cowp. 467), Lord Mansfield, who is compelled to acknowledge the authority of *Roper* v. *Radcliffe* in parallel
*587] cases, *combats the reasoning of Chief Justice Parker upon this doctrine of election, with irresistible force. He suggests, as the true answer to it, that though in a variety of cases, this right exists, yet it was inapplicable to the case of a person who was disabled by law from taking land, and that, therefore, a court of equity would, in such a case, decree that he should take the property as money.

The case of *Walker* v. *Denne* (2 Ves. jr. 170) seems to apply with great force to this part of our subject. The testator directed money to be laid out in lands, tenements and hereditaments, or on long terms, with limitations applicable to real estate. The money not having been laid out, the crown, on failure of heirs, claimed the money as land. It was decided, that the crown had no equity against the next of kin, to have the money laid out in real estate, in order to claim it by escheat. It was added, that the devisees, on becoming absolutely entitled, have the option given by the will; and a deed of appointment by one of the *cestuis que trust,* though a *feme covert,* was held a sufficient indication of her intention, that it should continue personal, against her heir, claiming it as ineffectually disposed of, for want of her examination. This case is peculiarly strong, from the circumstance, that the election is embodied in the devise itself; but this was not enough, because the crown had no equity to force an election to be made, for the purpose of producing an escheat.

Equity would surely proceed contrary to its regular course, and the principles which universally govern it, to allow the right of election, where
*588] it is desired, *and can be lawfully made, and yet refuse to decree the money, upon the application of the alien, upon no other reason, but because, by law, he is incapable to hold the land: in short, to consider him in the same situation as if he had made an election, which would have

been refused, had he asked for a conveyance. The more just and correct rule would seem to be, that where the *cestui que trust* is incapable to take or to hold the land beneficially, the right of election does not exist, and consequently, that the property is to be considered as being of that species into which it is directed to be converted.

Having made these observations upon the principles laid down in the case of *Roper* v. *Radcliffe*, and upon the arguments urged at the bar in support of them, very few words will suffice to show, that as an authority, it is inapplicable to this case. The incapacities of a papist, under the English statute of 11 & 12 Wm. III., c. 4, and of an alien at common law, are extremely dissimilar. The former is incapable to take by purchase, any lands or profits out of lands; and all estates, terms and any other interests or profits whatsoever out of lands, to be made, suffered or done, to or for the use of such person, or upon any trust for him, or to or for the benefit or relief of any such person, are declared by the statute to be utterly void. Thus, it appears, that he cannot even take. His incapacity is not confined to land, but to any profit, interest, benefit or relief, in or out of it. He is not only disabled from taking or having the benefit of any *such interest, but the will or deed itself, which attempts to pass it, is void. In *Roper* v. [*589 *Radcliffe*, it was strongly insisted, that the money given to the papist, which was to be the proceeds of the land, was a profit or interest out of the land. If this be so (and it is not material in this case to affirm or deny that position), then the will of John Roper in relation to the bequest to the two papists, was void under the statute; and if so, the right of the heir-at-law of the testator, to the residue, as a resulting trust, was incontestible. The cases above cited have fully established that principle. In that case, too, the rents and profits, till the sale, would have belonged to the papists, if they were capable of taking, which brought the case still more strongly within the statute; and this was much relied on, not only in reasoning upon the words, but the policy of the statute.

Now, what is the situation of an alien? He can not only take an interest in land, but a freehold interest in the land itself, and may hold it against all the world but the king, and even against him, until office found, and he is not accountable for the rents and profits previously received.(*a*) In this case, the will being valid, and the alien capable of taking under it, there can be no resulting trust to the heir, and the claim of the state is founded solely upon a supposed equity, to have the land by escheat, as if the alien had, or could, upon the principles of a court of equity, *have elected to take [*590 the land instead of the money. The points of difference between the two cases are so striking, that it would be a waste of time to notice them in detail.

It may be further observed, that the case of *Roper* v. *Radcliffe* has never, in England, been applied to the case of aliens; that its authority has been submitted to with reluctance, and is strictly confined in its application to cases precisely parallel to it. Lord Mansfield, in the case of *Foone* v. *Blount*, speaks of it with marked disapprobation; and we know, that had Lord Trevor been present, and declared the opinion he had before entertained, the judges would have been equally divided.

(*a*) See Jackson, ex dem. State of New York, *v.* Clarke, *ante*, p. 12, n.

The case of the *Attorney-General* and *Lord Weymouth* (Ambler 20) was also pressed upon the court, as strongly supporting that of *Roper* v. *Radcliffe*, and as bearing upon the present case. The first of these propositions might be admitted; although it is certain, that the mortmain act, upon which that case was decided, is even stronger in its expression than the statute against papists, and the Chancellor so considers it; for, he says, whether the surplus be considered as money or land, it is just the same thing, the statute making void all charges and incumbrances on land, for the benefit of a charity. But if this case were, in all respects, the same as *Roper* v. *Radcliffe*, the observations which have been made upon the latter would all apply to it. It may be remarked, however, that in this case, the Chancellor avoids expressing any opinion upon the question, whether the money to arise from the sale of *the land, was to be taken as personalty or land; and, although he mentions the case of *Roper* v. *Radcliffe*, he adds, that he does not depend upon it, as it was immaterial, whether the surplus was to be considered as land or money, under the mortmain act.

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Upon the whole, we are unanimonsly of opinion, that the legacy given to Thomas Craig, in the will of Robert Craig, is to be considered as a bequest of personal estate, which he is capable of taking for his own benefit.

Certificate accordingly.

Cameron *v.* McRoberts.

Decree.—Jurisdiction.

The circuit courts have no power to set aside their decrees in equity, on motion, after the term at which they are rendered.[1]

Where McR., a citizen of Kentucky, brought a suit in equity, in the circuit court of Kentucky, against C. C., stated to be a citizen of Virginia, and E. J. and S. E., without any designation of citizenship; all the defendants appeared and answered; and a decree was pronounced for the plaintiff: it was *held*, that if a join interest vested in C. C. and the other defendants, the court had no jurisdiction over the cause; but that if a distinct interest vested in C. C., so that substantial justice (so far as he was concerned) could be done, without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone.

Appeal from the Circuit Court for the district of Kentucky. *John McRoberts, stated in the pleadings to be a citizen of the state of Kentucky, brought his suit in equity, in the district court of Kentucky (said court then having by law the jurisdiction of a circuit court) against Charles Cameron, stated to be a citizen of Virginia, and Ephraim Jackson, Samuel Emerson, and other parties named in the bill, without any designation of citizenship. The defendant Cameron was not served with process, but appeared and answered the bill, as did the other defendants. The cause was heard, and at the November term of said court, in 1804, a final decree was pronounced for the plaintiff McRoberts.

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In 1805, the defendant Cameron filed a bill of review, which is now pending, and at the May term of the circuit court of 1811, moved the court to set aside the decree, and to dismiss the suit, because the want of jurisdiction appeared on the record; and upon the allegation, that the said Jackson,

[1] McMicken *v.* Perin, 18 How. 507; Scott *v.* Blaine, Bald. 287; Brush *v.* Robbins, 3 McLean 486.