pended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.

A majority of the Court is of opinion, that judgment upon this special verdict ought to be given for the plaintiffs, which opinion is to be certified to the Circuit Court.

Certificate for the plaintiffs.

[Devise.]

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J. B. devises all his real estate to the testator's son, J. B., jun., and his heirs lawfully begotten; *and, in case of his death without such issue*, he orders A. Y., his executors and administrators, to sell the real estate *within two years after the son's death*; and he bequeaths the proceeds thereof to his *brothers and sisters*, by name, *and their heirs for ever, or such of them as shall be living at the death of the son, to be divided between them in equal proportions, share and share alike.* All the brothers and sisters die, leaving issue. Then A. Y. dies, and afterwards J. B., jun., the son, dies without issue. *Heirs* is a word of limitation; and none of the testator's brothers and sisters being alive at the death of J. B., jun., the devise to them failed to take effect.

Quære, Whether a sale by the executors, &c. under such circumstances, is to be considered as valid in a Court of law?

However this may be, a sale, thus made, after the lapse of two years from the death of J. B., jun., is without authority, and conveys no title.

Quære, Under what circumstances a Court of equity might relieve,

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in case the trustee should refuse to exercise the power within the prescribed period, or should exercise the same after that period?

A power to A. Y., and his executors or administrators, to sell, may be executed by the executors of the executors of A. Y.

ERROR to the Circuit Court of Pennsylvania. This was an action of ejectment, brought in the Court below, by the plaintiffs in error, to recover the possession of a messuage and lot in the city of Philadelphia. The special verdict in the case stated, that on the 8th of August, 1768, John Bleakley, of Philadelphia, being then in London, made and duly executed his last will, as follows: "In the name of God, amen. I, John Bleakley, of Philadelphia, esquire, now in London, and shortly bound to Philadelphia, being in perfect health, and of sound and disposing mind, memory, and understanding, and considering the certainty of death, and the uncertainty of the time thereof, do therefore make and declare this my last will and testament, in manner following, that is to say: First, and principally, I commend my soul to God, and my body to the earth or sea, as he shall please to order; and as for and concerning my worldly estate, I give, devise, and bequeath the same in manner following, that is to say: First, I will and desire that all my just debts and funeral expenses, (if any,) be fully paid and satisfied, as soon as conveniently may be after my decease. Also, I give and bequeath to my brother, David Bleakley, living in the north of Ireland, the sum of ten pounds sterling. Also, I give and bequeath to my brother, William Bleakley, living near Dungannon, the sum of ten pounds sterling. Also, I

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give and bequeath to my sister, Margaret Harkness, of Dungannon, the sum of one hundred pounds sterling. Also, I give and bequeath to my sister, Sarah Boyle, wife of the Rev. Mr. Boyle, the sum of ten pounds sterling. Also, I give and bequeath to my cousin, Archibald Young, of Philadelphia, an annuity of thirty pounds, Pennsylvania money, to be paid to him out of the rents and profits of my real estate, on the 25th day of March, in every year, during the joint lives of him, the said Archibald Young, and my son, John Bleakley, or his heirs lawfully begotten. But, in case of the decease of my said son, without issue lawfully begotten as aforesaid, in the lifetime of the said Archibald Young, then the said annuity is to cease; and in lieu thereof, I give and bequeath unto the said Archibald Young, and his assigns, the sum of four hundred pounds sterling, payable out of the proceeds of my real estate, when the same is sold and disposed of, according to the intention of this my will, herein after mentioned, and before any dividend is made of the proceeds of my said estate. And this legacy or bequest is made to my said cousin, Archibald Young, not only for the natural affection I have and bear to him as a relation, but also as a full compensation for the services he has already rendered me, and in lieu of his commissions for the trouble he may hereafter have in the execution of this my will. All the rest and residue of my estate, real and personal, of what nature, kind or quality the same may be or consist, and herein before not particularly disposed of, I give,

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devise, and bequeath to my son, John Bleakley, and his heirs lawfully begotten; and in case of the decease of my said son, without such issue, then I do direct and order my said cousin, Archibald Young, his executors or administrators, to sell and dispose of my real estate, within two years after the decease of my said son, John Bleakley, to the best advantage. And I do hereby give and bequeath the proceeds thereof to my said brothers, David Bleakley and William Bleakley, and my said sisters, Margaret Harkness and Sarah Boyle, and their heirs for ever, or such of them as shall be living at the decease of my said son, to be divided between them in equal proportions, share and share alike, after deducting out of such proceeds the sum of 400 pounds sterling, herein before given and bequeathed to the said Archibald Young, immediately on the decease of my said son without issue in lieu of the annuity above mentioned. And in case my said son should die before he attains the age of twenty-one years, without issue lawfully begotten, as aforesaid, then my will and mind is, that the remainder of my personal estate, hereby intended for my said son at his own disposal, if he should live to attain the age of twenty-one years, shall go to, and be divided amongst my said brothers and sisters, with the proceeds of my real estate, as is herein before directed to be divided. And I do hereby nominate and appoint the said Archibald Young, and my said son, John Bleakley, executors of this my will, hereby revoking, and making void, all former wills, codicils, and bequests, by me, at any time or times

heretofore made, and do ordain this will to be as and for my last will and testament. In witness whereof," &c.

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The testator died in the month of January, 1769. His brothers and sisters all died, leaving children, (who are still alive,) at or about the following periods, viz. Sarah Boyle between the years 1760 and 1770; William in the year 1775; David in the year 1790, and Margaret Harkness in the year 1794. The children were of full age, or nearly so, when the above will was made, and were personally known to the testator. Archibald Young died in May, 1782, having duly made and executed his last will and testament, whereby he appointed Robert Correy his executor, who, on the 24th of April, 1797, made his last will and testament, and thereof appointed Eleanor Curry, and James Boyd, the executors, and died in June, 1802.

John Bleakley, the son, died on the 3d of September, 1802, without issue, and of full age, having previously executed his last will and testament, whereof he appointed J. P. Norris his executor, and thereby directed his real and personal estate to be sold, and the proceeds, after paying certain legacies, to be divided among certain of his relations. On the 25th of May, 1803, the said Norris, for a valuable consideration, sold and conveyed the premises in dispute to W. Folwell, who, on the 21st of April, 1810, conveyed the same for a valuable consideration to the defendant. On the 1st of February, 1805, Eleanor Curry, and James Boyd, the executors of R. Correy, (who was the

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executor of A. Young,) by deed, bargained and sold the premises in question to James Smith, which deed was afterwards cancelled; and subsequently, on the 27th of March, 1820, they sold and conveyed the said premises to the lessor of the plaintiff, who, at the time of his purchase, had notice of the death of the brothers and sisters of John Bleakley, in the lifetime of his son.

Upon this special verdict, judgment having been rendered, *pro forma*, for the defendant, in the Court below, the cause was brought by writ of error to this Court.

Feb. 25th.

Mr. *Wheaton*, for the plaintiff, stated, that the will of J. Bleakley, senior, was, in effect, a devise of an estate tail to the testator's son, with a remainder over to his executor, A. Young, &c. in trust to sell, in case of the son's dying without issue, and the proceeds to be distributed equally among his brothers and sisters, and their *heirs*, (as a *designatio personæ*,) or such of *them* as should be living at the son's death. But the first difficulty in the cause was, a determination of the Supreme Court of Pennsylvania, upon an ejectment brought in that Court under the same will. The State Court there held, that the word "*heirs*" was a word of limitation; and none of the brothers and sisters being alive at the death of the son, J. Bleakley, junior, the object of the power to sell had failed; their issue were not entitled, and a sale by the executors of Young conveyed no title; although it was admitted, that the power might be

executed by Young's executors, if the object of sale had continued.[a]

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This decision was that of two Judges only,[b] and could hardly be considered as a binding authority even in the State Courts, whatever respect might be felt for the great abilities of the learned Judges by whom it was pronounced. This is not one of those cases where the decisions of the State Courts, on questions of local law, establish rules of property, which this Court will not disturb; but it is a mere question of the interpretation of a will, depending entirely on the rules of the common law.

There are two questions for consideration: (1.) Whether the power, or trust, to sell, now exists? and, (2.) How the distribution of the proceeds of the sale is to be made?

The second question is certainly subordinate to the first. For if there be an absolute power to sell, (as will be contended,) then the disposition of the fund is a matter to be determined between the trustees, and those who may claim it in a Court of equity; but it cannot interfere with the paramount authority to sell. But it has been supposed, that if the object for creating the fund no longer exists, the power is gone with it. The second question, therefore, will be considered first; not meaning, however, to admit, that the one is a corollary from the other. Reasons may have existed

a Smith's lessee v. Folwell, 1 *Binney's Rep.* 546.

b Tilghman, Ch. J., and Yeates, J.; Smith, J., died after the argument, and before judgment, and Breckenridge, J., dissented.

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to induce the testator to desire a sale at all events; and the fact of its not being in express terms restricted to any particular event, goes to prove, that it was to be made under all circumstances, except only the son's having issue.

Such is the necessary ambiguity of all human language, that particular words used in a will, or any other writing, must be taken in their most usual technical sense, or not, according to other considerations. One of the most important of these considerations, is the design of the writer, as manifested by the general scope of the writing itself. What, then, was the intention of the testator, and who were the objects of his bounty, as manifested by the will itself? We contend, that he intended to devise all his property, and to retain it in his own family. The first and great rule in the exposition of wills, is the *intention of the testator expressed*, which, if consistent with the rules of law, shall prevail.[a] To this, all other rules are but subsidiary or suppletory.[b] Supposing this to be the design of the testator, the means are appropriate to the end. He gives to his cousin, A. Young, a small pecuniary annuity, burthened with onerous duties; and to his son, the mere usufruct of the residue, unless he should have children; in which event only the restraint on alienation is removed.

The first great object of the testator's bounty,

a Cas. Temp. Talbot, 43. 2 *Burr.* 770. 1 *Fonbl. Eq.* 413. Ambrose v. Hodgson, *Dougl.* 323.

b Sir W. Jones., Isæus. Comm. 308.

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then, was his *son*. The second class of objects was his *brothers and sisters;* and the third class was the *children of his brothers and sisters.*

Had the brothers and sisters survived the son, they would unquestionably have succeeded, by the executory devise, on the occurrence of the sole contingency, viz. the death of the son, without issue lawfully begotten. Did the devise extend beyond the brothers and sisters? It is clear that it was not, *in terms*, restricted to the brothers and sisters personally: the terms of it contemplate something more. The words are, "to my said brothers, &c. and my said sisters, &c. and their heirs for ever, or such of them as shall be living at the decease of my said son, to be divided between them in equal proportions, share and share alike." Whatever may be the technical meaning of the word *heirs*, &c. the use of them certainly shows that the testator looked beyond the brothers and sisters. The opposite construction rejects words which the testator has thought fit to use; and it is a well established principle, that no words in a will shall be rejected that can bear any construction.[a] The opposite argument must also take for granted, that the words, "such of *them* as shall be living," &c. refer to *brothers and sisters* merely. But this supposition is contradicted, both by fair grammatical construction, and the general scope of the will. *Fiat relatio proximus antecedenti:* the word "*them*" is in immediate juxtaposition with

[a] Barry v. Edgeworth, 2 *P. Wms.* 575.

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the word "*heirs.*" The whole scope and object of the will, is to provide for the family; and to restrict this devise to the brothers and sisters, is to defeat this object. The intention of the testator was evidently to dispose of his property, not to leave it floating and precarious. The death of his *brothers and sisters* was naturally to have been expected; but of their *children*, some of *them* would probably be alive, should the son die without issue. It was not for the purpose of giving a fee simple that the word "*heirs*" was introduced; for it was personal property which was devised, and which would pass absolutely without words of inheritance. The children of his brothers and sisters were personally well known and dear to him. They were, therefore, the natural objects of his bounty; and this extrinsic circumstance may aid in the construction.

But what is the meaning of the word "*heirs,*" as coupled with the words "*brothers* and *sisters?*" It may mean, (1.) HEIRS AT LAW; in which case, whilst it bears the most technical meaning, it will consist with a liberal and rational interpretation. The proceeds go to the brothers, &c. If any of them are dead, to the heir at law of the deceased, standing in *loco parentis*, and the surviving brothers, &c. If all are dead, leaving children, to the heirs at law of all. If all are dead, and some have left no children, and, therefore, no heirs at law, except the children of the others, then to the surviving heirs at law. (2.) Or it may mean CHILDREN. It is thus used in popular discourse, and writings not technical: "If *children*, then

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heirs," says St. Paul.[a] The testator himself uses it in this sense, in at least one other part of his will. He says, "I give and bequeath to my son, John Bleakley, and his *heirs* lawfully begotten; and in case of his decease without *such issue*," &c. And this use of the word is perfectly legal. Thus, in *Jones* v. *Morgan:* "It is first necessary to determine upon the whole of the will, whether, by the word *heirs*, the testator meant that succession of persons so denominated by the law. If that appear to be the intention, the rule in Shelly's case must, in all events, take place. But when the word is used in any other sense, the rule is not applicable, and the limitation must have its effect, as if proper words had been made use of."[b] So, in *Bamfield* v. *Popham*, "It was agreed, that the word heirs was not always, and of necessity, to be intended as a word of limitation. Thus, in 2 *Ventr.* 311., a devise to A., for life, remainder to the heirs male of the body of A., now living: these were words of purchase. So, in *Raym.* 279. Lisle v. Gray, 1 *Jones*, 114., lands were limited to A. for life, &c. the words *heirs male*, were understood to signify sons."[c] And in *Darbison* v. *Beaumont:* "Devise to the *heirs male* of J. S., begotten. J. S. having a son, and the testator taking notice that J. S. was then

a *Rom.* viii. 17.

b *Bro. Ch. Rep.* 206.

c 1 *P. Wms.* 59. S. P. 1 *P. Wms.* 87. 142. 754. 2 *P. Wms.* 471. 1 *Eq. Cas. Abr.* 194. 3 *Bro. Parl. Cas.* 467. 2 *Ves.* 646. 1 *Ventr.* 225. 2 *Lord Raym.* 873. 1407. 2 *Salk.* 679. *Dougl.* 323.

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living, a sufficient description of testator's meaning, and such son shall take, though (strictly speaking) he is not heir." "As to the objection, that, Mr. Long being living, there could not, in a legal sense, be any heir male, &c. it was answered, that the intent of the testator, by the devise, (which was the only matter in question,) did plainly appear, &c. That the word *heir* had, in law, several significations: in the strictest, it signified one who had succeeded to a dead ancestor; but in a more general sense, it signified an heir apparent, which supposes the ancestor to be living; and in this latter sense, the word *heir* is frequently used in statutes, law books, and records."[a] By way of analogy, it may also be mentioned, that the word "*issue*" is frequently taken as a *descriptio personæ*.[b]

The rule in Shelly's case has been frequently broken in upon in favour of last wills. Once fix the intention, and the word *heirs* may as well be a word of *purchase*, as a word of *limitation*. And it may even be taken as a word of purchase in a *deed*, if such be the intention of the grantor.[c] So, also, in marriage articles.[d] This is not upon the principle, that the rules of property are different

a 1 *P. Wms.* 232. S. P. 1 *Ventr.* 344. 2 *Lev.* 232. *Raym.* 330. 2 *Sir W. Jones*, 99. *Pollexf.* 457.

b *Cruise's Dig.* tit. 38. *Devise*, c. 10. s. 33—35.

c Lisle v. Gray, *Th. Raym.* 315. S. P. Walker v. Snow, *Palmer's Rep.* 349.

d Honor v. Honor, 1 *P. Wms.* 123. Bale v. Coleman, *Id.* 142. Trevor v. Trevor, *Id.* 612. West v. Errisey, 2 *P. Wms.* 349.

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in Chancery from what they are at law; that notion was long since completely exploded.[a] But the rule has been still more frequently relaxed in the case of devises, for very obvious reasons.[b] Several attempts have been made, both by Judges and elementary writers, to classify the cases, in which, by an exception to the rule, the word *heirs* is construed as a word of purchase; but all the exceptions will be found to turn upon the intention of the testator. And when it is said, that this intention must not be contrary to the rules of law, this dictum does not apply to the technical *sense of the terms* used by the testator. It merely applies to the *legality of the object* which he wishes to effect. e. g. The testator wishes to create a perpetuity; *any words*, however untechnical, which import the idea, are sufficient; but the law will not permit a perpetuity to be created *at all.* This distinction is clearly stated by Lord Keeper Henley. "It was argued, that if the intent was plain, yet, if the testator had used words which, by the rules of law, imported a different signification, the rule of law, and not the intent, would prevail; but there was no such rule applicable to this case. In case of a will, the intent shall prevail, if not contrary to law; the meaning of which is, *if the limitations are such as the law allows;* but it does not mean, that the words *must be taken in such signification* as the law imposed on them. If words, which, in

a Watts v. Ball, 1 *P. Wms.* 108. Philips v. Philips, *Id.* 35.

b Archer's case, 1 *Co. Rep.* 66. Luddington v. Kime, *Lord Raym.* 203. Backhouse v. Wells, 1 *Eq. Cas. Abr.* 184. 1 *Ventr.* 184. *Lord Raym.* 1561. Bagshaw v. Spencer, 1 *Ves.* 142.

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consideration of law, were generally taken as words of limitation, appear in a will to be very plainly intended as words of purchase, they must be considered as such both in Courts of law and equity."[a]

But, admitting, *argumenti gratia*, that if the children of the testator's brothers and sisters take in character of heirs, they must take in quality of heirs, i. e. by descent; they may take in this manner consistently with the rules of law. Either it is a contingent executory devise to their parents, or, as it is commonly called, an *executory interest*; or it is a contingency or *possibility coupled with an interest*. In the first case, although the devisees die before the contingency happens, their children will take by descent.[b] If it be a contingency or possibility coupled with an interest, they may take in the same manner.[c] It is now the settled text law, that these contingent estates are transmissible to the heirs of the devisee, where such devisee dies before the contingency happens, and if not disposed of before, will vest in such heirs when the contingency happens; though for-

a Austen v. Taylor, *Ambl.* 376. S. P. *Sir W. Jones, Isæus.* 308.

b Gurnell v. Wood, 8 *Vin. Abr.* 112. *Willes' Rep.* 211. S. P. Goodright v. Searle, 2 *Wils.* 29. Porter v. Bradley, 3 *Term Rep.* 143. Weale v. Lower, *Pollexf.* 54. Vick v. Edwards, 3 *P. Wms.* 372. 1 *H. Bl.* 30. 33. 3 *Term Rep.* 88.

c King v. Withers, 3 *P. Wms.* 414. Perry v. Phillips, 1 *Ves.* jr. 254. Selwyn v. Selwyn, 2 *Burr.* 1131. Roe v. Jones, 2 *H. Bl.* 30.

merly an opinion prevailed, that they could not pass by a will made previous to their vesting.[a]

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If it should be objected, that this is a *double contingency*, which is bad; the answer is, that there is no rule of law which prohibits a limitation on a double contingency, or a contingency on another contingency. A limitation may be good, though made to depend on any number of contingencies, if they be collateral to, or independent of each other, and may all happen within the legal time of limitation. In *Routledge* v. *Dorril*,[b] a grandchild took on a limitation dependent on no less than four contingencies.

It is a well established doctrine, that where a *class or denomination* of heirs, indefinitely, are intended to be embraced, the word *heirs* is a word of limitation; but where *particular or special persons* are constituted the stock of a new descent, it operates as a word of purchase.[c] Here the devise is to the brothers and sisters, and such of their heirs as may be living at a particular time. *Heirs general*, therefore, could not have been meant; but only the heirs of *each brother, and of each sister*, i. e. the children of each brother and sister. The term is restricted (supposing it to be a devise of the *realty*) to such as should be heir

a *Fearne's Cont. Rem.* 534. 537. *Cas. Temp. Talb.* 123. 2 *Ves.* 119. 1 *Str.* 131. 2 *Atk.* 618. *Watk. Desc.* 14. *Cruise's Dig.* tit. 38. *Devise*, c. 3. s. 18—21. c. 20. s. 43—53. 2 *Bl. Comm.* 290.

b 2 *Ves.* jr. 358.

c *Hargr. Law Tracts*, 561. Jones v. Morgan, 1 *Bro. Ch. Cas.* 206.

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of such of the brothers and sisters as were dead when J. Bleakley, jun. died without leaving issue. The heirship must be established by the known canons of descent; but when ascertained, the objects defined would still take by purchase. The word *heirs* is, indeed, a word of limitation, for the purpose of ascertaining who are to take; but after it has performed that office, the objects who are to take are in by purchase, and not by descent. And herein, it is humbly apprehended, consists the radical defect in the argument of the learned Judges of the State Court. If the word *heirs* necessarily compelled all who take under it, to take in quality of heirs, then the argument, that they must take *per stirpes*, and not *per capita*, might have its difficulties. But this word does not operate, exclusively, either as a word of purchase, or of limitation. That it is often a word of purchase has been before shown; and in the common case of a devise "to A. for life, remainder *to the heirs of B.* who leaves a *daughter*, and his wife enseint with a *son*. On the death of B. the *daughter* takes, under the description of heir, *by purchase*, and she shall not be devested by the subsequent birth of the son."[a] So, also, in the case of an estate to A. for life, remainder to the *right heirs* of B., or of an executory devise to the *right heirs* of A. The canons of descent are referred to for the purpose of ascertaining who are the *right heirs*; and, after this is ascertained, such persons

a Goodwright v. Wright, 1 *Str.* 30. *Dougl.* 499. note. *Watk. Desc.* 208.

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take by purchase. It does not follow, that because the word *heirs* is a word of limitation, that the heirs, when ascertained, must take *as heirs;* for there are many cases where terms of limitation operate only *sub modo* as such, viz. for the purpose of defining the objects who are to take in quality of purchasers. Thus, if a remainder be limited in gavelkind, or borough English lands, to the *right heirs of A.*, the common law points out the eldest son as the heir, contrary to the custom, which gives the land in the one case to all the sons, and in the other to the youngest son. "For," says Mr. Watkins, "notwithstanding we may thus have recourse to the *law of descents* to ascertain the persons who are to take, yet, when they are *once ascertained,* they take *as purchasers.*"[a] So, if lands be devised to the *right heirs of A.*, who leaves two daughters, they are both his heirs; but they take not as parceners, (for to do this they must take by descent,) but as joint-tenants, or in common, i. e. as purchasers.[b] In general, purchasers take *per capita,* and those who claim by descent, take *per stirpes;* but if the intention of the grantor or devisor can be better promoted by purchasers taking *per stirpes* than *per capita,* there is no inflexible rule of law to prevent it. In the present case, we hold, that the intention is plain, and that all claiming as heirs of those brothers and sisters would take *per stirpes,* even

a Watk. Desc. 226. *Co. Litt.* 220 *a.* Brown v. Barkman, 1 *Str.* 42.

b Coxden v. Clark, *Hob.* 33. 3 *Leon.* 14. 24.

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though they take by purchase; but whether they take in one way or the other is quite immaterial, provided it be shown, that the brothers and sisters *personally* were not the *sole objects* of the testator's bounty, and, consequently, need not survive J. Bleakley, jun.

The same construction has been adopted, respecting personal property, under the statute of distributions, 29 Charles II. c. 3. Where there is a bequest of personalty to the *relations* or *next of kin of A.*, the statute furnishes the rule; i. e. ascertains who are the persons comprehended within these words; and these persons may take *per capita*, though if distributed, in such case, under the statute, they would take *per stirpes*.[a]

That these children are entitled to take, *as purchasers*, under the word *heirs*, is manifest, as none can claim by descent, unless the subject of the limitation vests, or might have vested, in the ancestor, *qua* ancestor. But here no estate, *in land*, was ever contemplated to vest in the brothers or sisters named, or in either of them. The entire estate, in the *land*, vested either in Bleakley, jun. or in Young, the executor, &c. and the proceeds of a sale, i. e. *personalty* only, was to be paid over to such persons as satisfied the description entitled at the time of Bleakley, jun. his death without issue. Under no possible circumstances or view of the case, could these children take *in quality of heirs*; because nothing ever did or could vest in their parents as ancestors; and the

[a] *Prec. in Ch.* 401. 1 *Atk.* 470. 2 *P. Wms.* 385.

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subject itself of the devise was not real property, but money, of which heirship cannot with legal accuracy be predicated. It is, therefore, manifest, that if they take at all, it must be as purchasers, and that the word *heirs* may be used for the purpose of ascertaining who are embraced within the scope of the testator's bounty; and, having performed that duty, it is *functus officio,* and ceases to operate as a word of limitation.[a]

The next question in the cause is, whether the power to sell exists in those who have exercised it, and under a sale from whom, the plaintiff claims title?

And this divides itself into two inquiries: (1) Whether there is in any person, now existing, an authority to sell? (2) Whether the event has taken place, which, in the contemplation of the testator, was to occasion its exercise?

1. It is a familiar principle, that no execution of a trust shall fail for want of a trustee. On a total failure, Chancery will appoint one; but if the individual named by the testator is wanting, it devolves on the person who succeeds to the general rights and duties with which it is coupled. Here the direction of the testator himself extends it beyond the first individual named. The trust, as it is created, extends not only to the executors, but to the *administrators* of A. Young, who may be total strangers. But even if it were not so; the power given to one, will extend by operation

[a] *Co. Litt.* 13 a. 298 a. *Watk. Desc.* 233. Swain v. Burton, 15 *Ves.* jr. 365.

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and construction of law to his executors, and so on from executor to executor.[a] And, by the local law of Pennsylvania, the distinction between a power to sell, and a devise of the land to be sold, is taken away, and the executors have the same interest in the one case as in the other.[b] The remainder in fee, then, on the death of Bleakley, jun. vested in the executors, &c. for the purpose of sale. The will of the testator was, that it should be sold on the occurrence of that event. It is immaterial for what reason. It is sufficient that it was his will. The direction to sell is mandatory, and not a mere discretionary authority. The time within which it was to be performed is immaterial. Its performance might have been retarded by many accidents.

2. The event has occurred, which, in the contemplation of the testator, was to occasion the exercise of the power to sell. The language of the will, on this point, is unambiguous and clear. "In case of the decease of my said son without issue, *then* I do direct and order," &c. It is made to depend on the single event of his decease without issue. How the proceeds are to be distributed, is another and a distinct question. They are not made dependent upon each other. If the brothers and sisters had all lived, they could not have entered into possession of the real property: they

a 8 *Vin. Abr.* 465. P. c. cites 2 *Bulst.* 291. 19 *Hen.* VI. fol. 9. 8 *Vin.* 467. pl. 16. 2 *Brownl.* 194. *Bulstr.* 219. 1 *Ch. Cas.* 180. 2 *Bl. Comm.* 506.

b 3 *Laws of Pennsylv.* 200.

could only have compelled an execution of the trust, by the preliminary measure of a sale.

Mr. *Sergeant*, contra, stated, that this case had been submitted to the highest Court of Pennsylvania, where it was decided against the title, now in question, so long since as 1809. He admitted, that a verdict and judgment in ejectment were not conclusive, and that a second ejectment might be brought on the same title. But the decision of a competent Court, of the highest resort, solemnly rendered on a question of law, submitted to them by the parties, ought to be decisive of what the law is on that question, as between the parties, and all claiming under them with notice. It would be conclusive on that Court, and on all inferior jurisdictions: and where there is concurrent jurisdiction, the rule is, that the tribunal which first gets possession, has exclusive possession of the cause and of its incidents. Here the question was upon the law of Pennsylvania, as it regarded land in that State: not the statute law, which is written, but the common law, as shown by the decisions of her Courts, and modified by usage and custom, or the peculiar adoption and application of its principles. Had this case been first submitted to the Circuit Court, and brought here by appeal, a decision of the Supreme Court of the State, in another case, in all respects similar, would be of the highest authority. And it is fit that it should be so, for the sake of uniformity in the settlement of the law; or else the peculiar judicial constitution of this country might be pro-

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ductive of the greatest confusion. Suppose the decision of this Court should be different from that of the State Court; it is not a case in which, by the constitution and laws of the Union, this Court has any superiority that would give its decision a binding effect. There would, consequently, be an irreconcilable conflict of decisions. The decision of the Supreme Court of Pennsylvania must, therefore, be regarded as of the highest authority, and ought to be followed, unless flatly absurd and unjust.

But, considering the will, independent of the authority of the decision in the State Court, it is obvious that the testator did not mean to provide for the disposition of his estate, in *every event* that might happen, except by the residuary clause in favour of his son. If he had said, or had clearly intimated, that he meant in no case to die intestate, so as to let in the heir, this might have been considered as a pervading intention, that would influence the interpretation of the will. But this was not necessary, for the law had provided an heir, in whose favour the affections of the testator would coincide with the provisions of the law. The heir is a favourite of the common law, and is not to be disinherited but by express words, or by necessary implication. That implication can only exist where there is a plain intention not to die intestate. But here the intention was merely to provide for certain persons, whom the testator, for reasons known only to himself, chose to consider as objects of his bounty, in certain events. So far he meant to restrain

his son, and no farther. From his having done so, it is impossible to infer an intention to provide for other persons, or for other events, as there might be, in a case where there was a manifest design not to die intestate.

The will must be interpreted by itself, and then it will appear that the testator had in view: (1) His son, to whom he gives a clear estate tail in the realty, and an absolute estate in the personalty, on certain terms. (2) A. Young, to whom he gives an annuity of 30 pounds a year, during the joint lives of himself and the son, or the son's issue: and to whom, in the event of his surviving the son, and the son dying without issue, or the issue failing in his lifetime, he gives 400 pounds in lieu of the annuity, to be paid out of the proceeds of the sale of his estate. A. Young could, then, certainly, take nothing but in the case specified of the son dying without issue, or the issue failing, in the lifetime of Young. It is put in place of the annuity, and, in case of issue, the annuity is to be continued. (3) The brothers and sisters of the testator. If the son die, living A. Young, the right of A. Young is vested: and then (i. e. A. Young surviving the son, and the son dying without issue) the testator's will is, that the property shall be sold by A. Young, his executor, &c. and the proceeds, after paying his 400 pounds, to the four brothers and sisters, *by name*, and their heirs, or such of *them* as shall be living at the son's decease. And that this was meant only of his brothers and sisters, is evident

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from the subsequent bequest to them of his personal estate.

We say, then, that the power to sell was limited to arise upon the contingency: (1) Of John, the son, dying without issue in the lifetime of A. Young, or of the issue failing in the lifetime of A. Y.; or, (2) Of his dying without issue, living one or more of the brothers or sisters of the testator. And that neither of these contingencies having happened, the fee, which was in the son by descent, was discharged from the power, and was devised by his will.

But, it may be asked, why should the disposition in favour of the brothers and sisters be made dependent upon the life of A. Young? The answer is, because it was first and chiefly for the sake of A. Y. that the sale was to be made; and there is no more reason, as regards the intention of the testator, for limiting the disposition in case of issue failing, than in case of the son's dying leaving no issue. And yet the former is clearly done, and was indispensable. Suppose J. Bleakley, jun., had left a child, who survived A. Y. one day, and then died. The reversion in fee would then go to the heir of John, the son, so as to merge and destroy the estate tail, and all intermediate contingent estates.[a] The contingent limitation is only good by way of executory devise. J. Bleakley, jun., took a vested estate tail by the will, and the reversion in fee by descent. The descent was immediate, liable to open and let in the power,

[a] *Fearne's Cont. Rem.* 343. 353. 7th ed.

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upon the happening of the contingency upon which the power was to arise. After the failure of the estate tail, the fee would be in the son and his heirs, until the power was exercised, no estate being given to A. Young. This could only be done by executory devise.[a] There is no preceding particular estate to support the remainder. The fee by descent is no particular estate. It must, therefore, be considered a contingent limitation, good only by way of executory devise. As a contingent remainder, it might be barred by common recovery, but not as an executory devise.[b] It is, besides, the creation of an estate of freehold, to commence *in futuro*, by the exercise of a power collateral to the estate, and, therefore, also, must be an executory devise. As an executory devise cannot be destroyed by an alteration of the preceding limitation, nor barred by a recovery, to avoid perpetuity, the contingency must be one to happen within a reasonable time, i. e. a life or lives in being, and twenty-one years and a few months thereafter.

Now, let us consider whether it is so limited, and what the limitation is. Dying without issue, or failure of issue, legally imports an indefinite failure of issue, as it respects both personal and real estate, but especially the latter, "for there the interest of the heir is concerned, which is always much favoured at law."[c] In the case of per-

a 2 *Ves.* jr. 269.
b *Fearne*, 419. 423, 424. 429.
c *Id.* 476.

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sonal estate, it has indeed been often construed to mean a dying without issue living at the time of the death. And in the case of real estate, it has been sometimes so construed. But this has been only from necessity, to support the limitations over, and effectuate the legal intention of the testator.[a] And it has therefore never been so construed, where there was an express limitation in the will to the contrary, or of equivalent legal effect. Where, then, there is a limitation sufficient to maintain and preserve the subsequent dispositions, such implication is unnecessary. And where there is a limitation expressed, inconsistent with such implied limitation, the implication is impossible. Such inconsistency is equally great, whether the *actual* limitation is shorter or longer than the implied limitation. The limitation in this will is, the dying of J. Bleakley, jun., without issue, in the lifetime of A. Young: which includes his so dying, leaving no issue, or leaving issue which fail in the lifetime of A. Young. It is not a *double* contingency, but a single contingency, embracing both events. The limitation, too, is sufficient to support the ultimate disposition. If so, there can be no limitation to dying without issue, &c. The words are: "I give to my cousin, A. Young, &c. an annuity, &c. during the joint lives of him, the said A. Young, and my son, J. Bleakley, or *his heirs lawfully begotten; but in*

a Dansey v. Griffiths, 4 *Maul. & Selw.* 61. and see 5 *Mass. Rep.* 500.

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case of the decease of my said son without issue lawfully begotten, as aforesaid," &c.

If it be said, that the subsequent words, which contain the disposition in favour of the brothers and sisters, are different; " and in case of the decease of my said son without such issue," and ought to be construed a dying without issue living at the time of his death, I answer, that they cannot be so interpreted here; because, (1) They are connected with the antecedent words in the prior part of the will, " herein after mentioned, and before any dividend is made of the proceeds of my said estate;" and with the words in the subsequent part, " after deducting out of the proceeds," &c. (2) It would make the bequest to A. Young depend upon one contingency, and that to the brothers and sisters upon another; whereas, they are plainly connected together, and made to depend upon *one* contingency. (3) These same identical words are before used as equivalent to a failure of issue; " during the joint lives of him, the said A. Y., and my son, J. B., or his heirs lawfully begotten; but in case of the decease of my said son without issue," &c.

As a limitation, the life of his brothers and sisters, who were *in esse*, would answer equally well as the life of A. Young. But, it must be admitted, that there is no express limitation of that kind in the will. And it would follow, that if there be not a limitation to the life of A. Y., there is none at all.

Under this head, however, I shall contend, (1) That the distribution was to be made among

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such of the brothers and sisters as should be living at the time when the contingency happened. (2) As none were then living, and A. Young was dead, there was no object for the exercise of the power, and, therefore, the power was never brought into existence.

Such was the opinion of a majority of the Judges of the State Court; and it is the natural and obvious reading of the will. The proceeds are given to the brothers and sisters by *name*, to be divided between them in equal proportions, share and share alike; which imports, that he had some definite idea, *whom* it was to be divided amongst. But, if there were any doubt, the bequest of the personal estate, which refers to the former, makes it quite plain. The legal construction is the same; for it cannot be denied, that *heirs* is, *generally*, a word of limitation, and only descriptive of the quantity of estate meant to be given. Strike out the words "and their heirs for ever," and all doubt is dissipated. Strike out the words of contingency; "or such of them as shall be living at the decease of my said son;" and would not the whole vest in the ancestor, and the heir take by descent? In either case, suppose one to die in the lifetime of the testator, would not the legacy lapse? But the words "for ever," unequivocally stamps the character of limitation. The supposition that *heirs* is to be a word of purchase, in one event only, goes on the ground, that the same word is to be construed, according to circumstances, in senses entirely different. That is to say, that in the mind of the testator,

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and at the time of making the will, it was understood to be a word both of limitation and of purchase. It would follow, then, that if one of the brothers and sisters died in the lifetime of the testator, the heir would take by purchase. There could, therefore, be no such thing as a lapsed legacy or devise, if the word *heirs* be used; and some new mode must be invented of describing the quantity of the estate.

This construction is liable to another objection, that it strikes out an entire clause. It is manifest enough, that the testator thought it was real estate, and, therefore, used the word *heirs*. He might well think so, as it was to be real estate up to a certain point. How this estate was to be regarded, might not have been generally understood at the time when this will was made. It was, probably, Lord Hardwicke who first decided, that land to be converted into money, or money to be laid out in land, were to be considered "by the transmutation of a Court of equity."[a] Besides, the legatee might, in such case, perhaps, have an election.[b] *At law*, it is still real estate; that is, supposing A. Young to be either dead, or his legacy paid. And it deserves to be remarked, that the testator drops these words, when he speaks of what he himself deems *personal estate*.

Our construction is the only reasonable and practicable one. *Heirs*, standing alone, is never a word of purchase; and when it is a word of pur-

[a] 3 *Atk.* 256.

[b] 1 *Madd.* 395. 1 *P. Wms.* 130. 389.

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chase, it always means, that the heir is to take in *exclusion* of the ancestor.[a] Thus, where an estate is given to the ancestor for life, the heir may take by purchase, so that the estates will not unite. Where the ancestor takes no estate at all, an *heir* may take by purchase, as the first taker; the word *heir* being then a *descriptio personæ*, or individual designation.

But, supposing it to be otherwise, we must take one of two alternatives: (1) That if some of the brothers and sisters were living, and some dead, those who were living, and the heirs of those who were dead, should take. In that case, the heirs must take *per capita* as purchasers. (2) That if the brothers and sisters were all dead, the heirs of all would take. In this case, also, they must take *per capita*. *That* could not be the intention. But even as words of purchase, *heirs*, standing alone, and without qualification, is a designation only of the person or persons who, by law, are heirs. It can never mean children or issue.[b] Then, what heir is it to be? The heir by the law of Ireland, of England, or of Pennsylvania? If restricted to the issue of the brothers and sisters, (which is a still further construction,) and all are to take equally, then there might be every possible variety in the circumstances and character of these children, which must have been unknown to the testator, and are unknown to the Court. But there is a flat legal bar to such a con-

a *Powell. Dev.* 236, 237. 239. 241.
b *Powell*, 242, 243.

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struction; and that is, that the limitation to the children would be upon a double contingency, which is bad.

But, it is said, that the contingent interest is descendible, and would go to the children. Doubtless it might; but that must depend upon the nature of the contingency.

If, then, A. Young being dead, and all the brothers and sisters being dead, there was no object remaining for the power, did the power itself ever come into existence? It never existed in A. Y., because he died before the contingency happened; and, it could not be derived from him to his executors or administrators. But supposing it might; then, *at law*, it expired at the end of two years from the death of J. Bleakley, jun., and before the deed to Smith.[a] To be sure, equity would not suffer it to perish, if there were objects for its exercise. But, even in equity, it expired with the expiration of its object.[b] Here all the objects were completely at an end.

It is, however, contended, that the use is subordinate to the power, and the sale is to be made at all events. But that makes the end subservient to the means. The purpose was contingent, and, therefore, the power was made contingent. No good purpose is to be answered by prolonging the

a 15 *Hen.* VII. fol. 12.

b *Sugd. Powers*, 459, 460. 258. 470. Bradley v. Powell, *Cas. Temp. Talb.* 193. Yates v. Phettiplace, 2 *Vern.* 416. Tournay v. Tournay, *Prec. Ch.* 290. Roper v. Radcliffe, 9 *Mod.* 171. Croft v. Lee, 4 *Ves.* jr. 60.

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existence of the power. It may, perhaps, only be meant, that the whole is to be considered as the personal estate of the testator, and go according to the statute of distributions. The consequence would then be, that he would die intestate. But there is no case which goes so far, and no reason for it. If it were personal estate at the death of Bleakley, jun., then it all goes to him by will; and he surviving A. Young, and the brothers and sisters of the testator, took the whole absolutely in possession. He would have the right of election, and he makes his election by his will.

Mr. *D. B. Ogden*, for the plaintiff, in reply, argued, that the adjudication in the State Court had no other authority here, than the opinion of the same learned men would have upon any other question of general law. It was not conclusive, as a *res judicata*, even in the State Court; and by what magic could the doctrines on which it was founded, be considered as conclusive in another forum? A judgment in ejectment is never conclusive at law; and how can a decision in another suit, on the same devise, or another devise, be considered as conclusive on a tribunal having concurrent jurisdiction? The question was not upon the local law, of which the State Courts are the exclusive expounders; it arose not upon the statute, or the common law of Pennsylvania, (if any such there be,) but upon that law which is expounded at Westminster and at Washington.

The intention of the testator is the great polar

star in the interpretation of wills. If there be ambiguity in the particular words used by the testator, you may not only look at the general scope and design of the will, as manifested on its face; but you may go out of the will, and inquire into the state of the testator's family, in order to ascertain whether particular persons might probably be the objects of his bounty.[a] It would be strange, indeed, if wills were the only writings in which the necessary imperfection of human language might not be supplied by a view of all those extrinsic considerations which may be supposed to have influenced the writer's mind, and caused him to use words in one sense or another. It appears in the case, that the testator had just left his relations in Ireland, his native country, where his brothers and sisters, and their children, then were, the latter being of age, or nearly so, and that his will was made in London, on his way to this, his adopted country. Next to his son, his brothers and sisters and nephews and nieces, were probably nearest his heart.

It is admitted, that the son took an estate tail. The question has been supposed to be, what became of the reversion on the failure of issue? But whether it descended on the son, or was devised to the testator's brothers and sisters is immaterial; because, the question is, whether the fee, in whomsoever it may now be, is still subject to the power of sale created by the will. He might charge the reversion after the estate tail

[a] 1 *Ball & Beatty*, 431.

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had expired. And he has not only empowered, but ordered and directed A. Young, his executors, &c. to sell. His object, doubtless, was, to convert the real property into money, in order that it might go to his relations in Ireland, who would, probably, never come to this country. If a testator says, " I will my heir shall sell the land, and does not mention for what purpose, it is in the breast of the heir at law whether he will sell it or no, &c. But when a testator appoints an executor to sell, his office shows, that it is intended to be turned into personal assets, without leaving any resulting trust in the heir."[a]

It is apparent, that the testator considered himself as disposing of personal property. The subsequent legacy of his personal estate shows, that he considered it as one common fund. It is a mistake to suppose, that Lord Hardwicke established, for the first time, in 1746, the rule of equity, that land devised to be sold and converted into money, shall be considered as personal property. Such had always been the doctrine of the Court of Chancery. The order to sell is absolute, not coupled with any condition whatsoever, nor depending on the lives of his brothers and sisters. If nothing had been said about the distribution of the proceeds, they would go of course to the personal representatives. The subsequent clause is merely intended to describe how the proceeds were to be divided, and not to indicate the quantity of interest in what had thus become

[a] 2 *Atk.* 568.

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personal property by its very destination before it had been actually sold. As to the word *heirs*, it must surrender its ordinary technical meaning in order to subserve the intention. And it is clear, that it may be a word of purchase wherever it is necessary for that purpose. Thus, it sometimes means *children*, and sometimes *issue* indefinitely.[a] If the words "their *heirs*," were stricken out of this clause, the property being personal, would be vested absolutely in the brothers and sisters. The words, therefore, must have been added for some other purpose than to create a limitation. All the legatees, except one, and probably that one, were alive at the death of the testator. There was, then, no lapsed legacy. There was a clear contingent remainder to the brothers and sisters, which was transmissible to their representatives. The words, "their heirs for ever," were intended as words of purchase, and to substitute the children or grandchildren for the original parents, in order to effect the great intention of the testator, which was, to keep the estate in his own family. He supposed he had prevented his son from aliening it by the entail, and that he had provided for the case of his son's dying without issue, by the direction to sell, and the disposition of the proceeds. All his intentions are to be frustrated by the construction contended for on the other side.

As to the supposed difficulties about the distribution of the proceeds among those who are entitled, that question is not now before the Court.

[a] *Fearne*, 466.

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It is sufficient that there is an object for the present exercise of the power. It is immaterial in what proportions those who are entitled are to take. When they shall file their bill on the equity side of the Court, it will be time enough to consider that question.

The case cited from the Year Book, 15 *Hen.* VII. has nothing to do with the present question. That was a feoffment, on condition that the feoffee, who was the party in interest, should aliene; and not the case of a trust. The time within which the power was to be executed is immaterial, it being merely incidental to the general object of the testator. Suppose the executor of A. Young, and all the others by whom the power was to have been executed, had neglected or refused; are the *cestuis que trust* to be disappointed? Would not a Court of equity compel the execution, or supply the defective execution? And if so, will it not confirm what has been already done? It may indeed be admitted, that the trust will not be enforced, or the execution of it confirmed, if the object for which it was created no longer exists. But here the first object was to convert the real property into money, and then to distribute it. But if the property is to be considered as real estate, it would vest in him who was heir at law of the original donor, at the time of the expiration of the particular estate. J. Bleakley, jun., had indeed a right to dispose of this reversionary interest, but he never exercised that right. There

is nothing in his will showing an intention to devise it.[a]

Mr. Justice WASHINGTON delivered the opinion of the Court; and, after stating the case, proceeded as follows:

March 1st.

The material question to be decided is, whether the power given to A. Young, his executors and administrators, to sell the real estate of the testator, was legally exercised? If it was not, then the plaintiff in error, who claims under a sale made by the executor of Young, acquired no title under it, and the judgment below is right.

It was contended by the counsel for the defendant, that by the death of Young, as well as of the brothers and sisters of the testator, in the lifetime of John Bleakley, the son, the devises to them to arise out of the power to sell never took effect; and, consequently, there being no person in existence, at the death of the son, to receive the proceeds of the sale, or any part of them, the power was unduly exercised. The premises upon which the above argument is founded, as well as the conclusion drawn from them, being controverted by the counsel on the other side, our inquiries will be confined to those two points.

With respect to the devise of the 400 pounds to A. Young, a majority of the Court is of opinion, that by the words, as well as from the obvious intention of the testator, that sum was not to be raised except in the event of the death of John

[a] *Watk. Desc.* 110. 153.

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Bleakley, the son, without issue, in the lifetime of Young. During the joint lives of the son, or his issue, and Young, the latter was to receive an annuity of 30 pounds out of the rents and profits of the real estate. But if the son should die without issue in the lifetime of the said Young, the annuity was, in that event, to cease, and the 400 pounds was to be raised for his use, out of the proceeds of the real estate, when the same should be sold, according to the intention of the will, as thereafter mentioned. The contingency on which the devise of the 400 pounds was to take effect, is in no respect connected with that on which the devise of the proceeds to the brothers and sisters was to depend. The 400 pounds is expressly given in lieu of the annuity, in case Young should survive the son, without issue, in which event it was to cease.

The contingency upon which the devise of the proceeds of the real estate to the brothers and sisters was to take effect, was the death of the son without issue; and since it was possible that the particular estate of the son might endure beyond the life of Young, the power to sell, for the benefit of the brothers and sisters, is extended to his executors and administrators. It is true, that by the clause which gives the power to sell, taken independent of the devise to Young, it would seem as if the 400 pounds was, at all events, to be first deducted out of the proceeds of the sale, and paid to him, in the same event as the residue was to be paid to the brothers and sisters, that is, on the death of the son without issue. But the

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two clauses must of necessity be taken in connexion with each other, the one as containing the bequest to Young, and the contingency upon which it was to take effect; and the other, as pointing out the fund out of which it was to be satisfied. If the former never took effect, it is clear that the latter was relieved from the burthen imposed upon it.

A very good reason appears for making the devise of the 400 pounds to Young, to depend upon his surviving the son without issue, since it would be in that event only that he would want it; the annuity, which it was intended to replace, continuing until that event happened. But no reason is perceived why the devise over to the brothers and sisters of the testator, or the execution of the power for their benefit, should have been made to depend on the same event; a trustee to sell being provided in the executors of Young, in case he should die before the power could be executed.

Having shown, it is believed, that the devise of the 400 pounds to Young never took effect, in consequence of his death in the lifetime of John Bleakley, the son, it becomes important to inquire, whether the devise to the brothers and sisters of the testator failed, in consequence of their having all died in the lifetime of the son. The operative words of the will are, "I give the proceeds thereof [of his real estate] to my said brothers and sisters, and their heirs, for ever, or such of them as shall be living at the decease of my son, to be divided

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between them in equal proportions, share and share alike."

The Court has felt considerable difficulty in construing the above clause, with a view to the intention of the testator, to be collected from the whole of the will, and of the circumstances stated in the special verdict. Some of the Judges are of opinion, that the devise is confined, both by the words and by the apparent intention of the testator, to the brothers and sisters who should be living at the death of the son without issue, considering the word "heirs" as a word of limitation, according to its general import, and that there is no evidence of an intention in the testator to give the part of a deceased brother or sister to his or her children, which ought to control the legal meaning of that word, when used as it is in this clause. On the contrary, they think, that the use of it in the devise of the proceeds of the real estate, and the omission of it in the devise of the personal estate, and yet declaring that the latter is to be divided amongst his brothers and sisters, *with the proceeds of his real estate as therein before directed to be divided,* strongly indicates the intention of the testator to give the proceeds of the real estate to the same persons who were to take the personal estate. Others of the Judges are of opinion, that an intention to give the proceeds of the real estate to the children of a deceased brother or sister, as representing their ancestor, is fairly to be collected from the will, which strongly intimates that the testator did not

mean to die intestate, as to any part of his real or personal estate.

Upon a question of so much doubt, this Court, which always listens with respect to the adjudications of the Courts of the different States, where they apply, is disposed, upon this point, to acquiesce in the decision of the Supreme Court of Pennsylvania, in the case of *Smith's lessee* v. *Folwell*, (1 *Bin.* 546.) that the word *heirs* is to be construed to be a word of limitation, and, consequently, that the devise to the brothers and sisters failed to take effect by their deaths in the lifetime of the son.

Whether the conclusion to which that Court came, and which was pressed upon us by the plaintiff's counsel, that the contingencies on which the power to sell was to arise, having never happened, the sale under the power was without authority, is well founded in a Court of law, need not be decided in this case, because the majority of the Court are of opinion, that, by the express words of the will, the sale was limited to the period of two years after the decease of John Bleakley, the son. The circumstance of time was no doubt considered by the testator as being of some consequence, or else it is not likely that he would so have restricted the exercise of the power. But whether it was so or not, such was the will and pleasure of the creator of the power, and that will could only be fulfilled by a precise and literal exercise of the power. The trustee acts, and could act, only in virtue of a special authority conferred upon him by the will; he must act, then, in the way,

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and under the restrictions which accompany the authority. If an adjudication were wanted to sanction so plain and obvious a principle of law, it is to be found in a case reported in the Year Book, 15 *Hen.* VII. 11, 12.

Under what circumstances a Court of equity might relieve, in case the trustee should refuse to exercise the power within the prescribed period, or should exercise the same after that period, need not be adverted to in this case, since this is a question arising in a case purely at law.

The sale in this case, then, having been made about eighteen years after the death of John Bleakley, the son, the trustee acted without authority, and the sale and conveyance was absolutely void at law.

Mr. Justice JOHNSON. I have no hesitation in conceding, that if all the objects had failed, for which the power in this will was created, the power itself ceased, both at law, and in equity. Those objects were,

1. The raising of the legacy of 400 pounds for Young.

2. The sale and distribution of the testator's estate among his own relatives.

If neither of these objects remained to be effected, the power, under which the plaintiff makes title, was at an end.

The words on which the legacy depends are these: "but in case of the decease of my said son, without issue, as aforesaid, in the lifetime of the said Archibald Young, then the said annuity is to

cease; and in lieu thereof, I give and bequeath unto the said A. Y., and his assigns, the sum of 400 pounds sterling, payable out of the proceeds of my real estate, when the same is sold and disposed of according to the intention of this my will herein after mentioned, and before any dividend is made of my said estate."

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The question which this clause presents is, whether the legacy was given upon the single contingency of the son's death without issue, or upon the double contingency of his death without issue, *in the lifetime of A. Y.*

This question appears to me to be settled by the testator himself; for in a subsequent part of the will, speaking of this same legacy, and of course with reference to the clause bequeathing it, he says, "the sum of 400 pounds sterling, herein before given and bequeathed to the said A. Y., *immediately on the decease of my said son without issue.*" The testator, then, has attached this construction to his own words; and that the clause containing this bequest will well admit of that construction is obvious; for there is no necessity for joining the first member of the sentence, which contains the double contingency, to the last member, which contains the bequest. And the effect of the will, without this connexion, (which I cannot but think forced and unnecessary,) will be, to give the pecuniary legacy absolutely on the event of the son's death without issue, but at the same time to declare, that the annuity should no longer run on, whenever this bequest took effect. This would literally be giving it in lieu of the an-

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nuity, and would fully satisfy those words in the will.

Indeed, this construction appears irresistible, when we consider another part of the will.

The power to sell is extended *to the executors and administrators* of A. Y. They, therefore, were authorized to sell, in the event of the death of the son without issue, although he should survive A. Y. Yet, we find the testator, when obviously contemplating the event of the son's surviving Young, expressly directing the payment of this legacy, before the proceeds should be distributed among his devisees over. This could only be consistent with a bequest upon the single contingency of the son's death without issue, independently of Young's survivorship.

Nor is there the least ground for contending, that this bequest is upon a contingency too remote, since the sale and devise over are expressly limited to take effect upon the death of the son, thereby restricting the generality of the words issue and heirs, so as to mean issue living at his death. This, too, is consistent with those acknowledgments of the testator of a debt of gratitude to A. Y., and not only of a debt to accrue, but of a subsisting debt. The annuity is given *in presenti*; and so is its substitute, the legacy. The words are, "I give and bequeath," thus vesting a present interest, although the payment is deferred to a future time and event. The views of the testator are easily explained: if his son or his issue took the estate, his bounty to Young was to be limited to the annuity. But if it should go over to his colla-

teral kindred, the testator enlarges his bounty, and gives this substitute for the annuity, at the same time that he frees his estate from a charge that would embarrass the sale.

Nor can I possibly admit the doctrine, that the power to sell was either at law, or in equity, limited to the duration of two years after the death of the son without issue. The words are, "*then I direct and order* my said cousin, A. Y., his executors and administrators, to sell and dispose of my real estate within two years after the decease of my said son." Here the words are clearly imperative, and their effect is, both to confer the power generally, and to exact the execution of it in two years. The intention of the testator must prevail, both at law and in equity, in construing his words; and when they will admit of a construction which will make the power commensurate with the views of the testator in creating it, I hold that to be the true construction both in law and equity. It is only when the power given admits not of this latitude by construction, that the aid of Courts of equity is resorted to, in order to carry into effect the views of the testator. By possibility, the executors of A. Young may have been minors, or may not have proved his will until the two years had expired, or a sale during that time may have been stayed by injunction, or by the want of purchasers; and it would be difficult to show why, in any one of these events, the power should have ceased. Certainly no reason can be extracted from the provisions of the will, whence an intention could be inferred to restrict the power to sell to the

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period of two years. Every thing favours the contrary conclusion. For whose benefit was this injunction to sell within the specified period imposed upon the executor? Clearly for that of the brothers and sisters, in order that, under it, they may have compelled the executor to proceed to sale within the time limited. It would be strange, then, if a provision so clearly intended for their interests, should have put it in the power of the executor, either wilfully, or by *laches*, to defeat their interests, and let in the heir at law.

This is not the case of a mere naked power: it is a power coupled with a trust. The executor was to sell, that he might possess himself of the value in money, and distribute it among the *cestuis que trust*. In such cases, it has been well observed, that "the substantial part is to do the thing," and that "powers of this kind have a favourable construction in law, and are not resembled to conditions, which are strictly expounded."

I am, therefore, of opinion, that the words creating this power will well admit of being construed into a general devise of the power, and that the object intended to be answered, necessarily requires that construction.

The dictum cited from the Year Books, therefore, (besides that it has not been very correctly translated,) has no application to this case; since it supposes the actual restriction under the will, which I deny to be imposed in the present instance, upon the true construction of its words.

Being, therefore, of opinion, that both the legacy to Young, and the power to sell, subsisted

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at the date of the sale to the plaintiff, these views of the case are sufficient to sustain the sale to the plaintiff; and the subsequent questions would arise, only upon the distribution of the remainder of the purchase money, after satisfying the legacy. Nevertheless, I will make a few remarks upon that part of the will which relates to the devise over to the testator's family, since it serves to elucidate, by another application, the principle upon which I have formed my opinion respecting the legacy to A. Young.

On the subject of the devise over to his brothers and sisters, the testator has again been his own expositor. It is very clear, that if the words, "or such of them as shall be living at the decease of my said son," stood alone and unexplained, the relative *them* might be applied grammatically with more propriety to the word "heirs," than to the words "brothers and sisters;" and thus, perhaps, give those words the effect of words of purchase. But the testator himself gives these words a distinct application, in the latter part of his will, when disposing of his personal estate; concerning which he says, that it shall be "divided among my *brothers and sisters*, with the proceeds of my real estate, *as* herein before directed to be divided." Under the words here used by the testator, it is clear, that the *brothers and sisters* only could take, and not the brothers' and sisters' children, thus restricting the word "heir" to its natural and appropriate signification; from which, it can be converted into a word of purchase, only by the clear and controlling intent of the testator. This

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construction is further supported by those words which require a distribution of the proceeds of the real estate *equally, share and share alike, to the* legatees; a distribution which could not take place *per stirpes,* or in the event of one or more brothers surviving, and the death of the rest, leaving issue, living at the death of the son.

On this point, therefore, I concur with the Supreme Court of Pennsylvania; and only regret that I cannot concur both with that Court and this on the other bequest.

Upon the question so solemnly pressed upon this Court in the argument, how far the decision of the Court of Pennsylvania ought to have been considered as obligatory on this Court, I would be understood as entertaining the following views: As precedents entitled to high respect, the decisions of the State Courts will always be considered; and in all cases of local law, we acknowledge an established and uniform course of decisions of the State Courts, in the respective States, as the law of this Court; that is to say, that such decisions will be as obligatory upon this Court as they would be acknowledged to be in their own Courts. But a single decision on the construction of a will, cannot be acknowledged as of binding efficacy, however it may be respected as a precedent. In the present instance, I feel myself sustained in my opinion upon the legacy to A. Y., by the opinion of one of the three learned Judges who composed the State Court.

Judgment affirmed.