ate, and admitted to record, in the state of Ohio, still, the title to be derived under it could not be permitted to overreach the legal title of this defendant, founded, as it is, upon an equitable title, acquired *bonâ fide*, and for a valuable consideration paid, which purchase, payment and acquisition of legal title, were made before he had either legal or constructive notice of the *204] *will, or of the claim of the daughters, for we are all of opinion, that the probate of the will in Pennsylvania cannot be considered as constructive notice to any person, of the devise of the lands in controversy. The decree of the court below must, therefore, be affirmed generally, with costs.

Decree affirmed.

WRIGHT, Plaintiff in error, *v.* DENN *ex dem.* PAGE, Defendant in error.

Devise.—Estate for life.—Charge of legacy on lands.

J. P., by his last will, after certain pecuniary legacies, devised as follows; "Item. I give and bequeath unto my loving wife, M., all the rest of my lands and tenements whatsoever, whereof I shall die seised, in possession, reversion or remainder, provided she has no lawful issue: Item. I give and bequeath unto M., my beloved wife, whom I likewise constitute, make and ordain my sole executrix of this my last will and testament, all and singular my lands, messuages and tenements, by her freely to be possessed and enjoyed," &c.; "and I make my loving friend, H. J., executor of this my will, to take care and see the same performed, according to my true intent and meaning," &c.; the testator died seised, without issue, and after the death of the testator, his wife M. married one G. W., by whom she had lawful issue: *Held*, that she took an estate for life only, under the will of her husband, J. P.

Where there are no words of limitation to a devise, the general rule of law is, that the devisee takes an estate for life only, unless, from the language there used, or from other parts of the will, there is a plain intention to give a larger estate.[1]

To make a pecuniary legacy a charge upon lands devised, there must be express words, or a plain implication from the words of the will.[2]

Page *v.* Wright, 4 W. C. C. 194, affirmed.

*205] *ERROR to the Circuit Court of New Jersey. This was an action of ejectment brought in the court below. The sole question arising upon the state of facts in the cause, was upon the construction of the will of James Page, made on the 15th of February 1774. By that will, after the usual introductory clause, the testator proceeded as follows:

"Item. I give and bequeath unto my beloved sister, Rebecca, 100 pounds, proclamation money, to be paid in four years after my decease. Item. I give and bequeath unto my beloved sister Hannah, the sum of 50 pounds, proclamation money, to be paid when she is of age. Item. I give and bequeath unto my sister, Abigail, the like sum of 50 pounds, proclamation money, to be paid when she arrives at age. Item. I give and bequeath unto my loving wife Mary, all the rest of my lands and tenements whatsoever, whereof I shall die seised, in possession, reversion or remainder, provided she has no lawful issue. Item. I give and bequeath unto Mary, my beloved wife, whom I likewise constitute, make and ordain, my sole executrix of this my last will and testament, all and singular my lands, messuages

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[1] S. P. Abbott *v.* Essex Co. 18 How. 202; King *v.* Ackerman, 2 Black 408; Clayton *v.* Clayton, 3 Binn. 476; Burr *v.* Sim, 1 Whart. 272; Holme *v.* Harrison, 2 Id. 283.

[2] Brandt's Appeal, 8 Watts 198; Montgomery *v.* McElroy, 3 W. & S. 370; Buchanan's Appeal, 72 Penn. St. 448; Reynolds *v.* Reynolds, 16 N. Y. 257.

and tenements, by her freely to be possessed and enjoyed; and I do hereby utterly disallow, revoke and disannul all and every other former testaments, wills, legacies and bequests, by me in any ways before made, willed and bequeathed, ratifying and confirming this, and no other, to be my last will and testament. And I make *my loving friend, Henry Jeans, of the county and province aforesaid mentioned, executor of this my will, to [*206 take care and see the same performed, according to my true intent and meaning; and for his pains," (leaving the sentence incomplete.) "In witness whereof," &c. (in the common form of attestation.)

The testator was seised of the land in controversy, at the time of the will, and died seised, without issue, on the 10th day of October 1774, leaving his wife Mary, the devisee, who, afterwards, married one George Williamson, by whom she had lawful issue, still living, and died in the year 1811. The lessor of the plaintiff was the brother of the testator, and his only heir-at-law. The defendant claimed title to the premises as a purchaser under Mary, the wife of the testator.

The title of the testator to the premises was derived from a devise in the will of his father, John Page, dated the 11th of November 1773. That will, among other things, contained the following clause: "Item. I give and devise unto my son James, one equal half part of my land (comprising the land in controversy), with all my plantation, utensils, &c., to him, his heirs and assigns for ever." He then gave the other moiety of the land to his son John, to him, his heirs and assigns. He then bequeathed several legacies to his daughters, Sarah and Mary, and added: "Item. I give and bequeath to my three daughters, Rebecca, Hannah and Abigail, Rebecca the sum of 50 pounds, Hannah and Abigail the sum of 50 pounds each of them. Likewise *it is my will, that my son James do pay Hannah and Abigail the said sum of fifty pounds each, when they come of age." He then [*207 concluded his will by appointing an executor, and revoking all former wills, &c.; and died soon afterwards. James (the son) left no other real estate than that devised to him by this will. What personal estate he or his father left at the times of their decease, was not found in the case; and therefore, it did not appear whether or not it was sufficient to pay the legacies in their wills.

The court below gave judgment for the lessor of the plaintiff, who was the heir-at-law of the testator, and the cause was brought, by writ of error, to this court.

February 21st. *Wood*, for the plaintiff in error, contended, that Mary, the wife of the testator, took a fee-simple under the devise. It was admitted, that a devise of land, without any technical words of limitation, or explanatory words, gives only an estate for life. But the intention of the testator will supersede this rule, and is the polar star to guide in the construction of wills. The local legislature were so impressed with the good sense of this principle, that, in 1783, a few years after the making this will, they passed a statute, declaring that a devise of lands should pass a fee, unless it was expressed to be for life only. Courts ought, therefore, to be liberal, in considering the explanatory words and circumstances relied on, to show an intention to devise the fee; by so doing, they further the intention *of the testator. *Richardson* v. *Noyes*, 2 Mass. 59; *Doe* v. *Richards*, [*208

3 T. R. 359; Willes 140; *Goodright* v. *Allen*, 2 W. Bl. 1042. Greater certainty is not attained by a rigid, than by a liberal, construction of devises. The only mode of arriving at certainty is, by admitting a general devise to pass a fee, or by requiring strict technical words of limitation. The notion that descent is the general rule, and devise the exception, is more specious than solid. They are both distinct, co-ordinate rules.

He would first examine the clauses of the devise in question separately, and then consider their combined operation. The words, "all the rest of my lands and tenements, whatsoever, whereof I shall die seised, in possession, reversion or remainder," &c., are sufficient to pass a fee. The words rest, and in reversion or remainder, ought not to be rejected, if a meaning can be discovered for them. The devise of all the rest of his lands to his wife, clearly imports, that the previous pecuniary legacies shall be a charge on the lands, and that his wife shall be entitled to whatever interest remains, after the legacies are paid. A charge on lands may be implied in a will. *Smith* v. *Tyndall*, 2 Salk. 685; 1 Ves. jr. 440; Prec. in Ch. 430; *Alcock* v. *Sparhawk*, 2 Vern. 229; 2 Dall. 131. An estate-tail in lands may be created by implication from a proviso (*Chapman's Case*, Dyer 333; *King* v. *Rumball*, Cro. Jac. 448), *à fortiori*, a charge may be
*209] implied. *These lands were already charged in the hands of the testator with the payment of other legacies, by the will of his father, John Page, and which were not then due. The clause in question then is, as it purports to be, a general residuary clause, in which the testator means to devise all his remaining interest in his real property. He could not have meant the rest of his lands, by way of local description, for he had devised none before; but he meant all the remaining interest in the lands, after the legacies were deducted. Wherever it appears, that the testator intended to devise all his interest in land, a fee-simple passes. *Lambert* v. *Paine*, 3 Cranch 97; *Sargent* v. *Town*, 10 Mass. 305. This rule applies with increased force to residuary clauses, in which a greater latitude of construction is allowed. *Willis* v. *Bucher*, 2 Binn. 464; *Lambert* v. *Paine*, 3 Cranch 129; *Hogan* v. *Jackson*, Cowp. 299; *Grayson* v. *Atkinson*, 1 Wils. 333. Though the words "lands and tenements" are strictly descriptive of locality, yet, in connection with other expressions, especially, in a residuary clause, they may refer to the quantity of interest or estate. *Cooke* v. *Gerrard*, 1 Lev. 212; *Ludcock* v. *Willows*, Carthew 50; 2 Ventr. 285; *Wheeler* v. *Waldron*, Aleyn 28; *Chester* v. *Chester*, 3 P. Wms. 46; *Strode* v. *Russel*, 2 Vern. 621; *Rooke* v. *Rooke*, Ibid. 461. The words, "in remainder or reversion," aid the construction. Though the testator might not have been acquainted with the precise technical distinction between them, yet they must have known
*210] they *meant an estate in expectancy. The case of *Norton* v. *Ladd*, Lutw. 755, is very analogous to the present, and shows that a fee was intended. If it be established, that the testator referred to his interest or estate in the farm in question, in this clause, it carries all his interest, *i. e.*, a fee-simple, because it is residuary, and the language is broad and comprehensive enough for the purpose.

Again, the proviso, "provided she has no lawful issue," shows an intention in the testator to give a fee to his wife. This is a condition precedent, to take effect at the time of his death; 1. Because the terms used ordinarily import a condition precedent. Where there is nothing in the nature of the

proviso, or in respect to the time of its performance, to show that a condition subsequent was intended, it is always construed a condition precedent. 2. All the circumstances of the case show, that the testator intended the condition to take effect at his death, and to be precedent; for then the issue the devisee might have, would be his own child and heir. If it be contended, that this proviso refers to children the devisee might have by a future husband, the testator is made guilty of the absurdity of intending, that if his wife should marry again, she might retain the land, but if she should have issue by such marriage, she should forfeit it. The devise to the wife in this case, was intended to be a substitute for the descent to the *heir. Whenever a devise of land is intended as a substitute for a fee, the [*211 substituted devise is a fee. *Moone* v. *Heaseman*, Willes 152; *Green* v. *Armsteed*, Hob. 65; *Ibbetson* v. *Beckwith*, Cas. temp. Talb. 157. A court may discover, in a condition, the effect of which is, in a certain event, to defeat the estate, an intent, when the estate actually vests, to enlarge the disposition to a fee. Thus, as before shown, a devise may be enlarged to an estate-tail by the terms of a condition. *Chapman's Case*, Dyer 333; *King* v. *Rumball*, Cro. Jac. 448.

But to leave no doubt of his intention, the testator, in the next sentence, gives the devisee his land, "to be by her freely possessed and enjoyed." He drops the peculiar phraseology of the former clause, and takes up new language, manifestly for the purpose of enlarging the subject of his bounty. A life-estate is susceptible only of a partial and limited enjoyment. The words "freely to be enjoyed," have been held sufficient to carry a fee. *Loveacre* v. *Blight*, Cowp. 352; *Willis* v. *Bucher*, 2 Binn. 464. The idea, that these words, as used in the present case, give a life-estate, dispunishable for waste, is wholly inadmissible. It would be creating a state of things which would make the interest of the tenant at variance with the permanent improvement of the soil, and, consequently, of the best interest of the country. It would be his interest to commit waste, and to destroy the property. The testator could not have meant that the devisee should hold the lands *as tenant for life, dispunishable for waste, merely; for that would only exempt the property devised from one kind of [*212 restriction, when he manifestly contemplates a free enjoyment, generally, without any restriction whatever. The free enjoyment is not annexed to the estate devised, but to the land. It is the land which is to be freely enjoyed. The estate is only the technical medium through which that free enjoyment is secured, and the court will see that the devisee takes such an estate as is compatible with a free enjoyment.

But even supposing these different clauses, taken separately, should be deemed inadequate to pass a fee, yet, taken conjointly, they form a body of evidence, strong and conclusive, to show that the testator intended to devise his entire interest in the lands. It is impossible to suppose, that a plain man would have used such phraseology merely to give his farm to his wife for her life. All the clauses may be taken together, and receive their full, combined effect. *Juncta valent.* *Frogmorton* v. *Holyday*, 1 H. Bl. 540.

Webster and *Coxe*, contrà, contended, that under the will of James Page, nothing more passed to the devisee than an estate for life. The plaintiff below claimed as heir-at-law. The title was, *primâ facie*, in him. It was

admitted on all hands, that the devise contains no words of limitation sufficient to pass the inheritance. It is a general rule, that in order to create an estate in *fee, words of inheritance, as "heirs," must be employed. *213] Wherever an estate is granted, either specifically for the life of the grantee, or without any limitation, the legal presumption is, that the design was to create an estate for life only. In wills, a greater latitude has been allowed. The intention of the testator, expressed in clear, unambiguous terms, will carry the fee. But the rules of conveyance at common law still operate, although not so rigorously, even in regard to wills; and before the heir can be disinherited, there must be, not merely an intention, but an intention legally perceptible, in an instrument legally executed. The only difference between wills and deeds is, that in the latter, certain specific technical terms are essential; in the other, any words legally indicating the clear intention of the testator, are sufficient. The intent must be clearly expressed, for it is a fundamental rule in the construction of wills, that the heir cannot be disinherited, without express words, or necessary implication. Cro. Car. 368; 2 W. Bl. 839; 2 Bos. & Pul. 267; 2 Doug. 736; Cowp. 235. This intention must also be expressed in language at least *quasi* technical; for it is perfectly immaterial, how plain it may be, that the design of the testator was to pass a larger estate, unless that intention be manifest to the legal eye. Cowp. 355; 3 T. R. 359; 5 Bos. & Pul. 349.

As the construction now contended for by the plaintiff in error would disinherit the heir-at-law, *and vest the inheritance in a stranger, it *214] is incumbent upon him to establish one or the other of these two propositions: 1. That there are express words creating an estate in fee in the devisee (which is not pretended, and which, if actually existing, would preclude all argument), or 2. An intent, so clearly expressed as to require, by necessary implication, that such an estate should pass.

The circumstance, that no words exist in this will, which, by their intrinsic force, carry any larger estate than for life, raises a legal presumption, that no larger interest was intended to pass. If the testator had designed the heirs or issue of his wife, as the objects of his bounty, some language, indicating such an intention, would have been used. If, in addition to this negative circumstance, we find, that these persons, in that capacity, were present to the mind of the testator, and yet are not made objects of his bounty, it superadds a positive weight to the legal presumption, that they were not designed to be so, and that their omission was not merely accidental.

There being, then, no express words carrying the fee, let us examine those particular expressions which are relied upon to show the actual intent that the fee should pass. These words are, 1. "All the rest of my lands and tenements;" 2. The words "reversion or remainder;" 3. The words "freely to be possessed and enjoyed."

1. As to the words, "all the rest of my lands *and tenements." *215] One of the earliest cases in which the effect of similar words came under consideration, was that of *Wilkinson* v. *Merryland*, Cro. Car. 447, 449. There, A. being seised of divers lands in A., B. and C., the lands in C. being in him by mortgage forfeited, devised the lands in A. and B. to several persons, and then devised "all the rest of the goods, chattels, leases, estates and mortgages, whereof he was possessed," to his wife, after his

debts and legacies paid, made his wife executrix, and died. The question was, whether the fee passed to his wife by this devise; and it was held, that an estate for life only passed. In that case, there were several circumstances rendering it stronger in favor of a fee than the present. 1. There was a previous clause devising part of the property, and there was, therefore, an antecedent to which the word rest could relate. Here, there is no such prior clause, and the word "rest" is senseless, or the testator attaches to it his own peculiar signification. 2. The devise of the real property is there, in the same clause which contains a bequest of the personalty; and therefore, the inference as to the testator's intention was irresistible, that he designed to give the same interest, *i. e.*, an absolute interest, in all the subjects of the devise. 4. In the case cited, the word *estate* is employed, as the descriptive term, which is a word frequently held sufficient of itself, *proprio vigore*, to carry a fee.

*The case of *Canning* v. *Canning*, Moseley 240, is very similar to the present. There, the words of the will were, "all the rest, residue and remainder of my messuages, lands or hereditaments, &c., after my just debts, legacies and funeral expenses first paid, I give to my executors, in trust for my daughters." It was adjudged, that the executors took only an estate for life; and notwithstanding the general character of Moseley, as an inaccurate reporter, this case has been frequently recognised as law. 2 Bos. & Pul. 251. This is evidently a much stronger case than the one now before the court. 1. It is properly a residuary devise; this is not. 2. It contained the term hereditaments, emphatically embracing the inheritance, according to the opinion of many eminent lawyers. 3. The estate was devised "after debts, legacies and funeral expenses first paid." Yet, under all these circumstances, it was held, that the words "rest, residue and remainder of my messuages, lands or hereditaments," so much stronger and more comprehensive that those of the present testator, were merely descriptive. The ground of that determination was, that the words rest, residue and remainder, being unaccompanied by any words of limitation, could not operate on the inheritance. 2 Bos. & Pul. 251, *per* MACDONALD, C. B. This applies, with at least equal force, to the present case. In *Peiton* v. *Banks*, 1 Vern. 65, where one devised to his wife for life, and the *reversion to A. and B., to be equally divided, &c., it was decreed, that they were tenants in common for life only. That case, and the one referred to by Sergeant Maynard, were stronger than the present, since the freehold having been already disposed of, it might have been plausibly argued, that the term "reversion" there used, *ex vi termini*, necessarily included the inheritance. In this case, no such argument would apply, the word *rest* being without an antecedent, and being a term more appropriate, as descriptive of the subject, than of the quantity of interest. In *Doe* v. *Richards*, 3 T. R. 356, where, after bequeathing a certain leasehold estate, the testator devised "all the rest, residue and remainder of my messuages, lands, tenements, hereditaments, goods, chattels and personal estate whatsoever," the court held, that these words were not sufficient to carry the fee. The property thus devised being, however, made subject to a charge, this circumstance was held sufficient, although the propriety of that part of the decision seems to have been questioned. 5 Bos. & Pul. 349.

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But the authority of the case, so far as it determines that these words were insufficient, of themselves, to pass the fee, has never been controverted. In that case, the clause was properly a reversionary clause, a previous devise having been made, leaving a reversionary interest to be disposed of. There also the word "hereditament" was used; neither of which circumstances exist here.

*218] *The next case is that of *Denn* v. *Mellor*, 5 T. R. 558, which deserves the more weight as an authority, because a second action was afterwards brought on the same title; the judgment rendered in the K. B., reversed in the Exchequer (1 Bos. & Pul. 558); and that judgment afterwards reversed in the House of Lords, and the original judgment in the K. B. affirmed. (2 Ibid. 247.) It may, therefore, be presumed to have been thoroughly examined and considered. In that case, the testator having first devised a life-interest in a copyhold messuage, then uses these words, "all the rest of my lands, tenements and hereditaments, either freehold or copyhold, whatsoever and wheresoever, my goods, chattels and personal estate, of what nature or kind soever, after payment of my just debts and funeral expenses, I give, devise and bequeath the same unto my wife S. C., and I do hereby nominate and appoint her, my said wife, sole executrix of this my will." In delivering the opinion of the twelve judges, MACDONALD, C. B., states the question arising under that will to be, "whether the words are materially distinguishable from those used in other wills, and which have been held not to denote an intention so expressed by the testator, as to enlarge that which would, otherwise, be an estate for life only, into a fee?" He then states, that this would depend upon the effect of the word "rest," of the word "hereditaments," and of the provision "after pay-

*219] ment of my just *debts and funeral expenses." He considers *Canning* v. *Canning* as decisive of the question on the two first words. These two cases must, therefore, be considered as decisive in settling the construction to be given to this part of the present will; in which, the phraseology used is still less indicative of an intent to pass the inheritance. The word "hereditaments," found there, is wanting here; a word which, in *Lydcott* v. *Willows*, POWELL, J., considered as sufficient to carry the fee, and this opinion was unanimously confirmed in the exchequer chamber. 2 Vent. 285. So also, Lord HOLT considered it as sufficient to pass the fee, in *Smith* v. *Tindal*, 11 Mod. 103; and in *Frogmorton* v. *Wright*, Lord C. J. DE GREY held, it might have that operation. 3 Wils. 418. Notwithstanding these decisions, however, the law, as recognised in *Canning* v. *Canning*, is considered as settled in Westminster Hall, and the word "hereditaments" is now held insufficient to pass the fee.

The case of *Marhant* v. *Twisden*, Gilb. Rep. 30, is, in many respects, analogous to that now before the court. A., having settled all his freeholds on his wife for life, as a jointure, bequeathed several legacies, and then says, "all the rest and residue of my estate, real and personal, I give to my wife, whom I make sole executrix:" *held*, that the reversion of the jointure lands did not pass, but the personal estate only. The reason assigned

*220] *appears decisive of the present question, "for, as the testator devised not real estate, there could be no residue." So, in the present case, the whole effect to the words "rest, remainder and reversion" (if it should be thought that in themselves they have any to denote an estate larger than one for life) is destroyed: 1. By the circumstance, that there was no pre-

vious disposition of any real estate in the will, and therefore, this is not a residuary clause. 2. By the circumstance, that the testator was seised of no estate in reversion or remainder, which could pass under these words, and therefore, they are wholly inoperative. 3. It is perfectly manifest, that the words in question were used simply as descriptive of the subject-matter, and not of the interest in that subject-matter. In this view, the case has a strong resemblance to *Pettiward* v. *Prescott*, 7 Ves. 541, where the testator devised at follows: "I give to R. P. my copyhold estate at P., consisting of three tenements, and now under lease to A. B." The master of the rolls, after showing, from variety of adjudged cases, that the word *estate* is sufficient to carry the fee in general, yet decides that the devisee took only a life-interest, on the ground, that the testator, by the word in that case, did not mean to speak of the quantity of the legal interest, but merely of the *corpus* or subject in the disposition.

As corroborating the construction of the words "reversion and remainder," now insisted on, it may *be observed, in the statute of wills of [*221
32 Hen. VIII., c. 1, it was enacted, "that all and every person and persons having manors, lands, tenements or hereditaments, may give and dispose of them," &c. Afterwards, the statue 34 & 35 Hen. VIII., c. 5, entitled, "an act for the explanation of wills," was passed. This statute recites, that several doubts, questions and ambiguities had arisen upon the previous statute, and enacts, that "all and singular persons having a sole estate, or interest in fee-simple, &c., of or in any manors, lands, tenements, rents or other hereditaments, in possession, reversion, remainder, &c., shall have full and free liberty to give, dispose, will," &c. In the first statute, it seemed to be thought, that the language implied a present vested estate in the devisor, in order to give validity to this form of disposition. The ambiguity was removed by the second statute, which gave the right, whether the party was seised in possession or in expectancy. The statute, then, authorizes a testator to devise an estate in which he has no present, but only a reversionary interest; but the same language must be used to carry the fee, as if the estate were in possession. The subjects capable of being devised are enlarged, but the form of the instrument is not altered. A reversionary interest, like a possessory interest, may be for life, for years, in tail, or in fee; and it is equally important, that these different quantities of interest should be designated by the will, in the one case, as in the other. The *case of *Ager* v. *Pool*, 3 Dyer 371, shows this construction to be [*222
correct; and *Peiton* v. *Banks*, 1 Vern. 65, is to the same effect. Both of these cases are stronger than the present, for in each of them the testator had such a future interest as he described.

As to the words "provided she has no lawful issue," the argument on the other side is, that they imply a condition precedent. To this it is answered: 1. That if a condition precedent to the vesting of any estate in the wife, the proviso would be entirely at variance with the whole design of the testator. He evidently intended an immediate interest to pass to the wife, which could not take place, if the fact that she should have no lawful issue is to be a condition precedent. That could only be ascertained by her dying without issue. 2. If it be a condition precedent, she took no estate, because she, in point of fact, had lawful issue. To obviate these conclusions, an interpolation is made in the will, and the testator is presumed to

have said, lawful issue by himself. The answer is, that such a presumption is not warranted by the language employed. The case of *Norton* v. *Ladd*, turns upon the extent to be given to the expression "whole remainder," after a disposition of a life-estate in all the lands, and the interest of an heir-at-law was not involved. *Lambert's Lessee* v. *Paine*, turns upon the meaning to be attached to the word "estate." *Wheeler* v. *Waldron* is
*223] deprived *of much of its authority by a remark made in a note to *Chester* v. *Chester*, 3 P. Wms. 56.

As to the second clause of the will, which contains the words "to be by her freely possessed and enjoyed," the legal signification of this phraseology has been frequently settled. In *Loveacres* v. *Blight*, Cowp. 352, is a clause to this effect: "Item, to my two sons, T. M. and R. M., whom I make and ordain my sole executors, all my lands and tenements, freely to be possessed and enjoyed alike." In this case, there were, 1. Introductory words, which Lord MANSFIELD always considered as entitled to much weight. 2. There was a charge, and he thought it but reasonable to infer an intention to pass a fee, because that alone would enable the devisees to comply with the testator's directions fully and completely. 3. "Freely to be enjoyed," he considered, in that case, as meaning absolutely, because, having charged the estate, it could not mean free from incumbrances. None of these circumstances exist here, and therefore, the case is not analogous, and cannot warrant the same construction. The case of *Goodright* v. *Barron*, 11 East 220, more nearly resembles the case before the court. There, after the introductory words "as touching my worldly estate," the testator devised to B., whom he made his executrix, "all and singular his lands, messuages and tenements, by her freely to be possessed and enjoyed." These are the
*224] identical words here employed, and no other distinction *exists between the cases, than that here are no introductory words (sometimes so important), yet the court held that the fee did not pass.

The only other ground on which it can be presumed that the testator intended a fee, is the circumstance, that this devise is after certain legacies; and it is said, that "all the rest," &c., means, that the devisee was to take the real estate, subject to the payment of these legacies. Admitting, that wherever the testator employs language of an indefinite kind, prescribing no limits to the estate devised, and burdens the devisee with a gross, but certain charge, the fee will pass, that rule of construction is inapplicable here, because: 1. There is no disposition of the personal estate, the appropriate fund for the payment of legacies. 2. There is, at most, only an implied charge upon the real estate; and it seems unreasonable, to require the court to imply a charge, for no other purpose than to furnish a ground for raising another implication still more serious. Admitting the verbal construction of the opposite counsel to be correct, the case of *Jackson* v. *Harris*, 8 Johns. 141, is decisive against the conclusion they would infer from it. If a charge at all, it is a contingent charge. The personal property is applicable, in the first instance, and there is only a possibility that it will prove insufficient. A contingent charge is not sufficient to carry a fee. Besides, supposing the
*225] whole of these legacies *to be payable out of the real estate, the conclusion contended for would not result. The rule of law is, that where the charge is upon the estate, and not upon the person of the devisee in respect of the estate, no fee passes by implication. *Jackson* v. *Bull*, 10

Johns. 148 ; *Doe* v. *Allen*, 8 T. R. 497 ; *Merson* v. *Blackmore*, 2 Atk. 341. So much of the estate as is sufficient to raise the sum required, is not given to the devisee at all. The residue is devised perfectly unfettered. *Canning* v. *Canning*, *Denn* v. *Moor* and *Denn* v. *Allen*, were all cases in which the real estate was given, after payment of debts, &c., and yet held not a fee.

March 4th, 1825. STORY, Justice, delivered the opinion of the court, and after stating the case, proceeded as follows :—The principal question arising in this case is, what estate Mary, the wife of James Page, took under his will ; whether an estate for life, or in fee. If the former, then the judgment of the circuit court is to be affirmed ; if the latter, then it is to be reversed.

Some reliance has been placed upon the will of John Page, the father, to show the predicament of the land, in the possession of his son James, and thence to draw aid in the construction of the will of the latter. Without doubt, James took a fee in the moiety devised to him by his father (which includes the land in controversy), for it is given "to him, his heirs and *assigns." But it is argued, that the land came into his hands charged with the legacies payable to his sisters Hannah and Abigail, and as [*226 these legacies were not payable, until they came of age, they remained a charge upon the land, in the hands of James, at his death. Whether the sisters were of age at his death, or not, or had received their legacies, or not, does not appear from the statement of facts, and nothing can be presumed either way. But what is there to show that these legacies were a charge on the land? The direction in the will is, that "James do pay Hannah and Abigail the said sum of 50 pounds each, when they come of age ;" but it is not said or implied anywhere in the will, that these legacies shall be a charge on the land. The direction is personal, and must be a charge on the person only, unless it can be shown, from other parts of the will, that the testator intended a charge on the land. A testator may devise lands, with a view to legacies, and make them a charge on the land, or on the person of the devisee, or on both ; (*a*) and whether a particular legacy be in either predicament, must depend upon the language of the will. In the large class of cases which have been decided on the subject, and which has principally arisen from questions respecting the quantity of the estate taken by the devisee, the ground assumed has been, that the will must speak expressly, or by fair implication, *that the testator intends the lega- [*227 cies to be a charge on the land. When, therefore, the testator orders legacies to be paid out of his lands, or where, subject to legacies, or after payment of legacies, he devises his lands, courts have held the land charged with the legacies, upon the manifest intention of the testator. But here there is no such language. There is no direction that the devisee shall pay the legacies out of the land. The charge is personal ; and the case falls directly within the authority of *Reeves* v. *Gower*, in 11 Mod. 208.

We may, then, proceed to the consideration of the will of James Page, inasmuch as that of his father affords no light to guide us in the construction. The grounds mainly relied on to establish that Mary, the wife of the

(*a*) See Roe *ex dem.* Peter *v.* Daw, 3 M. & S. 518 ; 5 East 87 ; 4 Ibid. 495.

testator, took a fee, are, that the legacies given to his sisters are a charge on his real estate in the hands of his widow ; that all the rest of his "lands and tenements," in possession, reversion and remainder, are given ; that the devise is subject to the proviso ; "that she has no lawful issue," which is not a condition merely, but a substitution for an estate intended for his children ; and finally, that the lands, &c., are devised to her "freely to be possessed and enjoyed," which words are best satisfied upon the supposition of a fee.

Before proceeding to the particular examination of the legal effect of these different clauses in the will, it is necessary to state, that, where there are no words of limitation to a devise, the general rule of law is, that the *228] devisee takes an *estate for life only, unless, from the language there used, or from other parts of the will, there is a plain intention to give a larger estate. We say, a plain intention, because, if it be doubtful or conjectural, upon the terms of the will, or if full legal effect can be given to the language, without such an estate, the general rule prevails. It is not sufficient, that the court may entertain a private belief that the testator intended a fee ; it must see that he has expressed that intention, with reasonable certainty, on the face of his will. For the law will not suffer the heir to be disinherited upon conjecture. He is favored by its policy ; and though the testator may disinherit him, yet the law will execute that intention only when it is put in a clear and unambiguous shape.

In the present case, there is no introductory clause in the will, expressing an intention to dispose of the whole of the testator's estate. Nor is it admitted, that such a clause, if it were inserted, would so far attach itself to a subsequent devising clause, as *per se* to enlarge the latter to a fee, where the words would not ordinarily import it. Such a doctrine would be repugnant to the modern as well as ancient authorities. The cases of *Frogmorton* v. *Wright* (2 W. Bl. 889), *Right* v. *Sidebotham* (2 Doug. 759), *Child* v. *Wright* (8 T. R. 64), *Denn* v. *Gaskin* (Cowp. 657), *Doe* v. *Allen* (8 T. R. 497), and *Merson* v. *Blackmore* (2 Atk. 341), are full to the point. The most that can be said is, that where the words of the devise admit of passing *229] a greater interest than for life, courts will lay *hold of the introductory clause, to assist them in ascertaining the intention. The case of *Hogan* v. *Jackson* (Cowp. 297), admits this doctrine. That case itself did not turn upon the effect of the introductory clause, but upon the other words of the will, which were thought sufficient to carry the fee, particularly the words, "all my *effects*, both real and personal." The case of *Grayson* v. *Atkinson* (1 Wils. 333), admits of the same explanation ; and besides, the inheritance was there charged with debts and legacies.

There is no doubt, that a charge on lands may be created by implication, as well as by an express clause in a will. But then the implication must be clear upon the words. Where is there any such implication in the present will ? The testator has not disposed of the whole of his personal estate, which is the natural fund for the payment of legacies ; *non constat*, how much or how little he left. For aught that appears, the personal estate may greatly have exceeded all the legacies ; and if it did not, that would be no sufficient reason to charge them on the land. It is not a sound interpretation of a will, to construe charges, which ordinarily belong to the personalty, to be charges on the realty, simply because the original fund is insuffi-

cient. The charge must be created by the words of the will. Now, from what words are we to infer such a charge in this case? It is said, from the words "all the rest;" but, "all the rest" of what? Certainly, not of the personal estate, because the words immediately *following are, "of my lands and tenements," which exclude the personalty. The words, [*230 "all the rest," have then no appropriate meaning, in reference to the personal estate, for the connection prohibits it. Can they then be supposed to import "all the rest of my lands, &c., *after* payment of the legacies," and so be a charge on them? This would certainly be going much further than the words themselves authorize, and much further than any preceding clause requires or justifies. A charge of legacies on land would not be a devise of the real estate, in the ordinary understanding of men, nor in the contemplation of law. It would make them a lien on, and payable out of, the land; but it would still be distinguishable from an estate in the land. But it is sufficient for us to declare, that we cannot make these legacies a charge on the land, except by going beyond, and not by following, the language of the will; we must create the charge, and not merely recognise it. The case of *Marhant* v. *Twisden* (Gilb. Rep. 30), was much stronger than the present. There, the testator had settled all his freeholds on his wife for life, as a jointure; and by his will, he bequeathed several legacies, and then followed this clause, "all the rest and residue of my *estate*, chattels, real and personal," I give to my wife, who I make sole executrix. But the court held, that the wife did not take the reversion of the jointure, by the devise, for as the testator had not, in the preceding part of the will, devised any *real estate, there could be no residue of real estate, on which the [*231 clause could operate.

But admitting that the present legacies were a charge on the lands of the testator, this would not be sufficient, to change the wife's estate into a fee. The clearly established doctrine on this subject is, that if the charge be merely on the land, and not on the person of the devisee, then the devisee, upon a general devise, takes an estate for life only. The reason is obvious. If the charge be merely on the estate, then the devisee (to whom the testator is always presumed to intend a benefit) can sustain no loss or detriment, in case the estate is construed but a life-estate, since the estate is taken subject to the incumbrance. But if the charge be personal on the devisee, then if his estate be but for life, it may determine before he is reimbursed for his payments, and thus he may sustain a serious loss. All the cases turn upon this distinction. *Canning* v. *Canning* (Moseley 240), *Loveacres* v. *Blight* (Cowp. 352), *Denn ex dem. Moor* v. *Mellor* (5 T. R. 558, and 2 Bos. & Pul. 247), *Doe* v. *Holmes* (8 T. R. 1), *Goodtitle* v. *Maddem* (4 East 496), all recognise it. And *Doe & Palmer* v. *Richards* (3 T. R. 356) proceeds upon it, whatever exception may be thought to lie to the application of it in that particular case. We are then of opinion, that there is no charge of the present legacies on the land; and if there were, no inference could be drawn from this circumstance, to *enlarge [*232 the estate of the wife to a fee, since they are not made a personal charge upon her.

The next consideration is, whether the words, "all the *rest* of my lands and tenements," &c., import a fee. In the first place, this clause is open to the objection, that it is not a residuary clause in the will, for no estate in

the lands is previously given, and consequently, if it operates at all on the fee, it gives the entire inheritance, and not a mere residuum of interest. And if a devise of "all the rest and residue of lands," in a clear residuary clause, was sufficient to carry a fee, by their own import, it would follow, that almost every will containing a residuary clause, would be construed, without words of limitation, to pass a fee. Yet, the contrary doctrine has most assuredly been maintained. In *Canning* v. *Canning* (Moseley 240), the testator devised as follows: "all the rest, residue and remainder of my messuages, lands, &c., after my just debts, legacies, &c., are fully satisfied and paid, I give to my executors, in trust for my daughters;" and the question was, whether these words passed an estate in fee or for life, to the executors. The court decided that they passed a life-estate only. The authority of this case was fully established in *Moor* v. *Denn ex dem. Mellor* (2 Bos. & Pul. 247), in the House of Lords, where words equally extensive occured; and the authority of this last case has never been broken in upon.

The cases which seem at first view to interfere with and control this
*233] doctrine, will be *found, upon close examination, to turn on other points. Thus, in *Palmer* v. *Richards* (3 T. R. 356), where there was a devise of "all the rest and residue of the testator's lands," &c., his legacies and personal expenses being thereout paid; Lord KENYON admitted, that the words "rest and residue," &c., were not sufficient to carry a fee; but he relied on the subsequent words, "legacies, &c., being thereout paid," which he considered as creating a charge upon the lands in the hands of the devisee, of such a nature as to carry a fee. In this opinion the court concurred; and though this case has been since questioned, on its own circumstances, its general doctrine remains untouched. So, in the case of *Norton* v. *Ladd* (1 Lutw. 755, 759), where the devise was to A. C., his sister, for life, of all his lands, &c,, after the decease of his mother; then to J. C., his brother, "the whole remainder of all those lands and tenements," given to A. C. for life, if he survived her; and if not, then "the whole remainder and reversion of all the said lands, &c., to his sisters, C. E., and A., and to their heirs for ever;" the court held, that a fee passed to J. C., under the devise, upon the ground, that taking the whole will, the words "whole remainder" properly referred to the estate or interest of the testator undisposed of to his sister, A. C.; and that the words could not relate to the quantity of lands, which the testator intended to devise to his brother, J. C., for he had plainly devised all his lands to his sister, A. C., and all the lands he had devised to
*234] A. C. he had devised to J. C.; *so that the words naturally and properly had relation to the quantity of estate which the testator intended to give J. C., that is, all the remainder, which is the same in effect as all his estate. If the words were merely to be referred to the lands he intended to devise to J. C., they would be ineffectual, for it was impossible that he could have any remainder of lands, when he had devised all to A. C.; so that they must refer to the estate in the lands. Such is the substance of the reasoning of the court; upon which it is unnecessary to say more, than that the case turned upon the supposed incongruity of construing the testator's words otherwise than as importing the whole remaining interest in the lands, upon all of which lands a life-estate was already attached. And the final devise over, which carried a plain fee to the sisters, being a substitution for the

former estate to J. C., in the event of his death before the testator, greatly fortifies this interpretation. This case has been much relied on by the plaintiff in error, upon the present argument; but it is very distinguishable from that before the court. There, a life-estate was given, and the terms, "whole remainder," had a natural meaning, as embracing the whole remaining interest. Here, on the contrary, there is no preceding interest given in the real estate, and therefore, the terms, "all the rest," are not susceptible of that sense. There, a substituted estate in fee, was clearly given; here, no clause occurs, leading necessarily to such a conclusion. All that the case in Lutwyche, taken as the fullest authority, *establishes, is, that the words "rest and residue" may, in certain connections, carry a fee.(a) [*236 This is not denied or doubted; but when the words attain their force from their juxta-position with other words, which fix the sense in which the testator has used them. In *Farmer* v. *Wise* (3 P. Wms. 294), the residuary clause was of "all the rest of his estate, real and personal," and the word "estate" has long been construed to convey a fee. This court have carried the doctrine still further, and adjudged a devise of "all the estate called Marrowbone," to be a devise of the fee, construing the words, not as words merely of local description, but of the estate or interest also in the land. *Lambert's Lessee* v. *Paine* (3 Cranch 79). *Murry* v. *Wyse* (2 Vern. 564, s. c. Prec. in Ch. 246) contained a devise, after a legacy, of all the residue of his real and personal estate, and rests on the same principle, as do *Beachcroft* v. *Beachcroft* (2 Vern. 690) and *Ridon* v. *Pain* (3 Atk. 494). In *Willows* v. *Lydcott* (Carth. 50, 2 Vent. 285), the residuary devise was to A. and her assigns for ever, which latter words indicate a clear intention to pass a fee. In *Grayson* v. *Atkinson* (1 Wils. 333), there was an introductory clause, purporting the intention of the testator to dispose of all his temporal estate, then several legacies were given, and a direction to A. to sell any part of his real and *personal estate, for payment of debts and legacies; and then the will says, as to the rest "of my goods and chattels, [*236 real and personal, movable and immovable, as houses, gardens, tenements, my share in the copperas works, &c., I give to the said A." Lord HARDWICKE, after some hesitation, held it a fee in A., relying upon the introductory clause, and the charge of the debts and legacies on the land, and upon the language of the residuary clause. Whatever may be the authority of this decision, it certainly does not pretend to rest solely on the residuary clause; and its containing a mixed devise of real and personal estate, was not insignificant, in ascertaining the testator's intention.

It may also be admitted, that the words "lands and tenements," do sometimes carry a fee, and are not confined to a mere local description of the property. But in their ordinary sense, they import the latter only; and when a more extensive signification is given to them in wills, it arises from the context, and is justified by the apparent intention of the testator to use them in such extensive signification. The cases cited at the bar reach to this extent and no further. Their authority is not denied; but their application to the present case is not admitted.

We may, then, take it to be the general result of the authorities, that the words, "all the rest of my lands," do not of themselves, import a devise of

(a) See Lord HARDWICKE's comments on this case, in Bailis v. Gale, 2 Ves. 48.

the fee; but unless aided by the context, the devisee, whether he be a sole
*237] or a residuary *devisee, will, if there be no words of limitation, take only a life-estate.

We next come to the effect of the words, "in possession, reversion or remainder," and, as incidental thereto, the effect of the wore "tenements." That the term "remainder" may, in some cases, connected with other clauses, carry a fee, has been already admitted, and was the very point in 1 Lutw. 755. The same is true, in respect to the word "reversion." This is affirmed in the case of *Bailis* v. *Gale* (2 Ves. 48), where the devise was, "I give to my son, C. G., the reversion of the tenement my sister now lives in, after her decease, and the reversion of those two tenements now in the possession of J. C." Lord HARDWICKE, in pronouncing judgment, relied on the legal signification of the word "reversion," and that its use by the testator was fairly to be inferred to be in its legal sense, as the whole right of reverter; and he adverted to the circumstance, that the devise was to a child, to whom it could scarcely be presumed the parent intended to give merely a dry reversion, or to split up his interest in it, into parts. But in that case, as in 1 Lutw. 755, there were antecedent estates created or existing in the land; and the devise was of a "reversion," and not, as in this case, of "all the rest of my lands, &c., in reversion," &c. The land now in controversy was not held by the testator as a reversionary estate, but as an estate in possession; and in no way, therefore, can the doctrine help the present case. But there are cases, which are contrary to *Bailis* v. *Gale*, and
*238] *somewhat clash with its authority. In *Peiton* v. *Banks* (1 Vern. 65), the case was, that a man devised his lands to his wife for life, and he gave the reversion to A. and B., to be equally divided betwixt them. The court decided, that A. and B., took an estate as tenants in common for life only. And Sergeant Maynard stated a similar decision to have been made about twenty years before that time. It is not material, however, to enter upon the delicate inquiry, which of these authorities is entitled to most weight, because the present case does not require it.

In respect to the word "tenements," it is only necessary to observe, that is has never been construed in a will, independently of other circumstances, to pass a fee. In *Canning* v. *Canning*, Moseley 240, and *Doe ex dem. Palmer* v. *Richards*, 3 T. & R. 356, and *Denn ex dem. Moor* v. *Mellor*, 5 Ibid. 558; s. c. 2 Bos. & Pul. 247, the same term occurred, as well as the broader expression, "hereditaments;" in neither case, was the term "tenement," supposed to have any peculiar effect; and the argument, attempting to establish a fee upon the import of the word "hereditaments," even in a residuary clause, was deliberately overruled by the court. The same doctrine was held in *Hopwell* v. *Ackland*, Salk. 239.

If, then it is asked, what interpretation the court put upon the words "all the rest," in connection with "lands and tenements?" the answer is,
*239] that no definite meaning can, in this will, be *annexed to them. It is our duty to give effect to all the words of a will, if, by the rules of law, it can be done. And where words occur in a will, their plain and ordinary sense is to be attached to them, unless the testator manifestly applies them in some other sense. But if words are used by him, which are insensible in the place where they occur, or their common meaning is deserted, and no other is furnished by the will, courts are driven to the necessity of

deeming them as merely insignificant, or surplusage, and to find the true interpretation of the will without them.[1] In the present case, the words, "all the rest of my lands and tenements," stand wholly disconnected with any preceding clause. There is nothing to which "the rest" has relation, for no other devise of real estate is made. We have no certain guide to the testator's intention in using them. We may indulge conjectures; but the law does not decide upon conjectures, but upon plain, reasonable, and certain expressions of intention found on the face of the will.

The next clause is, "provided she has no lawful issue." The probable intention of this proviso was, "provided she has no lawful issue" by me. Men do not, ordinarily, look to remote occurrences, in the structure of their wills, and especially unlearned men. The testator was young, and his wife young, and it was natural for them not to despair of issue, although, at the time of the will, he was in ill health. In case of leaving children, posthumous or otherwise, he might *think, that the gift to his wife of the whole of his real estate, would be more than conjugal affection could [*240 require, or parental prudence justify. In that event, he might mean to displace the whole estate of his wife, and to leave her to her dower at the common law, and the children to their inheritance by descent. This interpretation would afford a rational exposition of the clause, and, perhaps, ought not to be rejected, although there is no express limitation in the words. In this view, it is not very material, whether it be considered as a condition precedent or subsequent, though the general analogies of the law would certainly lead to the conclusion, that it was in the latter predicament. But even in this view, which is certainly most favorable to the plaintiff's in error, it falls short of the purposes of the argument. As a condition, in the event proposed, the prior estate of the wife would be defeated; but there would be no estate devised to the issue. They would take by descent as heirs, and not by devise. It would be going quite too far, to construe mere words of condition to include a contingent devise to the issue; to infer from words defeating the former estate, an intent to create a new estate in the issue, and that estate a fee, and a clear substitute for the former. No court would feel justified, upon so slender a foundation, to establish so broad a superstructure. Nor can any intention to give a fee to the wife be legally deduced from the proviso, in any way of interpreting the terms, because it is as perfectly consistent with the intention *to defeat a life-estate, as a fee in the whole of the lands. The testator, with a limited property, might [*241 justly think it too much to take from his own issue the substance of their inheritance, during a long minority, in favor of a wife, who might live many years, and form new connections. In such an event, leaving her to the general provision of law, as to dower, would not be unkindness or injustice. But it is sufficient to say, that the words are too equivocal to enable the court to ascertain from them the clear purpose of establishing a fee. And if the proviso refers to any lawful issue by any other husband, then it must be deemed a condition subsequent; and in the events which have happened, the estate of the wife, whether it be for life or in fee, has been defeated, and the plaintiffs in error are not entitled to reverse the present judgment. *Quacunque via data est*, the proviso cannot help the case.

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[1] See Mütter's Estate, 38 Penn. St. 314; Seibert *v.* Wise, 70 Id. 147.

It remains now to consider the succeeding clause of the will, in which the testator repeats his devise, and gives to his wife "all his lands," &c., dropping the words "the rest," and therefore, showing that he did not understand them as having any other or stronger import than the will presented without them. Then follow the words, "by her freely to be possessed and enjoyed;" upon which great stress has been laid at the bar. If these words had occurred in a will devising an estate for years, or for life, or in fee, in express terms, they would not, probably, have been thought to have any distinct auxiliary signification, but to be merely a more full annunciation
*242] *of what the law would imply. Occurring in a clause where the estate is undefined, they are supposed to have a peculiar force; so that, "freely to possess and enjoy," must mean to possess and enjoy, without any limitation or restriction as to estate or right. The argument is, that a tenant for life is restricted in many respects. She can make no permanent improvements or alterations; she is punishable for waste, and is subject to the inquisition of the reversioner. But if this argument be admitted, it proves, not that a fee is necessarily intended, but that these restrictions on the life-estate ought to be held to be done away by the words in question; they admit of quite as natural an interpretation, by being construed to mean, free of incumbrances; and in this view, are just as applicable to a life-estate as a fee. Perhaps, the testator himself may have entertained the notion, that the legacies in his will, or that of his father, were incumbrances on the estate; and if so, the words would indicate an intention, that the wife should be disincumbered of the burden. But in what way are we to reconcile the argument deduced from this clause, with that drawn on the same side from the preceding proviso? How could the testator intend, that the wife should "freely possess and enjoy" the lands in fee, when, in one event, he had stripped her of the whole estate, and that by a condition inseparably annexed as an incumbrance to her estate? We ought not to suppose, that he intended to repeal the proviso, under such a general phrase.

*243] The *case of *Loveacres* v. *Blight* (Cowp. 352) has been supposed to be a direct support of the argument in favor of a fee. In that case, the testator made the following devise: As touching such worldly estate wherewith it hath pleased God to bless me in this life, I give," &c., "in the following manner and form: First of all, I give and bequeath to E. M., my dearly-beloved wife, the sum of five pounds, to be paid yearly out of my estate, called G., and also one part of the dwelling-house, being the west side, with as much wood-craft, home at her, as she shall have need of, by my executors hereafter named. I give," &c., "unto my son, T. M., the sum of five pounds, to be paid in twelve months after my decease. I give unto my grand-daughter E., the sum of five pounds, to be paid twelve months after my decease. Item. I give unto J. M., and R. M., my two sons, whom I make my ——— and ordain my sole executors," &c., "all and singular my lands, messuages, by them freely to be possessed and enjoyed alike." The question was, whether, by this clause, the sons took an estate for life, or in fee. The court held, that they took a tenancy in common in fee. Lord MANSFIELD, in delivering the opinion of the court, admitted, that if the intention were doubtful, the general rule of the law must take place. But he laid stress upon the circumstance, that the

estate was charged with an annuity to his wife, so that the testator could not mean by the word "freely," to give it free of incumbrances. He thought the free enjoyment must, therefore, mean, free from *all limitations, that is, the absolute property of the estate. He also thought the introductory clause not unimportant; and that the blank after *my* was intended to be filled with "heirs;" and it can scarcely escape observation, that it was a case where the sons of the testator were the devisees. These considerations may well lead to a doubt, whether Lord MANSFIELD intended to lay down any general principle of construction in relation to the words, "freely to be enjoyed," &c. But if he did, the subsequent case of *Goodright* v. *Barron* (11 East 220) has manifestly interfered with its authority. In that case, there was an introductory clause, "as touching such worldly estate wherewith it hath pleased God to bless me," &c.; and the testator then proceeded as follows: "I give and bequeath to my brother T. D., a cottage-house, and all belonging to it, to him, and his heirs, for ever — W. C. tenant. Also, I give and bequeath to my wife E., whom I likewise make my sole executrix, all and singular my lands, messuages, and tenements, by her freely to be possessed and enjoyed." The court held, that the wife took an estate for life only; that the words, being ambiguous, did not pass a fee against the heir, but might mean free from incumbrances or charges, free from impeachment for waste; and that the introductory clause could not be brought down into the latter distinct clause to aid it, though, if joined, it might have had that effect. The court distinguished that case from the case before Lord MANSFIELD, because, in the latter, as the testator had already *incumbered the estate, the words must have meant to pass a fee, or they would have no meaning at all. Mr. Justice LE BLANC added, that the words used were not inconsistent with a life-estate only; and he distinguished between them and the words, "freely to be disposed of," admitting that the latter would pass a fee. So that, taking both these cases together, the fair deduction is, that the words, "freely to he possessed," &c., are too uncertain, of themselves, to raise a fee, but they may by aided by other circumstances. [*244 [*245

The case before us is far less strong than either of the foregoing cases, for there is no introductory clause, showing an intention to dispose of the whole property, as there was both in *Goodright* v. *Barron*, and *Loveacres* v. *Blight;* nor is there any incumbrance created by the testator on the land, which was the decisive circumstance that governed the latter.

Upon the whole, upon the most careful examination, we cannot find a sufficient warrant in the words of this will to pass a fee to the wife. The testator may have intended it, and probably did, but the intention cannot be extracted from his words, with reasonable certainty; and we have no right to indulge ourselves in mere private conjectures.

Judgment affirmed, with costs.