

*WALKER and wife, Appellants, v. CYPUS GRIFFIN's Heirs, Respondents.

Devise to classes.

Devise of the testator's estate, "One-fourth part to be given to the families of G. Holloway, W. B. Blackburn and A. Bartlett, to those of their children that my wife shall think proper, but in a greater proportion to F. P. Holloway, than to any other of G. Holloway's children; to E. P. Bartlett in a greater proportion than any of A. Bartlett's children; the balance to be given to the families of C. and T. F. Griffin's children in equal proportion;" Held, that the children of C. and J. T. Griffin took *per stirpes*, and not *per capita*, and that the property devised to them was to be divided into two equal parts, one moiety to be assigned to each family.¹

ERROR to the Circuit Court of Kentucky. This cause was submitted without argument.

March 10th, 1826. MARSHALL, Ch. J., delivered the opinion of the court.—This case depends entirely on the will of Francis Peart, deceased. The testator had devised his estate to the county court of Woodford, in trust for purposes therein mentioned; after which he adds, "should the county court of Woodford not have a right to take into possession this donation of the within will, I do request one-fourth part to be given to the families of G. Holloway, William B. Blackburn and A. Bartlett, to those of their children that my wife may think proper, but in a greater proportion *376] to Francis *P. Holloway than any other of G. Holloway's children; to Elizabeth P. Bartlett in a greater proportion than any of A. Bartlett's children; the balance to be given to the families of Cyrus and John T. Griffin's children, in equal proportion."

The devise to the county court of Woodford was held void; and thereupon, the heirs of Cyrus Griffin, who was dead at the time the will was made, brought a friendly suit against the heirs of John T. Griffin, who was also dead, in the circuit court for the district of Kentucky, for a division of the property. The circuit court decided, that the children were entitled to it, in exclusion of the grandchildren, whose parents were living, and that all the children should take in equal proportion. From this decree, the heirs of John Taylor Griffin have appealed to this court.

It is apparent, that in the devise of one-fourth to the families of G. Holloway, William B. Blackburn and A. Bartlett, the testator intended to designate the children, in exclusion of the grandchildren, because, he adds, "to those of their children that my wife may think proper;" obviously having the children only in his mind, and not taking grandchildren into view. When, in the same paragraph, and in the succeeding sentence, he uses the same word in the devise to the families of Cyrus and John T. Griffin, he must be supposed to have used it in the same sense, unless the additional words, "children to take in equal proportion," should show a change of

¹ See Gring's Appeal, 31 Penn. St. 292; Cushney v. Henry, 4 Paige 345. But it is a general rule of construction, that when a testator designates the objects of his bounty by their relationship to a living ancestor, they take equal shares *per capita*. Risk's Appeal, 52 Penn. St. 269. s. p. Downing v. Marshall, 23 N. Y. 366;

Gest v. Way, 2 Whart. 451; Witmer v. Ebersole, 5 Penn. St. 458; Walker v. Dunshee, 38 Id. 430. But, like all technical rules of construction, this must give way to the clearly expressed intent of the testator. Risk's Appeal, *ut supra*.

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intention, and that the property *was given to the children of the families, and not to the families themselves. The use of the words, families of Cyrus and John T. Griffin's children, to designate the grandchildren of Cyrus and John T. Griffin, would certainly be an unusual as well as awkward mode of describing them, and we think there is no necessity for resorting to this construction. The introduction of these words is to be readily accounted for. In the preceding devise, the testator had directed the children of two of the families, to take unequally. In this, he intended them to take equally ; and therefore, makes that provision.

The more difficult inquiry is, whether the property is to be divided into two equal parts, the one to be assigned to the family of Cyrus, and the other to the family of John T. Griffin ; or is to be divided equally among all the children of the two stocks. In solving this difficulty, it becomes necessary again to resort to the preceding sentence. The families of G. Holloway, Wm. P. Blackburn and A. Bartlett, take, each family, as a single devisee. Whatever may be the number of persons composing the family, and however unequal may be their number, they take, collectively, distinct and equal shares, by families ; each family constituting an individual devisee. This would be, we think, the natural import of the words, if unexplained by others. But we think, this construction is strengthened by the residue of the *sentence. The testator adds, "to those of their [*378 children that my wife may think proper, but in a greater proportion to F. P. Holloway, than to any other of G. Holloway's children, to E. P. Bartlett in a greater proportion than to any of A. Bartlett's children. These words show, that the inequalities intended by the testator were between children of the same family, not between the families. Francis P. Holloway was to have more, not than any of those who took under the devise, but than any other of G. Holloway's children. So, with respect to Elizabeth P. Bartlett. In each case, the share of the family is to be distributed among the children of the family, at the discretion of the wife ; that discretion being limited so far only that F. P. Holloway's should have more than any other of G. Holloway's children, and E. P. Bartlett more than any of A. Bartlett's children. We think it perfectly clear, that the families take in equal proportions.

It is reasonable to suppose, that the same intention was preserved with regard to the families of Cyrus and John T. Griffin, and the words must receive the same construction, if not controlled by those with which they are connected. Had the devise been to the families of Cyrus and John T. Griffin, the natural and obvious construction would have been, that the families took equally. We are, then, to inquire, what is the effect of the additional words, "children in equal proportion." Cyrus Griffin and John T. Griffin were both dead, Cyrus leaving four, and John T. Griffin two children, who were living at *the death of the testator, and were the objects of this devise. Had he intended them to take equally, the natural mode of [*379 expressing that intention, would have been to devise the property to the children of Cyrus and John T. Griffin. They would then have taken individually, and not by families ; but the testator directs them to take by families. Why, then, are the words, "children in equal proportion," added ? The testator had, in the preceding sentence, devised a part of the same property to three families, and had directed that the children of each should

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take unequally. Proceeding immediately to the two families of the Griffins it was natural, though not necessary, to express his wish that the children should take equally. But neither in this, nor in the preceding devise, does he mingle the children of the different families in one mass. He speaks of them severally, by families. We are, therefore, of opinion, that the children of Cyrus and John T. Griffin take by families, and that the property devised to them is to be divided into two equal parts, one moiety to be assigned to each family.

DECREE.—This cause came on to be heard, on the transcript of the record from the circuit court for the district of Kentucky, &c.: On consideration whereof, this court is of opinion, that the children of Cyrus and John T. Griffin took the property devised to them in the will of Francis Peart, deceased, by families: This court is, therefore, of opinion, that *380] the decree of the *circuit court is erroneous, inasmuch as it directs the said property to be divided among the said children *per capita*, and not *per stirpes*, and ought to be reversed; and this court doth so far reverse the same; and in all things else, it is affirmed. And the cause is remanded, to the said circuit court, that further proceedings may be had therein according to law.

DOE *ex dem.* PATTERSON v. WINN and others.

Land-law of Georgia.

In general, the validity of a patent for lands can only be impeached for causes anterior to its being issued, in a court of equity; but where the grant is absolutely void, as, where the state has no title, or the officer has no authority to issue the grant, the validity of the grant may be contested at law.

The laws of Georgia, in the year 1787, did not prohibit the issuing of a patent to any one person for more than 1000 acres of land; the proviso in the act of assembly of the 17th of February 1788, limiting the quantity to that number, is exclusively confined to head-rights.

CERTIFICATE of Division from the Circuit Court of Georgia.

February 24th, 1826. This cause was argued by *Berrien* and *Wilde*, for the plaintiff; and by *White*, for the defendant.

March 8th. THOMPSON, Justice, delivered the opinion of the court.—

*381] This case comes up from the circuit court for *the district of Georgia, and the question presented for decision appears by a certificate of division of opinion in that court, as to the admissibility of the grant offered in evidence on the part of the plaintiff.

The certificate states, that the plaintiff, to maintain his action, offered in evidence a patent, purporting to be a grant, in due form of law, from the state of Georgia to one Basil Jones, for 7300 acres of land, including the premises in question. And also, the warrant of survey upon which the said tract of land was laid off and surveyed, and the minutes of the court which granted the warrant. The defendant's counsel objected to the grant's going to the jury, affirming the same to be void in law, inasmuch as no grant could issue under the laws of the state for so great a number of acres as are comprised in the said grant. On which question so made the court was divided in opinion. The broad ground assumed in the objection is,