DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1863.

Cross *v.* De Valle.

1. The well-settled principle, that aliens may take land by deed or devise, and hold against any one but the sovereign until office found, exists in Rhode Island as elsewhere; not being affected by that statute which allows them to hold land "*provided*" they previously obtain a license from the Probate Court.
2. Although equity will, in some cases, interfere to assert and protect future rights,—as *Ex.* Gr. to protect the estate of a remainder-man from waste by the tenant for life, or to cut down an estate claimed to be a fee to a life interest only, where the language, rightly construed, gives but an interest for life; or will, at the request of trustees asking protection under a will, and to have a construction of the will and the direction of the court as to the disposition of the property,—yet it will not decree *in thesi* as to the future rights of parties not before the court or *in esse*.
3. *Langdale* v. *Briggs* (39 Eng. Law and Equity Reps. 194), followed and approved; distinguished, also, from *Lorillard* v. *Coster*, and *Hawley* v. *James* (5 Paige, 172, 442).
4. A "cross-bill" being an auxiliary bill simply, must be a bill touching matters in question in the original bill. If its purpose be different from that of the original bill, it is not a cross-bill even although the matters presented in it have a connection with the same general subject. As an original bill it will not attach to the controversy unless it be filed under such circumstances of citizenship, &c., as give jurisdiction to original bills; herein differing from a cross-bill, which sometimes may so attach.

Halsey devised real estate in Rhode Island to trustees there, in trust for the benefit of his natural daughter, Maria

De Valle, a married woman, during her life, for her separate use; and upon her decease the trustees were directed to convey in fee one-half of the estate to the eldest son of the said daughter living at her decease, if of age, and one-half part to her other children living at her decease, and in default of male issue to her daughters equally. Mrs. De Valle, who was born in 1823, was a native and resident of Buenos Ayres, and had five children born there. After a certain time she came to Rhode Island, and had one child born *there*.

The trustees were directed not to convey the real estate to his grandchildren, unless they should, within five years after being duly informed of his decease, have their permanent residence in the United States, and adopt and use the name of Halsey.

In case his daughter should die without issue living, or with issue who should neglect or refuse to comply with the conditions, the trustees were directed to pay two legacies out of the estate, and convey the residue to a certain Cross, the complainant, if then living, and if he should adopt and use the name of Halsey; or if said complainant should not then be living, or if he should refuse to adopt the name of Halsey, then to a nephew of Cross, upon condition that *he* should adopt the name of Halsey.

Cross now filed his bill in the Circuit Court of the United States for *Rhode Island* against the trustees and the beneficiaries of the trust, setting forth that the trusts in favor of Mrs. De Valle and her children had failed by reason of her and their alienage and incapacity to hold real estate in Rhode Island, and that the trust for the benefit of the complainant was hastened in enjoyment by such failure; claiming that the devise over to him took effect upon the probate of the will, *or*, that it took effect in favor of the heirs at law, *or* of the State of Rhode Island as sovereign, and praying that the estate should be conveyed to him by the trustees, *or* to the heirs at law, *or* to the State.

A cross-bill, or bill purporting to be so, was also filed *in the same court* by heirs at law of Halsey against this complain-

ant, Cross, the trustees, and other parties in interest,—the parties in both bills being the same, but being partially reversed,—for the purpose of more distinctly asserting and putting in issue the rights of the heirs at law, as against Mrs. De Valle, Cross, and those other devisees, and so of having the limitations on Mrs. De Valle's life-estate declared void, as tending to a perpetuity: and generally of having the rights of the heirs at law declared and protected by the court in its exercise of equitable jurisdiction. The complainants were citizens either of *Massachusetts*, or of *Wisconsin*, or of *Ohio*, or of *New York*. The defendants were all, with one exception, either citizens of *Rhode Island*, or *aliens commorant* there. The excepted defendant, Cross, complainant in the original bill, was a citizen of *Louisiana*, and not *commorant* in Rhode Island.

On the subject of alienage, it is necessary to mention that no special enactment had been made in Rhode Island, giving to aliens more ability to hold real estate than they had by the common law. On the contrary, rather, by a statute in force at Halsey's death, it had been enacted as follows:*

"Courts of Probate shall have power to grant petitions of aliens for leave to purchase, *hold* and dispose of real estate within their respective towns, *provided* the alien petitioning shall, at the time of his petition, be resident within this State, and shall have made declaration, according to law, of his intention to become a naturalized citizen of the United States."

On demurrer the Circuit Court dismissed the bill, and dismissed also the cross-bill. On appeal here, along with other questions argued—including the one whether the remainders were void as tending to perpetuities—were the following, the only ones considered by the court:

1. Was the equitable life-estate given by the will to Mrs. De Valle void in consequence of her alienage, so that persons who have interests in remainder have a right to be hastened in the enjoyment of the estate?

* Revised Statutes of R. I., 1857, page 351, § 21.

2. If not, did the court err in dismissing the cross-bill, and refusing to declare the future rights of the parties?

Mr. Jenkes in support of the Will:

1. Unless there be something special in the law of Rhode Island, alienage is no sufficient cause to declare the life-estate, *ipso facto*, void; however voidable the estate may be by the sovereign power, if such power is brought into action. This is familiar law. But Rhode Island herself interposes not. The statute relied on does but give the means by which an alien can acquire real estate, so that even the commonwealth has no rights of office found against it.

2. The application to declare future rights is made by what is called a cross-bill. But the bill is no proper cross-bill. It brings up new matter not touched on by the original parties. The bill of Mr. Cross asked nothing about future rights, nor did it seek to avoid anything as tending to perpetuity. This so-called cross-bill is, therefore, an original bill; and being so there was no jurisdiction. Cross was a citizen of Louisiana; all the defendants, therefore, were not citizens of Rhode Island, while all the complainants were citizens of States other than Rhode Island. Each of the complainants, therefore, could not, under the Judiciary Act, sue each of the defendants.* But supposing that bill rightly brought as respects form,—

3. Will this court decree, as asked by the heirs, on future rights? If it will not, it is unimportant whether the limitations over are void for remoteness or not. The question proposed was deeply considered so lately as 1856, in an English case, in the Court of Appeals in Chancery;† a case which is in point, and which we believe this court will follow. Lord Justice Turner there said, that long as he had known the court, he had always considered it to be settled that it did not declare future rights, but would leave them to be determined when they came into possession. He

* Connelly *v.* Taylor, 2 Peters, 564; Moffat *v.* Soley, 2 Paine, 103; Kitchen *v.* Strawbridge, 4 Washington, 84.

† Langdale *v.* Briggs, 39 English Law and Equity, 194.

added, that in *all* cases within his experience, where there had been tenancies for life with the remainder over, the course had been to provide for the interests of the tenants for life, reserving liberty to apply upon their deaths. Various considerations were urged before him in support of the proposition, which will be pressed by the other side, here, and among them the convenience and advantage it would be to parties to have their future rights ascertained and declared. To all arguments of this kind the judge replied, in effect, that the question was not one of discretion, but deeply affected the law of the court; that the course and practice in such cases constituted the law of the court; and added: "I cannot agree to break through that law upon any mere ground of convenience. If the law is productive of inconvenience, it is for the legislature to alter it." In *Jackson* v. *Turnley*,* the Vice-Chancellor would not entertain a suit for the purpose of declaring that a person who claims to have a right which may arise hereafter has no such right.

Messrs. Curtis and Curry on the other side:

1. The Rhode Island statute shows the only mode by which an alien can hold land in *that* State. He may hold it, "provided" he gets previous license. It declares, in effect, that without license from the Courts of Probate no one can hold it at all. It gives an increased severity to the already hard rule of the common law, never previously modified in the least in Rhode Island. On the contrary, as opposite counsel will admit, before its enactment, aliens were obliged always to have recourse by petition to the General Assembly for the privilege of taking or holding, or disposing of real property in that State. Will this court, by its decision of this cause, uphold our local immemorial law, or disregard it, and make another law for us?

2. If the second bill was an original one, the objection to the jurisdiction would be well taken as respects Cross. But it is a true cross-bill; a bill by some of the defendants to a former bill, touching the same matters and still depending,

* 21 English Law and Equity, 13.

against the other defendants and the plaintiff to the former bill, which plaintiff is the party on account of whose citizenship the objection is made that it cannot stand as an original bill. All the parties to both bills are the same, only that they are partially reversed. The subject-matter is the same; but the plaintiffs in the cross-bill assert rights to the property different from those allowed to them in the original bill, claiming an affirmative decree upon those rights, which the forms of pleading might deny to them as defendants to the former suit. The jurisdiction of the court having once attached to the controversy and the parties, it is coextensive, by the settled law of the court, with all the equities of the cause for every purpose properly arising in its progress, and especially as regards the original mover.

3. The general preventive power of equity; its capacity to treat vested estates in remainder as present interests to be protected; its habit of declaring a scheme of trusts, and so of deciding whether limitations over tend, or do not tend, to perpetuities, are all supposed to be shut off from exercise in a case *apparently* one for their application, by *Langdale* v. *Briggs*, decided in an English court. We believe that case to have been wrongly decided even upon English authorities. It is notoriously not in accordance with Scotch ones. Turner, L. J., though he said that *during* the hearing he had been surprised at the length to which the argument had been carried in favor of that view which *we* now take, yet adds: "But having looked into the cases since the argument, I feel bound *now* to say that I have been not less surprised to find how *little authority* is to be found upon the subject." He consoles himself by remarking, that "authority, however, is not *wholly* wanting;" and makes good his assertion by citing a book of no more modern and no more full character than "Equity Cases Abridged." His lordship also declared: "I am far from thinking that, to some extent, the legislature might not usefully interpose and provide some remedy for the ascertainment of future rights." Certainly, when a case decided in the face of expressions like these is pressed upon an American tribunal of supreme authority in limitation of *its* powers, we may pause before we adopt it. Space beyond

that usually allowed to argument will be pardoned in favor of an examination of the case itself, and of the precedents upon which it professes to be founded. The discussion will be dry to readers generally, but it may prove valuable to any future investigator of the limits upon general chancery jurisdiction.

In the case so much relied on, the testator had settled estates during his life in strict settlement, remainder to himself in fee. He afterwards made a will, devising all his estates, freehold, leasehold and copyhold, to his eldest daughter, the complainant, Lady Langdale, for life, remainder to her first and other sons, in tail male, remainder to his other daughters, &c., in strict settlement. Afterwards, upon the birth of a daughter to Lady Langdale, he made a codicil, by which he devised all his real estates (without mention of leasehold and copyhold), subject to Lady L.'s life-estate, to her daughter for life, remainder to the sons, &c., of said daughter, in tail male, remainder over, &c. One of the questions raised at the hearing of the cause, *though not apparently by the pleadings*, was upon the demand by the remainder-man in tail, under the will, to have the question decided as between himself and Lady L.'s daughter, *they being both parties defendant*, whether under the language in the codicil, the leasehold and copyhold estates would, upon Lady Langdale's death, pass to her daughter, or would go according to the will. Upon the refusal of the Vice-Chancellor to decide this point, as well as from the remainder of the decree, the remainder-man appealed, and upon the appeal the decision of the Vice-Chancellor was affirmed; *one of the Lord Justices declining to give any opinion upon this particular point*, the other, Turner, L. J., giving the opinion relied on.

The first case cited by the Lord Justice is *Hitchcock* v. *Sedgwick*,* or rather a case cited in a note to the report of that case. In the case cited (*Seyborne* v. *Clifton*),† plaintiff and defendant had both purchased a reversion, and plaintiff brought a bill to have his right declared and to perpetuate his testimony, and his bill was dismissed, so that he finally

* 1 Equity Cases Abridged, 234; or, 8vo. edit. 354, Dublin, 1792.

† Reported in Nelson's Chancery Reports, 125. REP.

lost his reversion for want of the testimony. The report of the case is loose; but it is clear that the principal question was upon the equity to perpetuate testimony, and it is clear that upon that point the decision was wrong, as Turner, L. J., admits.* As to the refusal to determine the title to the reversion, it probably was right, as the title appears to have been a purely *legal* one. The case is slight as authority here and now. In *Thellusson* v. *Woodford*,† next cited, the point does not seem to have been raised. *Wright* v. *Atkyns*‡ is the case on which the Lord Justice chiefly relies. That belongs to a large class of cases, those namely in which words of *recommendation* in a devise are construed to create a *trust.* The testator devised lands to defendant, his mother, in the fullest confidence that after her decease she would devise the property to the testator's family. Plaintiff, who was heir at law, *and also mortgagee*, brought his bill to have an account of the amount due on the mortgages, and that defendant be decreed to pay the same, if entitled to the *fee;* or, if she were only entitled to a life estate that the amount should be raised by sale. *There was no prayer for a decision of plaintiff's claim as heir at law to the reversion upon the life-estate of the defendant.* Sir William Grant, however, decided that she was entitled only to a life-estate, and that plaintiff would be entitled in fee upon her death. Consequently, that the mortgages should be raised by sale, she being made personally accountable only for the interest accrued during her possession. Lord Eldon confirmed this decree, and also issued an injunction against cutting timber upon the estate by defendant. The House of Lords, upon appeal, reversed so much of Sir William Grant's decree as declared the defendant to be merely tenant for life, and all declarations consequent thereon; from which it would seem that they must have decreed the whole of the mortgage to be chargeable upon the defendant, personally, as well as the land. Thus far it only appears that the House of Lords did not think it necessary to decide the question of the tenancy for life in order to provide

* 39 English Law and Equity, 214. † 4 Vesey, 227. ‡ 17 Id. 255.

for the mortgages; that consequently the question was not raised by the bill, and should not be passed upon.

The House of Lords reversed the decree for an injunction, on the ground that, whatever might be the claims of the heir at law after the death of the tenant for life, she was entitled, during her life, to the full enjoyment of the land. Upon this view of her rights, of course they could not decide the question, whether she was tenant in fee or for life upon a bill not specifically seeking any such decision.

Now, in this case we have the authority of Sir Wm. Grant and Lord Eldon, that Chancery may declare that an equitable remainder exists, pending the life-estate of the owner of the legal fee; while the House of Lords do not appear to have decided anything more than that in the particular case before them such a declaration was not called for.

But *Wright* v. *Atkyns* does not stand alone. There are many cases in which a bill has been brought to obtain a decree that precatory or advisory words in a devise in fee, constituted a trust, reducing the fee to a life-estate; and in several of these cases it appears that the bill was filed and the decree made pending the life-estate. So that all these cases must be wrong, as well as that of *Wright* v. *Atkyns*, if the position of L. J. Turner is sound. Let us examine the cases.

(A.D. 1801.) In *Brown* v. *Higgs*,* Lord Eldon plainly intimates, that if the bill had called for a decision of the question it might have been made, though the tenant for life was still alive.

(A.D. 1813.) *Lord Dorchester* v. *The Earl of Effingham*.† Lord D. settled certain estates in strict settlement, reserving a power of new appointment by deed or will. He made a will with this clause: "All my landed estates to be attached *to my title* as closely as possible." Upon bill brought *by the tenant in tail*, under the settlement to have his estate tail established under the will also, Sir Wm. Grant *held* that by the direction in the will all the estates tail under the settlement were cut down to life-estates. Upon the view of L. J.

* 8 Vesey, 561.

† 3 Beavan, 180, *n.*

Turner it would have been improper to decide this question during the life of the complainant.

(A. D. 1816.) *Prevost* v. *Clarke*.* Testatrix bequeathed *personal property* to her daughter, Anne Clarke, and added that, trusting in the honor of Edward Clarke, husband of Anne, she entreated him, in case he survived his wife and had no children by her, he would leave the property, at his decease, to the testator's children and grandchildren. Upon bill brought by the children and grandchildren, during the life of both Edward and Anne Clarke, to have their right to the property, in case of the death of defendants without issue, declared, it was held that, upon the authority of *Brown* v. *Higgs* (*supra*), their prayer must be granted.

(A. D. 1840.) *Knight* v. *Knight*† was a devise in fee with request as to disposition by devisee, and bill brought by claimant of remainder, to have his right declared during life of devisee. The devisee died pending the bill, and it was decided that he took an absolute fee. But no question was raised as to the power of the court to decide the question before the death of the devisee, although this must have been long after the final decision, in the House of Lords, of the case of *Wright* v. *Atkyns*. So far, then, as *Langdale* v. *Briggs* rests upon that case, it wants authority.

The next case cited, *Ferrand* v. *Wilson*,‡ has no bearing upon the question,—the admission by Sir James Wigram, that a *legal* right cannot be determined before some injury thereto, being true enough, but not to the purpose.

The only other cases cited by the Lord Justice§ are two decided by V. C. Wood, both meagrely reported.‖ Both were *special cases made up under the provisions of an act of Parliament*,¶ permitting rights to be declared in certain cases by the court upon a statement of facts and questions. It does not appear upon what grounds the decision of the point was urged, and the cases rest upon the single authority of Vice-Chancellor Wood.

* 2 Maddock, 458.
† 3 Beavan, 148.
‡ 4 Hare, 385.
§ 10 Hare app. pp. xii and xiv.
‖ Greenwood *v.* Sutherland; Garlick *v.* Lawson.
¶ 13 and 14 Vic., c. 35.

Now, in the United States we have the New York cases of *Lorillard* v. *Coster*, and *Hawley* v. *James*.* In the former, the trustees of Lorillard, who had left property to be divided among collateral relatives, brought their bill to have the trusts of the will established, and for guidance by the court. Among other provisions in the will was one requiring the trustees to convert all the residue of the testator's property into real estate in New York; the income to be paid in equal parts to such of the nephews and nieces as should from time to time be living; and two years after the death of the last of them the property remaining was to be divided among their surviving children and grandchildren *per stirpes*. The heirs at law, who were parties defendant to the bill, contended that the limitations, after the death of the nephews and nieces, were void, and that they were entitled to the remainder. The complainants contended that this question was not ripe for settlement, because the life-estates were pending, and because the proper parties were not yet all *in esse*. But the court held that the heirs at law were entitled to a settlement of the question, giving as a reason that the trustees could only be authorized to invest the property as required by the will, so far as the trusts were valid, and if the ultimate limitations were void, the investment must be made in such a way as to secure the rights of all parties. It was said that the trustees must be regarded as representing the parties not *in esse*. The other case, *Hawley* v. *James*, gave rise to a similar question, which received a similar decision.

It is impossible to reconcile these decisions with the views of Lord Justice Turner. Moreover, the reason given by him for the rule he lays down is insufficient. The difficulty in the way of equitable jurisdiction, in such cases, is not that the court cannot deal with *future rights*. A right in remainder is not a *future* right. It is a *present* right to a future enjoyment. It is recognized at Law and in Equity as an *estate*, and is protected as such just as an estate in possession. Even in *Langdale* v. *Briggs*, so much relied on, Turner, L. J.,

* 5 Paige, 172, 442.

says that the appellant whose rights he refused to declare, might bring his bill for a receiver, if the mortgages upon the estates were not kept down.* Of course the court would have to begin, in such a case, by deciding that he had an interest in the estates.

Davis v. *Angel*, decided by the Master of the Rolls, and on appeal by the Lord Chancellor, so lately as 1862,† would indicate that the opinion of Lord Justice Turner is not law in Westminster Hall. It was a bill by a remainder-man to have his rights declared. It was held that he could not maintain the bill, because he had *no vested interest*, and it was *contingent if he would ever acquire any*. And the Lord Chancellor says, that if the complainant had had *any* vested interest, *however future and remote it might be*, it would have been sufficient.

In the case at bar, the property was devised to trustees, and if the limitations of the equitable estates are void for remoteness,—as we think they are,—the heirs at law have present vested interests by way of resulting trusts; and the trustees are accountable to them now, as the owners of those interests, as entitled to have their rights admitted by the trustees, and all investments so made as to protect those interests, and so as to enable the trustees to pass over the property to the heirs at law, on the termination of the life-estate, if that be valid. It is one of the duties of trustees *to admit the existence of the trust;* a duty not dependent on the right of the *cestuis que trust* to present possession. A vested interest in remainder is a subject of sale, and the denial of the trust throws a cloud upon that title, which the trustee cannot properly do. These trustees deny the title of the heirs as *cestuis que trust* under this will. And for this reason, if there were no others, equity may entertain this bill.

Mr. Justice GRIER delivered the opinion of the court:

The bill alleges that the trusts declared in the will are all void, because of the alienage of Mrs. De Valle and her children, and prays that the trustees may be ordered to convey

* P. 219.

† 8 Jurist N. S. 709, and on appeal, 8 Id. N. S. 1024.

to the complainant as one of these numerous contingent remainder-men who is not an alien; *or* that the estate be conveyed to the heirs at law of the testator. As it is not alleged that the complainant is one of these heirs, it is not easy to apprehend on what grounds he claims as an alternative *remedy* that the court should decree in favor of those who claim adversely to himself. Perhaps it was to favor the attempt to give jurisdiction to the court to declare the future rights of the parties by converting an original into a cross-bill.

That an alien may take by deed or devise, and hold against any one but the sovereign until office found, is a familiar principle of law, which it requires no citation of authorities to establish. Nor is it affected by the fact that a statute of Rhode Island will permit aliens to take a license to purchase, which will protect them even as against the State; nor by the fact that a chancellor may not entertain a bill by an alien to enforce a trust, which, if conveyed to him, might immediately escheat to the crown.

Now, as the court rightly decided that Mrs. De Valle took an equitable life-estate by the will, defeasible only by action of the sovereign, Cross was in no situation to call upon the court to declare the fate of these numerous contingent remainders.

1. For if the remainders were void because of remoteness and tending to a perpetuity, his own remainder fell with the others.

2. And if declared to be valid, not only the six children of Mrs. De Valle, who are parties to the suit, but possibly and before her death there might be six more, not now *in esse*, who would be entitled to come in before him.

3. The bill demands no such *declaration of future rights*, nor does it suggest how it could be done, or any sufficient reason why the court should pass upon the rights of persons not *in esse*.

4. The bill charges no fault to the devisees except alienage, and before any of the contingencies happen the party entitled to take may be a citizen and capable of taking and holding the estate. In fact, one of the children of defendant was

born in Rhode Island, and therefore is as capable of taking as Cross.

The decree of the court was final and complete as to the case made by the complainant's bill. If the decree had been against Mrs. De Valle, and she had been held incapable of taking, then the heirs might well say, that in such a case the estate should be conveyed to them, and not to Cross, and have their cross-bill for that purpose. But the decree being in favor of Mrs. De Valle, and the bill dismissed, the cross-bill must have the same fate with the original. A cross-bill "is a mere auxiliary suit, and a dependency of the original." "It may be brought by a defendant against the plaintiff in the same suit, or against other defendants, or against both, but it must be touching the matters in question in the bill; as where a discovery is necessary, or as where the original bill is brought for a specific performance of a contract, which the defendant at the same time insists ought to be delivered up and cancelled; or where the matter of defence arises after the cause is at issue, where in cases at law the defence is by plea *puis darrein continuance*." The bill filed by the heirs is for an entirely different purpose from that of Cross. It called upon the court to decree on the future rights of their co-defendants and others not *in esse*, and decree the limitations on the life-estate to be void as tending to a perpetuity. This would be introducing an entirely new controversy, not at all necessary to be decided in order to have a final decree on the case presented by the original bill.

As an original bill the court might properly refuse to consider it. First, on account of the parties, and secondly, on account of the subject-matter.

The bill is filed in Rhode Island. All the complainants are citizens of States other than Rhode Island or Louisiana, while one of the defendants, Cross, is a citizen of the State last named, and not commorant in Rhode Island. It was admitted that this objection was conclusive, if the bill was an original. The second objection is equally conclusive, whether it be called a cross-bill or an original. A chancellor will not maintain a bill *merely to declare future rights*. The

Scotch tribunals pass on such questions by "*declarator*," but the English courts have never assumed such power.* In *Langdale* v. *Briggs*,† Lord Justice Turner remarks: "As long as I have known this court, now for no inconsiderable period, I have always considered it to be settled that the court does not declare future rights, but leaves them to be determined when they may come into possession. In all cases within my experience, where there have been tenancies for life with remainders over, the course has been to provide for the interests of the tenants for life, reserving liberty to apply upon their death."

A remainder-man may have a decree to protect the estate from waste, and have it so secured by the trustee as to protect his estate in expectancy. The court will interfere under all needful circumstances to protect his rights, but such cases do not come within the category of mere declaratory decrees as to future rights.

There is also a class of cases in which recommendations or requests in a will to a devisee or legatee have been construed as cutting down an absolute fee into an estate for life, with an equitable remainder to the person indicated by the testator in his request. In such cases the court will entertain a bill during the life of the first taker to have the right of the claimant in remainder established. Nor do these cases infringe upon the doctrine we have stated as to mere declaratory decrees concerning future contingent executory estates.

But there is a class of cases which are exceptions to this rule, and being *exceptional*, only tend to prove the rule. The New York cases of *Lorillard* v. *Coster*, and *Hawley* v. *James*,‡ cited by the counsel of the heirs at law, are of this character. There the bills were filed by the executors or trustees for their protection, and that they might have a construction of the will, and the direction of the court as to the disposition of the property. In such cases, from necessity, and in order to protect the trustee, the court are compelled to settle questions as to the validity and effect of contingent limita-

* Grove *v.* Bastard, 2 Phillips, 621. † 39 English Law and Equity, 214.
‡ 5 Paige, 172, 442.

tions in a will, even to persons not *in esse*, in order to make a final decree and give proper instructions in relation to the execution of the trusts.* It is this necessity alone which compels a court to make such cases exceptions to the general rule. But in the present case no such necessity exists. The court is not called upon to make a scheme of the trusts, nor could they anticipate the situation of the parties in the suit, or those who may be in existence at the death of Mrs. De Valle. The court has no power to decree *in thesi*, as to the future rights of parties not before the court or *in esse*.

DECREE AFFIRMED WITH COSTS.

WRIGHT *v.* ELLISON.

1. To constitute an equitable lien on a fund there must be some distinct appropriation of the fund by the debtor. It is not enough that the fund may have been created through the efforts and outlays of the party claiming the lien.
2. A power of attorney drawn up in Spanish South America, and by Portuguese agents, in which throughout there is verbiage and exaggerated expression, will be held to authorize no more than its primary and apparent purpose. Hence a power to prosecute a claim in the Brazilian courts will not be held to give power to prosecute one before a Commissioner of the United States at Washington; notwithstanding that the first named power is given with great superfluity, generality, and strength of language.

IN 1827, the American brig Caspian was illegally captured by the naval forces of Brazil, and condemned in the prize courts of that country. There being nothing else to be done in the circumstances, her master, one Goodrich, instituted legal proceedings to recover the brig, and gave to Zimmerman, Frazier & Co., an American firm of the country, a power of attorney with right of substitution, to go on with matters. The power was essentially in these words:

"I authorize, &c., in my name and representing me, to appear in and prosecute the cause I am this day prosecuting before the

* See Bowers *v.* Smith, 10 Paige, 200.