REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. III.

THIRD EDITION.

TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

BY LUCIAN MINOR,

COUNSELLOR AT LAW.

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former remedy against the appellant in equity,* or against the surviving obligor, who, in the event of their paying, may resort to the appellant for reimbursement. Upon the whole, there is error in the judgment, which is to be reversed by the unanimous opinion of the Court.

[* *Chandler's* ex'x v. *Neale's* ex'rs, 2 H. & M. 124; *Atwell's* adm'r. v. *Milton*, 4 H. & M. 253; *Atwell's* adm'rs. v. *Towler*, 1 Munf. 175.]

ALLEN *v.* HARRISON AND OTHERS.

[289]

Friday, October 22, 1802.

The act of 1785, concerning descents, was restored by the suspending act of 1792. [A will made since the 1st of Jan. 1787, (when the act of 1785 took effect.) may pass after acquired lands, if it evidently contemplate such property, but not otherwise.]*

This was an appeal from the High Court of Chancery, brought by Carter Harrison and Mary his wife, and by Anne and Martha Allen, against William Allen. The appeal is grounded on the following case:

John Allen, by his will, dated in May, 1783, devised all his estate to his father, William Allen the elder, and afterwards purchased a tract of land, called *Neck of Land and Robinson's Quarter*, in James City county. In September, 1789, the said William Allen the elder, by his last will, after certain specific bequests, devises as follows: "Item, I give and devise to my son John and his heirs, forever, all my lands in the county of Surry and in the county of Sussex. Item, I give and devise unto my son William, all my lands *in the county of New Kent and James City*, to him and his heirs forever; also, all my lands in the counties of Southampton and Nansemond, to him

* Accordant, *Smith* et al. v. *Edrington*, 8 Cra. 69.
A will made in 1789, giving certain lands which the testator did not then own, (though he was in possession of part of them,) and which were soon afterwards given him,—validly passed them, by force of the act of 1785-'7. *Turpin* v. *Turpin*, Wythe, 137. AFFIRMED, 1 Wash. 75.
The mere adding of a codicil does not make the will pass lands acquired between its date and that of the codicil; there being no words in the will applicable to after acquired lands, nor any words in the codicil applicable to those lands. *Kendall's ex'or., &c.* v. *Kendall et als.*, 5 Mun. 272.
Testator wills *the residue* of his estate to A., and afterwards buys land, and subsequently re-publishes the will. A. takes the after purchased land. *Bagwell, &c.* v. *Elliott and wife*, 2 Rand. 190.
See Code of 1849, p. 517, § 11. That Code took effect July 1, 1850.

and his heirs forever. Item, I give my plantation on the three creeks to my son John, to him and his heirs forever; I also give him my new chariot. Item, I give my plantation called the Fort-quarter to my son William and his heirs forever. Item, all the rest and residue of my estate, of what nature or kind soever, I give to my said two sons to be equally divided between them." The said John Allen died in May, 1793; and the said William Allen the elder, in July, 1793, leaving then alive one son, to-wit, the said Wm. Allen, the defendant, and three daughters, to-wit, Mary, (married to Harrison,) Anne and Martha, the plaintiffs. The defendant contends:

1. That the devise of the lands to John having lapsed by his death in the life-time of his father, the lands so devised
[290] descended to the defendant as heir-at-law to his father, inasmuch as the act of the 8th of December, 1792, had repealed the act regulating the course of descents, passed in the year 1785; and as the operation of the act of December 8th, 1792, was suspended by the suspending act of December 28th, 1792, until the 1st of October, 1793, the common law was restored, there being no act of Assembly in existence to regulate the descent; because the suspending act did not revive the act of 1785, as that would be repugnant to the act of 1789, which declares that if a statute be repealed, and the repealing statute be afterwards itself repealed, the first statute shall not be revived.

2. That the *neck of land* tract purchased by John did not pass by his will to his father, because John did not own it at the time of making his will, which was before the act of 1785.

3. That the *neck of land* tract did not descend to William the father, because, the act of 1785 being repealed, and that of the 8th of December, 1792, suspended, the common law gave the rule.

4. That if the *neck of land* tract did pass by John's will, or descended on his father, then it passed, by the will of Wm. the father, to the defendant: If not the whole, at least a moiety under the devise; and a fourth of the other moiety would descend on the defendant.

The plaintiffs insist:

That the act of 1785 was restored by the suspending act of the 28th of December, 1792; and, therefore, that the lapsed lands descended to them and the defendants in coparcenary. That the neck of land tract either passed by the will of John, or descended to his father; and from him it descended to the

plaintiffs and the defendant in coparcenary, and did not pass by the will of the father.

The Court of Chancery decreed in favor of the plaintiffs, and the defendant, William Allen, appealed to this Court. [291]

WICKHAM, for the appellant.

Two important questions arise in this cause. 1. Whether the suspending acts restore those of 1785, [c. 60, 12 Stat. Larg. 138, c. 61, p. 140,] relative to wills and descents? 2. If so, whether the *neck of land* tract, inherited from the testator's son John, passed by the will of William Allen the father?

As to the first: It is submitted whether *Proudfit* v. *Murray*, 1 Call, 394, gives the rule with regard to the suspending laws in general, and particularly with regard to this case?

As to the second: According to the decree, the appellant gets a larger proportion of the personal than he does of the real estate; when, if the just construction had prevailed, he ought to have had five-eighths of each. The Chancellor has labored to prove that the devise of the lands in James City does not comprehend this tract; but without taking up time to investigate that position thoroughly, I shall merely observe, that this part of the will strengthens our construction of the residuary clause, which we contend carries these lands. With respect to personal estate, the law always has been, that a devise of personal property relates to the death of the testator, and not to the time of making the will. And yet the testator can no more foresee, when he is making his will, that he will be possessed of a lease of land, or of a slave, at some future day, than he can that he will be owner of other lands after the will is made. Consequently, if a residuary clause will carry the first, it ought to carry the second also. The reason given by the Chancellor why the residuary clause carries the personal estate acquired after making the will, is incorrect, and is supported by no authority; for it is not because the property is fluctuating, but because it was a rule of the civil law, from whence it was borrowed by the *Ecclesiastical* Courts: which did not apply to real estates, because they could not be devised unless the testator had them at the time of making the will. At common law, lands could only be devised by custom, Litt. Sect. 167; and the statute of Hen. 8 merely gave power to devise those which the testator had at the time of making the will; for the words are, that a person *having* lands may devise them; and the early construction on [292]

it considered the word *having* as requiring a title at the time of making the will. *Butler* v. *Baker*, 3 Co. 30. Which shews that a will in England operates like other conveyances by deed, and not as the institution of an heir by the Roman law. [*Hogan* v. *Jackson*,] Cowp. 305. Therefore, when our act of Assembly removed the impediment to devising lands, it necessarily subjected them to the same situation, under residuary clauses, as personal estate is subject to. For, as feudal reasons prevented it at first, when they were removed, the residuary clause ought to have the same operation as to both. That John is joined with William in the residuary devise, makes no difference; for the testator, who is to be considered as *inops consilii*, will still have intended to pass all the residuary estate which he might have at the time of his death; and, consequently, lands, however derived, for that is the idea of men in general, when they insert sweeping clauses in their wills. This construction is consistent with the policy of the Legislature, who evidently intended to put both kinds of property on the same footing.

CALL, contra.

1. The lands devised to John by the will of his father, descend to the plaintiffs and defendant, who are the children of the father.

For the act of 1785 was restored by that of December 28th, 1792, *Proudfit* v. *Murray*, 1 Call, 394; *Brown* v. *Barry*, 3 Dall. 367. Therefore, as the devisee died in the life-
[293] time of the testator, the devise became void. Of course the lands were undisposed of by the will, and descended on the testator's heirs, the present plaintiffs, and the defendant.

2. The consequence of this is, that the *neck of land* tract, upon the death of John, under the act of 1785, which was revived by the suspending act, became the property of William the father; on whose death it descended on his children, and did not pass by his will. For the act of 1785 does not create a rule of construction: it merely gives the testator a *power* of devising *after-acquired* land. But this power he may exercise or not, as he pleases; and, therefore, he must manifest an intention of doing so, or the old rule will prevail.

In the present case, however, the testator has not manifested any intention of passing this tract of land; since he uses no future words, or any expression equivalent thereto.

For the devise of the James City lands did not pass them; because the testator meant to speak of the lands he then had in that county. For it is improbable that he calculated not

only that he should own other lands at a future day, but that he should own them in a particular county. This is too remote a possibility; and, therefore, the Court will not infer it, but confine the devise to the lands, which the testator had in that county at the time of making the will.

The residuary clause does not pass them: because the testator possessed a large residuary estate, which was sufficient to satisfy it; and, therefore, if any inconvenience or absurdity will follow from including the *neck of land* tract under the residuary clause, the Court will confine it to the other estate. *Kennon* v. *M'Roberts*, 1 Wash. 113.

A gross absurdity would follow from the other constructions, for the devise is to John and William: So [294] that, according to that interpretation, the testator will be made to devise to his son John the very lands which he was to inherit from that John himself. Which would be preposterous; and, therefore, upon the rule in *Kennon* v. *M'Roberts*, [1 Wash. 96,] the devise is to be confined to the other estate.

That the personal estate is subject to a different rule, and that the devise, as to that, takes effect from the death of the testator, makes no difference. For that does not depend upon the rule of the Roman law, as is supposed, but is founded upon the reason stated by the Chancellor; namely, the mutability and fluctuation of that kind of property, which is so subject to change that the testator, on any other construction, must make a new will every day, 4 Bac. Abr. 350, [Gwil. ed.] Whereas, lands are not subject to such changes, as a man seldom owns more than one or two tracts in the course of his life. And, therefore, there is no necessity for extending the expression, so as to include objects not contemplated by the testator when he made his will.

RANDOLPH, on the same side.

The case of *Kennon* v. *M'Roberts* expressly applies, and shews that, as there was other estate for the residuary clause to operate on, it ought to be confined to that, and not extended to this tract of land; because the absurdity of the testator's devising lands inherited from the son, to the son himself, must otherwise follow. The testator, although he had the power, was not bound to exercise it; and it appears, in this case, that he did not intend to exercise it. For, independent of the absurdity just mentioned, the preamble shews he only meant to devise the property which he then had; because he there only professes to dispose of the *estate which it has pleased God to bestow upon him:* thereby plainly mean-

ing the property which he then had. Upon this idea, I [295] contend that even the after-acquired personal estate did not pass. The general reasoning, in *Davers* et al. v. *Dewes* et al., 3 P. Wms. 40, is in favor of this opinion, and shews that, under circumstances like the present, personal property, acquired after making the will, does not pass by a general residuary clause. The act only intended to give the testator power to devise after-acquired lands; which he had not the means of doing before. Pow. on Dev. 196. But this was a right which he might exercise or not, as he pleased; and, therefore, the simple question is, whether the testator intended to devise this tract? which nobody, under the circumstances of the case, will answer in the affirmative. It is impossible he could have meant to devise to John the lands he was to inherit from him.

WICKHAM, in reply.

The laws upon this subject ought to be considered as one system; and, therefore, it is proper to consider what the law was before the statute. The rule with regard to personal estate is predicated on the Roman law; which, on account of feudal regulations, could not apply to lands. And the act of Hen. 8 only gave power to devise the lands which the testator had at the time of making the will. So that, notwithstanding that statute, the rule could not take place, because the impediment was only removed in part. But when the act of Assembly destroyed the obstruction altogether, there was nothing to prevent the operation of the rule; and, therefore, since that time, the rule fully applies. As to the want of words of *future* signification, that objection equally applies to the personal estate; and yet the law is clear, that as to that, the will operates from the death of the testator. The case of *Kennon* v. *M'Roberts* cannot have decided so much as the other side contends for. It is not material that John was one of the devisees; for the testator did not foresee what lands he should own in particular at his death; and, therefore, he meant that [296] the whole residue of his estate, real and personal, should pass under the residuary clause. For he did not mean to distinguish between them. The reason given for the rule as to personal estate, in 4 Bac. 350, is not correct; and the author is not supported by other authorities.

CALL. In Swinburne, 418, it seems as if the rule formerly was, that the will operated from the time of making it, as to personal estate; and he appears by the books cited in the

margin, to have extracted it from authors upon the *civil* law: which proves that the present rule is the work of the English Courts, founded upon the inconveniences arising from the mutable nature of personal property. But there is another reason given for it, by Lord Parker, in 1 P. Wms. 575, which defeats Mr. Wickham's argument, bottomed on the Roman law; namely, that the rule was adopted because, unless the estate went to the executor, there was no person before the statute of distributions to whom it could have gone, but it must have escheated; and, therefore, from necessity, it was decided that all belonged to the executor.

WICKHAM. Lord Mansfield, who is admitted to have been a great civilian, states the rule to have been founded on the civil law.

ROANE, Judge. In this cause two questions occur:

1. Whether the descent law of 1785 was in force or not at the time of Wm. Allen's death, which happened in 1783?

2. Whether the statute respecting wills, of 1785, operating upon the will of the said Wm. Allen, will pass his lands acquired after the date thereof?

As to the first question: it was rightly conceded by [297] the appellant's counsel that it was concluded by the decision of this Court in the case of *Proudfit* v. *Murray*, 1 Call, 394. That decision revokes the effect of the repealing act of 1792, until October, 1793, by construing both the repealing and suspending acts to relate to the first day of the session, and thus to commence their operation together. This construction was made under the common law doctrines upon this subject; and the rule governing in that case was resorted to, in consequence of another act having rejected the rule laid down in the act concerning elections in relation to two acts passed during the same session.

This rule of construing a statute to operate by relation, taken in its full extent, is certainly often retrospective, and productive of the highest injustice. It has accordingly been changed in England (as well as here,*) by stat. 33, Geo. 3, ch. 13. In the case of *Proudfit* v. *Murray*, however, as well as in this case, it had no retrospective operation; for the contract in that case, as well as in this, arising posterior to the passage of the relating acts and probably posterior to the rising of the Assembly, I believe I shall be warranted by my colleagues in saying (for I did not sit in the cause) that the decision in that

[* Act of Oct. 1785, c. 55, 12 Stat. Larg. 128–9.]

case was not meant to extend to a *mesne* act happening between the first day of the session and the times of passing the act so relating. This would be to render a contract lawful at the time, or an act then innocent, the one unlawful, and the other criminal, by relation! Such a doctrine is contrary to the general nature of a statute which is prospective in its operation: and it may well be questioned whether a doctrine of the common law, so replete with injustice and so inapplicable to the circumstances of any people professing to be governed by *existing* laws, can be adjudged to have been adopted by the ordinance of 1776? It is true this evil will the seldomer occur, as that rule of the common law is now confined to the
[298] case of two statutes passed during the same session. But it may yet sometimes occur, as is supposed; and whensoever it does, it will deserve great consideration before the Court can sanction so retrospective and iniquitous a construction.

Had this decision of *Proudfit* v. *Murray* not settled the question, I should have wished to have further considered whether a statute, not differing from a former one, but merely iterating the provisions of it, and containing a repealing clause, can be said to repeal the former? At present, I see considerable force in the Chancellor's ideas on this question; but I wish not to prejudge it.

As to the second question: It is admitted that a testament of personal estate speaks not until the death, and that after-acquired chattels do pass. Whether this doctrine was transplanted into England from the Roman law, or not, it is immaterial to enquire. Perhaps, however, it was; and the Courts in England assign a cogent reason in support of it, as applicable to chattels, arising from the fluctuating nature of that kind of property. 1 P. Wms. 240. But that reason does not hold in relation to land, which is more permanent, and with respect to which the testator may more easily keep pace, by varying his devises. Besides, this doctrine of the Roman law was interrupted in England, as relative to lands, by the doctrines of the feudal law on the subject of non-alienation: and when testamentary alienations were permitted by statute, they were considered not as a constitution of a general heir, but as a limitation of the testator's estate by a revocable act. [*Swift* v. *Roberts*,] 3 Burr. 1496: and as an appointment of particular lands to a particular devisee. But a man cannot appoint to another lands which he has not. [*Harwood* v. *Goodright*,] Cowp. 90.

The appellant's counsel was mistaken in supposing that the decisions relative to land turned upon the word *having* in the statute of wills, as may be seen in Cowp. 90, [299] where it is also observed, that the same construction had taken place upon the custom before the statute.

These two decisions, therefore, constitute the grounds of the criterion between the two kinds of property. As to that impediment which arose from the feudal system, there could certainly be no objection with the Legislature to get over it. But the other reason, arising from the fluctuating and transitory nature of personal property, does not hold as to land; and there is still the less necessity to extend the rule to that kind of property, by construction, since the equitable laws of descent lately enacted. It was enough for the Legislature to authorize a disposition of *after-acquired* lands, by devises evidently contemplating such property. Further they have not gone. And as the will now before us does not evidently contemplate *after-acquired* lands, I am of opinion that the decree should be affirmed.

FLEMING, Judge. Three points were made by the counsel for the appellant in this cause: 1st. Whether, during the period between the 8th of December, 1792, and the 1st of October following, the common law was restored, so that the lands devised by William Allen the father to his son John, (the devise having become ineffectual by the death of the son, living the father,) descended on the appellant as his eldest son and heir-at-law, in exclusion of his sisters? 2d. Whether the lands acquired by John Allen, after the date of his will, passed by the devise of all his estate to his father, and from him (whether his title were by descent or purchase,) to the appellant, under that clause of his will which gives all his lands in the counties of New Kent and James City to his son William? and if not, then 3d. Whether the appellant is entitled to a moiety of them under the residuary clause of his father's will?

The first point having been fully considered in *Proudfit* v. *Murray*, 1 Call, 394, was but slightly mentioned [300] by the appellant's counsel; but it may not be amiss to make a few observations on it, in order to shew my entire concurrence in the principle established in that case. The position contended for by the appellant's counsel is, that the act of 1789 having declared that whensoever one law, which shall have repealed another, shall be itself repealed, the former law shall not be revived without express words to that effect; and, therefore, as the act of 1785 had been repealed by the act of the

8th of December, 1792, it was not revived by that of the 20th of the same month; but there being no statute in the way, the common law rule of primogeniture was restored. This argument, however, involves its own destruction; because, if the act of 1785 was not resuscitated by that of the 20th of December, 1792, no more could the rule of primogeniture; for that had been as completely abrogated by the act of 1785 as the latter was by the act of the 8th of December. Besides, it may be a question whether those parts of the act of 1785 which were re-enacted into that of the 8th of December, were repealed by the latter, since the will of the Legislature remained the same. But, be that as it may, surely that construction would be a strange one, which should allow that the repealing clause of the act of 8th of December should alone continue in force, whilst the operation of every other part was suspended by that of the 20th. It would certainly be fairer to say that the operation of all, or none of it, was postponed. Again, it is a rule that all statutes on the same subject should be taken as one law; and, construing the acts of the 8th and 20th of December by that rule, the suspending act must be considered as annexed to the other immediately after the repealing clause: in which case, the act of the 8th of December [301] will not operate at all until the expiration of the suspending act; and, consequently, the act of 1785 will continue in force until the 1st of October, 1793. This construction supports the evident will of the Legislature, and puts an end to the discussion on the first head.

With respect to the second point: The *Neck of Land* tract did not pass by the will of John; because it was purchased by him after the making of his will, and both the will and purchase were made prior to the passing of the act of 1785, and, therefore, could not be affected by the subsequent provision of that act, enabling the testator to dispose of all the lands which he has, or may have, at the time of his death. But that circumstance does not alter the case; because the rights of the parties to this suit will be the same, whether William Allen the father took them by descent, or purchase, from his son John. The question then is, whether they passed by the will of the father? The act of 1785 only gives a power to devise after-acquired lands, leaving it to the discretion of the testator to dispose of them or not. Consequently, in order to produce that effect, there must be something indicating an intention to exercise the power. But in the present case, the testator could not have intended to devise to his son John those lands which he was to acquire from him by descent.

Such an idea was too absurd to have entered into the head of any man in his senses. Of course, the after-purchased lands did not pass by the will of the father.

With respect to the third point: It is extremely clear that this moiety did not pass under the residuary clause of the father's will; because that was intended to pass only what was not given before; but this moiety was expressly given to John, and, therefore, could not be comprehended under the residuary clause. The consequence is, that as the devise to John failed by his death in the life-time of the testator, this moiety descended on the female plaintiffs and the defendant, as the heirs of the father.

I am therefore of opinion, that the decree of the Court of Chancery is right, and ought to be affirmed. [302]

PENDLETON, President. We have to lament that the Court is so thin, on the decision of a question so important to the parties and the community, as well because we are deprived of the able advice and assistance of two of our worthy brethren, as because, if they had accorded with us, it would have given additional sanction to the precedent: on which account, we should certainly have forborne to hear the cause, if we had not been informed that the Judge who is absent (as well as him who is present) would have retired from the discussion. We have, however, this consolation, that we all agree in opinion, and indeed have had very little doubt upon the question.

The case is shortly this: William Allen, by his will, dated September 4th, 1789, having devised sundry personals to different legatees, and several tracts of land to his two sons, John and William Allen, devises "all the rest and residue of his estate, of what nature or kind soever, to his two sons, to be equally divided between them," and appointed them his executors. He lived till July, 1793; and in the mean time, his son John died without issue; by which a considerable estate, consisting of the lands, the subject of the present controversy, (called *Neck of Land* and *Robinson's Quarter*,) and a number of slaves, came to William the father, whether by his son's will, or as heir-at-law, is immaterial. It is admitted that the slaves and personals were comprehended in the residuary clause in the father's will, so as to give the son William a moiety thereof; but as to the lands, it is insisted that they did not pass by that clause, but descended to the testator's heirs-at-law; and such being the Chancellor's decree, the appeal brings that question before this Court. For as to the several estates devised to John, it is agreed the bequests became lapsed by his death in his father's life-time; and the es- [303]

tate was distributable to the testator's heirs. The rule in England is, that as to lands, a testator is supposed to speak at the date of his will, and therefore, although he shall devise all the lands which he may have at his death, any lands which he may acquire after the date of his will do not pass, but descend to his heirs; but that as to personals, he is supposed to speak at the time of his death, and a general residuary devise will comprehend all his personals, without enquiry when they were acquired. There was much labor at the bar to shew from what sources this distinction was derived; which appears to me not material. If it was so, my impressions are, that the distinction proceeded from the nature of the property. Lands are visible and durable, and their acquisition being by written conveyance, no difficulty occurs in ascertaining the time it takes place. Besides being valuable, they were on the English policy considered as a natural fund for the heir; and that after-purchases were not meant to be comprehended in a general devise. The rule being established, when, in *Bockenham's* case, [Gilb. Dev. 138; *Bunter* v. *Coke*, 1 Salk. 237; Pow. on Dev. 1 vol. 197, 2 Lond. ed.] there was a devise of all the lands he *then* had, or *should* have, at his death, there was great labor to make the rule bear upon that case, from the word *having* in the statute of wills, and other observations; but the decision applied the rule to that case.

On the other hand, personals were, when the rule was established, of inconsiderable value; in their nature perishable and mutable; the property transferred by mere change of possession, without written conveyances, and in secret, rendering it difficult, if not impossible, to ascertain the time of its acquisition, whether prior or subsequent to the date of the will. It was on this transient nature of personals that another common law rule prevailed, forbidding a division of interests in them, which was permitted in the case of real estate. A donation for an hour passed the whole property, not allowing [304] any remainders or reversions to operate. But whatever was the source of its foundation, the rule, as it came to us from England, was well understood, and established the distinction I first stated, that, as to lands, the testator speaks at the date of his will; and as to personals, at his death.*

It is certainly true that the Revolution produced a great change in our system, but not so broad as was contended for by Mr. Wickham, so as to put all transfers of property, whether real or personal, upon the same ground. The change was

[* *Kellett* v. *Kellett*, 1 Ball & Beatty, 542.]

principally confined to the case of descents and distributions; a difference being still preserved in the disposition of property, either by deed in the person's life-time, or by will. *Lands* can only pass by a particular mode of conveyance; *personals* still by mere transmutation of possession. *Lands* pass only by a will in writing, subscribed by two witnesses, or written by the testator; *personals* may be disposed of by any will, written or nuncupative. And if the diffusive spirit of the law of descents be recurred to, setting aside the rights of primogeniture and calling to the succession all who are in equal degree of kindred, it will seem to oppose Mr. Wickham's doctrine, by letting in those collective heirs, instead of giving the estate to a particular residuary legatee; a spirit which also dictated the abolition of all estates tail, in order to extend the power of alienation, and, in cases of descents, to bring all our lands within the operation of the new system.

Having made these general preliminary observations, I proceed to consider what the Legislature have directed in the case under consideration. The words of the clause are, "That every person aged twenty-one years or upwards, being of sound mind, and not a married woman, shall have power, at his will and pleasure, by his last will and testament in writing, to devise all the estate, right, title, and interest, in possession, reversion or remainder, which he [305] *hath*, or *at the time of his death shall have*, of, in, or to lands, tenements, or hereditaments, or annuities, or rents charged upon, or issuing out of them." With respect to the present will, it was truly observed to be very absurd to suppose that the testator meant to devise to John and William lands which would come to him from John by his death: a full proof that he did not mean to comprehend them in his residuary devise. And since the intention of the testator is to be the governing principle of construction, it might be sufficient, upon that ground, to affirm the Chancellor's decree in the present case. But, to settle the question in cases where that objection may not occur, the Court proceeded to consider it as a general question. If the Legislature had intended to abolish wholly the distinction in England, they would certainly have declared that every testator should be considered as speaking in his will at the time of his death, as well respecting his real as his personal estate; and thus have put an end to all controversy about it: instead of which, they have only varied the rule as to lands, *sub modo*, that is, by giving testators a *power*, which they may exercise or not, at their will and pleasure, to dispose of their after-purchased lands; meaning, as it appears to me,

to meet the desire in *Bockenham's* case, where a man shall devise all the lands which he shall have at his death, but not further interfering with the rule. And to me it seems to have been done with great propriety; since such an extensive clause shews the testator to have contemplated any after-purchased lands he may acquire, and that they shall pass to his devisee; whereas, without such clause, he will appear to have had in view only his present possessions, leaving future acquisitions to future provision, or to the disposition of the law. And, [306] therefore, where the power given by the act is not exercised by such a clause, as is the present case, the rule operates, and after-purchased lands will descend to the heir-at-law.* It follows, that I am of opinion with the other Judges, that the decree ought to be affirmed.

[* *Turpin* v. *Turpin*, 1 Wash. 73; *Smith* et al. v. *Edrington*, 8 Cranch, 69; *Kendall's ex'r.* v. *Kendall* et al., 5 Munf. 272; *Bagwell* et al. v. *Elliott* et ux., 2 Rand. 190.]

WATSON v. POWELL.

Wednesday, October 27th, 1802.

What words pass a fee in a will.*

The words "*all my temporal estate,*" in the preamble to a will, may be incorporated into the devising part, so as to pass a fee; though no *words of inheritance* be used.

In ejectment brought by Watson against the Powells, the jury found a special verdict, stating: That Levi Watson being on the day of *Anno Domini* 1776, seised in his demesne as of fee, in thirteen acres of land, being the premises in the declaration mentioned, and of no other visible property or estate, did, on the day and year aforesaid, duly make and publish his last will and testament in writing, the material parts of which are as follows: "I Levi Watson, have thought it suitable to settle these my affairs on this side of the grave, and all this my *temporal estate*, which it hath pleased God to endow me with, which I will and require to be in manner and form following: I give my soul to God, &c. and all

*After this will, and after the testator's death—viz: in 1785—the act was passed making a deed or will convey a fee simple *without words of inheritance*, if a less estate is not *expressly limited*. 1 R. C. of 1819, p. 369, § 27; Code of 1849, p. 501, § 8.