BETWEEN,

JOSEPH WILKINS, administrator of his late defunct wife Sarah, one of the grandaughters and legataries of Thomas Williamson, and widow, when she was married last of Hartwell Cocke, *plaintiff*,

AND,

JOHN TAYLOR, and William Urquhart, executors of the said Thomas Williamson, *defendents*,

IN this cause, upon the testament of Thomas Williamson, bearing date in june, 1787, whereof the words are:

'I give to my said daughter (A) the interest of 'four thousand pounds in the government funds, 'during her life; and, at her death, i give the 'interest of the above money, one fourth to each 'of my grandchildren Sarah Cocke, Elizabeth 'Clements, Francis Clements, and John Cle- 'ments; and, at their decease, the principal and 'interest to be disposed by them to their heirs, 'in such proportions as they, by their wills, 'respectively, may direct; and, in case of the 'death of my grandaughter Sarah Cocke, with- 'out issue, i give her part to my grandaughter 'Elizabeth Clements,'

the

(A) &c. refer to notes at the end of the case.

the queſtion debated by counſil was, whether the plaintiffs inteſtate Sarah, to whom Elizabeth Clements the daughter had releaſed her right to the intereſt of one thouſand, part of the four thouſand pounds, mentioned in the bequeſt, (B) was entitled to the ſaid one thouſand pounds, principal money? and the court, premiſing, that the releaſe by the daughter who confeſſedly was entitled to intereſt only during her life, to the former huſband of the inteſtate and herſelf, is unimportant to this diſquiſition, ſtated theſe poſitions:

The firſt poſition: Thomas Williamſon did intend his grandchildren NOT to have the PROPERTY of the money; becauſe,

firſt, the ſubject of the explicite gift to them, which is the only gift to them, except the gift of a power to direct to what proportions the heirs ſhould ſuccede, the energy whereof will in the ſequel be defined, was intereſt only, the terms being ‘ i give the INTEREST, of the above ‘ money, one fourth to each of my grandchil- ‘ dren;’

ſecondly, the property of the money is in terms devoted to the HEIRS of the grandchildren, in ſuch proportions however as theſe, by their wills, reſpectively, may direct;

thirdly, the part of Sarah, that is, the part, whereof the intereſt was given to her, the teſtator, in caſe of her death, without iſſue, gave to his grandaughter Elizabeth Clements. The

The ſecond poſition: the term, 'heirs,' which, in a deviſe or conveyance of land, is ſaid to be a word of (C) limitation of eſtate, that is, to declare the quantity of eſtate in the land to be taken by the deviſee or purchaſer, although it may be ſometimes, as in caſes of contingent remainders, a word of purchaſe, that is, may deſignate the perſons who ſhall take the land, can, in a bequeſt of chatels, be underſtood only to indicate the takers, and, in this caſe, indicates them, namely, thoſe whom the law hath appointed to ſuccede to the heritable rights of one who died inteſtate, by characters infallible, inſomuch, that, by a bequeſt to the heirs of A, the parties intitled may be demonſtrated with no leſs certainty than if they had been deſcribed by the appellations children, parents, brothers and ſiſters, &c, ſucceſſively of A; and, by the term, 'heirs,' in the bequeſt where the teſtator named the grandaughter Sarah and refered to her particularly, he intended children, which confined ſenſe, as to her, is indubitably proved by the gift, in the event of her death without iſſue, that is, children then living, to another grandaughter.

The third poſition: words in a teſtament ought not to be rejected, or be rendered ineffectual, if they be ſignificant, and may be interpreted in a ſenſe which is not contrary to law. (D)

The fourth poſition: the ſenſe of the terms, 'at their deceaſe,' that is, at the deceaſe of the

grand

grandchildren, 'the principal money and inter-'eſt to be diſpoſed by them to their heirs,' unconnected with the preceding member of the paragraph, is defective, becauſe among theſe terms is not any verb which governeth, in the language of grammarians, or acteth upon, the words principal and intereſt; but the words, 'i give,' occuring before, are underſtood, in like manner as if they had been repeated after the word 'deceaſe,' and thus ſupply the ſeeming chaſm in the ſenſe, conſiſtently with the intention of the teſtator, as will appear hereafter.

The fifth poſition: that by the term, 'diſpoſed,' is not underſtood, 'given,' implying a power in the grandchildren to diſpone the principal money to whom, as well as in what proportions, they pleaſed; becauſe that would contradict the teſtators declared will, that the grandchildren ſhould not have the property of the principal money, but is to be underſtood 'diſtributed;' impowering them, not to give the money, or to deſignate the donees but, to adjuſt the portions thereof which the donees, deſignated by the teſtator, ſhould take.

One proper ſenſe of the word 'diſpoſed' is diſtributed ſimply, as appeareth by theſe examples of writers in the language from which the word hath been adopted into our language:

Pompeius ex urbe profectus iter ad legiones habebat quas a Caeſare acceptas in Apulia hibernorum

cauſa,

cauſa, DISPOSUERAT. Caeſar,' b' c' l' 1. Pompey went from the city to the legions, which, received from Caeſar, he had DISPOSED, that is, DISTRIBUTED, in winter quarters in Apulia.

Scipio retentum ſecum Laelium, dum captivos obſidesque et praedam ex conſilio ejus DISPONERET, ſatis, &c. Romam mittit, Livii, l' 26. Scipio, having retained with him Laelius, until, by his advice, he ſhould DISPOSE, that is, DISTRIBUTE, the priſoners, hoſtages, and plunder, after diſpatching theſe affairs, ſends him to Rome.

DISPONERE diem is uſed by Tacitus, Suetonius, and others, to ſignify diviſion of the day into portions for particular occupations devoted to each.

Opus et requiem pariter DISPONIMUS ambo. Perſii, ſat' 5. we both DISPOSE, that is, DISTRIBUTE, the ſame hours to labour and reſt.

The ſixth poſition: the meaning of the whole bequeſt is exhibited truly by this paraphraſe, variant from the text only by ſupplement of the ellipſis and inſertion of the ſynonyma embraced by crotchets: ‘ i give the intereſt of the above ‘ money, one fourth to each of my grand-‘ children Sarah Cocke, Elizabeth Clements, ‘ Francis Clements and John Clements, and, at ‘ their

'their deceaſe, [i give] the principal and inter-
'eſt, to be DISPOSED [that is, DISTRI-
'BUTED] to their heirs, in ſuch proportions as
'they, by their wills, reſpectively, may direct.'

Scholium: the compariſon of adjudged caſes, quoted by counſil for the plaintiff, to prove that a power to diſpone a thing involveth a right to the thing, with the principal caſe, is altogether inept; for,

firſt, in the caſes quoted, he, who had the diſponing power, was, in expiicite terms, deviſee of the land or legatary of ſome other ſubject for a time; in this caſe, the principal money was not, in explicite terms, bequeathed to the grandchildren, nor, if bequeathed to them at all, bequeathed otherwiſe than by implication from the words, 'at their deceaſe the principal 'money and intereſt to be diſpoſed by them;' and the queſtion is, whether the power of the grandchildren to diſpone the money, which was not bequeathed to them, but of which the intereſt only was bequeathed to them, implicated a right in the grandchildren to the money itſelf, and authorized arrogation of it to themſelves? ſo that the argument from thoſe quotations, proving, that a deviſe or bequeſt of a thing to one for a time, with a power to diſpone it afterwards, transfereth to him the property, compared with the principal caſe, where the propoſition to be proved is, that a power in the grandchildren, to whom the intereſt, the uſe of money,

ney, for a time was bequeathed, to diſpone that money afterwards to their heirs, involved a right to the money, is a *petitio principii*, the ſophiſm to which a candid reaſoner diſdains to reſort:

ſecondly, in the caſes quoted, the power to diſpone was general; in the principal caſe, the diſpoſition, which the grandchildren had power to make was ſpecial, 'to their heirs,' that is, thoſe whom the law appointed to ſuccede to the inheritable property of the grandchildren: ſo that the argument from the caſes quoted, proving that one, who hath power to diſpone a thing to whom he will, muſt, by implication, have a property in the thing, applied to the principal caſe, to prove that he who hath power to diſpone a thing to perſons particularly deſignated, muſt, by implication, have property in the thing, and conſequently may diſpone it to whom he will, is a miſtake of the queſtion: nor is the caſe between (E) Shermer and Richardſon, on which the counſil for the plaintiff relied, an exception to what is here ſtated; for the deviſee there had power, not to diſpone to her heirs only, but, to make whom ſhe thought proper her heirs, which was equivalent to general power to diſpone:

thirdly, in the caſes quoted, the property was adjudged to be in him who had power to diſpone, in order that the will of the teſtator might be fulfilled; in the principal caſe, adjudication of the property to be in the grandchildren, who had power to diſpone, would, inſtead of fulfilling, defeat the will of the teſtator. The

The ſeventh poſition: the heirs of every grandchild, by which heirs, in the caſe of the plaintiffs wife the teſtator undoubtedly meaned children, will take, if his or her will direct not what proportions they ſhall have, one fourth part, in equal portions; becauſe when a ſubject is given to ſeveral, to be diſtributed among them diſcriminately or otherwiſe, at the election of him who is appointed to perform that office,

firſt, the refuſal or neglect of the diſtributor cannot injure the donees; for he is a miniſter only, not an owner:

ſecondly, if he do not exerciſe the power, the praeſumtion is, he declined it, becauſe he did not chooſe to diſtribute unequaly, in which caſe his function was unneceſſary; for diſtribution among aſſociates ought naturaly to be equal, if the contrary do not appear:

thirdly, if the heir be ſingle the diſtributor cannot act at all:

fourthly, all the donees, who were entitled to the whole ſubject of diſtribution, may, by mutual agreement, control the diſtributor, diſ-affirming and fruſtrating any partition equal or unequal by him, and therefore may prevent it.

The eighth poſition: the bequeſt of the principal money to the heirs of the grandchildren, or in other words, to thoſe whom the law appointeth to ſuccede to their inheritable property, was not contrary to law. If

If the teſtator, for the *phraſis*, 'heirs,' (F) had ſubſtituted its *periphraſis*, this part of the bequeſt would have been read thus: 'at their, 'my grandchildrens, deceaſe, [i give] the prin-'cipal and intereſt to [thoſe who will inherit 'their lands] in ſuch proportions as they, [ex-'cept my grandaughter Sarah,] by their wills, 'may direct, and, in caſe of the death of my 'grandaughter Sarah Cocke, without iſſue, '[without lineal ſucceſſors] i give her part to 'my grandaughter Elizabeth Clements, [ſingly, 'not in a communion with her brethren.']

That ſuch was the will of the teſtator is believed to be manifeſt, and that it was not contrary to any principle of law is likewiſe believed, becauſe the events, upon which the bequeſt would become efficacious, muſt happen within the times during which rights by ſuch a bequeſt may be in ſuſpenſe: for the heirs, if any exiſt at all, will exiſt, of the grandaughters immediately, and of the grandſons at the end of about nine months at fartheſt, after their deaths.

If theſe poſitions be true, as they are thought by the court to be, the conſequence unavoidable is a negative deciſion of the queſtion, in the principal caſe before propounded; and that the plaintiffs wife Sarah could have diſponed one fourth part of the money to her children, or their deſcendents only, and her ſiſter, when ſhe was living, could have diſponed, and her brothers can diſpone, the other three parts to their children,

or to their deſcendents, and, in default of them, to their heir in the aſcending line, or to their collateral heirs; but to none other. and hence the corollary muſt be,

the decree reviewed is affirmed.

NOTES.

(A) She was Elizabeth Clements.

(B) The plaintiff ſuccedeth to her, if ſhe were intitled, and is not accountable to her kindred.

(C) By a conveyance or a deviſe of land to Timothy, and to his heirs, the purchaſer or deviſee took an eſtate moſt ample, ſo that it was UNLIMITED, whereas, if the word, 'heirs,' had been omitted, and terms aequivalent had not C. L. 9 b. been ſubſtituted, referring toſome former act of conveyance, in one inſtance, or ſignifying the teſtators will, in the other inſtance, an eſtate LIMITED was taken; yet, 'heirs,' in law vocabularies is a word of LIMITation. this muſt be αντιφρασιν· 'heirs,' is a word of LIMITATION, becauſe it, or the aequivalent with it, was neceſſary to transfer an eſtate UNLIMITED. 'heirs of the BODY,' indeed are ſtrictly words of limitation.

(D) By

(D) By the decree of the county court, reverſed by the high court of chancery, and now propoſed to be reſtored, that the decree of the latter may conſiſt with a decree of the ſupreme court, in another cauſe, the words, in Thomas Williamſons teſtament, ‘ and in caſe ‘ of the death of my grandaughter Sarah Cocke, ‘ without iſſue, i give her part to my grandaugh- ‘ ter Elizabeth Clements,’ were entirely rejected. ſignificance of thoſe words, ‘ in caſe of the ‘ death of my grandaughter Sarah Cocke, with- ‘ out iſſue,’ in this ſenſe: ‘ the contingent gift ‘ to Elizabeth of Sarahs part ſhall be effectual, ‘ when a failure of the latters progeny ſhall hap- ‘ pen, either at the time of her death, or at a ‘ more diſtant period,’ is undeniable. the words can have no third meaning.

About the end of laſt century, engliſh judges would have underſtood that event to have been within the ſcope of the teſtators contemplation, by which he would have been thwarted, and ſhe, who was the object of his beneficence, would have been diſappointed, in a fond or a ſervile compliance with what thoſe judges called a rule of law, that is, a rule of interpretation, commented by themſelves, or coming to them by tradition from their predeceſſors, and in contradiction to the teſtators words, uninfluenced ‘ by the RESPECT, which ‘ all men have agreed to pay to the ‘ WILL of the dead.’

W r (i e Waſhingtons reports 1 vol) 102.

Succeding

Wr Succeding judges, 'in the progreſs of
164. 'their ſtruggle for the intention againſt a 'rigid unjuſt rule, would, as until lately was believed, have underſtood the other event to have been contemplated, according to the plane meaning of the words; whereby the wiſh of a grandfather, and the hope of her whom he moſt favoured of his offspring, might have been gratified, without violating any principle of law truely ſo called, or contravening, except peradventure in one inſtance, any caſes adjudged, to be found in the term reports, tranſatlantic or ciſatlantic, or other modern publications, of *reſponſa prudentum*.

Wr (E) 'I am free to own, that, where
273 'a teſtators intention is apparent to ME,
300 'caſes muſt be STRONG, UNIFORM, 'and apply POINTEDLY, before they will 'PREVALE to fruſtrate that intention;' by the preſident of the court of appeals: of which the converſe is: 'I am free to own, that, where a 'teſtators intention is apparent to ME, caſes, 'which are STRONG, UNIFORM, and ap-'ply POINTEDLY, WILL PREVALE to 'FRUSTRATE that intention.'

Obſervations and queſtions:

1 This, although delivered in the firſt perſon, 'i' and 'me,' is ſuppoſed to have been the ſentiment, unanimous ſentiment, of the conclave;

becauſe

becauſe the report, corrected 'from the 'notes of him' who was *praeſes*, doth doth not ſhew that any were diſſentient; becauſe it is 'declared to be the opinion 'of the court,' that is, for any thing hinted to the contrary, the whole court; and becauſe it ſeems then to have been ſettled, and to have become a rule of property.

Prat. to W. 1. W. r. 302. ibid.

2 Srength of a caſe, diſtinct from its uniformity and pointed application, is believed to be its ratiocination, cogent of aſſent to propoſitions intended to be verified.

Strength of the authority, ſaid Holt ſome where, is the reaſon of the reſolution.

3 By uniformity in the caſes is underſtood, either a harmony of them with one another, or a ſymmorphoſis, a likeneſs in form, in meaning, with that to which they were compared. which ever be the ſenſe, aptly may be here remembered theſe words of the preſident, delivering the opinion of himſelf and his aſſeſſors, in the caſe between Shermer and Shermers executor: 'ſeveral caſes have been cited, but they ſeem to 'verify the ſaying of a judge: "that, in diſputes "upon wills, caſes ſeldom illucidate* the "ſubject, which, depending on the in- "tention of the teſtator, to be collected from "the will, and from the relative ſituation of the "parties, ought to be decided upon the ſtate "and circumſtances of each caſe.' to which i 'will add: that i have generaly obſerved, that 'adjudged caſes have more frequently been pro-

Wrazy.

* So it is writen.

'duced

'duced to diſappoint, that to illuſtrate, the in-
'tention.'

Now: in the diſpute between Godwin and his wife, plaintiffs, and theſe defendents, when the court of appeals, upon this will of Thomas Williamſon, determined, that his grandchildren were entitled to the money, which by the bequeſt before recited they were empowered to diſpone to their heirs, determined ſo upon authority of the caſes cited, and principaly, as hath been ſaid, upon authority of the caſe between Shermer and Shermers executor:

was not 'the intention APPARENT TO' the ſage preſident, and to every other member, that the grandchildren SHOULD NOT, but that their heirs, in ſome proportions or other, SHOULD, have the principal money? whether that intention was illegal, is not now the queſtion;

were the caſes cited, in panoply complete, with all their armature, ſo STRONG, whatever or wherever their vigor was, and the harmony of them with one another, or the ſymmorphoſis, likeneſs in form, in meaning, of them with the principal caſe, ſuch, that they PREVALED to FRUSTRATE that intention? do the ſix firſt paragraphs, that is all but one, of the courts opinion in the caſe upon Shermers will, apply to the caſe upon Williamſons will? if the ſtrength of Shermers caſe, applied to the

other,

other, be in that part where ſome inſects are armed with ſtings, and if it be potent there, doth it not oppugn ineluctably the reverſal which it was adduced to authorize?

did the caſes cited 'illucidate,' elucidate, or dilucidate 'the ſubject' of diſquiſition, and aſſiſt the judges to diſcover the POLAR STAR, which directed them in the 'conſtruction of 'the will, and guided the deciſion,' ſo that it ſhone more brightly than it ſhone before? men uſe the darkened lens of a teleſcope, when they contemplate the ſuns diſc, or the *faculae*, or *maculae*, or other *phaenomena*, on the face of that luminary, that they may not be dazzled or blinded by the ſplendor of its rays, but uſe every optic aid, that the medium, through which opake bodies are viewed, may be pellucid as poſſible. ſome judges, when they propoſe to diſcover a teſtamentary polar ſtar, condenſe, by confuſing with a miſt called authorities, the medium through which the object is confeſſedly to be diſcerned, obſcure its atmoſphere with a ſoot called technical words, and leave certain people doubting whether the ſtar, which the teſtators words indicated, defining it with ſuch accuracy that an un-law-learned man, who would credit the information of his ſenſes and hearken to the ſuggeſtions of an unperverted underſtanding, would ſwear it could not be miſtaken, was or was not the ſtar, which ſhould 'direct the 'judges in the conſtruction of the teſtators will;'— Wr 102. Wr 103.

doubting,

doubting, becauſe law-illumined aſtronomers had, by the τεχνη ἑρμηνευτικη, ſkill in the art of interpretation, diſcovered, and had, by an irreverſible and therefore infallible judicial ſentence, declared, that the ſtar, upon which ordinary obſervers were gazing, was as different and as diſtant from the ſtar, 'which is to guide W r 102. 'the judges deciſion' as Mercury from Herſchel. in truth, law-interpreters have deprived the STAR, intention, of POLARITY, W r. 271. rendering it planetic, erratic, ſo that 'they ſeem to verify the ſaying of a judge 'a "will may be any thing, every thing, no thing."

Did the caſe upon Shermers will,

giving the profits of his whole eſtate to his wife for her life;

impowering her to make whom ſhe pleaſed her heir or heirs of one half;

giving that half, not to her heir, but, to whom ſhe think proper to make her heir or heirs; in effect, giving to her immediately dominion, full dominion, of the half, ſo that ſhe might have diſponed it, to whom ſhe pleaſed, when ſhe pleaſed, for a diſpoſition at any time would have been effectual, and how ſhe pleaſed;—did this caſe apply POINTEDLY to the

caſe upon Williamſons will,

giving, not the money, but, the intereſt of the money, to his grandchildren;

not

not empowering them to make whom they pleaſed their heirs;

giving the money, not to thoſe whom the grandchildren ſhould think proper to make their heirs, but, to thoſe who by law would be made heirs of the grandchildren, refering apportionments of ſhares among the heirs to diſcretion of their reſpective anceſtors; and is not the caſe upon Shermers will, if it apply to the caſe upon Williamſons will, in any point, in point-blanc oppoſition to it?

do not theſe words of the venerable preſident 'he, John Sheimer, does not give her, Wr 272 'his wife, a power to diſpoſe, but, to name the 'perſon or perſons ſhe might chuſe to ſuccede 'to her part, TO WHOM the teſtator GIVES 'the money,' and the reverſal of the decree, in Godwins caſe, upon Williamſons will, if this were founded on that, ſtrike an ear, not the moſt acute, with a διαφωνια, a diſſonance in the caſes; did he, Thomas Williamſon, give to his grandchildren a power to name the perſons who ſhould ſuccede to the money; on the contrary, are not thoſe ſucceſſors, or rather proprietors of the principal money, named by himſelf; and did he give the money to thoſe whom the grandchildren ſhould chuſe to ſuccede; on the contrary, did he not give the money to thoſe whom he choſe to ſuccede?

If the opinion in Ayletts caſe be, as it is there
Wr 302 called, a 'PRINCIPLE,' ſo 'SET-
'TLED that it had become a RULE of PRO-
'PERTY,' is not the converſe of the opinion a
'PRINCIPLE' too, and muſt it not 'become
'a RULE of PROPERTY,' as well as its an-
titype.

If judges can form rules for interpreting wills
Wr 99 of 'teſtators, IGNORANT of the
100 'technical ſenſe affixed to words by pro-
'feſſional men'—teſtators, unaſſiſted by thoſe
profeſſional men, 'often when their wills are
'made in extremity reduced to the neceſſity of
'reſorting to any perſon, however unſkilfull,
'who may be at hand'—— if the judges can con-
vert theſe rules into 'PRINCIPLES, SET-
'TLED RULES of PROPERTY,' can de-
clare, that againſt them, where the adjudged ca-
ſes approving them are ſaid to be STONG, al-
though not a ſingle reaſon, as in the caſe of Roſe
and Bartlett, and other caſes, is pretended in
juſtification of them, to be UNIFORM and to
apply POINTEDLY, terms not defined, nor
perhaps defineable, intentions of teſtators, AP-
PARENT intentions, WILL NOT PRE-
VALE — may not judges 'mould teſtators
Wr 99 'wills into any forms, which whim,
'fancy, or worſe paſſions, may ſuggeſt?'

When the teſtator is admitted to have intend-
ed one thing, is not to adjudge him to have in-
tended another thing, and that this ſhall PRE-

VALE

VALE againſt that, the ſame as to adjudge that what IS his will IS NOT his will, and ſufficient, when this is named interpretation, to juſtify a proſopopoeia of common ſenſe hooting ſuch jargon?

Further obſervations upon rules formed by judges, for interpretation of teſtaments, that is, for explanation of words in them, ſo that they may be underſtood by thoſe who did not underſtand them before:

Judges, probably, if they had not been perplexed by rules juridicaly praeſcribed by themſelves or their praedeceſſors, would have expounded a teſtators words, unleſs they were terms of art, in the ſenſe which other men, as well acquainted as theirſelves with the language, attribute to them*, reſorting to thoſe ſources of invention, which circumſtances, too many for enumeration, too various for ſpecification, ſuggeſt for inveſtigating his intention;

—would

* *Marcus Pomponius Marcellus, cum ex oratione Tiberium reprehendiſſet, affirmante Ateio Capitone, et eſſe latinum, et, ſi non eſſet, futurum, 'certe jam inde mentitur, inquit, Capito. tu enim Caeſar, civitatem dare 'potes hominibus, verbis non potes.' Sueton' de illuſt' grammat,' 22.* interpretation of words, which are not legal terms of art, is not peculiarly within the juridical ſphere, and legal judges can, by their caſes, precedents, authorities, rules of conſtruction, or whatever elſe they pleaſe to call them, no more 'ESTABLISH for PRINCIPLES, and 'RULES of PROPERTY' falſe interpretations of ſuch words than a roman emperor, as he was told by honeſt Marcellus, with a generous boldneſs, although he might grant freedom of the city to foreigners and barbarians, could denizate or naturalize a ſolotciſm;—a power, which the baſe Capito, with the ſervility of a cringing court favourite yielded.

—would have expounded his words, if they were terms of art, ſimple and unaequivocal, in the ſenſe attributed to them by ſkilfull profeſſors of the art;

—would have expounded his words, if they were terms of art, but aequivocal, ſo as to be intelligible, in a demotic, popular, or in a technic, artificial ſenſe,—in one of which the teſtament would have been valid, in the other void—would have expounded his words in the former ſenſe, and rejected the latter; prefering that to this, *ut res magis valeat*, by the benignity, *quam pereat*, by the malignity, of the law—the law, which favours the praeſumtion, that the teſtator intended what he could do, rather than that he intended what he could not do.

W r 99 When judges, who 'diſclame all legiſ-'lative power to change the law,' pronounce, that a will ſhall not be performed, becauſe the teſtator had not declared his meaning in language, which was preſcribed by rules of interpretation, rules of conſtruction, as they ſometimes are called—(truly called ſo, for properly conſtruction is building, taken for expoſition by a metonymy, and wills are often, according to rules of conſtruction, built, not interpreted, by engliſh judges)—although his meaning was declared in language which could not be miſunderſtood—rules, of which he had never heard—rules, which although attempted to be dignified by their makers claſſing them with rules of law,

are

are defective in a quality eſſential in the conſtitution of laws, having never been ſo promulged that they can be known by thoſe who are not profeſſionaliſts—do not judges, forming theſe rules, and adhaering to them ſo that caſes where they have been recognized 'will prevale 'againſt APPARENT intentions' of teſtators, aſſume authority to fabricate types 'for mould-'ing teſtators wills?' do they thus 're- W r 99 'gard the teſtators own words, and compare 'them with his circumſtances, and the relative 'ſituation of the deviſees?' do they not oppoſe their rules of conſtruction to the law, making the commandment of it, THAT THE WILL OF THE TESTATOR ORDAINING WHAT IS LAWFULL SHALL BE PERFORMED, of none effect by their traditionary interpretations? if this be not, 'what is, aſſum-'tion of a legiſlative power'—power 'to change 'the law,' to aboliſh the law? ought ſuch rules of interpretation, if it muſt be called interpretation, to 'become RULES of PROPERTY?' if engliſh judges change ſome of their rules, as frequently they have done, will their apes, *dictu nefas*, be found among judges—in the latitude—of Virginia!

One would ſuppoſe, rules for interpretation of teſtaments ſhould tend to illuſtrate intention, ſhould be conſiſtent with themſelves, be ſimple.

But,

W r 272 But, as we are taught, 'adjudged caſes,' in which we find theſe rules, 'have more 'frequently been produced to diſappoint than to 'illuſtrate the intention.'

W r 102 Inſtead of conſiſtency, 'apparent claſhing 'of the caſes relied upon,' in ſome inſtances, where theſe rules have been applied, is confeſſed, and in numberleſs others may be ſhewn.

Inſtead of ſimplicity, judges, by the canonic art, ſkill in forming rules, for interpretation of W r 102 wills, have 'tied a gordian knot.'

Why gordian knot? the του ζυγου της αμαξης ὁ δεσμος, the *vinculum inextricabile*, to which is here alluded, is ſaid to have been *ſerie vinculorum ita adſtricta, ut unde nexus inciperet, quove ſe conderet, nec ratione, nec viſu, percipi poſſet.* now we learn, that the judges, tying W r 100 this knot, were inſtigated by 'the ſpirit 'of the feudal ſyſtem;' ſo that the judges, who 'have been ſince ſtruggling,' we are not told how long, 'ſince to untie it,' and who poſſibly knew *unde nexus inceperat*, and therefore could have found one end of the cord with which the knot was tied, muſt have been clumſy, if they could not find, *quo ſe condidit*, the other end. the pellaen hero, if he had been ſo lucky as to diſcover the begining of the cord, with which the phrygian knot was tied, would have been more dexterous, and probably, by unloſing it,

Quint' Curt' lib' 3, Cap' 1.

would

would have fulfilled an oracle, inſtead of eluding it, by the diſciſſion. this expedient, however, is commended: for we are informed, 'it would have been better if they, ENGLISH 'judges, had cut it, the knot, at once.' yea verily? would it have been better? if ſo, why did not, why do not, Virginia judges imitate the macedonians example, ſince, 'by the american 'revolution, and ſome of our laws, we have happily got rid of the feudal ſyſtem;' and the ſpirit of it in this part of the globe hath been exorciſed? they would have been, they will be, acquited of temerity, which was aſcribed to him, and might have avoided, may ſtill avoid, agonies which engliſh judges ſuffer, in 'their ſtruggle for the intenti-'on againſt rigid unjuſt rules of law,' that is, rules of interpretation.

Quint' Curt' lib' 3 Cap' 17

The engliſh ſtructure of canons, rules for interpretation of teſtaments, 'unfortunately ad-'mitted,'—unfortunately truly for all but thoſe, who, like Demetrius and his ſuit, 'by 'this craft have their wealth'—a ſtructure of rules for expounding teſtaments, that is, for 'counteracting, defeating, intenti-'ons of teſtators' (for to call it interpretation and expoſition, if not ironicaly, muſt be nonſenſe) a ſtructure, agreed to be an imp of the feudal ſtock—may be reſembled rather to the cretan labyrinth. for expediting us from its maeanders, our Daedalus, who

Act' 19th' Cap XIX,

Virg ——*ipſe dolos tecti ambagesque reſolvit,*
Caeca regens filo veſtigia,——
the general aſſembly, ſhewed the clew, execrating, in our ſyſtem of juriſprudence, every part formed of feudal materials, or faſhioned in feudal ſtyle. how we ſhall profit by the indication
W r 300 may be augured by the caſe of Ayletts ex-
*W r 110 ecutor againſt Aylett, and by the *eulogy which no doubt was extremely delectable to him whom it blandiſhed, and 'whoſe laborious re-' ſearches on ſuch occaſions were pleaſing to the ' court.'

(F) Let us ſuppoſe the teſtator to have uſed inſtead of the word, 'heirs,' the ſyllabus of it, taken from the ſtatute directing the courſe of deſcents, when the bequeſt would have been writen thus: ' at my daughters death,

' i give the intereſt of the money to my grand-' children Sarah Cocke, Elizabeth Clements, ' Francis Clements, and John Clements, one ' fourth to each; and at their deceaſe,

' [i give] the principal and intereſt† to their ' children, or their deſcendents, to be diſpoſed ' by them, in ſuch proportions as they, by their ' wills, ſhall direct;

† ' if no children nor deſcendents of my gran-' daughter Sarah Cocke be, i give her part to ' my grandaughter Elizabeth Clements;

' if

† tranſpoſitions, by which the conſtruction, in either ſenſe, without the leaſt change of meaning is more perſpicuous.

'if no children nor deſcendents of my other grandchildren be, [i give their parts of] the 'principal and intereſt to their father,' here ſuppoſed to be the ſame man. the teſtator probably did not intend this: but ſuch muſt have been the effect, if the father were living;

'if the father be dead [i give their parts of] 'the principal and intereſt to their mother,' alſo ſuppoſed to be the ſame woman, 'brothers and 'ſiſters, and their deſcendents or ſuch of them 'as there be in ſuch proportions;' and ſo forth.

That the teſtators words may be underſtood in this ſenſe is inconteſtable, and that they ought, even in oppoſition to 'caſes ſtrong, uniform, 'applying pointedly,' to be underſtood in this the demotic ſenſe, by which his intention may be fulfilled, rather than that his intention ſhould be counteracted, defeated, by expoſition of the word, 'heirs,' in the technical ſenſe, is——— hold here

———give thy thoughts no tongue. Shakſp'

MANTISSA.*

*Cro' Car' ſub finem.

'The rule is laid down, in Roſe and 'Bartlett, by all the judges, that where Wr 302 'a teſtator, having both freehold and leaſehold 'lands, in a particular place, deviſes ALL his 'lands in THAT place, only the freehold lands 'ſhall paſs.'

'*Le report del caſe argue en le common banke devant touts les juſtices de meſme le banke en le quart an du raygne de roy Jacques, entre* Matthew Stradling, *plant,*' *et* Peter Styles, *def,*' en un action *propter cer-tos equos coloratos, anglice,* pyed horſes port per le dit Matthew *vers le dit* Peter. *le recitel del caſe.* Sir John Swale, of Swalehall in Swale dale faſt by the river Swale, k't, made his laſt will and teſtament: in which, among other bequeſts, was this, *viz.* 'out of the kind love "and reſpect that i bear unto my much honour-"ed and good friend mr Matthew Stradling, "gent,' i do bequeath unto the ſaid Matthew "Stradling, gent,' ALL my black and white "horſes.' the teſtator had ſix black horſes, ſix white horſes, and ſix pyed horſes. le point. the debate therefore was, whether or no the ſaid Matthew Stradling ſhould have the ſaid pyed horſes, by virtue of the ſaid bequeſt. this caſe was argued by Atkins, apprentice, pour le pl,' and by Catlyne, ſerjeant, pour le defend.' le court fuit longement en doubt, de ceſt matter; et apres grand DELIBERATION eu judgment fuit donne pour le pl, *niſi cauſa.* motion in arreſt of judgment, that the pyed horſes were mares; and there-upon an inſpection was prayed. et ſur ceo le court *adviſare vult.*'

Scriblerus's reports.

Theſe two caſes 'apply POINTEDLY.' the reſolutions of them are contradictory.

Stradling

Stradling *verſus* Styles, although adjudged, if indeed the caſe ever exiſted, long before Roſe *verſus* Batlett, as may be conjectured from divers conſiderations, doth not appear to have been cited in the argument of the latter caſe; probably for theſe reaſons; firſt, the reports of maſter Scriblerus had not been publiſhed; ſecond, if they had been publiſhed, they would have been diſregarded, not being authorized by the judges *imprimatur*; laſt, the name of the ſuppoſed author is believed to be fictious, and to have been aſſumed by a certain COMMON SENSE, who, long a probationer, had not, in the time of George Croke, knight, reporter of Roſe *verſus* Bartlett, been able to become a licentiate, in Weſtminſter hall, even of an *cuſier* barriſter degree.

'Thus ſettled' (the principle in Shermers caſe) 'it has become a rule of property' (that is a law, which the judges who aſſumed authority to ordain it, have, and their ſucceſſors will have, equal authority to abrogate) 'which the 'court cannot depart from without diſturbing 'MANY titles enjoyed under this LONG ES-'TABLISHED PRINCIPLE.' Wr 302

If the preſent judges ſhall not abrogate theſe rules and principles, their ſucceſſors will not want logic to prove that thoſe who can make, who can ESTABLISH, can defeat, can DEMOLISH, RULES of property, that is, LAWS.

If

If precedents be requiſite, they are at hand, *W r 134 ‘ *FURNISHED,’ by the court of appeals: for example:

W r 302 ‘ The court cannot depart from a rule of ‘ property,’ by which they mean a judicial rule of interpretation, as it it explained by themſelves, ‘ without diſturbing titles.’ then they may depart from the rule, if it be a bad rule, and if departure from it will quiet more titles, than adhaeſion to it will diſturb.

Again for a more POINTED example.

‘ The judges after laying down the true rule, ‘ built upon intention, unfortunately admitted, ‘ that, if there be no words of limitation the ‘ common law rule muſt prevale; by which they ‘ tied a gordian not, which they have ſince ſtrug- ‘ gled to untie. it would have been better if ‘ they had cut it at once.’

W r 102 and in many more places

Now, with what was this knot tied? with ‘ rules of interpretation, rules of ‘ conſtruction, principles, rules of ‘ property.’ ‘ what are rules of property’ but laws? who ‘ tied the knot?’ judges. who formed the rules? judges. who ‘ have ſtrug- ‘ gled to untie the knot?’ judges. who ‘ would ‘ have done better if they had cut it?’ judges. ‘ at once;’ when? not before the knot was tied by preceding judges, ſurely. what is the proper, inſtead of the metaphorical ſenſe of ‘ tying, ‘ ſtruggling

'ſtruggling to untie, cuting, the knot?' forming 'rules of interpretation, rules of conſtruction, 'principles, rules of property,' was 'tying.' endeavouring to change them was 'ſtruggling 'to untie.' declaring them to have been originaly contrary to law was 'cuting.'

Conſequently the court of appeals authorized abrogation of rules for interpretation of teſtaments.

Here upon the conceſſion of the court of appeals, that, for interpretation of wills, 'the 'rule built upon intention' is the 'true rule,' deſerves to be remarked, if it were a true rule, it was a common law rule. if it were a common law rule, the rule 'the judges unfortunate-'ly admitted to prevale againſt it,' is a falſe rule, and the propoſition that it was 'the common law-'rule,' involves a contradiction.

'From the rule of property,' the rule of conſtruction, 'ſettled by judges and chancellors,' in the caſe of Roſe and Bartlett, and ſome other caſes, in England, 'the court could not depart,' in the caſe, of notable celebrity,* between Ayletts executor and Aylett, 'without 'diſturbing MANY titles, enjoyed under this 'LONG ESTABLISHED PRINCIPLE.' W r 302 will

* If in this caſe the intention appeared CLEAR, that the 'leaſehold land ſhould paſs the court would give a deciſion according to 'this principle, IN SUPPORT OF THE INTENTION; but WE 'can diſcover NO SUCH INTENTION.' theſe words have been read by ſome people without STARING! W r 302

will obſequence of that glaringly falſe unjuſt principle, or deviation from it, think you, produce the moſt quietude or diſturbance in this country? probably the caſe hath frequently happened, 'where a teſtator, having both freehold 'and leaſehold lands, in a particular place, de-'viſed ALL his lands in that place,' and been ſettled, without litigation, by the parties, who had not been informed of this 'LONG ESTA-'BLISHED PRINCIPLE,' according to his 'apparent intention.' and perhaps 'MANY 'titles have been enjoyed peaceably and quietly 'under' ſuch ſettlements. we hear of a ſingle inſtance, in this country, where any perſon had queſtioned, whether 'only the freehold lands 'ſhould paſs by ſuch a deviſe;' in other words, whether the poſtulate of Euclid, in his elements, 'that the whole is greater than its part,' ought to be granted. if ſo, when Waſhingtons reports ſhall be, as they quickly will be, in the hands of every *legulejus*, indefatigable in his 'reſear-
Wr 'ches' after adjudged caſes, and ambitious
110 to deſerve the 'opinion, that what is not 'produced by him, in favour of the ſide he ad-'vocates, does not exiſt,' this caſe of Aylett, for
Wr 'for which nothing can be ſaid, but that in
302 'Ayletts will are no words or circumſtances 'to ſhew an intention, which do not appear in the 'caſe of Roſe and Bartlett,' inſtead of being a *finis litium*, will multiply them, and be as prolific as the fabulous hydra, or that ſpecies of the true hydra, called the polypus,

ERRATA.

Page 5, line 8, for *Roman* read *Romam*.
——16, line 20, after the word *she* read *should*.
——10, line 22 23, for *aequivalent*, read *equivalent*.
Page 22, line 27, for *pellaen*, read *pellaean*.