

Wright Vs. Denn

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Appeal No. : 23 U.S. 204

Appellant : Wright

Respondent : Denn

Judgement :

Wright v. Denn - 23 U.S. 204 (1825)

U.S. Supreme Court Wright v. Denn, 23 U.S. 10 Wheat. 204 204 (1825)

Wright v. Denn

23 U.S. (10 Wheat.) 204

ERROR TO THE CIRCUIT

COURT OF NEW JERSEY

SYLLABUS

J.P., by his last will, after certain pecuniary legacies, devised as follows:

"Item. I give and bequeath unto my loving wife M. all the rest of my lands and tenements whatsoever whereof I shall die seized in possession, reversion, or remainder, provided she has no lawful issue."

"Item. I give and bequeath unto M., my beloved wife, whom I likewise constitute, make, and ordain my sole executrix of this my last will and testament, all and singular my lands, messuages, and tenements, by her freely to be possessed and enjoyed, . . . and I make my loving friend H.J. executor of this my will, to take care and see the same performed according to my true intent and meaning,"

&c.; The testator died seized without issue, and after the death of the testator, his wife M. married one G.W., by whom she had lawful issue. *Held* that she took an estate for life only, under the will of her husband, J.P.

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

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

General rule as to what words will carry a fee.

An introductory clause showing an intention to dispose of the whole of the testator's estate will not attach itself to a subsequent devising clause so as to enlarge the latter to a fee.

A charge upon lands cannot be created by implication unless the implication is plain.

Effect of the words, "in possession, reversion, or remainder," &c.;

Where words are used by a testator which are insensible in the place where they occur or their ordinary meaning is deserted and no other is furnished by the will, they must be entirely disregarded.

The word "tenements" does not carry a fee independent of other circumstances.

This was an action of ejectment brought in the court below. The sole question arising upon the state of facts in the cause was upon the construction of the will of James Page, made on 15 February, 1774. By that will, after the usual introductory clause, the testator proceeds as follows:

"Item. I give and bequeath unto my beloved sister, Rebecca, 100 pounds, proclamation money, to be paid in four years after my decease."

"Item. I give and bequeath unto my beloved sister Hannah the sum of 50 pounds proclamation money, to be paid when she is of age."

"Item. I give and bequeath unto my sister Abigail the like sum of 50 pounds, proclamation money, to be paid when she arrives at age."

"Item. I give and bequeath unto my loving wife Mary all the rest of my lands and tenements whatsoever whereof I shall die seized in possession, reversion, or remainder, provided she has no lawful issue."

"Item. I give and bequeath unto Mary, my beloved wife, whom I likewise constitute, make, and ordain, my sole executrix of this my last will and testament, all and singular my lands, messuages, and tenements, by her freely to be possessed and enjoyed, and I do hereby utterly disallow, revoke, and disannul all and every other former testaments, wills, legacies, and bequests by me in any ways before named, willed, and bequeathed, ratifying and confirming this and no other to be my last will and testament. And I make

Page 23 U. S. 206

my loving friend, Henry Jeans, of the county and province aforesaid mentioned, executor of this my will, to take care and see the same performed according to my true intent and meaning, and for his pains, [leaving the sentence incomplete]. In witness whereof,"

&c.;, (in the common form of attestation). The testator was seized of the land in controversy at the time of the will, and died seized, without issue, on 10 October, 1774, leaving his wife Mary, the devisee, who afterwards married one George Williamson, by whom she had lawful issue still living, and died in the year 1811. The lessor of the plaintiff is the brother of the testator and his only heir at law. The defendant claims title to the premises as a purchaser under Mary, the wife of the testator.

The title of the testator to the premises was derived from a devise in the will of his father, John Page, dated 11 November, 1773. That will, among other things, contained the following clause:

"Item. I give and devise unto my son James one equal half part of my land, [comprising the land in controversy], with all my plantation, utensils, &c.;, to him, his heirs and assigns forever."

He then gives the other moiety of the land to his son John, to him, his heirs and assigns. He then bequeaths several legacies to his daughters, Sarah and Mary, and adds,

"Item. I give and bequeath to my three daughters, Rebecca, Hannah, and Abigail, Rebecca the sum of 50 pounds, Hannah and Abigail the sum of 50 pounds each of them. Likewise

Page 23 U. S. 207

it is my will that my son James to pay Hannah and Abigail the said sum of fifty pounds each when they come of age."

He then concludes his will by appointing an executor and revoking all former wills, &c.;, and died soon afterwards. James (the son) left no other real estate than that devised to him by this will. What personal estate he or his father left at the times of their decease was not found in the case, and therefore it did not appear whether or not it was sufficient to pay the legacies in their wills.

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

Page 23 U. S. 225

MR. JUSTICE STORY delivered the opinion of the Court, and after stating the case, proceeded as follows:

The principal question arising in this case is what estate Mary, the wife of James Page, took under his will -- whether an estate for life or in fee. If the former, then the judgment of the circuit court is to be affirmed; if the latter, then it is to be reversed.

Some reliance has been placed upon the will of John Page, the father, to show the predicament of the land in the possession of his son James, and thence to draw aid in the construction of the will of the latter. Without doubt James took a fee in the moiety devised to him by his father (which includes the land in controversy), for it is given "to him, his heirs and

Page 23 U. S. 226

assigns." But it is argued that the land came into his hands charged with the legacies payable to his sisters Hannah and Abigail, and as these legacies were not payable until they came of age, they remained a charge upon the land in the hands of James at his death. Whether the sisters were of age at his death or not or had received their legacies or not does not appear from the statement of facts, and nothing can be presumed either way. But what is there to show that these legacies were a charge on the land? The direction in the will is that "James do pay Hannah and Abigail the said sum of 50 pounds each when they come of age," but it is not said or implied anywhere in the will, that these legacies shall be a charge on the land. The direction is personal, and must be a charge on the person only, unless it can be shown from other parts of the will that the testator intended a charge on the land. A testator may devise lands with a view to legacies, and make them a charge on the land or on the person of the devisee, or on both,^{1} and

whether a particular legacy be in either predicament, must depend upon the language of the will. In the large class of cases which have been decided on this subject and which has principally arisen from questions respecting the quantity of the estate taken by the devisee, the ground assumed has been that the will must speak expressly or by fair implication

Page 23 U. S. 227

that the testator intends the legacies to be a charge on the land. When, therefore, the testator orders legacies to be paid out of his lands, or where, subject to legacies or after payment of legacies, he devises his lands, courts have held the land charged with the legacies upon the manifest intention of the testator. But here there is no such language. There is no direction that the devisee shall pay the legacies out of the land. The charge is personal, and the case falls directly within the authority of *Reeves v. Gower*, 11 Mod. 208.

We may, then, proceed to the consideration of the will of James Page, inasmuch as that of his father affords no light to guide us in the construction. The grounds mainly relied on to establish that Mary, the wife of the testator, took a fee are that the legacies given to his sisters are a charge on his real estate in the hands of his widow; that all the rest of his "lands and tenements," in possession, reversion, or remainder, are given; that the devise is subject to the proviso "that she has no lawful issue," which is not a condition merely, but a substitution for an estate intended for his children; and finally that the lands, &c., are devised to her "freely to be possessed and enjoyed," which words are best satisfied upon the supposition of a fee.

Before proceeding to the particular examination of the legal effect of these different clauses in the will, it is necessary to state that where there are no words of limitation to a devise, the general rule of law is that the devisee takes an

Page 23 U. S. 228

estate for life only unless, from the language there used or from other parts of the will, there is a plain intention to give a larger estate. We say a plain intention

because if it be doubtful or conjectural upon the terms of the will or if full legal effect can be given to the language without such an estate, the general rule prevails. It is not sufficient that the court may entertain a private belief that the testator intended a fee; it must see that he has expressed that intention with reasonable certainty on the face of his will. For the law will not suffer the heir to be disinherited upon conjecture. He is favored by its policy, and though the testator may disinherit him, yet the law will execute that intention only when it is put in a clear and unambiguous shape.

In the present case there is no introductory clause in the will expressing an intention to dispose of the whole of the testator's estate. Nor is it admitted that such a clause, if it were inserted, would so far attach itself to a subsequent devising clause as *per se* to enlarge the latter to a fee where the words would not ordinarily import it. Such a doctrine would be repugnant to the modern as well as ancient authorities. The cases of *Frogmorton v. Wright*, 2 W.Bl. 889, *Right v. Sidebottom*, Dougl. 759, *Child v. Wright*, 8 D. & E. 64, *Denn v. Gaskin*, Cowper 657, *Doe v. Allen*, 8 D. & E. 497, and *Merson v. Blackmore*, 2 Atk. 341, are full to the point. The most that can be said is that where the words of the devise admit of passing a greater interest than for life, courts will lay

Page 23 U. S. 229

hold of the introductory clause to assist them in ascertaining the intention. The case of *Hogan v. Jackson*, Cowper 297, admits this doctrine. That case itself did not turn upon the effect of the introductory clause, but upon the other words of the will, which were thought sufficient to carry the fee, particularly the words, "all my effects, both real and personal." The case of *Grayson v. Atkinson*, 1 Wils. 333, admits of the same explanation, and besides the inheritance was there charged with debts and legacies.

There is no doubt that a charge on lands may be created by implication as well as by an express clause in a will. But then the implication must be clear upon the words. Where is there any such implication in the present will? The testator has not disposed of the whole of his personal estate, which is the natural fund for the

payment of legacies, *non constat* how much or how little he left. For aught that appears, the personal estate may greatly have exceeded all the legacies, and if it did not, that would be no sufficient reason to charge them on the land. It is not a sound interpretation of a will to construe charges which ordinarily belong to the personalty to be charges on the realty simply because the original fund is insufficient. The charge must be created by the words of the will. Now from what words are we to infer such a charge in this case? It is said from the words "all the rest;" but "all the rest" of what? Certainly not of the personal estate, because the words immediately

Page 23 U. S. 230

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

Page 23 U. S. 231

real estate, there could be no residue of real estate on which the clause could operate.

But admitting that the present legacies were a charge on the lands of the testator, this would not be sufficient to change the wife's estate into a fee. The clearly established doctrine on this subject is that if the charge be merely on the land, and not on the person of the devisee, then the devisee, upon a general devise, takes an estate for life only. The reason is obvious. If the charge be merely on the estate, then the devisee (to whom the testator is always presumed to intend a benefit) can sustain no loss or detriment in case the estate is construed but a life estate, since the estate is taken subject to the encumbrance. But if the charge be personal on the devisee, then if his estate be but for life, it may determine before he is reimbursed for his payments, and thus he may sustain a serious loss. All the cases turn upon this distinction. *Canning v. Canning*, Moseley 240, *Loveacres v. Blight*, Cowp. 352, *Denn, ex dem. Moor v. Mellor*, 5 D. & E. 558, and 2 Bos. & Pull. 227, *Doe v. Holmes*, 8 D. & E. 1, *Goodtitle v. Maddem*, 4 East 496 all recognize it. And *Doe & Palmer v. Richards*, 3 D. & E. 356, proceeds upon it, whatever exception may be thought to lie to the application of it in that particular case. We are then of opinion that there is no charge of the present legacies on the land, and, if there were, no inference could be drawn from this circumstance to

Page 23 U. S. 232

enlarge the estate of the wife to a fee, since they are not made a personal charge upon her.

The next consideration is whether the words, "all the rest of my lands and tenements," &c.;, import a fee. In the first place, this clause is open to the objection that it is not a residuary clause in the will, for no estate in the lands is previously given, and consequently, if it operates at all on the fee, it gives the entire inheritance, and not a mere residuum of interest. And if a devise of "all the rest and residue of lands" in a clear residuary clause was sufficient to carry a fee by their own import, it would follow that almost every will containing a residuary clause would be construed, without words of limitation, to pass a fee. Yet the

contrary doctrine has most assuredly been maintained. In *Canning v. Canning*, Moseley 240, the testator devised as follows:

"All the rest, residue and remainder of my messuages, lands, &c., after my just debts, legacies, &c., are fully satisfied and paid I give to my executors in trust for my daughters,"

and the question was whether these words passed an estate in fee or for life to the executors. The court decided that they passed a life estate only. The authority of this case was fully established in *Moor v. Denn, ex dem. Mellor*, 2 Bos. & Pull. 247, in the House of Lords, where words equally extensive occurred, and the authority of this last case has never been broken in upon.

The cases which seem at first view to interfere with and control this doctrine will be

Page 23 U. S. 233

found upon close examination to turn on other points. Thus, in *Palmer v. Richards*, 3 D. & E. 356, where there was a devise of "all the rest and residue of the testator's lands," &c., his legacies and personal expenses being thereout paid. Lord Kenyon admitted that the words "rest and residue," &c., were not sufficient to carry a fee, but he relied on the subsequent words, "legacies, &c., being thereout paid," which he considered as creating a charge upon the lands in the hands of the devisee of such a nature as to carry a fee. In this opinion the court concurred, and though this case has been since questioned on its own circumstances, its general doctrine remains untouched. So in the case of *Norton v. Ladd*, 1 Lutw. 755, 759, where the devise was to A.C., his sister, for life, of all his lands, &c., after the decease of his mother; then to J.C. his brother, "the whole remainder of all those lands and tenements," given to A.C. for life, if he survived her; and if not, then "the whole remainder and reversion of all the said lands, &c., to his sister, C.E. and A., and to their heirs forever," the court held that a fee passed to J.C. under the devise upon the ground, that taking the whole will, the words "whole remainder" properly referred to the estate or interest of the testator undisposed of to his sister, A.C., and that the words could not relate to the quantity of lands, which the testator

intended to devise to his brother J.C., for he had plainly devised all his lands to his sister, A.C., and all the lands he had devised to A.C. he had devised to J.C.,

Page 23 U. S. 234

so that the words naturally and properly had relation to the quantity of estate which the testator intended to give J.C. -- that is, all the remainder, which is the same in effect as all his estate. If the words were merely to be referred to the lands he intended to devise to J.C., they would be ineffectual, for it was impossible that he could have any remainder of lands when he had devised all to A.C., so that they must refer to the estate in the lands.

Such is the substance of the reasoning of the court, upon which it is unnecessary to say more than that the case turned upon the supposed incongruity of construing the testator's words otherwise than as importing the whole remaining interest in the lands, upon all of which lands a life estate was already attached. And the final devise over, which carried a plain fee to the sisters, being a substitution for the former estate to J.C. in the event of his death before the testator, greatly fortifies this interpretation. This case has been much relied on by the plaintiff in error upon the present argument, but it is very distinguishable from that before the Court. There, a life estate was given, and the terms, "whole remainder" had a natural meaning as embracing the whole remaining interest. Here, on the contrary, there is no preceding interest given in the real estate, and therefore the terms, "all the rest" are not susceptible of that sense. There, a substituted estate in fee was clearly given; here, no clause occurs leading necessarily to such a conclusion. All that the case in *Lutwyche*, taken as the fullest authority,

Page 23 U. S. 235

establishes is that the words "rest and residue" may, in certain connections, carry a fee.^{2} This is not denied or doubted, but then the words attain their force from their juxtaposition with other words which fix the sense in which the testator has used them. In *Farmer v. Wise*, 3 P.Wms. 294, the residuary clause was of "all the rest of his estate, real and personal," and the word "estate" has long been

construed to convey a fee. This Court has carried the doctrine still further and adjudged a devise of "all the estate called Marrowbone" to be a devise of the fee, construing the words not as words merely of local description, but of the estate or interest also in the land. [Lambert's Lessee v. Paine](#), 3 Cranch 79, *Murray v. Wise*, 2 Vern. 564, S.C. Prec. in Ch. 246, contained a devise, after a legacy, of all the residue of his real and personal estate, and rests on the same principle, as do *Beachcroft v. Beachcroft*, 2 Vern. 690, and *Ridart v. Paine*, 3 Atk. 486. In *Willows v. Lydcott*, Carth. 50, 2 Vent. 285, the residuary devise was to A. and her assigns forever, which latter words indicate a clear intention to pass a fee. In *Grayson v. Atkinson*, 1 Wils. 333, there was an introductory clause purporting the intention of the testator to dispose of all his temporal estate, then several legacies were given, and a direction to A. to sell any part of his real and

Page 23 U. S. 236

personal estate for payment of debts and legacies; and then the will says, as to the rest "of my goods and chattels, real and personal, moveable and immoveable, as houses, gardens, tenements, my share in the copperas works, &c.;, I give to the said A." Lord Hardwicke, after some hesitation, held it a fee in A., relying upon the introductory clause, and the charge of the debts and legacies on the land, and upon the language of the residuary clause. Whatever may be the authority of this decision, it certainly does not pretend to rest solely on the residuary clause, and its containing a mixed devise of real and personal estate was not insignificant in ascertaining the testator's intention.

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

We may, then, take it to be the general result of the authorities that the words, "all the rest of my lands" do not of themselves import a devise of the fee, but unless aided by the context, the devisee, whether he be a sole or a residuary

Page 23 U. S. 237

devisee, will, if there be no words of limitation, take only a life estate.

We next come to the effect of the words "in possession, reversion, or remainder," and, as incidental thereto, the effect of the word "tenements." That the term "remainder" may in some cases connected with other clauses, carry a fee has been already admitted, and was the very point in 1 Lutw. 755. The same is true in respect to the word "reversion." This is affirmed in the case of *Bailis v. Gale*, 2 Ves. 48, where the devise was "I give to my son, C.G., the reversion of the tenement my sister now lives in after her decease, and the reversion of those two tenements now in the possession of J.C." Lord Hardwicke, in pronouncing judgment, relied on the legal signification of the word "reversion," and that its use by the testator was fairly to be inferred to be in its legal sense, as the whole right of reverter, and he adverted to the circumstance that the devise was to a child, to whom it could scarcely be presumed the parent intended to give merely a dry reversion or to split up his interest in it into parts. But in that case, as in 1 Lutw. 755, there were antecedent estates created or existing in the land, and the devise was of a "reversion," and not, as in this case, of "all the rest of my lands &c.;, in reversion," &c.; The land now in controversy was not held by the testators as a reversionary estate, but as an estate in possession, and in no way, therefore, can the doctrine help the present case. But there are cases which are contrary to *Bailis v. Gale* and

Page 23 U. S. 238

somewhat clash with its authority. In *Peiton v. Banks*, 1 Vern. 65, the case was that a man devised his lands to his wife for life, and he gave the reversion to A. and B., to be equally divided betwixt them. The court decided that A. and B. took an estate as tenants in common for life only. And Sergeant Maynard stated a

similar decision to have been made about twenty years before that time. It is not material, however, to enter upon the delicate inquiry which of these authorities is entitled to most weight, because the present case does not require it.

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

If, then, it is asked what interpretation the court put upon the words "all the rest" in connection with "lands and tenements," the answer is that no definite meaning can, in this will, be

Page 23 U. S. 239

annexed to them. It is our duty to give effect to all the words of a will if by the rules of law it can be done. And where words occur in a will, their plain and ordinary sense is to be attached to them unless the testator manifestly applies them in some other sense. But if words are used by him which are insensible in the place where they occur, or their common meaning is deserted and no other is furnished by the will, courts are driven to the necessity of deeming them as merely insignificant or surplusage, and to find the true interpretation of the will without them. In the present case, the words, "all the rest of my lands and tenements" stand wholly disconnected with any preceding clause. There is nothing to which "the rest" has relation, for no other devise of real estate is made. We have no certain guide to the testator's intention in using them. We may indulge conjectures, but the law does not decide upon conjectures, but upon plain, reasonable, and certain expressions of intention found on the face of the will.

The next clause is "provided she has no lawful issue." The probable intention of this proviso was "provided she has no lawful issue" by me. Men do not ordinarily look to remote occurrences in the structure of their wills, and especially unlearned men. The testator was young and his wife young, and it was natural for them not to despair of issue, although at the time of the will he was in ill health. In case of leaving children, posthumous or otherwise, he might

Page 23 U. S. 240

think that the gift to his wife of the whole of his real estate would be more than conjugal affection could require or parental prudence justify. In that event, he might mean to displace the whole estate of his wife, and to leave her to her dower at the common law and the children to their inheritance by descent. This interpretation would afford a rational exposition of the clause, and perhaps ought not to be rejected, although there is no express limitation in the words. In this view, it is not very material whether it be considered as a condition precedent or subsequent, though the general analogies of the law would certainly lead to the conclusion that it was in the latter predicament. But even in this view, which is certainly most favorable to the plaintiffs in error, it falls short of the purposes of the argument. As a condition, in the event proposed, the prior estate to the wife would be defeated, but there would be no estate devised to the issue. They would take by descent as heirs, and not by devise. It would be going quite too far to construe mere words of condition to include a contingent devise to the issue; to infer from words defeating the former estate an intent to create a new estate in the issue, and that estate a fee, and a clear substitute for the former. No court would feel justified, upon so slender a foundation, to establish so broad a superstructure. Nor can any intention to give a fee to the wife be legally deduced from the proviso in any way of interpreting the terms, because it is as perfectly consistent with the intention

Page 23 U. S. 241

to defeat a life estate, as a fee in the whole of the lands. The testator, with a limited property, might justly think it too much to take from his own issue the

substance of their inheritance during a long minority in favor of a wife, who might live many years and form new connections. In such an event, leaving her to the general provision of law as to dower would not be unkindness or injustice. But it is sufficient to say that the words are too equivocal to enable the court to ascertain from them the clear purpose of establishing a fee. And if the proviso refers to any lawful issue by any other husband, then it must be deemed a condition subsequent, and in the events which have happened, the estate of the wife, whether it be for life or in fee, has been defeated, and the plaintiffs in error are not entitled to reverse the present judgment. *Quacunque via data est*, the proviso cannot help the case.

It remains now to consider the succeeding clause of the will, in which the testator repeats his devise and gives to his wife "all his lands," &c.;, dropping the words "the rest," and therefore showing that he did not understand them as having any other or stronger import than the will presented without them. Then follow the words "by her freely to be possessed and enjoyed," upon which great stress has been laid at the bar. If these words had occurred in a will devising an estate for years or for life or in fee in express terms, they would not probably have been thought to have any distinct auxiliary signification, but to be merely a more full annunciation

Page 23 U. S. 242

of what the law would imply. Occurring in a clause where the estate is undefined, they are supposed to have a peculiar force, so that "freely to possess and enjoy" must mean to possess and enjoy without any limitation or restriction as to estate or right. The argument is that a tenant for life is restricted in many respects. She can make no permanent improvements or alterations; she is punishable for waste, and is subject to the inquisition of the reversioner. But if this argument is admitted, it proves not that a fee is necessarily intended, but that these restrictions on the life estate ought to be held to be done away by the words in question. They admit of quite as natural an interpretation by being construed to mean free of encumbrances, and in this view are just as applicable to a life estate as a fee. Perhaps the testator himself may have entertained the notion that the legacies in

his will, or that of his father, were encumbrances on the estate, and if so, the words would indicate an intention that the wife should be disencumbered of the burden. But in what way are we to reconcile the argument deduced from this clause with that drawn on the same side from the preceding proviso? How could the testator intend that the wife should "freely possess and enjoy" the lands in fee when in one event he had stripped her of the whole estate, and that by a condition inseparably annexed as an encumbrance to her estate? We ought not to suppose that he intended to repeal the proviso under such a general phrase. The

Page 23 U. S. 243

case of *Loveacres v. Blight*, Cowp. 352, has been supposed to be a direct support of the argument in favor of a fee. In that case the testator made the following devise:

"As touching such worldly estate wherewith it hath pleased God to bless me in this life, I give, . . . in the following manner and form:"

"First of all, I give and bequeath to E.M., my dearly beloved wife, the sum of five pounds, to be paid yearly out of my estate, called G., and also one part of the dwelling house, being the west side, with as much wood craft, home at her, as she shall have need of, by my executors hereafter named. I give . . . unto my son T.M. the sum of five pounds, to be paid in twelve months after my decease. I give unto my granddaughter E. the sum of five pounds, to be paid twelve months after my decease."

"Item. I give unto J.M., and R.M., my two sons, whom I make my and ordain my sole executors, . . . all and singular my lands and messuages, by them freely to be possessed and enjoyed alike."

The question was whether by this clause the sons took an estate for life or in fee. The court held that they took a tenancy in common in fee. Lord Mansfield, in delivering the opinion of the court, admitted that if the intention were doubtful, the general rule of law must take place. But he laid stress upon the circumstance that the estate was charged with an annuity to his wife, so that the testator could not

mean by the word "freely" to give it free of encumbrances. He thought the free enjoyment must therefore mean free from

Page 23 U. S. 244

all limitations -- that is, the absolute property of the estate. He also thought the introductory clause not unimportant, and that the blank after "my" was intended to be filled with "heirs," and it can scarcely escape observation that it was a case where the sons of the testator were the devisees. These considerations may well lead to a doubt whether Lord Mansfield intended to lay down any general principle of construction in relation to the words "freely to be enjoyed," &c.; But if he did, the subsequent case of *Goodright v. Barron*, 11 East 220, has manifestly interfered with its authority. In that case, there was an introductory clause, "as touching such worldly estate wherewith it hath pleased God to bless me," &c.;, and the testator then proceeded as follows:

"I give and bequeath to my brother T.D., a cottage house, and all belonging to it, to him and his heirs forever, W.C. tenant. Also, I give and bequeath to my wife E., whom I likewise make my sole executrix, all and singular my lands, messuages, and tenements, by her freely to be possessed and enjoyed."

The court held that the wife took an estate for life only; that the words, being ambiguous, did not pass a fee against the heir, but might mean free from encumbrances or charges, free from impeachment for waste; and that the introductory clause could not be brought down into the latter distinct clause to aid it, though, if joined, it might have had that effect. The court distinguished that case from the case before Lord Mansfield because in the latter, as the testator had already

Page 23 U. S. 245

encumbered the estate, the words must have meant to pass a fee, or they would have no meaning at all. Mr. Justice Le Blanc added that the words used were not inconsistent with a life estate only, and he distinguished between them and the words "freely to be disposed of," admitting that the latter would pass a fee. So that,

taking both these cases together, the fair deduction is that the words "freely to be possessed," &c.;, are too uncertain of themselves to raise a fee, but they may be aided by other circumstances.

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

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

Judgment affirmed with costs.

See Roe ex dem. Peter v. Day, 3 M. & S. 518; 5 East 87; 4 East 495.

See Lord Hardwicke's comments on this case in *Bailis v. Gale*, 2 Vesey 48.

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