Case 96.—CHESTER *versus* PAINTER. [1725.]

At the Council.

2 Eq. Ca. Ab. 313, pl. 21 ; 375, pl. 24 ; 560, pl. 6.

One devises a third of all his estate whatsoever to his wife, and two thirds of all his real and personal estate to his son *J. S.* and his heirs ; the wife has but an estate for life in the third part of the real estate, the word " estate " being intended to describe the " thing " only, and not the " interest " in the thing, and when the testator intends to pass a fee, he adds the word " heirs " to the word " estate."

Upon an appeal to the King in council from a decree in the Court of *Chancery* in the island of *Antigua* :

The case was : One *John Painter* seised in fee of a real estate, and possessed of a personal estate in *June* 1711, made **[336]** his will, and thereby gave and bequeathed one third part of *all his estate whatsoever* to his wife *Anne*, and devised to his son *John Painter* and to his heirs two thirds of all his real and personal estate, upon condition to pay his debts ; and gave to *J. S.* the sum of ———, payable at twenty-one, and in the mean time he to have the yearly sum of ———, which did not amount to the interest of the legacy given to him. *J. S.* died under twenty-one, and his executors demanded the legacy presently.

In the privy council were present *inter al'* the Lord Chief Justice *Raymond*, Sir *Joseph Jekyll* Master of the Rolls, and the Lord Chief Justice *Eyre* ; and the questions were,

1*st*, Whether the wife, to whom the third part of all the testator's estate whatsoever was devised, should have an estate in fee, or only an estate for life ? (On this head vide *Barry* v. *Edgworth*, post, 523.)

2*dly*, Whether the wife should have a third part of the personal estate free from the debts, or only a third part of so much as should remain after payment of debts ?

3*dly*, Whether the executor of *J. S.* should be paid this legacy presently, or wait until such time as *J. S.* would, if he had lived, have attained his age of twenty-one.

As to the first, the *Chief Justices* and the *Master of the Rolls* without difficulty held, that by the devise of a third part of all the testator's estate whatsoever the land did pass, as well as the personal estate by virtue of the word [whatsoever] ; but they conceived that the wife should have but an estate for life therein, the word [estate] being rather a description of the **[337]** thing itself, than of the testator's interest in it ; and by the next clause it appeared, that where the testator intended to give a fee, there he took care to add the word [heirs] to the word [estate.](1)

But as to the other two points, the *Judges* and the *Master of the Rolls*, took time to consider, and having met together, they all agreed, and *Raymond*, C. J., delivered it as their unanimous opinion with regard to the second point, that the widow should have her thirds not liable to the debts, they being by the express words of the will fixed upon the other two thirds, by which the devise to the wife was rendered clear ; and upon this point were cited Dy. 59 b, 164 a ; Goldsb. 149.

As to the third point they likewise held unanimously, that the executors of the legatee should wait for their legacy until such time as their testator should, in case he had lived, have attained twenty-one, it being unreasonable that the executors of *J. S.* standing in his place should be in a better case than *J. S.* himself would have been, had he been living (vide post, 478, *Laundy* v. *Williams*, and the distinction there taken between the executors or administrators of a legatee dying before the day of payment, and the devisee over) ; and it was to be presumed that the first testator had made a computation of his estate, and considered when the same would best bear and allow of the payment of this legacy ; and there could be no reason given why an uncertain accident should accelerate the payment of this legacy before the time which was at first intended for that purpose. See in support of this resolution, 2 Vern. 94, 199, but 1 Leo. 277, *Lady Lodge's* case, *contra.*

The above case was reported to me by the Right Hon. Sir *Joseph Jekyll* Master of the Rolls.

(1) But see the case of *Ibbetson* v. *Beckwith*, where the devise was, of *all my estate* to *A.* for life, and to *T. D.* after her death, he taking the testator's name, and if he

refused, to *M. B. and her heirs for ever.* The *Master of the Rolls* held *T. D.* took only an estate for life; but 11 *Dec.* 1735, Lord *Talbot* was of opinion *T. D.* had a fee, and varied the decree at the *Rolls*, Ca. temp. Tal. 157. But see *Frogmorton* v. *Holyday*, 1 Blac. Rep. 540. *Lord Cardigan* v. *Armitage*, 2 B. & C. 214.

[338] Case 97.—ATTORNEY GENERAL *versus* HOOKER, and SOMNER *versus* HOOKER. [1725].

Lord Chancellor King.

2 Eq. Ca. Ab. 441, pl. 45.

In the case of a will, though an express legacy be given to the executors, yet if a legacy is also given to the next of kin, this is equally a bar to the next of kin, as to the executors; and therefore if the surplus be not disposed of by the will, the executors shall have it. *Qu.*

This suit (*inter al'*) was for a distribution of the surplus of a personal estate:

The case was: One having a sister, who was next of kin, and having several sums of money in the *South-sea* and Bank, made his will, whereby he devised £100 per annum to his sister for life, and the residue of his bank-stock to his executor, and devised ——— per annum out of his *South-sea* stock to ———, remainder of his said stocks to ——— he devised the furniture of his house to his executor and the heirs of his body, giving an express legacy or a sum of money to his sister, and making one who did not appear to be any relation to him executor; but there was no disposition of the surplus of his personal estate. On the death of the testator, the question was, how the residue of the personal estate should go?

Insisted by Mr. *Lutwyche* and Mr. *Talbot* on behalf of the sister the next of kin, that here being an express legacy to the executor, it necessarily implied that he was to have no more, *expressio unius est exclusio alterius*, the executor could not have *all and some*; and though the sister had an express legacy as well as the executor, yet this did not bar the next of kin from taking (under another will) by the statute of distributions; that in most of the cases which had been decreed where the executor had an express legacy, the next of kin had one too, which yet [339] was no objection against letting such next of kin into a distribution; they admitted the case of *Ball* and *Smith* in Lord *Harcourt's* time, where the testator marrying the widow and executrix of one *Atkins*, who as executrix was possessed of a considerable quantity of plate, and the testator *Smith* by his will gave to his said wife all the plate and goods which he had with her, and made her executrix, without disposing of the surplus; this being in the case of a wife, Lord *Harcourt* decreed the surplus to her; but they observed at the same time that the plate and goods were what she had already had as executrix of her former husband, and therefore the devise thereof to her was in strictness void; that according to Lord *Macclesfield's* opinion every executor was but a trustee, and that if an executor dies intestate all the personal estate the property whereof is not altered, will go to the administrator *de bonis non, &c.*, and not to the next of kin to the executor. (See the case of the *Duke of Rutland* versus *Duchess of Rutland*, ante, 210, and *Farrington* versus *Knightley*, vol. 1, 553.)

Solicitor General contra. It is a very strange construction that because the testator not knowing (perhaps) how far his personal estate will hold out, gives *in all events* an express legacy to his executor, therefore the latter shall not have the residue as executor: surely he shall; but in this case it is the stronger, since as to these stocks out of which particular annuities are given to some persons for their lives, the remainder is devised to the executor, which shews that the remainder of the whole was intended to go to him; and it is like the case of the *Duchess of Beaufort* (see *Farrington* v. *Knightley*, ubi supra), where the late Duke of *Beaufort* gave the use of his plate to his wife for life, and after her death gave the plate to his grandson (afterwards Duke of *Beaufort*) and made his wife executrix, without disposing of the surplus [340] of his personal estate; whereupon though the court of chancery decreed the surplus to go to the next of kin, yet the House of Lords reversed that decree and gave it to the wife.

Lord Chancellor. I could wish an act of parliament was made to reduce this point to a certainty, for if it were once settled either way, it would be well enough; but in