June 5, 1818.

MORTGAGE.—HUSBAND AND WIFE.

principal at the death of the wife, and to be considered as a charge on the estate; and from that time the husband was bound to keep down the interest.

Another mistake is that Ruscombe is ordered to reconvey the estate free from all incumbrances. It ought to be free from all incumbrances created by himself.

Decree *affirmed*, with alterations as above.

IRELAND.

ERROR FROM THE COURT OF EXCHEQUER CHAMBER.

SHULDHAM—*Plaintiff in Error.*
SMITH (Lessee of Mathews)—*Defendant in Error.*

AND

SMITH—*Plaintiff in Error.*
SHULDHAM—*Defendant in Error.*

April 25, 28, July 8, 1817; June 3, 5, 1818.

DEVISE.

DEVISE of real estate in trust to pay the clear rents, issues, and profits, and in certain proportions, to certain persons in the will mentioned, for life: and then testator proceeds to devise as follows:—"And from and after the death of "the survivor of them the said L. S." &c. (naming the several persons to whom the above life interests were given) "then I give and devise all and singular the "said manor, messuages, lands, &c. unto all and every "the children of my late sister E. C. by her three se-"veral husbands" (naming them), "that shall be then "living, and their heirs and assigns for ever, equally to

"be divided between them as tenants in common, and "not as joint tenants: and if there should be but one "such child, *and no issue of any of the other children* "*then living*, then, and in that case, I give and devise "all my said real estates in Ireland unto such surviving "child, his or her heirs and assigns for ever." The event which happened was that, at the death of the surviving annuitant, there was only one child of the sister E. C. then living, but that there was issue of several of the other children then living. Held by the House of Lords, in concurrence with the unanimous opinion of the Judges attending, that there was an intestacy, from the death of the surviving annuitant; the event which happened not having been provided for.

April 25, 28, July 8, 1817; June 3, 5, 1818.

DEVISE.

THIS was an ejectment on the title, brought in or as of Hilary Term, 1811, in the Court of Exchequer, in Ireland, by Elizabeth Mathews, widow, by John Smith, her feigned lessee upon her own demise only, for the recovery of all that and those the town and lands of Balleymulvey, and other lands in the declaration in ejectment particularly mentioned, situate in the County of Longford, in Ireland, to which ejectment defence was taken generally by the Plaintiff in error in Hilary Term, 1811; and at the Summer Assizes, 1811, the same came on to be tried by a special jury of the county of Longford, at Longford, when the said jury found a special verdict to the substance and effect following; that is to say,

Ejectment, Hilary Term, 1811, by John Smith, lessee of Elizabeth Mathews, against John Brady Shuldham.

"That Pooley Molyneux was seized of the lands, "tenements, and hereditaments mentioned in the "declaration within-written, in his demesne as of "fee, and being so thereof seized on the 12th day "of April, in the year of our Lord 1767, duly

Special verdict.

April 25, 28, July 8, 1817; June 3, 5, 1818.

DEVISE.

Will of Pooley Molineux, April 12, 1767. Devise of all testator's estates to Lemuel Shuldham, in fee, upon trusts.

" made his last will and testament, signed by him " in the presence of three credible subscribing wit- " nesses, and subscribed by the said three credible " witnesses in his presence, and thereby gave and " devised in the words following:—'As touching and " 'concerning my temporal estate and effects, I de- " 'vise all and singular my manors, messuages, lands, " 'tenements, hereditaments, and real estate what- " 'soever in the kingdom of Ireland, which I shall " 'be seized or possessed of, interested in or en- " 'titled unto at the time of my death, unto my " 'nephew, Lemuel Shuldham, Esquire, and his " 'heirs and assigns for ever; upon the trusts, ne- " 'vertheless, and to and for the several intents and " 'purposes hereinafter mentioned, expressed, and " 'declared, of and concerning the same; that is to " 'say, in trust, after deducting all taxes, repairs, " 'receiver's or bailiff's salaries, and all outgoings " 'incident to the said estate, to divide the clear " 'residue of the yearly rents, issues, and profits " 'thereof into twenty equal parts or shares, and " 'to pay the same unto the several persons herein- " 'after mentioned, to wit, six twentieth parts or " 'shares of the said clear residue of the yearly " 'rents, issues, and profits of my said real estates " 'unto himself the said Lemuel Shuldham, or his " 'assigns, for and during the term of his natural " 'life, by equal half-yearly payments; six other " 'twentieth parts or shares thereof to my sister, " 'Dorothy Molyneux, or her assigns, for and dur- " 'ing the term of her natural life, by equal half- " 'yearly payments; two other twentieth parts or " 'shares thereof to Mrs. Rebecca Shuldham, or

To divide rents and profits into twenty shares, and pay same to certain persons for life.

" ' her assigns, for and during the term of her
" ' natural life, by even half-yearly payments; one
" ' other twentieth part or share thereof unto my
" ' niece, Sarah Curtis, or her assigns, for and
" ' during the term of her natural life, by equal
" ' half-yearly payments; one moiety or half part
" ' of one other twentieth part or share of the
" ' said clear residue of the said yearly rents, issues,
" ' and profits, unto my niece, Nabby Jackson, or
" ' her assigns, for and during the term of her na-
" ' tural life, by equal half-yearly payments; and
" ' the other moiety or half part of the said last-
" ' mentioned twentieth part or share unto my
" ' niece, Catherine Hewetson, or her assigns, for
" ' and during the term of her natural life, by equal
" ' half-yearly payments; one other twentieth part
" ' or share of the said clear residue of the said
" ' yearly rents, issues, and profits of my said real
" ' estate unto my niece, Catherine Smith, or her
" ' assigns, for and during the term of her natural
" ' life, by equal half-yearly payments; two other
" ' twentieth parts or shares thereof unto my niece,
" ' Eleanor Shuldham, or her assigns, for and dur-
" ' ing the term of her natural life, by equal half-
" ' yearly payments; and the remaining twentieth
" ' part or share of the said clear residue of the
" ' yearly rents, issues, and profits of my said real
" ' estate, unto my servant, David Davies, or his
" ' assigns, for and during the term of his natural
" ' life, by equal half-yearly payments. Provided
" ' always, and it is my true intent, that in case
" ' any of the said several persons to whom I have
" ' directed such particular parts, shares, and pro-

April 25, 28, July 8, 1817; June 3, 5, 1818.

DEVISE.

Shares of persons dying in testator's life-time, or in the life-time of Lemuel

April 25, 28, July 8, 1817; June 3, 5, 1818.

DEVISE.

" 'portions of the clear residue of the yearly rents
" 'and profits of my said real estates, to be paid as
" 'aforesaid, shall happen to die, either before me
" 'or in the life-time of my said nephew, Lemuel

Shuldham, to be taken by said Lemuel Shuldham for life.

" 'Shuldham, then I will and direct that the said
" 'part and share, parts and shares of the said seve-
" 'ral person and persons so dying, shall go and be
" 'had, received, and taken by my said nephew, Le-
" 'muel Shuldham, or his assigns, for his natural
" 'life. Provided also, and it is my further intent
" 'and meaning, that when and as any of the
" 'said several persons hereinbefore named, who
" 'shall survive my said nephew, Lemuel Shuld-
" 'ham, shall happen to die, then I will and direct
" 'that the part, share, and proportion of the said
" 'clear residue of the rents and profits of my said
" 'real estate, hereinbefore directed to be paid to
" 'him, her, or them so dying, shall go and belong
" 'to and be divided between the survivors or sur-
" 'vivor of the said several persons share and share
" 'alike, and in equal parts, shares, and propor-

After decease of said Lemuel Shuldham and the other annuitants, devise to all and every the children of testator's late sister Elizabeth, by her three husbands, as tenants in common.

" 'tions, and from and after the death of the sur-
" 'vivor of them, the said Lemuel Shuldham,
" 'Dorothy Molyneux, Rebecca Shuldham, Sarah
" 'Curtis, Nabby Jackson, Catherine Hewetson,
" 'Catherine Smith, Eleanor Shuldham, and David
" 'Davies; then I give and devise all and singular
" 'the said manor, messuages, lands, tenements,
" 'hereditaments, and real estate whatsoever, in
" 'the said kingdom of Ireland, unto all, *and every*
" 'the children of my said late sister, Elizabeth
" 'Curtis, deceased, by her three several husbands,
" ' Kelly, Esq. the Reverend

" 'Shuldham, and Butler, *that shall be* April 25, 28, July 8, 1817; June 3, 5, 1818.
" '*then living*, and their heirs and assigns for ever,
" 'equally to be divided between them as tenants in
" 'common, and not as joint tenants; and if there DEVISE.
" 'should be but one such child, *and no issue of* If but one such child, and no issue of any of the other children then living, devise to such one child in fee.
" '*any of the other children then living*, then, and
" 'in that case, I give and devise all my said real
" 'estates in Ireland unto such surviving child, his
" 'or her heirs and assigns for ever: Item, it is my
" 'will, and I do hereby authorize and empower
" 'my said nephew, Lemuel Shuldham, his heirs
" 'and assigns from time to time, as occasion
" 'shall require, during the continuance of all
" 'or any of the trusts hereby in him or them re-
" 'posed, to grant leases of all or any part of my
" 'said real estates in Ireland, for three lives or
" 'thirty-one years, at the best improved yearly
" 'rent that can be had or gotten for the same,
" 'without taking any thing by way of fine or in-
" 'come, for, or in respect thereof, so as such
" 'leases do commence in possession and not in
" 'reversion, or by way of future interest, and so Leasing power to trustee.
" 'as the same be not made dispunishable of waste
" 'by any express word therein contained,' as it
" did by the said will produced in evidence to the
" jury aforesaid more fully appear.

" That the said Pooley Molyneux afterwards, that Death of testator, October 1772.
" is to say, on the day of October, in the year
" 1772, died, seized of such his estate, of and in
" the lands, tenements, and hereditaments afore-
" said, and in the said declaration mentioned, with-
" out having revoked or in any manner altered the
" said will; after whose decease, the said Lemuel

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" Shuldham, the trustee named in the said will, " entered into the said lands, tenements, and here- " ditaments, in the said declaration mentioned, and " was seized thereof as the law requires.

Decease of all the annuitants previous to 1809.

" That the said Lemuel Shuldham, Dorothy " Molyneux, Rebecca Shuldham, Sarah Curtis, " Nabby Jackson, Catherine Smith, and Eleanor " Shuldham, and David Davies, in the said will " mentioned, died previous to the year 1809; and

Catherine Hewetson, the last surviving annuitant, died May 15, 1809.

" that the said Catherine Hewetson, in the said " will mentioned, having survived them, died on " the 15th day of May, 1809.

Testator never married, had no brother, but had three sisters, two of whom died in his life-time.

" That the said Pooley Molyneux never was mar- " ried, but had three sisters, *viz.* Mary Molyneux, " Dorothy Molyneux, and Elizabeth Butler, and " had no brother, and that at the time of his mak- " ing his said will, the said Mary Molyneux, and " Elizabeth Butler, were dead; and that the said " Mary Molyneux died without issue; and that the " said Dorothy Molyneux, sister of the said Pooley " Monyneux, survived the said testator and died

Testator's sister, Elizabeth, married three times.

" without issue; and that the said Elizabeth, the " sister of the said Pooley Molyneux, was married " three times, that is to say, the said Elizabeth " was first married in the year 1712 to Bryan Kelly, " who died in the year 1716; and the said Eliza- " beth was afterwards married in the year 1718 to " Samuel Shuldham, who died in the year 1721; " and the said Elizabeth was afterwards married in " the year 1732 to Brickley Butler.

Her issue by her first husband, Kelly.

" That the said Elizabeth had issue by the said " Bryan Kelly, two daughters, Catherine Kelly " and Elizabeth Kelly, her only issue by the said

" Bryan Kelly, and that the said Elizabeth Kelly, April 25, 28,
" her daughter, intermarried in the year with July 8, 1817;
" William Hewetson; and that the said Elizabeth June 3, 5, 1818.
" Hewetson, otherwise Kelly, died after the time DEVISE.
" of the making of the said will, but previous to
" the said testator's death, to wit, in the year 1768,
" leaving children by her said husband, namely,
" Brimsley Hewetson, who is since dead, leaving
" issue still living, Catherine Hewetson, otherwise
" Nicholson, who is also dead, leaving issue still
" living; and Abigail Hewetson, otherwise Jackson,
" who is also deceased, leaving issue still living;
" and that the said last-mentioned Catherine Kelly,
" in the year intermarried with John Mew-
" kins, and after his death with James Smith;
" and that the said last-mentioned Catherine Kelly
" died after the testator, to wit, in the year 1778,
" leaving children by her said two husbands, some
" of whom left issue, who are still living.

" That the said Elizabeth, the sister of the said Issue by her second husband, Shuldham.
" Pooley Molyneux, had issue by Samuel Shuld-
" ham her second husband, three children, namely,
" Lemuel Shuldham, Molyneux Shuldham, and
" Rebecca Shuldham; and that the said Molyneux
" Shuldham died in the year 1798, unmarried
" and without issue, and that the said Rebecca
" Shuldham died in the year 1785, unmarried and
" without issue, and that the said Lemuel Shuld-
" ham, the son of the said Elizabeth, died in the
" month of October, in the year of our Lord 1775,
" leaving lawful issue, Elizabeth Shuldham his
" eldest daughter, Pooley Shuldham his eldest son,
" and the said Eleanor Shuldham his third child;

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" who died in his the said Lemuel's life-time; and " that the said Elizabeth, daughter of the said " Lemuel Shuldham, intermarried in the year 1771, " with Folliott Warren, and had by him several " children, some of whom are now living, and that " the said Pooley Shuldham died in the year 1793, " leaving John Brady Shuldham the Defendant, " his eldest son and heir at law, and several other " children, and the said John Brady Shuldham is " also heir at law of the said Pooley Molyneux of " the said Elizabeth Molyneux, otherwise Butler, " of the said Dorothy Molyneux, of the said Le- " muel Shuldham, Rebecca Shuldham, and Pooley " Shuldham.

Issue by her third husband, Butler.

" That the said Elizabeth, the sister of the said " testator Pooley Molyneux, did, after the death of " her second husband Samuel Shuldham, inter- " marry with Buckley Butler, and that she, the " said Elizabeth, had by the said Buckley Butler " issue, two daughters, namely, Sarah Butler and " Elizabeth Butler; and that the said Sarah died " in the year 1802, without issue, and that the " said Elizabeth, the daughter of the said Eliza- " beth and Buckley Butler, married in the year " 1755 with William Robinson, who died in the " year 1758, by whom she had issue, one son, Wil- " liam Robinson, who is living; and that the said " Elizabeth Robinson, after the death of the said " William Robinson her husband, that is to say, " in the year 1764, intermarried with Samuel Ma- " thews, by whom she had issue, several children " now living, and that the said Samuel Mathews " died in the year 1785; and that the said Elizabeth

" Mathews is the lessor of the Plaintiff in this " action.

" That the said Elizabeth Mathews was the only " child of the said Elizabeth Butler, the sister of " the said Pooley Molyneux living at the time of " the death of the said Catherine Hewetson; and " that all the children of the said Elizabeth, the " sister of the said Pooley Molyneux, died in the " life-time of the said Catherine Hewetson, save " the said Elizabeth Mathews, who survived the " said Catherine Hewetson, and that there are issue " of several of the said children now living.

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" That the said Catherine Hewetson, otherwise " Nicholson, Abigail Hewetson, otherwise Jackson, " Sarah Mewkins, otherwise Curtis, and Eleanor " Shuldham, four of the annuitants in the said will, " named, were children of the children of the said " Elizabeth, the sister of the said testator; and " that the said Catherine Hewetson survived the " said Lemuel Shuldham, Dorothy Molyneux, " Rebecca Shuldham, Sarah Curtis, Nabby Jack- " son, Catherine Smith, Eleanor Shuldham, and " David Davies.

" That at the time of the death of the surviving " annuitant, there was only one child of the said " Elizabeth, the said testator's said sister, to wit, " the lessor of the Plaintiff, Elizabeth Mathews, " then living, but there was issue of several of the " other children of the the said Elizabeth testator's " sister then living.

At the death of the last surviving annuitant, only one child of testator's sister Elizabeth (to wit, lessor of Plaintiff), living, but there was issue of several of the other children of said

" That on the death of the said Pooley Moly- " neux, the said Lemuel Shuldham entered into

April 25, 28, July 8, 1817; June 3, 5, 1818. DEVISE. Elizabeth then living. On the death of testator, Lemuel Shuldham became possessed; on his death his eldest son, Pooley Shuldham, entered into possession; on the death of Pooley Shuldham, the Plaintiff in error entered into and is now in possession.

"possession of the said lands, tenements, hereditaments, and premises in the ejectment in this cause mentioned, and continued in possession thereof till his death, and that upon his death the said Pooley Shuldham entered into possession of the said lands, tenements, hereditaments, and premises, and continued in possession thereof till his death, and that thereupon the said Defendant John Brady Shuldham entered into possession of the said lands, tenements, hereditaments, and premises, and is now in possession thereof.

"That the said Lemuel Shuldham, Pooley Shuldham, and the Defendant John Brady Shuldham, whilst respectively in possession of the said lands, paid the annuities in the said will mentioned, pursuant to the trusts in said will to the several annuitants to the year 1809, when the surviving annuitant died."

Judgment of Exchequer in favour of lessor of Plaintiff in ejectment, as to two sixth undivided parts of the premises.

The special verdict having come on to be argued, the Court, in Trinity Term 1811, pronounced judgment that the lessor of the Plaintiff in the ejectment should recover her term against the Defendant, of and in two sixth parts undivided, of and in the said premises, in the declaration mentioned.

Against this judgment each of the parties brought a writ of error in the Court of Exchequer Chamber: Shuldham, the heir at law, conceiving that Mrs. Mathews, the lessor of the Plaintiff, ought to have recovered nothing; and Mrs. Mathews conceiving that, instead of two-sixths, she ought to have recovered the whole. The judgment having, in T. T.

1812 been affirmed in the Court of Exchequer Chamber, the parties brought their writs of error in the House of Lords. April 25, 28, July 8, 1817. June 3, 5, 1818.

The ground on which the courts below gave judgment for two-sixths in favour of Elizabeth Mathews, was stated by one of the council above, *arguendo*, to be this. The courts below considered the words, "*that shall be then living*," as referable to the time of the death of the testator, and construed the will as if the interests had then become vested. There were six children of the testator's sister, Elizabeth Curtis or Butler, living at the time of his death; one of whom, Sarah Butler, the sister of Mrs. Mathews, died without issue; and the Court was of opinion, that Mrs. Mathews, the lessor of the Plaintiff, took one-sixth in her own right, and one-sixth as heir at law of her deceased sister. But this construction of the will was almost, or altogether, abandoned in the argument above; the words, "*that shall be then living*," being understood as clearly referring to the time of the death of the last annuitant. DEVISE.

The two causes were first argued on the 25th and 28th April, 1817, by *Sir S. Romilly* and *Mr. Leach* (now *Sir John Leach*, V. C. E.) for Shuldham, the heir at law; and by *Mr. Hart* and *Mr. Preston* for Smith, the lessee of Mrs. Mathews. On the 8th July, 1817, they were by order again argued, the Judges being present.

Mr. Preston (for Smith, Lessee of Mathews. After stating the previous part of the will). Then Smith v. Shuldham. July 8, 1817.

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come the words on which the question turns, "then "I give and devise all and singular in the said "manor, messuages, lands, &c. unto all and every "the children of my said late sister Elizabeth "Curtis, deceased, by her three several husbands "Brien Kelly, Samuel Shuldham, and Buckley "Butler, that shall be then living, and their heirs "and assigns for ever, equally to be divided be-"tween them as tenants in common, and not as "joint tenants: and if there should be but one "such child, and no issue of any of the other "children then living, then and in that case I give "and devise all my said real estates in Ireland unto "such surviving child, his or her heirs and assigns "for ever." The testator died in 1772, leaving his nephew Lemuel Shuldham his heir at law, Elizabeth Mathews the survivor of the children of Elizabeth Butler, and others of her children. On this the question has arisen, whether Mrs. Mathews, as the only survivor of the children of Elizabeth Butler, living at the death of the last annuitant, is entitled to the whole, or any, and what proportion, or is excluded by the second clause, there being issue of other children of Elizabeth Butler then living. I contend that she took the whole, or at least one-fourth. (*Lord Eldon*, C. one-fourth?) Yes, as there were four branches, the issue, living at the death of the last annuitant, of Elizabeth and Catherine Kelly, and of L. Shuldham, taking three shares as representing their parents, and Mrs. Mathews the remaining fourth. But the first clause, independent of the second, would give the whole to Mrs. Mathews, and the gift is in these terms, "to

Eliz. and Cath. Kelly. L. Shuld. and Mrs. M.

" all and every the children of my said late sister, &c. " by her three several husbands, &c. that shall be " then living, their heirs and assigns for ever." It is not necessary to enter into any criticism respecting the meaning of the word *every*, as by the rule of law, where there is a gift to persons as a class, and one only is living, that one takes the whole: and so it was held in a late case in K. B. 13 East, 526, *Doe, Lessee of Stewart, v. Sheffield.* There the testator " gave and devised unto the sisters " (the gift being plural) " of J. H. to hold to them, &c. as " tenants in common." J. H. had had three sisters, of whom one only was living at the date of the will. It was contended that as the gift was plural to *sisters*, the testator must have meant that, if there was only one, that one should not take: and that, as the devise was to the sisters as tenants in common, the testator manifestly intended that the three who were all once living should take several estates or shares, which were not to go over from the one to the other. The authorities were there considered; and Lord Ellenborough says, " though no case has " been cited which in terms corresponds with " this; yet, looking at the will itself before us, I " have little doubt in saying, that the testator in- " tended to devise the estate to the several objects " of his bounty in classes, taking the chance of " there being a greater or less number of persons " in each class: and meaning that, if there were " more than one individual of the same description, " they should all take equal shares; if only one, " that the one should take the whole given to that " class or description." And then speaking of

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another part of the will he says: "there is no "doubt but that, if only one of each class had been "living at the testator's death, that one would have "taken the whole of what was bequeathed to the "same class;" and he cites, *Crooke v. Brocking*, 2 Vern. 106. And then he says: "if she be not "entitled to the whole, what part is she to take? "a third or the half? Supposing there had been "ten sisters originally, and some of them had died, "were the rest to have taken only each a tenth? or "could he have meant that the class should have "less when reduced to one only? The scope of "the will shows that he looked to the class, and "not to the number of individuals who might "happen to compose it." And then he combats the proposition that this was a lapsed devise. Le Blanc, J. says: "it is clear that the testator, in "devising the premises *to the sisters of J. H.* "generally, used the term sisters, to denote that "family as it was at the time of making the will, "which is the time to look to," &c. And Bayley, J. says: "it is left to *the sisters* generally, not by "name, &c. If indeed the property had been left "to them by name, as tenants in common, no "doubt, if one of them had died before the testator, "her share would have gone over:" and then he lays down broadly the doctrine which I contend for: "where it is left generally, under the class or "description of *sisters*, *children*, or the like; and "there may be additional sisters, children, &c. "after the will is made; there who ever answers "the description at the death of the testator, will "take under such a devise, &c." This is in unison

with the rule of law that where there is a gift to two, and one only is capable, that one takes the whole. That is stated in the year books 17 Ed. 3. fol. 29. and 18 Ed. 3. fol. 29., and is referred to in the argument in Shelly's case; and it is consistent with *Greenwood v. Tyler* and *Windsmore, Lessee of Long, v. Hobart*, in Lord Hobart's time. Thus it appears, that in wills and deeds where there is a gift to persons, even by name, some capable and some not, such as are capable take the whole. It is evident therefore upon authority and principle, and also from the practice in limitations in settlements to children in tail and in fee, that if one only is capable, that one takes the whole.

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Shelley's case. 1 Co. Rep. 100.—Greenwood v. Tyler, Hob. 314.—Windsmore v. Hobart, Hob. 313.

This is a provision therefore, though not adequately expressed, that if only one child of the sister should be living at the death of the last annuitant, she should take the whole. If there had been two children then living, they would have divided the property; and it would be absurd that she should lose all by the death of one in the life-time of Catherine Hewetson. It is more consistent that she should take the whole than nothing. It is clear the testator did not intend an intestacy, if there should be any issue of his sister living at the death of the last annuitant; and he never contemplated that the heir should take while there existed a descendant of the sister. If the point stood on this clause alone, it would be impossible to meet the argument. There is a case which comes near this in 1 Mer. 321. before the M. R. in which the testator gave. "to all and every the child and "children of my brother and sister, which shall be

Christopherson v. Naylor, 1 Mer. 320.

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" living at my death: but if any child or children " of my said brother and sister should happen to " die in my life-time, and leave issue, then the " legacy or bequest, hereby intended for such child " or children so dying, shall be for his, her, or " their issue." In point of fact, there were children dead at the date of the will, who left issue. But it was held that the issue took only by substitution for their parents, and that the issue only of such children as were living at the date of the will were entitled in the event of the death of their respective parents during the testator's life-time. The testator did not contemplate the issue of the sister's children in their own character, and they could not take as purchasers. It must have been meant, that they should take, if at all, by descent or transmission from their parents. But I submit that, if the case stood there, Mrs. M. would clearly take the whole.

Whatever difficulty there is, arises from the second clause. They must say, either that it puts a different construction on the former clause; or that it repeals it altogether. He might mean to include the issue, but, if he has not done so, they cannot take; and then she is not excluded. They must show a clause of repeal in such a way as that if there was only one living, and no issue of the others, in that case only was the surviving child to have any thing. That is contrary to the intent; for though there should be no plan by which the issue could take along with the surviving child, if that was the intent, yet *utile per inutile non vitiatur*; and it is not consistent with common sense, that if

there were two children, and if one died without issue, the survivor should take; but that Mrs. M. should be defeated by the accident that the one died, leaving issue. It is not desired on the part of Mrs. Mathews to strike out any words. Her title is complete under the first clause; and by the second it was intended only to express the sense of the first more fully. But although it should be your Lordships' opinion that there was an omission in the first clause, she could not be entirely excluded.

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The rule of law is, that the intent is to be executed as far as possible, and shall not fail altogether because the whole cannot take effect, as *utile per inutile non vitiatur*. Unfortunately there is no clause providing for the issue; but the intent is clear. The children of his sister were the objects of his bounty while there existed issue of hers capable of taking. Then if two children could take, why not one? But if the second clause repeals the first, she will take nothing. Where is the expression in the will excluding her? Not in the first clause; and the design of the second is to express more fully the intent in the first, though there is a blunder. The title vests by the former clause, and no slip in a subsequent clause can take from Mrs. M. her title under the first clause. The question is, whether the second is a clause of repeal. It is admitted that if there were two, Mrs. M. would take the half; but it is contended that, as she is the only surviving child, and there is issue of the others, neither Mrs. M. nor the issue can take any thing. Is that the plan of the will? I am aware that Mrs.

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M. perhaps takes more than was intended if she takes the whole. But she has the rule of law in her favour. In the courts below they endeavoured to make the issue participate. (*Lord Eldon*, C. How did they get at two sixths for Mrs. M.?) (*Sir S. Romilly*. They were of opinion that the six children took a vested interest at his death. (*Lord Eldon*, C. Who were the six that took? And how came Mrs. M. to take two shares?) The six children who survived the testator. Mrs. M. they thought, besides her own share, took another share, as heir at law of her sister Sarah Butler.) (*Lord Eldon*, C. According to that reasoning, the words *then living* refer to the time of the testator's death.) *Mr. Preston.* As to that part of the case it is for them to answer it. But, I submit, it is quite impossible to say that the event on which they were to take was the death of the testator. The case of *Den v. Bagshaw*, 6 T. R. 512, is a decisive authority against that construction. The event was clearly the death of the last annuitant. That shows however how anxious the courts below were that the issue should participate. But is that a reason why Mrs. M. should take nothing? She certainly takes either the whole or a part; for the testator did not intend an intestacy while any object of his bounty was capable of taking. And though the issue should be excluded, still she takes as the surviving child of the sister, because *utile per inutile non vitiatur*. The case of *Doe v. Martin*, 4 T. R. 39, shows how anxious the courts were to go to the full extent of the words. The devise was "to the use of all "and every the child or children, equally, share

" and share alike, to hold the same, if more than " one, as tenants in common, and not as joint " tenants; and if but one child, then to such only " child, his or her heirs or assigns for ever." The Court seeing the intent to give the children the fee, brought the words " his or her heirs " to the words " all and every the child or children."

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4 T. R. 65. 66.

The testator perhaps intended that the issue should take under the first clause; but *quod voluit non dixit;* and if they can take, it is under a construction of the first clause put upon it by the second. Every part of the instrument is to be taken, and, though I protest for Mrs. M. against that construction, yet, by way of experiment, if you can see upon the face of the will that he intended to include the issue, the intent must be that no child should be excluded who had issue living at the death of the last annuitant. And you are to judge whether he has sufficiently shown that intent on the face of the will. But for that purpose words must be supplied, " then living, *or if dead, leaving " issue at the death of the surviving annuitant.*" These words are not there; but if it be clear from the second clause that it was so intended, I do not know any rule of law that prevents the supplying of these words. This construction, however, is one to which, if to be adopted at all, you must be driven by necessity. The first construction is founded on the rule of law; the second can be resorted to only to execute the intent.

Sir S. Romilly (for the heir at law). It will be impossible to affirm the judgment, that the plaintiff

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in the original cause takes two sixths, because the words *then living* cannot be understood as applying to the time of the testator's death, or because there is nothing on the record which shows that Mrs. Mathews was heir at law of Sarah Butler. A new view is taken of the case to-day, that she takes the whole, or one fourth, on the ground that the Court may supply words not in the will, "then living, *or* "*shall be then dead, having left issue, then living.*" And they say that the three who were then dead having left issue had each a share, and that Mrs. M. takes the other fourth. No diligence has been able to furnish a case like this. The question here is, whether in the event that has happened there is any devise. As to the intent, I do not know that any one who makes a will intends to die intestate, even if he were to devise to the heir, though that would be the effect in law. But in several events that have or might have here happened, he would have died intestate. If all the annuitants died in the life-time of Lemuel Shuldham, he would take the whole of their shares for his life. But if three of them, suppose, were to die in his life-time, and then he were to die, their shares are not given over on his death; for among the annuitants themselves, the survivorship takes place only between the annuitants surviving him: so that this would be so far an intestacy. Then as the words *then living* clearly refer to the death of the surviving annuitant, if Mrs. M. had died while any of the annuitants were living, there would have been an intestacy. But the event which has happened is that one child survived the annuitants, and that others, who had

previously died, left issue then living, an event which, as we say, is not provided for at all: since the property is given to the one only in case there should be no issue of the others then living. Can you then, against the words of the will, say that it shall go over in the event which has happened? He seems to have thought that he had provided for the issue of the other children then living. But although he thought so, he had not in fact done it.

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If it had stood on the first clause, it is said she would take the whole, as a devise to a class takes effect though it should be reduced to one. But the reason of that is, that the one is the only person who answers the description at the time the devise can take effect. In *Doe v. Sheffield*, if sisters had been born after the date of the will, they would have taken, as the devise was to a decription or class, and not to persons by name. And the words tenants in common, there refer to a possible case. As to the cases in the year books there the devise is *per my et per tout*, as to a man and his son, and he has no son, the man takes the whole. But I do not see how that applies to a devise to the sister's children as tenants in common. But, although the legal effect of the former clause were to give the whole to Mrs. M., it would be revoked by the subsequent clause. The whole will is to be taken together; and words cannot be overlooked, whatever may be their operation. The testator says, "unto all and every the "children of my late sister, by her three several "husbands, &c. that shall be then living, and their "heirs, &c. equally to be divided between them as

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"tenants in common." The legal effect then would be, if it stood there, that the one surviving child should take the whole. But it does not stop there. The testator goes on saying, in effect, that he did not there provide for the event of only one surviving; and he provides for it in this way, by giving the estate to such child, only in the event of there being no issue of the others. As to the intent he did not look at the other event of one surviving, and there being issue of the others then living: supposing that he had provided for it before, which he had not done. But it being clear that he did not provide for that event, though there should be no doubt that he would have provided for it if he had thought of it, yet your Lordships will not supply words for that purpose, if he has not expressed that intent.

It is admitted that the testator did not intend that Mrs. M. should take the whole, but a portion; and unless they can tell what portion, the heir must take. It is clear it cannot be a fourth. Mr. P. says that you may supply certain words which would have that effect. But I ask from what part of the will as it stands does it appear what she is to take? He proposes to supply the words, "or be "dead leaving issue then living." What estate then would Elizabeth Kelly take who died in his lifetime? Would she take in fee? for Mr. P. gives an estate to her. So that he proposes to supply words which would give an estate in fee to a nephew or niece, though dead before the estate could take effect, even before the death of the testator. A view of this case was taken before which is not re-

lied on to-day. It was argued that the testator, when he uses the words, "that shall be then living," must be understood to mean exclusive of those who were annuitants, and that the testator meant "no issue of any of the other children who "were not annuitants," and it was said that such other children died without issue. But Elizabeth Kelly died leaving issue; and it is clear that she was one who could, upon that supposition, have taken. So that supposing such violence could be done to the words of the will as to say that the meaning was "no issue of any other children be- "sides annuitants;" it is not the fact that all such other children died without issue. But besides, what could be more capricious than to supply words to exclude those to whose parents the testator had given annuities? Why exclude the issue of L. Shuldham for instance, who was his favourite? That was quite extravagant, and how did it appear that he intended this? You must strike out the words "and no issue of any of the other children "then living," if you exclude the heir at law; whereas the rule is, that he is never to be disinherited, except by express words or necessary implication.

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Mr. Preston. The argument is such as I anticipated; that the second clause is a repeal of the former. I say the first is the substantial clause, and that the second is not a repeal, but only accumulative, and doing more fully what he had done before. It is admitted that by the first clause she has some portion; and that she takes more than was intended, is no reason why she should not take what was intended for her. By the rule of law Mrs. M.

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takes the whole by the effect of the first clause; and it is better that she should take more than was intended, than that she should take nothing. There I stand; and let them show what less than the whole I am to take. The only difficulty is that she takes more than was intended, but the devise ought not to fail on that account.

They say it does not appear on the verdict that Sarah Butler died intestate. It is not necessary it should appear on the verdict. If you pretend that she was not, we will show that she was.

Then where there is a general and particular intent, and both cannot be satisfied, you will give effect to the general intent; and if the issue cannot take as purchasers, they may take as representing their parents. What was the effect of the will at the time the testator made it? Did he mean that Mrs. M. should be excluded, if she should be a surviving child? If he meant that she should be included, my object is answered. And as to the issue, if they admit that two would take the whole from the issue, then it follows that one will take it. I conclude then with great confidence that the devise in the first clause is not repealed by the second; and that if the second has any effect, it can only be in putting some construction on the first.

Lord Eldon, (C.) The testator died in 1772, having previously made his will, and the state of his family at the time he made his will was this. He never was married, and never had a brother, but had had three sisters, Mary, Dorothy, and Elizabeth. At the time of making the will, Mary and

Elizabeth were dead, the former without issue, the latter, Elizabeth, leaving issue. Dorothy survived the testator, but died without issue; and it appears that some of the issue of the sister Elizabeth were living at the time of making the will, and were among the annuitants. And when he disposed of his property in twenty shares, and meant that this should be brought to a conclusion by the death of the annuitants, he could not but contemplate that more than one child of his sister Elizabeth might leave issue then living. Then he makes provision for certain annuitants; and if he were asked whether, upon their death, he intended an intestacy, he would probably say "no such thing;" yet that may be the case, and a surprise upon his intention, though I do not say it is so.

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The courts in Ireland were of opinion that the lessee of Mrs. Mathews ought to recover two-sixths of the estates, and this on the ground, as I now understand, that six children of his sister Elizabeth Butler survived the testator, putting out Elizabeth Kelly; and that they were to be considered as the issue under a clause which I shall state presently; and that it was to be taken that Sarah Butler, one of the six, died intestate as to her share, and that her sister Mrs. M. took one-sixth as her sister's share, and one-sixth as her own.

Then error was brought, and it was contended that, if Mrs. M. was not entitled to two-sixths, she ought to have the whole; and the heir says that she was not entitled to two-sixths nor to any thing:— and that there were no words in the will to give her any part of the property. And it was contended

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further that Mrs. M. took one-fourth, if not the whole, on the principle that Lemuel Shuldham's issue living at the death of the last annuitant took one share, the issue of Catherine Kelly another share, the issue of Elizabeth Kelly, who, although she died in the testator's life time, left issue living at the death of the last annuitant, another share, and Mrs. M. the other fourth share.

The question is whether, according to the true construction of this will, Elizabeth Mathews who was the only surviving child of the testator's sister Elizabeth Butler at the death of the survivor of the annuitants, took any and what estate or interest in the estates devised.

That depends on these words:—"and after the "death of the survivor of them the said Lemuel "Shuldham (naming the annuitants), then I give "and devise all and singular the said manor, mes- "suages, lands, tenements, hereditaments, and real "estate whatsoever, in the said kingdom of Ireland, "unto all and every the children of my said late "sister, Elizabeth Curtis, deceased, by her three "several husbands, Brien Kelly, Samuel Shuldham, "and Buckley Butler, that shall be *then living*, "and their heirs and assigns for ever." Now according to all the ordinary rules of construction, that cannot mean living at the death of the testator, especially as the shares of the annuitants dying in Lemuel's life-time were to go over to Lemuel, and the shares of those dying after his death, to the other annuitants. It must mean living at the death of the survivor of the annuitants:—"equally to be "divided between them as tenants in common, and

"not as joint tenants." We have to consider whether, when he gives estates to all the children of his sister Elizabeth who should be living at the death of the last annuitant, it can be implied that if one only such child should be then living, that one can take the whole. But that is to be considered here having regard to the circumstance that he goes on to contemplate the event of there being but one such child then living; and says, "if there should be "but one such child, and no issue of any of the "other children then living, then and in that case "I give and devise all my said real estates in Ire- "land unto such surviving child, his or her heirs "and assigns for ever."

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The first question then is whether, by the effect of the first clause, Elizabeth Mathews takes the whole; and the next question is whether, if that is displaced by the second clause, she takes any thing, and what that is to be.

(A question, for which *vid. post*, was then stated for the opinion of the Judges, who desired time to consider, and no opinion was given in that session.)

On the 3d June, 1818, the cause, Shuldham (heir at law) Plaintiff in error, and Smith, lessee of Mathews, Defendant in error, was again argued (the Judges present) by one counsel on each side. Nothing of consequence sufficient to require a statement of the argument in detail was added to the former argument.

Shuldham v. Smith, June 3, 1818.

Sir S. Romilly (for the heir at law). The testator

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gives the rents in proportions to certain persons, among whom was his nephew Lemuel Shuldham, for life; and he gives the portions of those dying in the life-time of Lemuel Shuldham to Samuel Shuldham for life. But the portions of the annuitants predeceasing him, upon his death, are not disposed of; the portions of those only who should survive him being to be divided among themselves: so that in that and other events there would be an intestacy. On the death of the survivor of the annuitants, the testator has devised the estates to such of the children of his sister Elizabeth as should be then living; and in case there should be but one such child then living, he has devised to that one only in the event that there should be no issue of any of the other children then living; an event which has not happened; so there is an intestacy as to the whole of the estates from the time of the death of the last annuitant.

Mr. Hart (for Smith, Defendant in error). The first question is whether the Defendant in error is not entitled to the whole. Second, whether he is not entitled to some and what proportion.

It is a fundamental principle in the construction of wills to prevent an intestacy if possible where the testator has declared his intention in favour of certain objects of bounty to the extent of the entirety of his estate; and if on a review of the whole context you can find language sufficient to carry the entirety, you will not suffer that to be destroyed by any subsequent clause that may raise a doubt to control or narrow the construction. Admitting that

the testator has by inadvertence omitted to provide for some partial contingencies, that will not support an inference of intention to die intestate as to the whole of the estates from the death of the surviving annuitant. April 25, 28, July 8, 1817; June 8, 5, 1818. DEVISE.

It is hardly disputed but that, under the first clause, the single surviving child would take; and then the question is whether from the second clause you can attribute to the testator a meaning so absurd as this—that if two children should be then living they should take the entirety, regardless of the issue of the others then living; but that if only one such child should be then living, that child should take nothing in case there should be issue of the others then living, for which issue he had made no provision. The second clause is not negative, but accumulative, although imperfectly expressed.

But your Lordships will struggle hard to include the issue, if it can be done; and then the question is whether the second clause may not be considered as a correction of the first so far as to read the will thus—" to all and every the children, &c. that " shall be then living, *or*, *being dead*, *shall have* " *left issue then living*." But if that cannot be done, the one child then living takes the whole under the first clause, and the second operates nothing.

Sir S. Romilly (reply). I cannot agree that it is a rule to lean against an intestacy. It must appear by declaration plain or necessary implication that the heir at law is disinherited. If you supply or take away words, there would be no difficulty in

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the construction of wills. But the rule is that you are to add nothing, and to give effect to every word if possible. To say that the meaning is capricious is nothing to the purpose. The question is, What has the testator said? and every other construction is no less absurd and capricious than ours, unless you add a whole string of limitations. If you supply the words—"*or being dead shall have* "*left issue then living*," an estate is given to persons dead at the time it takes effect, which is worse than our construction. But there is no clearly expressed intention of giving any thing to the issue; and then there is no devise to the one child then living, except by an implication—which is here prevented by the second clause, in which the testator has said that it is only in the event of there being no issue of any of the other children then living that he means to give the estate to such one child; an event which has not happened; so that the intestacy is clear. There is no decided case that bears upon this.

June 3, 1818. *Lord Eldon* (C.) As I understand this case, it will be difficult to support the judgment of the Court below giving two-sixths of the estates to Elizabeth Mathews, having regard to the whole of the will, and the facts found by the special verdict. It has been contended on the one side that Elizabeth Mathews took the whole; and on the other side it is contended that having regard to the will, the circumstances, and facts found, and the intestacy that must upon this will on some events have taken place, the whole must go to the heir at law. The

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will states—" and from and after the death of the " survivor of them the said" (naming the several " annuitants) " then I give and devise all and sin- " gular the said manor, messuages, lands, tene- " ments, hereditaments, and real estate whatsoever, " in the said kingdom of Ireland unto all and every " the children of my said late sister Elizabeth " Curtis deceased by her three several husbands, " Brien Kelly, Samuel Shuldham, and Buckley " Butler." And if the will had stopped with these words, there might be ground for contending that he meant that the interest should be vested at the time of making the will, or of his death. But then he adds—" *that shall be then living:*" and the question is whether these words are not so connected with the introductory words as to confine the vesting of the interest to the time of the death of the last annuitant: " and their heirs and assigns for ever, " equally to be divided between them as tenants in " common, and not as joint tenants." I agree that, if the will had stopped there, we might be autho- rized in law, although no mention was made of what was to be done in case there should be but one child living at the death of the last annuitant, to conclude that the one then living should take the whole. But the difficulty arises from this—that he goes on to say—" And if there should be but one " such child, and no issue of any of the other chil- " dren then living, then, and in that case, I give " and devise all my said real estates, in Ireland, " unto such surviving child, his or her heirs and " assigns for ever." And upon this it is contended that, unless the judgment of the Court below was

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right, although the testator has expressly said that the one child should take in the event of there being but one child, and no issue of any of the other children then living, yet the true construction of the will was that Mrs. Mathews, as the only surviving child, took the whole. It is very difficult to consider that as the legal effect of the will; and if that is not the legal effect of the will, then we have to consider, by implying words as far as we have authority to imply them, what proportion she is to take under the will, leaving the rest to go to the heir at law, or what others than the heir at law are to take, and in what proportions.

No estate is, in words, given to the issue; and, if you can imply words so far, you have to consider whether estates are given to the children of Elizabeth Curtis or Butler dying in the life-time of the last annuitant, but leaving issue, and not merely leaving issue, but issue who should be living at the death of the last annuitant: and then you must read the will in this manner: "I give and devise all and "singular the said manor, &c. unto all and every "the children of my said late sister Elizabeth Curtis "deceased, by her three several husbands, Brien "Kelly, Samuel Shuldham, and Buckley Butler, "that shall be then living: *and unto all and every* "*the children of my said late sister, by her three* "*several husbands, who shall not be then living,* "*but dead, leaving issue then living.*" The extent to which words can be implied is well known to the Judges; but there will be great difficulty in going this length. I move that the following question be put to the Judges.

" Whether on the true construction of this will, April 25, 28,
" Elizabeth Mathews, the lessor of the Plaintiff, July 8, 1817;
" the only child of the testator's sister Elizabeth June 3, 5,
" Curtis (or Butler), living at the time of the death 1818.
" of Catherine Hewetson the surviving annuitant,
" took any and what estate or interest in the estates
" devised by the testator—having regard to the
" whole contents of the will, and the facts found
" in the special verdict."

DEVISE. Question to the Judges.

The Judges retired, and, in about an hour after, returned.

Gibbs (C. J. C. B.) Your Lordships desired the opinion of the Judges in the case of Shuldham and Smith, upon the question—" whether on the true " construction of this will Elizabeth Mathews, the " lessor of the Plaintiff, the only child of the tes- " tator's sister, Elizabeth Curtis (or Butler) living " at the time of the death of Catherine Hewetson, " the survivor of the annuitants, took any and what " estate or interest in the estates devised by the " testator, having regard to the whole contents of " the will and the facts found in the special verdict." The Judges have considered the case, and we are all of opinion, having regard to the whole contents of the will and the facts found in the special verdict, that Elizabeth Mathews took no estate or interest in the estates devised by the testator: and the ground of this opinion is shortly this. Looking at the whole of the will, and observing how the several interests are disposed of, although we plainly perceive that the testator did not intend that the heir at law should take any thing while there existed

Answer. Intestacy from want of certainty in the disposition.

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any issue of the testator's sister Elizabeth Butler, living at the death of the surviving annuitant; yet it is impossible for us to discover, with any certainty, to whom or in what proportions the interests are given. And as we cannot make a disposition for the testator where he has made none for himself, that we can, with any certainty, discover, the whole, as undisposed of, must go to the heir at law.

Judgment. June 5, 1818.

Lord Eldon (C.) Your Lordships have now the benefit of the advice of the Judges in this case, who having regard to the whole of the will and the facts found in the special verdict, have certified their unanimous opinion that, instead of two-sixths, the lessee of Mrs. Mathews was entitled to nothing; and that there was an intestacy as to the whole of the property from the time of the death of the surviving annuitant. I have seldom been more disturbed about any case than about this: for I have not the least doubt, if your Lordships should concur in the opinion of the Judges, but that the actual intent of the testator must be disappointed. But the question is, whether there is here that intelligible expression of intention, which shows how the property is disposed of to the exclusion of the heir, who never claims by force of the intent, but by the rule of law.

The testator directs the rents and profits of his estates to be divided into twenty shares, and to be paid to certain persons for life. And then he says, "provided always, and it is my true intent, that "in case any of the said several persons, &c. shall "happen to die either before me, or in the life-

" time of my said nephew Lemuel Shuldham;" forgetting to provide for the event of their dying after him, or after Lemuel Shuldham, " then I will, " and direct that the said part and share, parts and " shares of the said several person or persons so " dying shall go, and be had, received, and taken " by my said nephew Lemuel Shuldham, or his " assigns for his natural life. Provided also, and " it is my farther intent and meaning, that when " and as any of the said several persons hereinbefore " named, who shall survive my said nephew " Lemuel Shuldham, shall happen to die, then I " will, and direct that the part, share, and pro- " portion of the said clear residue of the rents and " profits of my said real estate hereinbefore di- " rected to be paid to him or them so dying, shall " go, and belong to, and be divided between the " survivor or survivors of the said several persons, " share and share alike, and in equal parts, shares, " and proportions," not stating what was to be done with the shares of those dying before Lemuel Shuldham, in the event of his death, and his not being the surviving annuitant: " and from and " after the death of the survivor of them," naming the annuitants, " then I give and devise all and " singular the said manor, messuages, &c. unto all " and every the children of my said late sister, " Elizabeth Curtis, deceased, by her three several " husbands, Brien Kelly, Samuel Shuldham, and " Buckley Butter, that shall be then living," which " last words must mean living at the death of the surviving annuitant, " and their heirs and assigns " for ever." If the will had stopped there, the

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children then living must have taken as joint tenants; but then follows "equally to be divided "between them as *tenants in common*, and not "as joint tenants." If the will had stopped there, Mrs. Mathews might take the whole; as it is clear that where there is a devise to a class, equally to be divided between them as tenants in common, if there should not be a sufficient number to call for a division, one would take the whole; the operation and effect in law being the same as if the testator had said, "and if only one, then to that one." But the will does not stop there, and we cannot, by implication, conclude that he meant that one only should take when he himself happens to contemplate, and in terms to provide for, that event: and the misfortune is that the manner in which he here does so is this, "and if there should "be but one such child, *and no issue of any of* "*the other children then living*, *then, and in that* "*case*, I give and devise, &c. unto such surviving "child, his or her heirs and assigns for ever." Now the event which happened was that there was but one such child, and that there was issue of several of the other children then living: and then the question is, whether, as against the heir at law, you can, by implication, or by supplying words, give the whole to one, in an event in which the testator has said that such one child shall not have it: or whether you are authorised to divide the estate into different aliquot parts between the one child and the issue of the others, where the testator has not told you what aliquot part is to be given to the one, and what to the issue of the others. It

seems impossible therefore so to divide it, unless you can supply all that I before stated, "that shall "be then living, *or that shall be then not living,* "*but dead, leaving issue then living:*" that is, unless you can add a new class. The Judges have unanimously said that there is an intestacy, and I cannot put a more satisfactory construction on this will. June 5, 1818. DEVISE.

Lord Redesdale. This case appeared to me at first to admit of some doubt; but now I am clearly of opinion that the judgment of the Court below is erroneous, and must be reversed.

The estates were given upon the conclusion of the trust, "unto all and every the children, &c. "that shall be *then* living," the last words clearly referring to the death of the last annuitant, for otherwise the word ought to be *now* and not *then*: "and their heirs and assigns for ever." So that if two survived, they would have taken in moities; if three, in thirds; and so on. How the Court below came to divide the estate into sixths I do not exactly know. There were more than six children; and as the division was not to take place till the death of Lemuel Shuldham, he was not one of the children who could take. Then he adds, "equally "to be divided between them as tenants in com-"mon, and not as joint tenants." If he had stopped there, it might be implied that if there were only one, the one should take the whole. But then he goes on expressly to direct what is to be done in the event of there being but one such child; and he has declared that such one child

June 5, 1818.

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shall take only in case there should be no issue of any of the other children then living. He provides for two events, that of there being more than one child, and that of there being only one, and no issue of the others. But he has not provided for a third case, that of there being only one child, and issue of the others then living. The third event, however, is that which has happened; and in that event there is no disposition. I agree therefore that the judgment is wrong, and must be reversed, the lessee of Mrs. Mathews having no title to maintain the ejectment.

Judgment REVERSED accordingly.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

CORMICK—*Appellant.*
TRAPAUD and another—*Respondents.*

Feb. 6, March 16, June 5, 1818.

MORTGAGE.—VOLUNTEER.

M. CORMICK, first tenant in tail under the will of his father, R. C. deceased (by which will estates in tail male in remainder were given to the devisor's other sons, F. C. and T. C.) before suffering a recovery, executes a settlement on his marriage, by which he limits an estate for life to himself, with remainder to the first and other sons of the marriage, in tail male, remainders to his brothers, F. C. and T. C. for life, with remainders to their first and other sons in tail male:—and afterwards suffered a recovery, mortgaged the settled estate to R. Plaistow, and died without issue male. C. Cormick, son of T. C.