IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

COWLEY and others—*Appellants.*
M. W. HARTSTONGE—*Respondent.*

June 3, 1813.

CONSTRUCTION OF A WILL, IN REGARD TO THE EXERCISE OF A DISCRETIONARY POWER GIVEN TO TRUSTEES.

JOHN HARTSTONGE by his will devises and bequeaths certain real estates, and sums of money charged upon his nephew, Sir H. Harstonge's estates, &c. to trustees, on trust, to lay out the residue of his personal property (after payment of legacies) *either* in the purchase of lands of inheritance, *or* at interest, *as his trustees should think most fit and proper;* and then, upon trust, to pay the rents, profits, and interest, to Sir H. Hartstonge, for life; and after his decease, to convey and assign the whole to the first and other sons of Sir H. Hartstonge, in tail male; remainder to the daughter or daughters of Sir H. Hartstonge, in tail general; remainder to his niece, Ann Cummings, for life; remainder to her first and other sons in tail male; remainder to his natural daughter, Anne Hartstonge, for life; remainder to her first and other sons in tail male; remainder to her daughters in tail general; remainder to his niece, Mary Ormsby, for life; with remainders, as above, to her sons and daughters; remainder to testator's own right heirs, executors, and administrators. The trustees never acted. Anne Cummings and Sir H. Hartstonge died without issue, and John Vesey, first son of Anne Hartstonge, became tenant in tail upon the death of his mother. John Vesey, and his children (infants) died, and his wife obtained administration, and claimed the personal fund as personal property, the same never having been invested in lands. The next remainder-man claimed it as land; and the question was, Whether it was to be considered as land or personal property? Decided, that it was to be considered as land, the discretionary power given to the trustees being limited by the intention of the testator, as collected from the whole of the will taken together.

Will of John Harstonge, May 23, 1766.

JOHN Hartstonge, of the City of Dublin, the Respondent's grandfather, by will, dated May 23, 1766,

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after various bequests (and, among others, a sum of 5000*l.*) to his natural daughter Anne Hartstonge, devised and bequeathed to trustees, their heirs, executors, and administrators, his lands of Camas, in the county of Limerick; an annuity of 150*l.* charged on his nephew, Sir H. Hartstonge's estate in the county of Limerick; his house in Limerick, a charge of 4000*l.* on his nephew's estate of *Bruff*, a charge of 2000*l.* on his nephew's estate of Glenduff, and whatever sums remained due to himself on a mortgage of Lord Fane's estate, &c. in trust, in the first place, to pay the sum of 5000*l.* to his daughter, an annuity of 150*l.* to his niece, Anne Cummings, for life; and next followed that part of the will which gave rise to the present question; viz.—

"Then, *upon trust*, to lay out the residue of the "said two several charges of 4000*l.* and 2000*l.* on my "said nephew's estate, herein before particularly "mentioned, with all such further or other sum or "sums of money as shall be due to me, by mortgage, "judgment, or upon any other security whatsoever, "*either in the purchase of lands of inheritance, or* "*at interest, as my said trustees shall think most* "*fit and proper*, (but without any risk or hazard to "my said trustees, or either of them;) and then, "upon this further trust, to pay the rents of the "said lands of inheritance, so to be purchased by "my said trustees herein before named, or the "interest money of the residue of the said charges "of 4000*l.* and 2000*l.*; and also the interest and "produce of all other sums of money as shall be "due to me, in manner aforesaid, if the same shall

" be laid out at interest; and also the residue of the
" said rents, issues, and profits, of the said lands of
" Camas, and of the said House in Limerick, and of
" the said annuity or rent-charge of 150*l.* a year;
" and also the interest and produce of the said
" mortgage on the late Lord Viscount Fane's estate,
" to said Sir Henry Hartstonge, for and during the
" term of his natural life; and from and after his
" decease, I appoint my said trustees, and the sur-
" vivor of them, and the heirs, executors, or admi-
" nistrators of such survivor respectively, to grant,
" convey, and assign my said real estate, the said
" rent-charge, or annuity, of 150*l.*, my said house
" in Limerick, the said charges and mortgages, or
" such estate as shall be purchased for the same, (and
" all other sums due to me upon any other security
" whatsoever,) to the first, and every other son, of
" my said nephew, Sir Henry Hartstonge, lawfully
" to be begotten, and to the heirs male of their bo-
" dies, severally and successively, the eldest of such
" sons, and the heirs male of his body being always
" preferred, and to take before the younger of such
" sons; and in default of issue male of my said ne-
" phew, Sir Henry Hartstonge, to the use of all and
" every the daughter and daughters of my said ne-
" phew, Sir Henry Hartstonge, and the heirs of her
" and their body and bodies, as tenants in common,
" and not as joint tenants; and, for want of such
" issue, to my niece, the said Anne Cumming,
" otherwise Hartstonge, for and during her natural
" life, with remainder to her first, and other sons,
" successively in tail male; and on failure of issue
" male of my said niece, Anne Cumming, to my

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" said reputed daughter, Anne Hartstonge, for and " during her natural life, with remainder to her " first and other sons successively in tail male. On " failure of issue male of my said reputed daughter, " Anne Hartstonge, to the use of all and every the " daughter and daughters of the said Anne Harts- " tonge, my said reputed daughter, and the heirs of " her and their body and bodies, as tenants in com- " mon, and not as joint tenants; and in default of " such issue of the said Anne Hartstonge, my said " reputed daughter, to my niece, Mary Ormsby, " otherwise Hartstonge, wife of Henry Ormsby, " Esq. for and during her life, without the control " or intermeddling of her husband, the said Henry " Ormsby, or without his having any manner of " power over the same, or any part thereof; but " that the receipt and receipts of the said Mary " Ormsby alone, and no other, notwithstanding her " coverture, shall, from time to time, be good and " sufficient for the rents, issues, and profits, of my " said real and personal estate and fortune, with " remainder to her first and other sons respectively, " in tail male; and on failure of issue male of my " said niece, Mary Ormsby, to the use of all and " every the daughter and daughters of my said " niece, Mary Ormsby, and the heirs of her and " their body and bodies, as tenants in common, and " not as joint tenants; and in default of such issue " of my said niece, Mary Ormsby, to my own " right heirs, executors, and administrators, for " ever.

" And my will and intention is, that when my " trustees shall invest my said personal estate in

"lands of inheritance, that the present persons, whom I intend and make tenants for life thereto, shall have, as they come into possession, power to make leases of such lands for three lives, or thirty-one years in possession, and not in reversion, and at the full improved rent, without fine."

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The trustees renounced the execution of the will, and administration with the will annexed was granted to Sir H. Hartstonge by the Prerogative Court. Afterwards, one of the trustees (the other having died without acting) assigned the whole of the testator's trust property to Sir H. Hartstonge, subject to the trust.

Surviving trustee assigns the trust property to Sir Henry Hartstonge.

Sir H. Hartstonge received a sum of about 10,000*l*. in the whole, personal property of the testator, and paid the interest of her 5000*l*. to Anne Hartstonge. He had, of course, after deducting the 5000*l*. belonging to Anne Hartstonge, an additional sum of about 5000*l*. in his hands, subject to the ulterior trusts of the will. The niece, Anne Cummings, died, without issue, before Sir H. Hartstonge; afterwards Sir H. Hartstonge died without issue, and without having invested the surplus money in lands, and the Earl of Limerick became his personal representative. Anne Hartstonge intermarried with a Mr. Vesey, by whom she had one son, John; and, upon the death of her husband Vesey, she intermarried with Edmond Weld, by whom she had the Respondent, who was the eldest son by him, and several children. Anne Weld died; upon which her son, John Vesey, became entitled to an estate tail, in possession, in the testator's real pro-

Death of Anne Cummings and Sir Henry Hartstonge, without issue: personal fund still uninvested in lands.

Anne Hartstonge marries first A. Vesey, by whom she has a son, John; and, on the death of her husband Vesey, marries Edmond Weld, by whom she has Respondent.

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perty devised as aforesaid, and to the residue of the testator's personal property, after payment of the 5000*l.* specifically bequeated to his mother; and he received 1000*l.*, part of such residue, from Lord Limerick.

Death of John Vesey and his infant children. Respondent becomes tenant in tail under will.

In March, 1803, John Vesey died, leaving the Appellant, Catherine, his wife, and one son and two daughters; all of whom died before the eldest attained the age of six years. By the death of John Vesey and his children, the Respondent, Matthew Weld, who assumed the name of Hartstonge pursuant to the directions in the will, became entitled to an estate tail, in possession, in the testator's real property, under the trusts of the will.

Widow of John Vesey claims the personal fund as personal property.

Catherine, the widow of John Vesey, on his death, and that of his children, obtained letters of administration to them, and afterwards intermarried with James Cowley, who, in her right, claimed the above-mentioned residue of the testator's personal fortune; the trustees having, in the exercise of their discretion, suffered it to remain out at interest, instead of purchasing lands.

May 8, 1804. Bill by Respondent.

The Respondent filed his bill in Chancery against the Appellants, to have the money paid over to him, or laid out in the purchase of lands, to be settled according to the limitations in the will. After answers, and issues joined, the cause came on to be heard before the Master of the Rolls, who, after three days' hearing, dismissed the bill, and ordered the costs to be paid out of the fund. The Respondent appealed to the Chancellor, who reversed the decree of the Master of the Rolls, and "decreed that the "Plaintiff (Respondent) was entitled to have the

July 15, 1805. Master of the Rolls dismisses the bill.

Dec. 13, 1806. Decree of the Chancellor in

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" money invested in lands, to be settled subject to " the uses and trusts of the will;" but gave no costs on either side. The Appellants thereupon appealed.

It was contended on the part of the Appellants, that the intention of the testator was, to give an option to his trustees to lay out the residuum of his personal fortune in the purchase of lands, or at interest. This appeared most manifestly from the strong and emphatic expressions which the testator had used in his will: he devised and bequeathed to his trustees, their heirs, executors, and administrators, his real and personal estate, " To lay out the " residue of the two several charges in his will spe- " cified, with all such further or other sum or sums " of money as should be due to him by mortgage, " judgment, or upon any other security whatsoever, " *either in the purchase of lands of inheritance, or* " *at interest, as his said trustees shall think fit and* " *proper, but without any risk to them.*" Here the testator had in express terms given his trustees an option, and invested them with the uncontrolled power of laying out the residue of his personal property either in the purchase of lands, *or* at interest; and yet it was contended, on the part of the Respondent, that although the trustees did not vest this residuum in lands, but, on the contrary, suffered it to remain at interest, it was to be considered as land, and not as money; but this construction was equally repugnant to the letter and spirit of the will; for if the testator had intended that the surplus of his personal fortune should absolutely be laid out in the purchase of land, for what purpose did he give

favour of the Respondent.

Argument for Appellants, that the testator had in express terms given trustees an option to allow money to remain at interest, or invest it in lands.

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That testator studiously made use of terms applicable to personal property only to provide for the event of the money continuing personal property.

the trustees a discretionary power of laying it out at interest, which must be nugatory and inoperative, if this construction was to prevail? This would be to *make*, and not to expound the testator's will; a liberty that courts of justice had never assumed. That such was not the testator's meaning might still further be inferred from the directions given to the trustees in a subsequent passage of his will. The testator directed his trustees "to pay the rents of "the lands of inheritance, *so to be purchased, or the* "*interest money of the residue of the said charges,* "*and also the interest and produce of all such other* "*sums of money as should be due to him, if the* "*same should be laid out at interest*, and also the "residue of the rents, issues, and profits, of the "lands of Camas, and of the house in Limerick, "and of the annuity of 150*l.*, *and also the interest* "*and produce of the mortgage on the late Lord* "*Viscount Fane's estate*, to his nephew, Sir Henry "Hartstonge, for life; and from and after his de-"cease, the testator appointed his said trustees, and "the survivor of them, and the heirs, executors, "and administrators, of such survivor respectively, "to grant, convey, and assign, his said real estate, "said rent charge, the said house at Limerick, the "*said charges and mortgage, or such estate as* "*should be purchased* for the same, *and all other* "*sums due to him*, upon any other security what-"soever, to the first and other sons of his said ne-"phew, in tail general, with several remainders "over. The testator also by his will provides, and "declares it to be his express will and intention, "that all and every, or any person or persons what-

" soever, who were in remainder to his said estates " *and fortune*, by his said will, as they should come " into the possession thereof, by virtue of the limi- " tations aforesaid, should always bear and take " upon them the surname of Hartstonge, and no " other; and use the arms belonging to his name, " and no other." Here it was observable that the testator had made use of terms properly applicable to personal property only, with a view evidently to provide for the event of his trustees continuing the money at interest, upon the old securities; or laying it out at interest upon new securities. In the case of *Curling v. May*, a sum of 500*l.* given to a trustee, to be laid out upon a purchase of lands, or on good securities, for the separate use of the testator's daughter, her heirs, executors, or administrators, (who died before the money was vested in a purchase,) was decreed to the administrator of the daughter. The words of Lord Talbot, in that case, were very strong, and, as it was presumed, conclusive, upon the present case. He observed, that it was originally personal estate, and then remained so; *and that the Court would take it as it was found.* The decision of Lord Talbot was recognized in the case of *Amler v. Amler*. In that case, the testator bequeathed " a sum of money to A to " remain at interest, or to be by him laid out in " real estates, and to go with other estates devised." A, being tenant in tail of the real estates, disposed of the money by will. The Court inclined in favour of the disposition by will, upon the ground, that A might have called for the money as absolute owner,

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3 Atk. 255.

3 Ves. 583.

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Amb. 241.

but it was established upon the option to continue it personal estate. The Chancellor there observed, that an option was given to the legatee either to lay out the money at interest, or in the purchase of lands; and surely, in the present case, an election was given to the trustees, in the most unequivocal terms, to lay out the money *either* in the purchase of lands, *or* at interest. The case of *Earlom v. Saunders* would, as it was apprehended, be principally relied upon as an authority in favour of the construction contended for by the Respondent; but that case was very distinguishable from the present; and even were it to be considered as an authority in point, it had been over-ruled by subsequent decisions. In that case, the testator directed his executors "to raise the sum of 400*l.* out of his personal "estate, and to pay it to his trustees, who should "lay out the same in the purchase of lands, or any "other security or securities; and that the lands so "to be purchased, *and* the security or securities on "which the 400*l.* should be so laid out, should be "made to, and settled on the trustees, their heirs "and assigns, in trust and to the use of his wife for "life, and after to such uses, and under such pro-"visoes, conditions, and limitations, as his lands "before devised were limited." Here it was to be observed, that the executrix (who was the widow of the testator) died before the 400*l.* was raised out of the personal estate, or paid over to the trustees, and consequently that sum never vested in them, and therefore they could not have exercised any discretionary power over it. Lord Hardwicke, in

giving judgment in that case, admitted, that trustees had an election to change the rights of parties, if it was expressly given to them.

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2 Ves. 170.
3 Atk. 255.
3 Ves. 583.
Amb. 241.

There was no doubt that a power might be given to trustees, to prefer one set of objects to another, and that this might be done by giving them discretionary power to render the fund real or personal estate. This was clear from the case of *Walker v. Denne*, *Curling v. May*, and *Amler v. Amler*. The principle was recognized in *Earlom v. Saunders*; though, from the particular circumstances of that case, the principle was held not to be applicable to it. The only questions therefore were, 1st, Whether the direction to the trustees conferred on them an imperative trust, or a discretionary power? and, 2d, If it conferred on them a discretionary power, whether the fund must not now be considered as personal estate, either from legal presumption of its having been made such by an exercise of the power, or from its having been personalty at the testator's decease, and its being now too late to make it real estate by an exercise of the power?

Now, it seemed impossible to confer a discretionary power of choosing between two acts more explicitly than by saying, that it should be lawful for the donee, or trustee of the power, to do one or the other of them, as he should think proper; and it was obvious, that the testator thought the fund might continue personalty through every stage of the trust, and, in its final determination, have the nature of personalty. The first appeared from the regular repetition of his directions for the payment of the interest of the money. The second, from his

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direction, that when the trustees were finally to divest themselves of the fund, and make it over to the *cestui que trust*, becoming absolutely entitled to it, they should then assign to him *the money and the securities for money*, and convey the land to him, *if it* should have been laid out in land. Then, from the length of time (above 40 years) during which the personal fund had been permitted to remain in that state, an exercise of the trustees' direction in favour of the personal quality of the fund must be legally presumed. It was submitted, that it was now too late to exercise it, as the testator expressly directed the transfer of the fund to be made, on the death of the devisee of the life interest, to his issue. This was to be the completion of the trust, and the discretion of the trustee was therefore to cease with it.

Argument for Respondent.

On the part of the Respondent, on the other hand, it was contended, that the Chancellor's decree ought to be affirmed, because money devised upon trust, to be invested in the purchase of lands of inheritance, was in equity regarded as real estate, and passed as such, although not so invested. As to *the option* here given to the trustees, either to purchase lands of inheritance, or lay out the money at interest, the latter could only be construed to mean a *temporary investment* until lands could be purchased, or, at most, until the death of Sir Henry Hartstonge, the first tenant for life, upon whose death a settlement was directed to be made in terms which manifestly shewed the testator had *real estate*, and *that only*, in contemplation. *All the limitations in the will directly applied to land, and*

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were analagous to the limitations of real estate; and it was worthy of remark, that there was no limitation or provision whatever throughout the will that applied to the fund as money; but, on the contrary, all the limitations of the will expressly applied to land, and all the remainders, even the most remote, were limited to the testator's kindred. If the property was supposed to be personal estate at that period, the limitations prescribed by the testator to be made, would not only have been liable to be defeated; but, in the very probable event of a person, designated as a remainder man in tail, having then come in *esse*, and being the first to take, would all have been void in the very moment of their creation. In this respect, the case of *Earlom v. Saunders*, was a direct authority in point; *and the case, too, of* Thornton v. Hawley *bore most strongly indeed in confirmation of the principle laid down by Lord Hardwicke.* As to the pretence of John Vesey having *elected to take the fund as personal*, and thereby determined its real nature in equity, it had no foundation in fact. He did no act evidencing even an intention of that kind; and if he had, his intention alone, as tenant in tail, would not have been sufficient to defeat the right of the remainder men. The peculiar circumstances of the trustees having refused to act, and having assigned the funds and their trust to the first tenant for life, who was also *debtor* to the testator's estate for the principal part of the monies directed to be invested, and therefore had an interest in omitting to invest it in the purchase of land, would distinguish this case, if necessary, from others, in which an election in

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10 Ves. 129.

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the trustees, as to the nature of the investment, had been thought to vary the equitable rule. And here the question did not arise between the real and personal representatives of a party who had a power over the fund to alter its nature, but between a *perfect stranger in blood to the testator*, and to all the parties in the intended settlement, on the one side, and the testator's *grandson*, to whom an estate tail was limited by the intended settlement, on the other. The Respondent has also taken the testator's name and arms, and become thereby the representative of his family, according to the direction of the will, and was admitted to be thereby entitled to such part of the devised property as was and continued to be real estate; there could be no doubt, therefore, that the decree appealed from, in giving the money in question as real estate to him, best effectuated the general intent of the testator.

Sir S. Romilly and *Mr. Hart* (for Appellants.) This was a mere question of construction. Where trustees were bound sooner or later to invest money in land, Courts of Equity would not allow their negligence to defeat the testator's purpose, or vary the rights of the parties, upon the principle of Courts of Equity to consider that as done which ought to be done. But then that supposed that there were rights of parties. It was clear that the testator, who was the absolute owner, might give a power to trustees to vary the destination of the trust funds. The question then was, Whether the testator could be considered as having used language which, at the hour of his death, imperatively fixed on this money

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the character of land? It was perfectly clear, upon the face of the will, that an option was here left to the trustees; and where that was evident, neither on principle nor on decided cases had the Courts any authority to control it? The testator might perhaps have intended that the personal property should go in the same course of limitations as the real; but the law did not permit this; and Courts of Justice could only act on the language of the will according to the rules of law and equity.

Messrs. Richards and *Leach* (for Respondent.) A testator might give trustees an election, but it was not very probable, at least, that it should be given to strangers. The trustees here did not choose to act, and there was no person to exercise the discretion, and, in such a case, the Court would say that *it* would exercise the discretion, and do that which was most consonant to the intent of the testator. But even if the trustees had acted, they had no discretion, except as to time; and they ought to have purchased land as soon as a proper purchase could be found. The case of *Amler v. Amler* was totally different from the present. That of *Earlom v. Saunders* was decidedly in favour of the Respondent; and that of *Thornton v. Hawley* contained much matter applicable to the question of option, though not exactly such an option as this. The testator had no male issue, but was desirous to continue his name; and the object evidently was, that the personal property should attend the succession. He gave his trustees a discretion to lay out the fund as circumstances and convenience required; but

3 Ves. 583.
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10 Ves. 129.

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this was perfectly consistent with fixing upon it the qualities of land. The discretion was, to manage the property according to the intent. Suppose an unlimited discretion in the trustees, and that, if called upon to invest the personal fund in land, they were to say, 'We don't choose it;' would that have been an answer to a Court of Equity on this will? 'No,' the Court, would say; 'the testator must be supposed to have meant such a discretion as was consistent with the general purposes of his will, and the discretion must be exercised accordingly.'

If the trustees had acted, as it was a principle of equity that what ought to have been done must be considered as having been done, it might be shewn here, that they acted contrary to the intent of the testator, and committed a breach of trust. But they had refused to act; and who took the property instead? Sir H. Hartstonge; who, besides his interest in keeping the debt unpaid, had another cogent reason for keeping the fund in the state of personal property. If he had a son born who only lived an hour, the whole of the personal property would have been his own. Suppose, then, a bill filed against Sir H. Hartstonge; the Court would have said, 'You are in such a situation of interest that you cannot be heard, and the money must be invested in land.'

Sir S. Romilly (in reply.) If the question as to the extent of the discretion were doubtful, the cases cited, and arguments used for the Respondent would have great weight. But they went for nothing

where the testator, as here, said, in express unequivocal terms, that his trustees should have the option. By the ultimate limitation in the will, he gave the property to his own right heirs, *executors, and administrators,* clearly supposing that even then the money might be personal property. This was directly contrary to the supposition, that it was the intention of the testator that some time or other it should be absolutely converted into real estate. Suppose the limitations spent, and the question had been between the heir at law and next of kin; by what legislative authority could Courts of Justice strike out these words, which established the claim of the next of kin? The cases relied upon on the other side were inapplicable, or, in principle, directly in favour of the Appellants. Sir H. Hartstonge stood in the place of trustees, and was willing to exercise the discretion; and he should be glad to hear of a case where the Court had taken from trustees willing to act a discretion expressly given them. As to the Court compelling Sir H. Hartstonge, as against himself, to invest the money in land, he thought the Court would do no such thing. The utmost the Court could do would be to say to him, 'You don't stand in a situation of perfect impartiality, and therefore we shall execute the trust;' but it did not follow that the Court would absolutely invest the money in land. It would merely, as standing in the place of the trustees, exercise a sound discretion.

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Lord Eldon, (Chancellor,) after reading the material part of the will, *(vide ante,)* said, The

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question now was, Whether, considering the whole will together, and the intention of the testator, as far as it can be collected from the will, this fund ought to be regarded as money, according to the decision of the Master of the Rolls; or as land, according to the decision of the Chancellor. It appeared to him that the decision of the Chancellor was the right one, and that his decree ought to be affirmed, subject to certain directions in regard to costs.

The Chancellor's decision right.

They had heard many cases cited at the bar, and he thought he might say this, that if a testator clearly manifested his intention on the face of the will, that his trustees should have such a discretion as that contended for on the part of the Appellants, the Court would not control that discretion. But where the trustees did not act, he could not agree that the Court was precluded from looking at the object which the testator had in view, in order to ascertain with more exactness the meaning of his expressions, if otherwise at all doubtful. The question here was, What was to be done by the Court, where no discretion at all had been exercised by the trustees? In his opinion, the discretion, in this case, was purely personal in the trustees: and then the Court had to consider what was a proper execution of the will, when the trustees had refused to act, or to exercise any discretion on the subject. The testator gave his real and personal estate under the various limitations of this will, and to these limitations the discretion given to his trustees must be held to refer. Now, what was his intention? He meant that the real and personal estates should go to the same persons. It was very

If the testator's intention clearly manifested on the face of the will to give unlimited discretion to the trustees, the Court will not control it.

Question here was, What was to be done by the Court, where the trustees had exercised no discretion.

Discretion here purely personal in the trustees.

Discretion must be held to refer to the limitations in the will.

true; the nephew, if he had a son born, though he died the hour after, might say, that, as the trustees had exercised no discretion, the money should be considered as the estate of the son dying intestate; but the trustees might come in and say, 'No; we, in the exercise of our discretion, determine that it shall be invested in land, and considered as such, that it may go according to the limitations in the will;' and the very occurrence of such a circumstance as the above might be a good reason for their interposition.

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They had, then, three points to determine:—

1st, Whether this money was to be considered as personal property or as land.

2d, Whether the testator did not mean that the discretion given to his trustees should be exercised according to his general intent and meaning; and,

3d, Since the trustees had done nothing, whether the Court ought not now to act, and do what was most fit and proper to be done.

Three points to be determined.

He thought that, taking the whole case into view, it could not be determined that this was personal estate; for if the discretion had not been exercised, it remained to be exercised. This case depended on its own peculiar circumstances and the language of the testator in his will. He thought the judgment of the Chancellor right on the principal point; but he appeared to him to have mistaken the course of the Court in regard to costs. The question was a fair one, and therefore the Master of the Rolls had taken a more proper view of this point, in directing the costs of all parties to be paid out of

Chancellor's decree right in the principal point, but wrong as to costs. Question a fair one, and costs to be paid out of the fund.

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the fund. If they agreed with him, therefore, the judgment of the Court below must be affirmed as to the principal point, but varied in regard to costs.

Lord Redesdale. After considering the grounds of the other cases, he had no hesitation whatever in concurring in the opinion that had just been given. The argument at the bar in favour of the Appellant was, that the trustees had a discretionary power, and that, if they never exercised that power, then the fund must be considered as money. That, however, was certainly never the intention of the testator; for, upon that principle, if the trustees had died in his life-time, the fund could have been nothing else than money. In the exercise of the discretion given, it was evident the testator intended that the money should some time or other be invested in land; and where, under such circumstances, an option was allowed, it must be understood with reference to the testator's intention, unless where the words were so express and clear, that the design to give an absolute uncontrolled discretion could not be misunderstood. The case of *Earlom v. Saunders* was exactly of the same nature, and to the same effect, as the present. The keeping the property as money would clearly defeat the intention of the testator. But there was another analogous case, which had not been noticed at the bar; that of *Johnson v. Arnold.* Lord Hardwicke, in that case, observed that it was a very blundering will; but the intention was that the property in dispute should go in a course of limitations, and, therefore, that the will ought to be so construed.

Evidently the intention of the testator, that, at some time or other, the money should be invested in land.

Johnson v. Arnold, 1 Ves. 169.

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This case, to use a familiar expression, went on all fours with the case of *Johnson v. Arnold*; except that this was a clearer case.

The time given here was evidently intended to enable the trustees to lay the money out in the mean time, without risk or hazard, until it should be convenient to invest it in land. The intent was, that it should be laid out either in the purchase of lands of inheritance, or at interest, as should be thought most fit and proper. Fit and proper for what? For executing the trust, and intent of the will, unquestionably. Then the trustees were bound to consider all the limitations of the will, and give effect to them, and were therefore bound to lay out the money in land, as they could not give effect to the limitations without so vesting it.

Trustees bound to consider all the limitations in the will, and to give effect to them.

But an argument in opposition to this had been founded upon an expression at the close of the will, "to my own right heirs, executors," &c. That expression, however, in his opinion, told rather the other way. The meaning was, that, if all the limitations should fail in the lifetime of Sir H. Hartstonge, there could be no further cause for investing the money in land; and that, therefore, the real estate might be left to go to the testator's heir at law, and his personal estate to his personal representative. The previous limitations, however, were not applicable at all to personal estate, and the desire of the testator, that it should go along with the real estate, clearly proved his intent that it should be invested in land; so that the conclusion drawn from the words above mentioned appeared to lead precisely the other way.

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But the extent to which the discretion was attempted to be carried on the other side was quite extravagant. If the trustees, and their representatives, might defer the exercise of their discretion as long as they pleased, then the question might always be kept in suspense, and nobody could claim the property, either as land or money. At any rate, the discretion in the present case was never executed, and the matter was in suspense at the time of filing the bill; and therefore it devolved upon the Court to say what was fit and proper to be done. The testator did not mean that Sir H. Hartstonge should have the personal estate, and that the real estate should go on in the prescribed course of limitation, but that both should go on together. The trustees having done nothing, it was for their Lordships to say what ought to be done. The Master of the Rolls had said that this money was to be considered as personal property; the Chancellor had said that it was to be considered as land: it remained now for their Lordships to determine the point; for, as no discretion had been exercised, the matter was still in suspense. It was difficult to believe that such a discretion should have been intended to be given to the trustees as to enable them to alter the rights of the parties. At all events, it was the clear intention of the testator, in the present case, that the money should go along with the real estate; and therefore he was decidedly of opinion that the judgment of the Chancellor (*Ponsonby*) was right. But in regard to the costs, the Chancellor had acted contrary to the course of the Court: All the parties to the suit were nesessary parties.

Extravagant extent of discretion contended for by the Appellant.

Intention of the testator that the personal and real estate should go on together in the prescribed course of limitations.

As no discretion had been exercised, the matter was still in suspense.

Lord Limerick acted as trustee, and it could not be said that he should not have his costs; and the other parties were necessary for the indemnity of the person who held the fund *quasi* trustee.

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The case was upon the whole a very clear one, notwithstanding the keenness with which the argument at the bar had been urged in favour of the Appellant.

Lord Carlton concurred in the above view of the case. The Chancellor's decree tended to effectuate the purpose of the testator. The great object of the testator was to create a succession of estates tail; and for that purpose his intention clearly was, that the personal estate should accompany the limitations of the real property. As to the case of *Earlom v. Saunders*, there was nothing in the will there to point out the main object of the testator, so that this was a much stronger case. In the present case, it was clear that the discretion was to be executed in the most fit and convenient manner, according to the intention of the testator.

Ordered and adjudged, That the decree complained of be affirmed, so far as it reverses the decree of the Master of the Rolls, save as to the matter of costs; and that, with respect to the costs, the same should be paid according to the decree of the Master of the Rolls.

Agents for Respondent, FORBES and POCOCK.

Agent for Appellants, J. PALMER.