IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

KELLETT and another—*Appellants.*
KELLETT—*Respondent.*

March 13, July 4, 1815.

WILL.—HEIR AT LAW.—RESULTING TRUST.

TESTATOR, seized of real and possessed of personal property, bequeaths various legacies "to be raised and levied from my *properties* by my executors," and then, after a specific devise of his interest in certain lands, says, "The remainder of my *properties* I devise to my executors to make good the above sums. And I also ordain, &c. and devise the said (naming the executors) executors to this my last will, &c. also my RESIDUARY LEGATEES, share and share alike." Held by the Court below that there was a resulting trust as to the real estate for the heir at law, and the decree affirmed by the House of Lords—Lord Eldon (C.) and Lord Redesdale stating it as a case of infinite doubt; but that where there was a doubt the heir ought not to be excluded, the rule of law being that the heir cannot be disinherited, except by express words or necessary implication.

JAMES KELLETT, of Fordstown, in the county of Meath, being seized of considerable real estates, and possessed of a large personal estate, on May 19, 1809, made his will, which was executed and attested as is by law required to pass real estates, as follows:

"I, James Kellett, bequeath to my two daughters, "by Elizabeth Regan, of Fordstown, in the county "of Meath, viz. Ann Kellett and Jane Kellett, both "now of said Fordstown, the sum of seven thousand

" pounds to each; that is to say, seven thousand
" pounds sterling to the said Ann Kellett, and seven
" thousand pounds sterling to the said Jane Kellett,
" to be raised and levied from my properties by my
" executors, to be hereafter in this will named and
" appointed, and paid to the said Ann Kellett, and to
" the said Jane Kellett, as soon as they shall attain
" the age of twenty-one years, with legal interest for
" their support until they shall have attained the age
" of twenty-one years. I bequeath to my son James
" Kellett, by Bridget Clarke, now about the age of
" two years old, the sum of five thousand pounds
" sterling, to be raised and levied by my executors
" from my properties, to be paid to him when he shall
" attain the age of twenty-one years, part of the in-
" terest of which to be expended on his maintenance
" and education, according to the discretion of my
" executors. I bequeath to my daughter Maria Kel-
" lett, by Catherine Maxwell of Newtown, now about
" six years old, the sum of five thousand pounds
" sterling, to be raised and levied from my properties
" by my executors, and paid to her when she shall
" attain the age of twenty-one years, with a proper
" allowance for her support and education, according
" to the discretion of my executors. I bequeath to
" the said Elizabeth Ryan, of Fordstown, the sum of
" five hundred pounds, to be paid to her immediately;
" and the sum of five hundred pounds to be paid to
" the said Bridget Clarke, of Ballinadrimney; and
" five hundred pounds to Catherine Maxwell, of
" Newtown, all in the county of Meath. I bequeath
" my interest in the lands of Barleyhill, in the county
" of Meath, to Richard Kellett, eldest son of my uncle

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" Laurence Kellett, now of Belturbet, in the county " of Cavan. *The remainder of my properties I* " *devise to my executors, to make good the above* " *sums;* and the following sums, that is to say, the " sum of five hundred pounds sterling to each of the " children of my uncle Laurence Kellett; and five " hundred pounds to each of the children of my late " aunt Smith, that are unmarried or widows; one " hundred pounds to each of the children of my aunt " Cripps; five hundred pounds to each of the children " of my aunt Holdcroft, by her present husband " George Holdcroft; two hundred pounds to each of " the children of my late uncle Richard Kellett; and " five hundred pounds to each of the children of my " late uncle James Kellett. I also bequeath to my " uncle Laurence Kellett, to my aunt Cripps, and to " my aunt Holdcroft, one hundred pounds to each. " I likewise bequeath to Mary Fox, my faithful " domestic, the sum of one hundred pounds sterling. " And I do hereby appoint the Reverend William " Kellett, of Monalby Glebe, in the county of Meath, " Mr. George Holdcroft, of the town of Kells, in the " said county, and Mr. Francis H. Holdcroft, of the " city of Dublin, to be my executors to this my last " will and testament, and guardians of the fortunes " of my children. *And I also ordain, appoint,* " *and devise the said Reverend William Kellett,* " *Mr. George Holdcroft, and Mr. Francis Henry* " *Holdcroft, executors to this my last will and* " *testament, also my* RESIDUARY LEGATEES, *share* " *and share alike.*"

The testator died the day after the execution of this will, leaving no legitimate children, and his exe-

cutors entered into and took possession of all his real and personal estates. On June 16, 1810, Lawrence Kellett, heir at law of the testator, filed his bill in the Irish Chancery, praying an account, and to be decreed entitled as such heir at law to the real estates, in case the personal estate should be sufficient to satisfy the debts, legacies, &c. or if not, then that he might be decreed entitled to such surplus of the real estates as should remain after satisfaction of such debts, legacies, &c. One of the executors, George Holdcroft, died before the suit was instituted. The surviving executors, William Kellett, Clerk, and Francis Henry Holdcroft, in their answer, submitted that the real estates were, by the will and for the purposes of it, turned into personal estate, to the residue of which they were entitled; or that, if there was no such conversion, yet that by the manifest intention of the testator they were legally and beneficially entitled to such part of the real estates as should remain after payment of the debts, legacies, &c. except the Barleyhill estate, specifically devised to the eldest son of the plaintiff. Laurence Kellett having died, his eldest son and heir at law, Richard Graham Kellett, revived the suit. The cause was brought on for hearing on bill and answer, on May 29, 1811; and on June 17, 1811, the Court decreed that the heir at law was entitled to the real estates, subject to the making up whatever deficiency there might be in the personal property as to the payment of the debts, legacies, &c. and ordered an account accordingly. From this decree the executors appealed.

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Decree for heir at law, June 17, 1811.

Appeal.

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Sir S. Romilly and ——— (for Appellants) contended that the real estates were well passed by the will, and that it was manifest on the face of it that the testator intended to give the residue of his whole property, real and personal, to his executors for their own benefit, and that the heir at law was disinherited.

Hart and *Bell* (for Respondents) relied upon the doctrine that there must be clear words, or necessary implication, to disinherit an heir at law, which here there were not; and they cited *Shaw v. Bull*, 12 Mod. 593.—*Piggott v. Penrice*, Pre. Ch. 471.—*Timewell v. Perkins*, 2 Atk. 102.—*Camfield v. Gilbert*, 3 East. 516.—*Berry v. Usher*, 11 Ves. 87. 92.—*Roe d. Helling v. Yeud*, 2 Bos. Pull. 214. The word *properties* did not pass the real estate. Under the words, "The remainder of "my properties I devise to my executors to make "good the above sums." The executors could not sell for any purpose but to pay debts and legacies, and there was a clear resulting trust for the heir, according to the doctrine of resulting trusts, as stated in *Hill v. Bishop of London*, 1 Atk. 618.—*King v. Dennison*, 1 Ves. Beam. 260.—*Robinson v. Taylor*, 2 Bro. Ch. Ca. 589. If the scales were balanced the heir at law turned them. The case of *Hardacre v. Nash*, 5 T. R. 716, and other cases of the same nature, were cases where the words *legacy* and *legatee* were held to relate to real estate, only in consequence of plain intention and particular circumstances appearing on the face of the will, furnishing irresistible evidence that the testator meant to disinherit the heir at law. The *devise* here to the

Piggott v. Penrice, Gilb. Eq. Rep. 187. Com. Rep. 250.

executors was merely for the purpose of executing the will, as far as related to the real estate.

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Romilly (in reply). The only question was what was the intention of the testator, and whether it did not appear on the face of the will that it was his intention to disinhérit the heir at law; and were it not for the word *legatees* it would be quite plain. If it had been "Residuary *devisees*" the matter would be quite clear. When he says, "the remainder "of my properties I devise, &c.," the word *properties* clearly applied to both real and personal; and on the other side they must contend that, in the same will, the remainder of my properties meant both, and that the residue applied only to the personal property. The words *devise* and *devisee* properly apply to real property; the words *bequeath* and *legatee*, to personal: but the question is, what was the intention. The cases cited for their purpose are very different from the present, and have no application.

It was discovered on the hearing in the House of Lords that neither the heir at law of the deceased executor, George Holdcroft, nor the personal representative of Laurence Kellett, had been brought before the Court, and the cause stood over till these parties were brought forward. It appeared that Francis Henry Holdcroft, who was before the House in his character of executor, was the heir at law of the deceased executor, but it was held necessary to bring him forward also in his character of such heir at law.

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Judgment.

Lord Eldon (C.) I should very much misrepresent the state of mind with respect to this question, if I did not say that it is a state of infinite doubt whether, according to the rules of law, and as collecting the intention of the testator from the whole of the will, the *residue* was intended by the testator to include the real estate. It is a whimsical way of putting it, but I feel a strong bias towards the opinion that he did mean to include it. I cannot say that the decision in this case is wrong, and I cannot say that it is right; but as I cannot say that it is wrong, it appears to me that the decree ought to be affirmed. I do not know what the state of my noble friend's (Redesdale's) mind is, as to the question of intention; but if he finds as much difficulty in it as I do, I feel for him. But the principle I take to be this, that if there is a doubt the heir cannot be excluded, because the rule is that he cannot be disinherited, except by express words or necessary implication.

Though it be very doubtful on the face of a will whether the testator did not mean to disinherit the heir at law, this is not sufficient to disinherit him

Lord Redesdale. I confess the state of mind is very much the same as that of the noble Lord; but the way to consider the matter is this, is it a clear rule of law that the heir shall not be disinherited, unless the Court can discover an evident intention to do so? If there is a doubt, the opinion of the Court below ought to turn the balance, and it is because I do not feel a doubt strong enough to reverse this decree, that I agree in the opinion that it ought to be affirmed.

Decree accordingly *affirmed*.

Agent for Appellant, ———.
Agent for Respondent, Bretham.