LECTURE VI.

(a) A will is the legal declaration of the intentions of the testator with respect to his property which he desires to be carried into effect after his death.(1)

(b) A codicil is an instrument made in relation to a will, and explaining, altering, or adding to its dispositions. It is considered as forming an additional part of the will.(2)

(a) A will is an instrument by which a person makes a disposition of his property to take effect after his decease, and which is *in its own nature* ambulatory and revocable during his life. It is this ambulatory quality which forms the characteristic of wills; for, though a disposition by deed may postpone the possession or enjoyment or even the vesting, until the death of the disposing party, yet the postponement is in such case produced by the express terms, and does not result from the nature, of the instrument. Thus, if a man, by deed, limit lands to the use of himself for life, with remainder to the use of *A* in fee, the effect upon the usufructuary enjoyment is precisely the same as if he should, by will, make an immediate devise of such lands to *A* in fee; and yet the case fully illustrates the distinction in question; for, in the former instance, *A*, *immediately* on the execution of the deed, becomes entitled to a remainder in fee, though it is not to take effect in possession until the decease of the settlor, while, in the latter, he would take no interest whatever

(1) Succession Act (X of 1865), s. 3, Probate and Administration Act (V of 1881), s. 3.

(2) *Ib.*

until the decease of the testator shall have called the instrument into operation.(1)

(b) Where a testator purports to make two bequests to the same person the word 'will' does not include a 'codicil'.(2)

Where a will has been revoked but there remains after the death of the testator a duly executed codicil thereto the codicil is entitled to be admitted to probate although the will has been revoked.(3)

Rule 1. To the Court of the domicile belongs the interpretation and construction of the will of the testator.

I hold it to be now put, beyond all possibility of question, that the administration of the personal estate of a deceased person belongs to the Court of the country where the deceased was domiciled at his death. All questions of testacy and intestacy belong to the judge of the domicile. It is the right and duty of that judge to constitute the personal representative of the deceased. To the Court of the domicile belongs the interpretation and construction of the will of the testator. To determine who are the next-of-kin or heirs of the personal estate of the testator, is the prerogative of the judge of the domicile. In short, the Court of the domicile is the *forum concursus* to which the legatees under the will of the testator, or the parties entitled to the distribution of the estate of an intestate, are required to resort.(4)

Succession to the immovable property in British India of a person deceased is regulated by the law of

(1) Jarman on Wills, 5th Ed., p. 18.

(2) Succession Act, s. 88.

(3) *Black* v. *Jobling* (1869), L. R., 1 P. &. D., 685. *In the goods of Turner* (1872), L. R., 2 P. & D., 403.

(4) *Per* Lord Westbury, L. C., *Enohin* v. *Wylie* (1862), 10 H. L. C., 1, at p. 13, but in that case the executors agreed to the jurisdiction of a Court other than the Court of domicile; *Doglioni* v. *Crispin* (1866), L. R., 1 H. L., 301.

British India, wherever he may have had his domicile at the time of his death. Succession to the movable property of a person deceased is regulated by the law of the country in which he had his domicile at the time of his death.(1)

A bequest to the children of a foreigner whether of movable(2) or immovable property(3) means to his legitimate children and by international law those children are legitimate whose legitimacy is established by the law of the father's domicile.(4)

Rule 2. No technical forms are necessary to convey the intention of the testator.(5)

The law has not made requisite, to the validity of a will, that it should assume any particular form, or be couched in language appropriate to its testamentary character. It is sufficient that the instrument, however irregular in form or inartificial in expression, discloses the intention of the maker respecting the posthumous destination of his property; and if this appear to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded.(6) The reason of this is because a testator is presumed by law to be *inops consilii*.(7)

Rule 3. The object of the interpretation of a will is to give effect to every part if possible.

There is one rule of construction which to my mind is a golden rule, *viz.*, that when a testator has

(1) Succession Act, s. 5.

(2) *In re Andros* (1883), 24 Ch. Div., 637.

(3) *In re Grey's Trusts* (1892), 3 Ch.,88.

(4) As regards domicile see ss. 6—19 of the Succession Act.

(5) Succession Act, s. 61.

(6) Jarman on Wills, 5th Ed., p. 19, cited with approval as correctly stating the law on the subject by Lord Selborne, L. C., in *White* v. *Pollock* (1882), 7 App. Cas., 400 at p. 409. Of course the wills of all persons governed by the Succession Act, the Hindu Wills Act (XXI of 1870), and the Oudh Estates Act (I of 1869) must conform to the provisions laid down by s. 50 of the Succession Act.

(7) *Surtees* v. *Ellison* (1829), 9 B. & C., 752.

executed a will in solemn form you must assume that he did not intend to make it a solemn farce—that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy.(1) Where there is a reasonable construction which results in a testacy, that construction must prevail rather than one which leads to an intestacy.(2)

Where a clause is susceptible of two meanings, according to one of which it has some effect, and according to the other it can have none, the former is to be preferred.(3) When, by acting on one interpretation of the words used, we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, then, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even if the construction adopted is not grammatically accurate.(4)

No part of a will is to be rejected as destitute of meaning, if it is possible to put a reasonable construction on it.(5)

But by "effect" is meant legal effect. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be effected by

(1) *Per* Esher, M. R., *In re Harrison* (1885), 30 Ch. Div., 390 at pp. 392, 393.

(2) *Ib., per* Fry, L. J., at p. 395.

(3) Succession Act, s. 71. *Arumugam* v. *Ammi* (1863), 1 M. H. C., 400; *Bhoobun Mohini* v. *Hurrish Chunder* (1878), 4 Cal., 23; s. c., 5 I. A., 138; *Akhoy Chunder* v. *Kalapahar* (1885), 12 Cal., 406; s. c., 12 I. A., 198.

(4) *Per* Lord Cranworth, *Abbott* v. *Middleton* (1858), 7 H. L. C., 68 at p. 89, cited by the P. C., *Indar Kunwar* v. *Jaipal Kunwar* (1888), 15 Cal., 725 at p. 749; s. c., 15 I. A., 127 at p. 147.

(5) Succession Act, s. 72.

surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded is the law of the country under which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displaces that assumption.(1)

Rule 4. The meaning of any clause in a will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other; and for this purpose a codicil is to be taken as forming part of a will. (2)

There are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorized and bound to construe the writing accordingly.(3) The true mode of construing a will is to consider it as expressing in all its parts, whether consistent with law or not, the intention of the testator and to determine upon a reading of the whole will,

(13) *Per* Turner, L. J., *Sreemutty Soorjeemoney Dossee* v. *Dinobundoo Mullick* (1857), 6 M. I. A., 526 at pp. 550, 551.

(1) Succession Act, s. 69. *Amirthayyan* v. *Ketharamayyan* (1890), 14 Mad., 65 at p. 69; *Skerrate* v. *Oakley* (1798), 7 T. R., 492, 494.

(3) *Per* Knight Bruce, L. J., *Key* v. *Key* (1853), 4 DeG. M. & G., 73 at pp. 84, 85.

whether, assuming the limitations therein mentioned to take effect, an interest claimed under it was intended under the circumstances to be conferred.(1) It is quite clear that, where a clause or an expression, otherwise senseless and contradictory, can be rendered consistent with the context by being transposed, the Courts are warranted in making that transposition.(2)

Rule 5. General words may be understood in a restricted sense where it may be collected from the will that the testator meant to use them in a restricted sense; and words may be used in a wider sense than that which they usually bear, when it may be collected from the other words of the will that the testator meant to use them in such wider sense. (3)

Corollary.—If the same words occur in different parts of the will they must be taken to have been used everywhere in the same sense, unless there appears an intention to the contrary. (4)

The main principle upon which you must proceed is, to give to all the words their common meaning: you are not justified in taking away from them their common meaning, unless you can find something reasonably plain upon the face of the document itself to show that they are not used with that meaning, and the mere fact that general words follow specific words is certainly not enough.(5) It is, however, incumbent on those who contend for the limited construction, to show that a rational interpretation of the will requires a departure from that which ordinarily and *primâ facie* is the sense and meaning of the words.(6) It is, however, a

(1) *Tagore* v. *Tagore* (1872), 9 B. L. R., 377 at p. 409; s.c., I. A., Sup. Vol., 47 at p. 79; 18 W. R., 359 at p. 371.

(2) Jarman, p. 465, and see cases cited there.

(3) Succession Act, s. 70.

(4) Succession Act, s. 73.

(5) *Per* Rigby, L. J., *Anderson* v. *Anderson* (1895), 1 Q. B., 749 at p. 755.

(6) *Per* Knight Bruce, V. C., *Parker* v. *Merchant* (1842), 1 Y. & C. Ch., 290 at p. 300.

general rule of construction that where a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class.(1) But if the particular words exhaust a whole *genus* the general word must refer to some larger *genus*.(2) The mention of one particular class of things, coupled with general words, will not cut down the general words. Thus, under a bequest of furniture and other movable goods in a house, money will pass. On the other hand, if there is a long enumeration of particulars, such as furniture, plate, linen, and the like, followed by general words, the general words will be confined to things *ejusdem generis;* so that, for instance, money in the house would not pass.(3) In a gift of household furniture and effects, the word "household" is to be read as limiting effects as well as furniture. Such words pass lathes, sewing and copying machines, tools, an organ, pictures, books, wines and liquors, but not fowling pieces, a cow, a pony, a parrot, jewellery, or stock-in-trade.(4) But if it is clear that the gift is not meant to be residuary, and the large words, if not confined to things *ejusdem generis*, would carry the residue, they must be so confined. This is the case if there is an express residuary gift.(5) In *Mahomed Shumsool* v. *Shewukram*(6) the words "heir and *malik*" as applied to a woman were construed by the Privy Council in a restricted sense and their Lordships there say (7): "In construing the will of a Hindu it is not

(1) *Per* Pollock, C. B., *Lyndon* v. *Standbridge* (1857), 2 H. & N., 45 at p. 51.

(2) *Per* Willis, J., *Fenwick* v. *Schmalz* (1868), L. R., 3 C. P., 313, at p. 315.

(3) Theobald, 7th Ed., p. 207, and see cases cited there.

(4) *Ib.*, p. 205.

(5) *Ib.*, p. 227.

(6) (1874), 2 I. A., 7; s. c., 14 B. L. R., 231.

(7) P. 14.

improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family ; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate." On the other hand in *Lala Ramjewan Lal* v. *Dal Koer*(1) the word *malik* as applied to a Hindu daughter was held to confer an absolute estate. The word *Dakhilar* though ordinarily meaning "occupant" was construed in reference to the context as possessor or manager without beneficial interest. (2) But where the language of a will is clear and consistent it shall receive its literal construction unless there is something in the will itself to suggest departure from it.(3)

The rule is distinct, that unless there is some very strong indication to the contrary, on the face of the will, the same words must mean the same thing in every part of the same will in which they are used.(4) But the same words applied to different subject-matter may bear a different meaning(5) and if words acquire a special meaning by reason of their context it is not safe to give that meaning to them when used in a different context.(6) It is dangerous where words have a fixed legal effect to suffer them to be controlled without some

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(1) (1897), 24 Cal., 406. See also *Lalit Mohun Roy* v. *Chukkun Lall Roy* (1897), 24 I. A., 76 ; s. c., 24 Cal., 831.

(2) *Tarachurn* v. *Suresh Chunder* (1889), 16 I. A., 166.

(3) *Gurusami* v. *Sivakarni* (1895), 22 I. A., 119 at p. 128 ; where the Privy Council refused to construe the words "have issue" in a restricted sense as meaning "leave issue."

(4) *Harvey* v. *Harvey* (1863), 32 Beav., 445.

(5) *Forth* v. *Chapman* (1719), 1 P. W., 667 (*n*) ; *Bamford* v. *Chadwick* (1854), 2 W. R., 531, 532.

(6) *Ballin* v. *Ballin*, *per* Wilson, J. (1881), 7 Cal., 224.

clear expression or necessary implication. The rule is that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise. (1) Nor can a clear devise be altered, modified or cut down except by clear words to that effect. Thus a bequest by a Hindu testator of a four-anna share of a zemindari to his youngest widow and her son for their maintenance with power to them to alienate by sale or gift the property bequeathed was construed as conferring on each of the legatees an absolute interest in a two-anna share of the zemindary and it was held that the words "for your maintenance" did not reduce the interest of either legatee to one for life only. (2)

Rule 6.—Where any word material to the full expression of the meaning has been omitted it may be supplied by the context. (3)

With regard to the discretion of the Court to supply words in a will, the cases are very numerous, but I think they may be classed under two heads: the first is, when the will is in itself capable of bearing any meaning unless some words are supplied so that the only choice is between an intestacy and supplying some words; but even there, as in every case, the Court can only supply words if it sees on the face of the will itself clearly and precisely what are the omitted words, which may then be supplied upon what is called a necessary implication from the terms of the will and in order to prevent an intestacy. The second class of cases

(1) *Per* Lord Redesdale, *Jeeson* v. *Wright* (1820), 2 Bligh., 56, 57.

(2) *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (1896), 23 Cal., 670; 23 I. A., 37; overruling *Vydinada* v. *Nagammal* (1888), 11 Mad., 258, on the question of the severance of the joint tenancy which had been created by the will between the widow and her son.

(3) Succession Act, s. 64, Illustration.

is like *Spalding* v. *Spalding* (1) where there is a clear and precise gift and a contingent limitation over, which is clearly expressed, but is not commensurate with the previous gift, the contingency being either in excess, as in many of the cases where the gift over has been upon a death without issue, and the Court has thought itself at liberty to curtail that gift over, by introducing the word "such" issue, or where there has been a defect, as in *Spalding* v. *Spalding* (1) and *Abbott* v. *Middleton* (2), where the limitation has been to one for life with remainder to his children, or to one in tail with remainder to his children, or to one in tail with a limitation over on a contingency, and the Court has held the gift over to be by way of substitution for the original gift, in the event of the original gift failing, and has found the contingency too narrow to fit that event, and has thought itself at liberty, from the whole context of the will, to supply words, there being a necessary implication that the gift over was intended to be reduced so as to suit the previous gift." (3)

If the contents of a will show that a word has been undesignedly omitted or undesignedly inserted, and demonstrate what addition by construction or what rejection by construction will fulfil the intention with which the document was written, the addition or rejection will by construction be made. (4)

(1) Cro. Car., 185.

(2) Jur. N. S., 1126. *See* also (1858), 7 H. L. C., 68.

(3) *Per* Sir W. Page Wood, V. C., *Hope* v. *Potte*, (1857), 3 K. & J., 209.

(4) *Per* K. Bruce, L. J., *Pride* v. *Fooks* (1858), 3 DeG. and J., 266, 267.