1857:
April 27th.

Will.
Construction.

A testator gave by his will as stated in the text. He left one daughter only by his first wife; he left children by his second marriage:—Held, that the remainder expectant on the wife's decease was not undisposed of, but went to the children of the second marriage.

TUNALEY *v.* ROCH.

THIS was the hearing of the cause, and the question argued was on the effect of the will of *Robert Tunaley*.

Robert Tunaley's will, dated the 14th February, 1805, was as follows:—

"First, I direct that all my just debts, &c. be paid; and after payment thereof, I give to my daughter *Mary Tunaley* the sum of 500*l.*, to be paid to her twelve months after my decease."

"I give to my friends Mr. *James Oakes* and Mr. *George Tritche*, both of *Derby*, (1) all the residue of my estate and effects of what nature or kind soever, except my household furniture, plate, linen and china, upon trust to permit my dear wife *Constantia Tunaley* to receive and take the rents, issues and profits thereof for her life, (2) and for the maintenance of herself and such children as I may have by her living at the time of my decease, till such child or children shall respectively attain the age of twenty-one years, subject to the legacies and provisions hereafter expressed. (3) I give to each of my children I shall have by my said dear wife the sum of 500*l.*, to be paid to them as they shall respectively attain the age of twenty-one years; (4) but in case of the decease of my said dear wife before they attain

that age, then my said trustees to apply the interest of my said estate and effects in their maintenance and education till they arrive at that, and to be equally divided between them, but in case any of them shall die under the age of twenty-one years, the share of such child or children so dying to go and be equally divided among the survivors or survivor of them. I also give to my said dear wife all my household furniture, plate, linen and china that may be in my dwelling-house at the time of my decease, to be at her own disposal, and not subject to the proviso hereafter mentioned: (5) provided always, and it is my will that in case my said dear wife shall marry again, then all my before-mentioned estate and effects shall go to and be equally divided amongst my said children by her in equal portions as they attain twenty-one, and subject to their maintenance and education in the meantime." The testator died in 1820. The widow died in 1854, without having again married.

The Plaintiff claimed, as heir-at-law, the real estate and a share of the personal estate devised and bequeathed to the widow for her life; alleging that as to the remainder expectant on the wife's decease there was intestacy.

The Defendants claimed under the limitations as tenants in remainder.

Mr. *Baily* and Mr. *Toller*, for the Plaintiff.

Mr. *Glasse* and Mr. *Amphlett*, for the Defendants.

The following cases were cited:—*Napper* v. *Sanders* (*a*),

(*a*) Hutton, 118.

1857.

TUNALEY v. ROCH.

1 *Jarm. Wills* (*a*), *Abbott* v. *Middeton* (*b*), *Luxford* v. *Cheeke* (*c*), *Edwards* v. *Champion* (*d*), *Hart* v. *Tribe* (*e*), *Doe* v. *Cundall* (*f*), *Fitz Henry* v. *Bonner* (*g*).

The VICE-CHANCELLOR:

Judgment.

I adhere to the general proposition which I acted on in *Fitz Henry* v. *Bonner*. In this case I must look at the circumstances in which the testator was placed at the time of making his will. He had married a second wife; he had one daughter only by his first wife, who is since dead. And I assume that he had some children by his second wife; at any rate he might have and might contemplate having children by that second marriage. Now he means clearly that his daughter, by the first marriage, should have nothing but the 500*l.* which he has given to her for her provision.

Then having done that, he had the residue of his property remaining for a provision for his second wife and such children as he might have by her. Having made provision for his daughter, he gives to his trustees "all the residue, &c., upon trust"—[His Honor stated the paragraph No. 1.],—and then he proceeds to declare the trusts. He imposes on that gift an obligation on his widow to maintain the children. [His Honor referred to the paragraph No. 2.] So far there can be no doubt; it was a life estate to the wife, not defeasible on any of the children attaining twenty-one; but at the same

(*a*) Page 690.
(*b*) 1 Jur., N.S. 1126.
(*c*) 3 Lev. 125.
(*d*) 1 De G. & Sm. 75.
(*e*) 18 Beav. 215.
(*f*) 9 East, 400.
(*g*) 2 Drew. 36.

time, as long as any of them were under twenty-one, those children were to be maintained. Then he adds these words, "subject to the legacies and provisions hereinafter expressed." Now suppose any of the children while the wife lived attained twenty-one, then those children ceased to have any interest during the life of the wife, and he meets that thus: "I give to each of my children"—[His Honor stated the paragraph No. 3.]

So that if, living the wife, any children ceased to be entitled to maintenance, those children would each have 500*l.* Then follows this clause:—"But in case of the decease of my dear wife"—[His Honor stated the paragraph No. 4.] That is, if the wife died before *they* attain twenty-one. *Primâ facie*, that means before *all* attain twenty-one; and then the trustees are to apply the income to *their* maintenance.

It appears to me the effect of this is merely to substitute the act of the trustees for the act of the wife; they are to be charged with the maintenance of the children instead of the mother: and each child would have 500*l.* as he attained twenty-one, whether the widow were living or not.

Then follow the words, "And to be equally divided between them, but in case any of them shall die under the age of twenty-one, the *share* of such child or children so dying to go and be equally divided among the survivors or survivor of them."

Now the question is, to what are these words to be applied? Did the testator mean to apply them to the direction for maintenance by the trustees; or did he mean to apply them to all his property, so as to make

1857.

TUNALEY v. ROCH.

that property equally divisible. Now we find that immediately after that passage, having first proceeded to dispose of his furniture, &c., &c. he concludes his will by saying, "Provided always—[His Honor stated paragraph No. 5.]

Now it is perfectly clear the testator meant that if his widow should marry again, whether the children were under twenty-one or had attained twenty-one, then his property was to be divided between the children as they should attain twenty-one, but subject to their maintenance and education; and it is very improbable that the testator should have meant, that if his widow married again his property should be so divided, but that if she did not marry again, he meant to die intestate. The improbability, however, is not so strong as that, if there were nothing in the will to repel it, I should be compelled to say the testator could not have intended that. But the question is, whether the improbability is not so great, as to leave me at liberty, in reference to a clause of doubtful interpretation, to put that interpretation on the clause which will be consistent with probability.

Now the clause of doubtful construction is the clause beginning "and to be equally divided between them, but in case:" that is the doubtful clause; the question is whether that applies to the mere *interest*, or to the *corpus*.

Now look at the sentence itself, "to be equally divided between them." These first words, if alone, *might* mean that the children were to have maintenance and education in equal shares. But at the same time, even on that

clause alone, it would be a very improbable meaning to attach to the words, to construe them as referring to maintenance only. But then when we come to the words, "the share of such child, &c. to go and be divided equally," the question is, the share of what? It is argued, it means a share of the interest; but the children had no *shares* of the interest. Maintenance is given no doubt, but maintenance only under twenty-one, and then it is at an end. Therefore, on the clause itself, it is contrary to probability to suppose that the testator when he gave over the share of a child dying under twenty-one, meant a share of interest, when he had given no share of interest to that child. It is much more natural to suppose that he meant to speak of the shares which the children on attaining twenty-one would take in the *corpus*.

Now then let us take the last clause, having considered the probability of what the testator meant by the intermediate clause. In the last clause he clearly means, that if the widow married again, the property was to be divided whether the children had or had not attained twenty-one. Is it then to be supposed that the testator meant that if she did not marry again, his estate was to be undisposed of? Now I have in this will a clause which *may* mean the shares of the *corpus*. I am not here deciding on implication. I am not, in the absence of a gift, implying a gift. I am proceeding on the interpretation of a doubtful clause, which may mean a gift, and I am gathering that interpretation, not from the clause itself, but from the context.

I think, on this view of it, that the testator meant to give his estate to the children of his second wife in any

1857.

TUNALEY v. ROCH.

event, whether of his second marriage or of his death, subject to the provision he had made for his wife.

Declaration, that the children of the second marriage were entitled.