REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

High Court of Chancery,

FROM THE YEAR 1789 TO 1817.

29 to 57 GEO. III.

BY FRANCIS VESEY, JUNIOR, ESQ.

OF LINCOLN'S INN, BARRISTER AT LAW.

VOL. XV.

1808—1809. 48 AND 49 GEO. III.

THE SECOND EDITION.

LONDON,

PRINTED AND SOLD BY

SAMUEL BROOKE, 35 PATER-NOSTER ROW;

SOLD ALSO BY

MESSRS. BUTTERWORTH & SON, FLEET STREET;

MESSRS. J. & W. T. CLARKE, PORTUGAL STREET.

1827.

1808.
Feb. 1*st.*
May 9*th.*

LEIGH *v.* LEIGH.

THE LORD CHANCELLOR.
THOMPSON, *Baron.*
LAWRENCE, *Justice.*

Devise to the Devisor's sister *A.*, then unmarried, for life; with remainders to her first and other sons in tail male; to her daughters in tail, as tenants in common; to his sister *B.*, then married, for life, and to her first and other sons in tail: remainder to the first and nearest of his kindred being male and of his name and blood, that shall be living at the determination of the estates before devised, and to the heirs of his body.

A person, claiming under the last limitation, must be of the name, as well as the blood; and the qualification as to the name is not satisfied by having the name, taken by the King's License, previous to the determination of the preceding estates.

THE Bill in this cause stated the Will of Lord *Leigh*, dated the 11th of *May*, 1767; devising all his estates, subject as to part to a term of five hundred years, to his sister *Mary Leigh* for her life; with remainder to her first and other sons in tail male; remainder to her daughters in tail general, as tenants in common; remainder to his sister *Ann Hachet* for her life; remainder to her first and other sons in tail; with a limitation in remainder in these words: "Unto the "first and nearest of my kindred being male and of my "name and blood that shall be living at the determina- "tion of the several estates herein before devised and to "the heirs of his body lawfully begotten."

The Bill farther stated the death of Lord *Leigh* in the year 1786, and of *Mary Leigh* in *June*, 1806, without issue: *Ann Hachet* having died in her life-time without issue; and that at the time of the death of Mrs. *Leigh* the Plaintiff was and is the first and nearest of kindred, being male, of the name and blood of the testator, living

living at the death of the said *Mary Leigh*; and that, being the son of *John Smith*, Esq. he had on the 8th of *April*, 1802, obtained his Majesty's License, that he and his issue might assume and take and use the surname of *Leigh*, instead of that of *Smith*, which surname of *Leigh* he has ever since assumed, taken and used.

The Bill prayed an account of the rents and profits of the estates, formerly belonging to Lord *Leigh*, and comprised in the term of five hundred years, and that the trustee of the term may assign it to the Plaintiff; and deliver up to him all deeds and writings respecting it.

To this bill a Demurrer was put in.

Sir *Samuel Romilly*, Mr. *Trower*, and Mr. *East*, in support of the Demurrer.

The Plaintiff claims as the first and nearest of kindred, being male, of the name and blood of the testator Lord *Leigh*, living at the death of his sister *Mary Leigh*; and the only question is, whether the Plaintiff is entitled under the last limitation in the Will of Lord *Leigh*; or is upon the statement of his bill a mere stranger, without interest in these estates. The demurrer is in substance, that the Plaintiff has shewn no title to relief in equity; and this is a mere question of intention. The Plaintiff must shew, that he answers every part of this description. The intention of the testator must have been, that his estates should go, either to the person, most nearly related to him, being male, and who had the name of *Leigh* by inheritance; or he must have had the object, for the purpose of preserving the name, that the estates should go to a person of that name. No anxiety appears in any part of this Will to perpetuate the name; and it appears

1808.
LEIGH
v.
LEIGH.

pears clearly, that he had no such desire, from the previous limitations to his two sisters, and their issue; and the circumstance of the name is only introduced upon the improbable event, that both his sisters might die without issue: both being then young; and one of them married. The estates also are limited expressly even to the daughters of Mrs. *Leigh*. His intention therefore was to mark, as he has with great anxiety, his nearest relation of the male line; that person also having the name of *Leigh* by inheritance, not by purchase.

The statement of this bill, that the Plaintiff's name was *Smith*, is equivalent to stating, that he is a relation in the female line. In *Box* v. *Smith* (83) under a devise to the next of his name it was held, that a married daughter could not take. *Jobson's Case* (84) is to the same effect. In *Counder* v. *Clarke* (85). *A.* had issue a son and a daughter: the daughter married; and had issue two daughters. *A.* devised to his son, but, if he die without issue, "to my right heirs of my name and "posterity:" the son being dead without issue, it was held, that the land should not go to the uncle; for, though of his name, he is not heir; for the issue of the daughter is heir.

The result of those authorities is, that the party must answer both parts of the description. In *Barlow* v. *Bateman* (86) the House of Lords determined upon the intention, that the daughter should marry a person, entitled by birth to the name and arms of the family; not one, who had assumed them. Lord *Hardwicke* in *Pyot* v. *Pyot*

(83) *Cro. Eliz.* 532.
(84) *Cro. Eliz.* 576.
(85) *Hob.* 29. *Moor*, 860. 1 *Brownl.* 129. Stated by Mr. *Hargrave* from Lord *Hale's* MSS. *Co. Lit.* 24 *b.* note 145.
(86) 3 *P. Will.* 65. 4 *Bro. P. C.* 194.

v. Pyot (87) expresses the same opinion; referring to that case with approbation; and puts the very case now before the Court (88): "If it refers to the name, suppose "a person of nearer relation than any of those now "before the Court, but originally of another name, "changing it to *Pyot* by Act of Parliament: that would "not come within the description of nearest relation of "the name of *Pyot*; for that would be the contrary to "the intention of the testatrix; and yet that description "is answered; being of the name of *Pyot* and perhaps "nearer in blood than the rest." It is not probable, that the testator should intend, that the name should be assumed in this way; which might afterwards be relinquished. A name, taken with the view, as Lord *Hardwicke* expresses it, to a scramble for an estate, is in some degree a fraud upon the testator's intention. *Pyot* v. *Pyot* (89) is a case of a mixed nature; and the argument, as to real estate, that the description is to be confined to the first and nearest in course of descent, was inapplicable to personal property: but as the real estate was involved with the personal, the construction, applicable to the latter, was applied to the real estate: the Will as to the personal estate, which could not be taken from them, furnishing the rule as to the real: but Lord *Hardwicke*, contemplating the circumstance of a person, assuming the name for the purpose of entitling himself to the testator's bounty, puts almost in precise terms this case; and declares, that the assumption of the name by Act of Parliament for that purpose would not do. In *Barlow* v. *Bateman* (90) the condition was to marry any person of the name of *Barlow*; not, as in this Will, looking to any particular line of descent. There was a ground

(87) 1 *Ves.* 335.
(88) 1 *Ves.* 338.
(89) 1 *Ves.* 335.
(90) 3 *P. Will.* 65. 4 *Bro. P. C.* 194.

1808.
LEIGH
v.
LEIGH.

ground therefore for the opinion of the *Master of the Rolls*.

This rule is laid down by Lord Chief Justice *Willes*, that the intent of the testator ought always to be taken, as things stood at the time of making his Will, and not to be collected from subsequent accidents; which the testator could not then foresee (91). This testator's preference of the male line of his family, as in *Chapman's Case* (92), is evident: but he does not sacrifice to that object his sisters; who had immediate claims upon him.

The Lord CHANCELLOR.

The Plaintiff's argument must admit, that, if Mrs. *Hachet* had a daughter, and that daughter had a son, that son, taking the name of *Leigh* by his Majesty's Licence, would have excluded all the males.

For the Demurrer.

The fair conclusion is, that the testator meant a person in the male line by patronimic descent; and could not mean any remote descendant in the female line; overlooking those, who were nearer. He might think it right, that an estate, descended for ages in the paternal line, should not go to the maternal line; deviating from that course only in favor of the immediate object, his sisters, and their families. Upon several authorities, "blood" is included in "kindred:" by the subsequent use of the word "blood" therefore the testator must be taken to mean something more: viz. "name by blood;" and some effect must be given to every word; if that can be. That this is the true etymology and sense appears in

(91) *Willes*, 297. *Doe, on dem. of Morris* v. *Underdown.*

(92) *Dy.* 333 *b.*

in *Sir Moyle Finch's Case* (93): "*Cognomen Majorum "est ex Sanguine tractum*" (94). The name therefore under this Will must be the name by blood: not a name, assumed afterwards merely to answer this particular purpose; and the Plaintiff both under the authorities and the intention does not answer the description.

Mr. *Richards*, Mr. *Leach*, and Mr. *William Agar*, for the Plaintiff.

If the paternal line is to be considered as the testator's object, it does not, upon this record, follow, that the Plaintiff has not descended through his mother from the family of *Leigh*. In the first devise the testator certainly does not affect any care about the name of *Leigh*. He passes by the daughters of his second sister; and prefers the person, answering the subsequent description; whoever he may be; perhaps a collateral relation very distant. The question comes to this; whether this Plaintiff is not to be considered as the devisee; appearing at this, the given time, with the name; though previously to the year 1802 he bore the name of *Smith*. Upon this argument it must be admitted, that he answers all the other requisites; and it is too much upon this Will, devising to a person, who might be a very remote relation, to the exclusion of the daughters of the testator's sister, to conclude, that he had a predeliction for persons of the name of *Leigh*, merely on that account. The construction must be upon the Will itself; not upon supposed cases, never contemplated by the testator.

In *Barlow* v. *Bateman* (95) the opinion of Sir *Joseph Jekyll*, that even a voluntary assumption of the name, without licence, would do, and his reasoning upon the *subject of surnames, are strong in this Plaintiff's favor; and the Reversal of the Decree does not form an objection. [*98]

(93) 6 *Co.* 63.
(94) 6 *Co.* 65.
(95) 3 *P. Will.* 65. 4 *Bro. P. C.* 194.

1808.

LEIGH v. LEIGH.

jection. It must be recollected, that the prerogative to grant arms, an important appendage to the surname of a family, yet subsists; and the Court of Chivalry is still in existence. No person by his own authority can assume arms. A person, bearing arms, must necessarily be of that family, whose arms he bears. In that case the arms could not, as the name might, be assumed: that person therefore could not answer the description in the most important respect; as a man of the family of *Barlow*, having, not only the name, but the arms also, was intended.

This Plaintiff has by that authority had the name of *Leigh* ever since the year 1802: he is also of the blood, and the first and nearest kindred of the name and blood. He must admit, as your Lordship has observed, that if a daughter of Mrs. *Hachet* had a son, that son, having assumed the name of *Leigh*, would have answered the description; and must have had the preference: but, the Plaintiff being the person, who answers the description, the circumstance, that another person might have come into existence, and might have had a preferable title, cannot form an objection. What is the meaning of a surname by birth? It is acquired only by usage; and may be abandoned. The Court is desired to introduce into this limitation these words "by course of patro-"nimic descent." Words in a Will are to be understood according to their plain and sensible import; unless that sense would give an irrational intention; or is controuled by a clear intention, collected from other parts of the Will. This testator seems to have had two objects: to perpetuate the estate in his name; and that it should be so perpetuated by the first and nearest of his kindred. He uses the term "*name*" generally; which must be [*99] *understood, by whatever means acquired. That construction, which advances both the objects, is the most sensible. If the testator had left a niece, who had a son,

is

1808.

LEIGH v. LEIGH.

is the inference irrational, that, if his object would have been promoted by that son's taking the name, the testator should have intended to prefer that son to a very remote relation? The construction, contended by this demurrer, must exclude that case. Although words may be added in a Will, or qualified, from the plain intention, collected from other parts, plain words cannot be controuled by conjecture. Is the argument irrational, that the testator intended, not to impose the condition upon a near relation, a grandson of his sister Mrs. *Hachet*, for instance, according to the case put by your Lordship, but that it should be annexed to the limitation in favour of a more remote relation? Why should he prefer the male line, except to perpetuate the name? Most of the authorities, which have been cited, are upon the general construction of the word "name." Lord *Hardwicke*'s construction in *Pyot* v. *Pyot* (96), that it was not necessary, that the claimants should be of the name of *Pyot*, according to the description of the Will, if they were of the stock, appears extraordinary.

LAWRENCE, *Justice*.

According to a manuscript note of that case, which I have, the bequest was "to my nearest relation of "the name," not "of *Pyot*," but "of the *Pyots*;" and that circumstance appears to weigh with Lord *Hardwicke* (97).

For the Plaintiff.

That makes it consistent; and a clear authority for this Plaintiff; who was not necessarily to have the name of *Leigh*: the limitation, not being to a person, bearing that name, is satsfied by a person, sprung from his name and blood. [*100]

In

(96) 1 *Ves.* 335.

(97) 1 *Ves.* 338. Mr. *Belt*, in his *Supplement*, page 161, says, that the words "*of the name*" are not in the *Register's Book*.

1808.

LEIGH v. LEIGH.

In *Sheppard's Touchstone* (98) several cases are put as to the meaning of the word "nearest."

In *Barlow* v. *Bateman* (99) the only reason, stated in the Appeal, is, that the Respondent could not assume the name legally, otherwise than by Act of Parliament. This Plaintiff has legally assumed the name, by the King's license. The question is, not, whether that assumption is voluntary; as it is in either case; but, whether it is legal: and this mode, by the King's license, is the daily course. A name can legally be assumed only by one of these two modes; which are mentioned by Lord *Mansfield* in *Gulliver* v. *Ashby* (100). Suppose the branch, which the testator was supposed to prefer, had changed the name of *Leigh*; and acquired another, by the King's licence.

The Lord CHANCELLOR.

A person, taking a name by Act of Parliament, does not lose his original name; and might take a legacy by it. The effect of the King's license is only permission to use a name: not imposing it.

In that case he would not have lost the other name. An Act of Parliament, giving a new name, does not take away the former name: a legacy given by that name, might be taken. In most of the Acts of Parliament for this purpose, there is a special proviso to prevent the loss of the former name. The King's license is nothing more than permission to take the name; and does not give it. A name, therefore, taken in that way, is by voluntary assumption (1).

For

(98) Page 436.

(99) 3 *P. Will.* 65. 4 *Bro. P. C.* 194.

(100) 4 *Bur.* 1929; see 1940.

(1) In *Doe, on the demise of Luscombe* v. *Yates*, 5 *Barn. & Ald.* 544, the voluntary assumption of a name was held sufficient to prevent a Forfeiture; though the farther direction, to procure within a limited time an Act of Parliament, or other sufficient authority, had not been followed; that term upon the construction of the Devise not being imperative.

For the Plaintiff.

The person who answers the description, when the contingency happens, is to take. The Plaintiff is therefore entitled, as having the name, acquired legally, at that time, and no other name; and the Court will not strain in favour of a much more remote relation.

Sir *Samuel Romilly*, in Reply.

The proposition, advanced by the demurrer is, that, taking the whole of this Will together, the testator intended a person, who is of his name, as being of his blood; answering also the other parts of the description; every part of which points to connection with him and his family. It would be difficult to express the idea he had by other words: it could not be done by merely inserting the words "by descent;" though for convenience used in the argument; as strictly a man cannot be said to have a name by descent; taking nothing by descent until the death of the ancestor. The testator must have intended, either a person having his name, as being of his blood, as connected with him; or, that the person, enjoying his estate, should have the name; and the latter construction is excluded by shewing, that he had no such anxiety, that the name and the estate should go together. The object, attributed to him, not to impose this condition of taking the name upon such near relations as his sisters, or their immediate issue, but to shackle the estate of a more remote descendant, is absurd. An object so extraordinary, it is to be presumed, would have been secured by an express condition. Upon the whole Will no other intention can be attributed to him than to express a person having the name by blood: that is, as being of the blood.

The case of *Barlow* v. *Bateman* (2) is a direct authority;

(2) 3 *P. Will.* 65. 4 *Bro. P. C.* 194.

1808.
LEIGH
v.
LEIGH.

rity; and a much stronger case than this. By the extract from the Will, in Mr. *Cox*'s note, and according to the printed case in the House of Lords, it appears, that nothing about the arms was expressed. The assumption of a name by Act of Parliament is as much a voluntary act as by the King's licence, or without any authority. The King's licence merely gives permission to the party to use the name, if he thinks proper: not imposing upon him the necessity of taking it; and, the bill states, that the Plaintiff assumed the name of *Leigh* instead of that of *Smith*. What would have been the offence of not using the former? A name by Act of Parliament, with the express injunction to use that name *only*, would form a case of considerable difficulty; and probably the party, being restrained from taking the name, would not be entitled to the estate. The case of *Pyot* v. *Pyot* (3), with the explanation, that has been given, is very intelligible.

May 9th.

LAWRENCE, *Justice*, having stated the case, delivered the following opinion:

The demurrer to this bill, admitting the facts, stated in it, has raised the questions; upon which your Lordship has been pleased to call upon us for our assistance; which were, whether it be not necessary, that the person, entitled under the devise in question, should be both of the blood and name of the testator; and, if it be, whether the being of his name is satisfied by the Plaintiff's having assumed the name of *Leigh* by his Majesty's licence; in answering which the only inquiry to be made is, what was the intent of the testator; and whom did he mean to describe by the words he has used.

Though

(3) 1 *Ves.* 335.

1808.

LEIGH v. LEIGH.

Though the Plaintiff, by taking the name of *Leigh*, may have brought himself within the letter of the Will, yet the demurrer does not admit, as was said in argument, that he answers the description in the Will; for that will depend on whether the Plaintiff comes within the meaning of the words; as they have been used by the testator; and, though it be true, that, if that meaning be ascertained, no reasoning from supposed cases can induce the Court to put a different construction upon the Will, but can only lead to a conclusion, that the testator did not see all the consequences of the disposition, he may have made, yet in endeavouring to ascertain the meaning of a testator, the absurdities, improbabilities, and inconsistencies, which may arise out of cases, falling within one construction, or another, have constantly been attended to, with a view of ascertaining such meaning.

If the meaning of a Will is ascertained, reasoning from supposed cases will not induce the Court to make a different construction; but can only lead to a conclusion, that the Testator did not see all the consequences: but the absurdities, improbabilities, and inconsistencies, which may arise out of cases, falling within one construction or another, are attended to, with a view of ascertaining the meaning.

In the course of the argument it was stated at the Bar, and I think justly, that the testator in requiring the remainder-man to be of his name could only have one of two objects in his view: viz. either that of continuing his estate in the name of *Leigh* from attachment to it, by inducing those, who from time to time might answer the other descriptions in his Will, to assume that name, and thereby to complete in themselves the whole description, which he willed the remainder-man should answer; or else, that of adding to the circumstances, he had before required of the remainder-man, a farther character, independent of any act of his own: and which could only belong to him in consequence of his descent from the same stock with the testator; with a view of excluding all of that stock, who might not have that additional character belonging to them.

In order to ascertain, whether the first of these two objects was that, which the testator had in his view, the situation

1808.

LEIGH v. LEIGH.

situation and circumstances of his family at the time of making his Will have great weight. He does not appear to have had any very near relations but his two sisters; for how near a cousin, Mr. *Craven* was, does not appear; one of his sisters was single; and the other married to a gentleman of the name of *Hachet*. These sisters in different degrees were the immediate objects of his bounty; and were with their children the only persons, whom in the disposition of his real estates he can be said to have distinctly contemplated. To his sisters he gave estates for life, and to the sons and daughters of the one and the sons of the other he gave estates tail, without any reference whatever to his own name.

From these limitations in his Will it has been argued, and I think truly, that his requiring the name of *Leigh* of the remainder-man could not proceed from any anxiety about the continuance of his name; as such anxiety is perfectly inconsistent with a disposition, which, if his estate followed the first limitations of his Will, in the family of either of his sisters, (as at the time of making his Will it was likely to do) would occasion an immediate disuse of his name during the lives of both his sisters; if the single one should marry: (an event he certainly contemplated); and during the lives of the issue male and female of the one, and of the issue male of the other; if they should have such issue; and a disuse of the name for ever; if the remainder in question should be barred by any of those, to whom the estate was limited in tail. Had an attachment to his name been his motive, the natural thing for the testator to have required would have been the continued and uninterrupted use of it by all those, to whom he had limited his estate; and his not requiring it of his sisters and their issue, but expecting it from a remote remainder-man, is not, I think, satisfactorily accounted for, from a supposition, that they would have felt the

the value of the limitations in their favor lessened by their being called on to bear the name of their ancestors; and the extinction of the name for generations, and possibly for ever, is not to be reconciled with any solicitude in the testator to preserve it; and therefore an attachment to his name does not appear to me the reason of his requiring the remainder-man to be of that name.

Another circumstance, from whence the same inference may be drawn, is that of the testator not having taken the usual and proper steps to provide, that the first and nearest of his kindred should be of the name of *Leigh*; by making it a condition, that he should assume the name, if at the determination of the prior estates he did not bear it; for, whether the remainder-man must have all the enumerated qualifications to be entitled, or whether he may be entitled, though he be not the first and nearest of the testator's kindred, being male, provided he be the first and nearest of the name, the consequence of not taking such steps might be, that the remainder might be entirely defeated; or the estate go to one, not the first and nearest; without any default in him, who might be the first and nearest of the testator's kindred; for, if all the enumerated circumstances must unite, an infant of a day old, who united in himself every part of the description, but that of the name, and, on account of his recent birth, could not assume the name, would by his birth prevent the remainder vesting in any other; and, if the terms of the limitation would carry the estate to the first and nearest, who at the determination of the prior estate might by assumption bear the name, an infant of the description I have mentioned would lose the estate, without any default whatever, by one more remote taking the name; and that surely could not be meant by the testator.

1808.
LEIGH
v.
LEIGH.

Another consequence would also follow from the construction contended for by the Plaintiff: viz. that during the continuance of the prior estates, which might have lasted for several generations, every one, who was first and nearest of kin to the testator, being male, not bearing the testator's name, must have, from time to time, assumed the name of *Leigh*; to qualify himself to take, in case the prior estates should determine, while he answered the description required; although the persons, so qualifying themselves, would be continually liable to be disappointed by the births of others, who would be prior and nearer; by whatever rule that proximity should be traced: if by the rules, which regulate the descent of real estates, by the sons of females of nearer degree; as would happen by the daughter of an elder brother having a son; who would, according to the rules of inheritance, be preferred to a cousin; who might before the son's birth have assumed the name: or, if the next of kin is to be looked for by the rules of the civil law, the same thing would happen, if the son of a female should be nearer in blood than a cousin, who might have assumed the name; as would be the case, if a second cousin were to assume the name, and a female first cousin should afterwards have a son.

If any rational construction can be put on this devise, I think, it cannot be supposed, that the testator meant so idle a thing as to induce his relations prospectively to take his name, when it might benefit none of them; as the prior estates might never determine, so as to give effect to the remainder; and, if it should take place, might occasion a frequent assumption of the name to become vain and nugatory; and on these grounds I conceive, that the testator did not mean, that the person, to take in remainder, should be one, who, in order to answer and complete the description in the Will, might assume his name; but

but that, when he spoke of the first and nearest of his kindred, being of his name, he meant, that he should be one, whose family name was *Leigh*; according to the opinion of the House of Lords in *Barlow* v. *Bateman* (4) and of Lord *Hardwicke* in the cases, put by him by way of illustration in *Pyot* v. *Pyot* (5); and this I think will appear, if effect be given to the several expressions, used by the testator.

By the Will the person, to take the remainder, is to have these several qualifications: viz. he is to be the first and nearest of his kindred: the person must be a male: he must be of his name and of his blood. The three first circumstances, those of his being first and nearest of the testator's kindred and a male, need not for the purpose of the present question be considered. It will be sufficient to attend to the two last.

In a general sense the being of a man's kindred is being of his blood; as the word "consanguinity," which is the same as "kindred," imports; but when, in addition to being of his kindred, a testator requires, that the object of his bounty shall be of *his blood*, he must be understood as speaking of that blood, which with some propriety may be called HIS; namely that, which in tracing an heir is considered as the blood of the most dignity and worth. Such in this case is the blood of the *Leighs* in contradiction to that of any other of the testator's ancestors. When therefore he required, that the remainder-man should be of his blood, in addition to his being of his kindred, his object was, as I conceive, to ascertain, *that stock* or *family*, to which the devisee should belong; and that the word "*blood*," as used by the testator, must have the same sense given to it, as was given by Lord *Hardwicke* in *Pyot* v. *Pyot* (6) to the words "of the name of the *Pyots*."

The

(4) 3 *P. Will.* 65. 4 *Bro. P. C.* 194.

(5) 1 *Ves.* 335.

(6) 1 *Ves.* 335.

1808.

LEIGH v. LEIGH.

The next thing to be considered is, what did the testator mean by requiring, that the remainder-man should be of his *name*; and I do not think, that this testator by the words "*of my name*" meant the stock or family of *Leigh*; for according to the common rule of interpretation, which requires, especially in Wills, that every word shall have some effect given to it, if it may be, and none rejected, or considered as tautologous, if a distinct and consistent meaning can be put upon it, the testator must be taken to have intended something beyond what was expressed and contained in the other words, which he had used; and, I think, a very obvious meaning may be put upon the word "*name*" different from, and consistent with, that, which, I think, belongs to the word "*blood*;" and that it must be understood as intended to exclude the female line of the stock or family of the *Leighs*; which stock he may be understood as marking with the word "*blood*," and as intended to narrow the number of persons of that family or stock, from among whom a remainder-man was to be sought for; by requiring, that the family name of such person should be *Leigh*; or, in other words, that he should be a person having the name of *Leigh* from his agnation to the testator; thereby excluding any person, who could only claim to be of kin with the testator by descent from a female of his family.

If the Plaintiff does not fall within the description in the Will, it will not be necessary to consider, what relation of the testator would fall within it; or to inquire, whether any thing different was meant by the word "*first*" from what was intended by the word "*nearest*." Had the word "*first*" only been used, possibly it might be held to have been the intent of the testator, that the remainder should go to such person, as would take the estate, if it had descended to the testator in tail male from

Construction of the description "*proximo* "*de sanguine.*"

from his eldest known ancestor of the name of *Leigh*; and possibly if the word "*nearest*" only had been used, the same interpretation might be put upon this devise; according to the sense, which in the cases, referred to in the *Touchstone* (7), mentioned by Mr. *Agar*, has been put upon the words "*proximo de sanguine.*" But if the words "*first and nearest*" cannot be interpreted as meaning the same thing, viz. the first in a course of descent, and it should happen, that there is no person of his name and blood, who unites in himself the circumstances of being the first and nearest of the testator's kindred, the devise may be void for want of a person to take, answering the description in the Will: but if there be such person, who is also a male, and whose name, being *Leigh*, is referable to his descent from a common ancestor with the testator, no difficulty will arise from the use of both these expressions. However it will be time enough to consider such points, when some person shall claim the estate, who may derive the name of *Leigh* from his ancestors: but with respect to the present Plaintiff my opinion, which I submit with deference to your Lordship, is, that the person to take under the devise in question must be both of the testator's blood and name; and that the Plaintiff, having assumed the name of *Leigh* in pursuance of his Majesty's licence, does not satisfy the words of the Will; which require, that the person to take in remainder, after the determination of the estates, limited to his sisters and their issue, should be of his, the testator's, name; and I am of opinion the demurrer should be allowed.

THOMPSON, *Baron.*

The question upon the facts, stated by this Bill, and admitted by the Demurrer, is, whether the Plaintiff is become

(7) *Shep. Touch.* 436.

1806.
LEIGH
v.
LEIGH.

become entitled to the estate, devised under this Will, as answering the description, contained in that Will. It has been contended for the Plaintiff, that the fact, set forth by the Bill, that he has assumed the name of *Leigh* by his Majesty's licence, is sufficient to satisfy that part of the description; which in the event, that has happened, requires him to be of the name, as well as to possess the other requisites of being the first and nearest of his kindred, being male. Upon the best consideration, that I can give this case, I do not conceive, that the Plaintiff upon his own statement has made out a title under this Will. The meaning of this Will I conceive to be, that the person, who is to take in default of the preceding limitations, should be one, who could make himself out to be the first and nearest of the testator's kindred, being male, and of his name and blood; possessing that name by inheritance, if it may be so expressed, from the common ancestor; and not merely assuming it; though by his Majesty's licence. The testator has not imposed any condition upon his first and nearest of kindred, being male, that he shall take the name of *Leigh*: nor does any anxiety to perpetuate the name with the possession of the estate appear; as in the devise to his sisters and their issue there is no provision, requiring them or their issue to take the name: nor does he use the name, as connected with his devisees, until the clause in question; which is not to operate, until the period, which he contemplated, the deaths of both his sisters, and the failure of the issue of one, generally, and of the issue male of the other, should arrive.

Some of the cases cited appear very material. The case of *Pyot* v. *Pyot* (8) was a disposition by Will in a certain event of real and personal estate to the testatrix's nearest

(8) 1 *Ves.* 335.

nearest relation of the name of "the *Pyots*:" so it appears in the *Register's Book;* which I have examined; and not "of *Pyot*." Lord *Hardwicke* says, a person of nearer relation, but originally of another name, changing it to *Pyot* by Act of Parliament, would not come within the description; and, though in the contemplation of that case his Lordship admitted, that sisters, who at the date of the Will were of that name, and had afterwards married, and a sister, who had before that time changed her name by marriage, should share, he did so under an express declaration, that the term "*relation*" is *Nomen collectivum:* that the testatrix intended the same stock: the name there standing for the stock; and it appears by the *Register's Book*, that those persons and the testatrix were both descended from the common ancestor. At the conclusion of his judgment Lord *Hardwicke* refers to a case in the House of Lords; where the House of Lords held, that a voluntary change of name was not a performance of the condition to marry a person of the testator's name. That case is *Barlow* v. *Bateman* (9): a decision, which completely warrants the proposition, that a devise upon condition of marrying a man of a particular name is not satisfied by marrying a man, who voluntarily changes his name. That case is stronger than this; as there no connection of blood was required: she might choose from the world at large any man, who bore that name.

Upon the whole of this case I have only to conclude with my humble advice to your Lordship, that the Plaintiff upon his own statement is not within the whole of that description, which he ought to have; in order to sustain the character of a person, entitled to these estates under this Decree in the events, that have happened.

The

(9) 3 *P. Will.* 65. 4 *Bro. P. C.* 194.

1808.

LEIGH v. LEIGH.

The Lord CHANCELLOR.

It is unnecessary for me to attempt, what would be of no use to the Bar, to repeat, in terms not so apt to express them, the grounds upon which my own opinion is formed. I shall be content to acknowledge my obligation to the learned Judges, and simply to state, that the advice which I have received, confirms the opinion I had upon first reading this Bill; and which throughout the argument has never varied.

Therefore, without farther detaining the Judges, I shall merely say, that the title, stated by this Bill is not one, which proves, that the Plaintiff answers the description, required by the Will; and consequently my judgment is, that this Demurrer must be allowed.

1808.
May 16th.

Commission of Lunacy in a proper case granted upon the application of a stranger; and without regard to his motive: the Lunatic being a natural child; and his mother opposing it.

OGLE, *Ex parte.*

THE prayer of this Petition was, that a Commission of Lunacy might issue. There was no doubt, that the party was in a state, that made him a proper object of the Commission. He was a natural child; and resided with his mother; who opposed the Petition.

Sir *Samuel Romilly*, and Mr. *Courtney*, in support of the Petition, said, that the *Lord Chancellor* will attend to an application for this purpose even by a stranger (10); as it necessarily is in this case: the lunatic being a natural child; and his mother resisting a Commission.

Mr.

(10) See *Ex parte Ward*, ante, Vol. VI, 579.