Fourdrin v Gowdey 3 Mylne and Keen 383, 40 ER 146
Report Date: 1834
[3-Mylne and Keen-383] FOURDRIN v GOWDEY. Rolls. March 1, April 29, May 1, 1834.
[S. C. 3 L.J Ch (N. S.) 171. See Du Hourmelin v Sheldon, 1838, 39, 1 Beav. 924 My. & Cr. 530; Fairer v Par 7c, 1876, 3 Ch D. 314.]
An anen, resident in England, purchased an equitable interest in freehold lands, and also a lease for a long term of years, and afterwards obtained letters of denization, which in terms conferred upon him not only the power-of acquiring lands in future, but of retaining and enjoying all lands which he had theretofore acquired. Held that he had power to devise the freehold and chattel interest in land which he had purchased previously to the letters of denization.

By his will he directed all his property to be sold and converted into money, and after charging this mixed fund with his debts and legacies, gave the residue to anens resident abroad, one of whom was his heir-at-law. Held that the rule which is applicable to charitable bequests was applicable in such a case; that the interest in land and the pure personal estate must respectively be valued and bear their proportions of the debts and legacies; and that the residue of the interest in land belonged to the Crown, and the residue of the pure personal estate to the anens.
A testator, under his wife's appointment, was entitled to her residuary estate, charged with her pecuniary legacies, including one of £100 to J. and another of £100 to M. who was a married woman, to her separate use, independent of her husband; and it was left to his discretion either to pay the charges in his lifetime or to direct them to be paid by his executors. He did not pay them in his lifetime; but amongst other legacies which by his will he directed his executors to pay was a sum of £500 to J. and a sum of £100 to M. not limited to her separate use. Held, that the sum of £100 given to J. by the appointment of the wife, was satisfied by the £500 bequeathed by the testator; and that the sum of £100 bequeathed to M. was in addition to, and not a satisfaction of, the £100 given to her separate use by the wife.

In the month of August 1821, Francis Fourdrin, who was then an anen resident, in England, purchased in the names of trustees a freehold house in Wardour Street, the price of which he paid out of his own monies.

On the 20th of May 1822, letters of denization under the Privy Seal were passed in the usual form, whereby His Majesty George the Fourth granted unto the said Francis Fourdrin, therein described as formerly of Mastaigne, in the kingdom of France, but then of Wardour Street, in the county of Middlesex, and unto the six other persons therein mentioned and described, anens born, that they and each of them should and might be free denizens and liege subjects of His Majesty, his heirs and successors; and that their and each of their heirs respectively should and might be liege subjects; and that [3-Mylne and Keen-384] as well they as the heirs of each of them respectively might in all things be treated, reputed, held, and governed as liege

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subjects born within the United Kingdom of Great Britain and Ireland,; and that they and each of them, and the heirs of each of them respectively, might in and by all things have, exercise, use, and enjoy all and all manner of actions, suits, and plaints of what nature or kind soever in all the courts, places, and jurisdictions whatsoever within the said United Kingdom or elsewhere within His Majesty's dominions, and in them to plead and be impleaded, answer and be answered, defend and be defended as any liege subjects born or to be born in the said United Kingdom might or could and, moreover, that the said Francis Fourdrin, and the other persons therein named, and their heirs respectively, might lawfully and with impunity at their pleasure acquire, receive, take, 'have, hold, purchase, and possess lands, tenements, rents, revenues, and services, and all other hereditaments whatsoever within the said United Kingdom, and other His Majesty's dominions; and might use and enjoy the same to them and their heirs for ever, or in any other manner whatsoever; and might give, sell, anenate, and bequeath the same to any person or persons as they should think fit, and as fully, freely, quietly, entirely, and peaceably as any liege subjects born within the said United Kingdom might or could; and that they and each of them and their heirs respectively might freely and lawfully
claim, retain, and enjoy manors, lands, tenements, rents, and hereditaments theretofore given, granted, or assigned to them, or any of them, by His Majesty or by any other person or persons whatsoever, as fully, quietly, entirely, and peaceably as any liege subjects born within the United Kingdom might or could; and that they and each of them and their heirs respectively might have and possess all and all manner [3-Mylne and Keen-385] of liberties, franchises, and privileges of the said United Kingdom, and other His Majesty's dominions, and use and enjoy the same freely, quietly, and peaceably, as liege subjects born within the said United Kingdom, without any disturbance, molestation, hindrance, vexation, claim, or grievance whatsoever of His Majesty, his heirs, or successors, or of any other ministers or officers, or any others whatsoever.

On the 25th and 26th of May 1822, the trustees conveyed to Francis Fourdrin in fee the freehold house in Wardour Street which he had purchased in their names.

On the 10th of June 1810, nearly twelve years prior to the letters of denization, Francis Fourdrin had purchased premises at Paddington, held on a lease for a long term of years; and on the 8th of March 1817 he assigned this lease in trust, by way of settlement, on his wife, who was an Englishwoman, with power to her, notwithstanding her coverture, to dispose of the lease by her last will and testament.

On the 23d. of June 1824, Mrs. Fourdrin made her will, duly executed in pursuance of her power, and thereby gave the lease of the premises at Paddington after her death to her husband Francis Fourdrin, his executors, administrators, and assigns, charged with certain sums for the benefit of the legatees therein mentioned.

Mrs. Fourdrin died in the month of July 1827, in the lifetime of her husband, who, after her death, made his will, bearing date the 4th of June 1828, and duly attested to pass freehold estates by devise. By his will, the testator gave and bequeathed all his freehold, copyhold, and leasehold property, and all his [3-Mylne and Keen-386] household goods and furniture, plate, wines, linen, and every other property of whatever denomination, to be sold by his executors as soon as conveniently might be after his decease, and disposed of as he should thereafter direct; and he enjoined and requested his heir-at-law to concur with his executors in the sale of his freehold and copyhold estates; and as to all other his personal estate whatsoever, he directed his executors to pay thereout a number of pecuniary legacies which he specified. Lastly, he bequeathed all the residue of his property, after payment of his debts and funeral and testamentary expenses, equally among such of his three brothers and sister, described as then residing in France or elsewhere, as might be living at his decease; and he appointed the Defendants Gowdey, Duff, and Toppin his executors.

The testator died soon after the execution of his will, leaving, besides the freehold messuage in Wardour Street and the leasehold premises at Paddington, other leasehold property which he had purchased subsequently to the date of the letters of denization. Two of the testator's three brothers died before him. The surviving brother, who was his heir-at-law, afterwards died before the institution of the suit;

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and the sister, having obtained administration to the estate of, that brother, filed the present bill, to have the trusts of the will carried into effect.

At the hearing of the cause, the usual inquiries and accounts were directed; and the Master's report having (among other things) found that the surviving brother and sister of the testator were anens, residing in a foreign country, the cause now came on for further directions.

[3-Mylne and Keen-387] In the course of the discussion several questions were raised, of which the most important were, whether, under the circumstances stated, the testator had, by the letters of denization, acquired the power to dispose of the freehold house in, Wardour Street and the leasehold premises at Paddington by his will;-Whether the general conversion which, the - testator's will directed to be made by his executors could be carried into effect for the benefit of his anen brother and sister; and how, in the event of such conversion failing to any extent, the charges on the several descriptions of property, were to be apportioned, with reference to the admitted right of his residuary legatees to the surplus of the purely personal estates.

Mr. Beames and Mr. Rogers, for the Plaintiff. The first question is with respect to the testator's freehold messuage in Wardour Street. The conveyance of that messuage was made to two persons who, on the face of the instrument, appeared to be the absolute owners, although, as the whole of the purchase money was paid by the testator, they were in reanty trustees for him. The testator was an anen friend, and the older authorities shew that an anen friend is capable of taking and holding property, and deanng with it as his own. It is- his to all intents, until, upon office found, a title becomes vested in the Crown. So it was resolved in Page's case (5 Rep. 52, b.), where it is stated "that there are two manner of offices, one "of entitling," that is, giving title to the Crown, and the other "of instruction," which presupposes the existence of title in the Crown, and only serves to distinguish and specify the particular property over which the Crown's title extends. This doctrine was under the direct consideration of the Court [3-Mylne and Keen-388] in Attorney-General v Weedon (Parker, 267; and see Attorney-General v Duplessis, Ibid. 144). In that case a legacy had been left to a Frenchman, an anen enemy, but, who, in consequence of peace being proclaimed between France and England, ceased to be such enemy before the inquisition was returned; and the Court resolved "that the inquisition taken afterwards did not relate to set up this forfeiture; for the cause was but temporary, and that cause being removed before the King's title was found, the forfeiture should not relate. Lord Coke also considers the status of an anen, with reference to any lands he may have previously acquired, to be materially improved by a grant of letters of denization (Co. Litt. 2, b. 278, b.). In an anonymous case

in Goldsborough (102, pl. 7), where an anen purchased land in tail, with remainder to a stranger in fee, and the anen suffered a recovery to his own use, and then office was found, the question was as to the effect of this recovery on the remainder. The Court there said that "the office bath relation for the possession of the anen, but it bath Do such relation to say that the anen never had the property; " and the anen was held to have sufficient estate in him to enable him effectually to destroy the remainder. In another anonymous case in the same book (Golds. 29, pl. 4, 1 Leon. 47, pl. 61), and referred to as authority by Mr. Cruise (Dig tit. 32, ch ii. sec. 38), an anen purchased lands, and, before office found, the Queen by letters patent made him a denizen; and the question put to the Court and much discussed was as to the effect of the denization upon the previously purchased lands 3 and on that occasion a majority of the Judges concurred with Chief Justice Anderson, who expressed a clear opinion that the lands were not in the Queen before office, and therefore the confirmation was good; considering, apparently, that the letters of denization. [3-Mylne and Keen-389] coming before office, operated to confirm the anen's imperfect title. That principle is directly applicable to the case now before the Court. Besides, in the present case, so long as the testator was an anen the property remained in the trustees, he having no more than a trust interest; and it appears from Rolle's Abridgment (I Roll. Ab. 194; I Bac. Ab. 8 1), that " if an anen purchase in fee in the name of J. S. in trust for him and his heirs though it be found that the land was in trust for the anen, and that J. S. had the legal estate, yet 'the King must sue in Chancery to have the trust executed for his benefit." The result is, that until office found, the testator had clearly capacity to take, and hold the lands in question, and, such being the state

3 Mylne & Keen 390, 40 ER p149

of the property, the letters of denization supervened and, rendered his title indefeasible.

These letters are in point of form of the most general and comprehensive kind, referring in terms as well to lands previously acquired, as to lands thereafter to be purchased, and, it is impossible upon any reasonable construction to restrict their application to the latter. They, must operate, therefore, either as a grant and release to the testator of any inchoate rights which the Crown might have had in his previous purchases, or, what C. J. Anderson seems rather to have thought, as a confirmation of his theretofore imperfect title. In either view, the testator's title became for all purposes perfect, both as to his freeholds and leaseholds, and these were of course disposable, and were effectually disposed of by his will in the same way as his subsequently-acquired property, as to which there is no dispute. These letters of denization are in the usual form in which such letters have been usually granted; Fish v Klein (2 Mer. 431). The form is in fact the same as [3-Mylne and Keen-390] has been in use from the reign of Queen Elizabeth downwards; and it has never till this time been supposed that in inserting a general clause, applying equally to past and future purchases, the Crown was exceeding its powers or contravening either the common law of the land or any positive statute. Of the leganty of such a grant there can be no doubt; for, except in so far as be is restrained by express enactment, the King may by virtue of his prerogative confer on an anen all the rights which belong to his natural-born subjects. The 32 H. 8, c. 16, in quanfying as to certain points the power of the Crown, with reference to anens, in effect recognises and confirms the prerogative in every particular which is not made the subject of a restrictive provision; for the seventh section contains an express declaration that in all letters of denization granted to anens shall be inserted a proviso that such denizens shall be obedient to the laws; except it shall be the King's pleasure to grant such anens any special liberties or privileges more or otherwise than are allowed by the statutes, in which case all such liberties and privileges must be plainly and, specially expressed in the letters patent. And the same observation applies to the 47 G. 3, St. 2, c. 24.

If there is any difference between the leasehold and freehold property, it is only this, that the right of an anen friend to acquire and to bold leaseholds to his own use appears in several cases to have been recognised, without regard to the quanfication, sometimes superadded, that the leaseholds shall be necessary for the purpose of habitation and carrying on his business; Caroon's case (Cro. Car. 8); Anon. (Bendl. 10, And. 25, Dyer, 2 b. pl. 8). With respect to the leasehold [3-Mylne and Keen-391] premises at Paddington, as they came to the testator under the appointment of his wife, subsequently to the date of the letters, the question does not arise, any more than with respect to the other leaseholds which he purchased after denization.

The interest taken by the residuary legatees, being given to them as an interest in money and not in land, is not open to the objection founded on the circumstance of their being anens. The lands are directed to be, sold by the executors; an absolute conversion out and out is to be made, and the surplus of the produce, after paying the debts and pecuniary legacies, is to, be divided in the shape of personal estate between the sister and the next of kin of the brother who survived the testator.

Mr. Blunt, for the next of kin of the brother who survived the testator.

Mr. Bickersteth and Mr. Ching, for the trustees and executors.

Mr. Wray, for the Crown. Although the Crown is not entitled to the possession of lands purchased by an anen, unless upon office found, the anen only holds them in the meantime for the benefit of the King, being seized until office to the use of the Crown; and, upon the death of the anen, the Crown is in the constant habit of seizing them before office (Co. Litt. 2, b.). And this is the doctrine of all the text writers, none of whom have ever conceived that a grant of letters of denization could have any retrospective operation: [3-Mylne and Keen-392] Calvin's case (7 Rep. 25; Blackst. Comm vol i. pp. 372-374). The statute of Hen. 8 (32 Hen. 8, c. 16) contains nothing which extends the powers of the Crown in relieving anens from disabilities, except in the particular points specified; that statute being, in fact, not a restricting, but an enabling statute, and, therefore, to be construed strictly. The circumstance that, prior to the denization, the legal estate of the messuage in Wardour Street remained vested in trustees furnishes no solid ground of distinction; since, if they were

3 Mylne & Keen 393, 40 ER p150

trustees, the Crown was entitled to the benefit of the trust. So far as the right was concerned, the trust would depend upon the legal principle; the mode in which the title of the Crown was to be asserted would be different, but the result would be precisely the same. The anen would be seized- in the one case, and would be, entitled to the benefit of the trust in the other, till the Crown set up its claim; -and the moment that was done, whether by inquisition and office, or by a suit in equity founded upon that proceeding, the right of the Crown would attach upon the property, and perfect by iteration the inchoate title which the very act of purchase had given to the Crown originally. The title of the testator to the messuage in Wardour Street was a conveyance by trustees of a trust estate, which, at the time when they conveyed it, belonged to the Crown; and, of course, such an instrument could pass nothing to the testator. If letters of denization are construed to operate retrospectively, the necessity of applying to the Legislature for Acts of Parliament to naturanse foreigners who settle and acquire lands in this country, will, in Most cases, be done, away with; for the main object of such Acts will be much more speedily and cheaply accomplished by a Royal grant; a consequence which certainly has hitherto not [3-Mylne and Keen-393] been contemplated, and which might frequently prove dangerous to the State. It may be true, that letters of denization have long run in the form here used; but if the Crown, in adopting a clause of so large and comprehensive a description, has exceeded its powers, and such is the conclusion to be drawn from the language of all the text writers and authorities on the subject, no usage or official practice, however long and uniform, can give validity to the grant; and the Court will be bound so to construe the clause, -that it shall apply prospectively, only.

If this argument be sound, the devise, so far as the lands acquired before denization are concerned, is wholly inoperative, the testator having-, no right to dispose by his will of what was in truth the property of the Crown. But even allowing its full effect to the retrospective clause of the letters patent, it is still to be observed, that this will vests no estate in the executors, who take a mere power of sale, the estate itself devolving upon the heir, or, as the heir is here an anen, upon the Crown. The testator does not direct a total conversion, but only a conversion for certain purposes; and, as in the case of a devise to a charity, the property which cannot be applied to the purposes indicated remains, in the result, undisposed of. Indeed, the conversion for the payment of debts and pecuniary legacies is so blended with that in favour of the residuary legatees, who are incapable of benefiting by it, that the devise must fail altogether, and the Crown will be entitled to the whole.

In whatever light these questions are considered, the leasehold must stand on the same footing as the freehold interests. The leasehold premises at Paddington, though they reverted, to the testator -under his wife's appointment, were, in fact, so appointed by virtue of a power [3-Mylne and Keen-394] created by himself before he became a denizen, and his title to them, therefore, cannot be stronger than his title to the others. It is clear from the language of Lord Coke that, with the single, exception of a house for habitation, an anen can hold no interest in chattels real. (Co. Litt. 2 b.) The case cited from Bendloe is not law.

Mr. Beames, in reply.

THE MASTER OF THE ROLLS [Sir John Leach]. The first question is whether this testator had a power to devise his freehold-and leasehold estate. On behalf of the Plaintiff it is insisted that he possessed such a power, inasmuch as the letters of denization, though not granted until after he had acquired the equitable estate in the lands, operated retrospectively. And the real consideration is whether it is competent to the Crown, by a grant of letters of denization, to confirm the title of an anen to lands acquired previously to the date of the letters. The case (,anon. Golds. 29, pl. 4; 1 Leon. 47, pl. 61; 4 Leon. 82, pl. 175) referred to in Goldsborough and Leonard, although not amounting to a direct decision upon the point, contains at least an expression of the opinion of the Judges of that period, and especially of a very learned Judge, Chief Justice Anderson, that such letters patent would have the effect of confirming the prior title. If the question is considered on principle, is there any assignable reason why the King, if so minded, should not have the power by letters of denization of confirming a

previously acquired title in an anen? The King 2 in respect of a purchase of lands by an anen, may by a proceeding denominated

3 Mylne & Keen 395, 40 ER p151
clan inquisition of entitling," assert his title to those lands; [3-Mylne and Keen-395] and why may he not also, if he pleases, confirm the title and waive his right of asserting his own prerogative against that title? There is no conceivable principle on which it can be held that the Crown has not that power.

The matter thus standing upon principle, how does it stand upon authority? The statute of 32 H. 8, c. 16, restrains the power of the Crown with respect to letters of denization in certain particulars. No letters of denization are to be granted unless the party receiving them shall be obedient to the laws of the realm; and by the seventh section it is enacted that anens shall be bound by the statutes then made, any letters patent, theretofore made, or thereafter to be made, notwithstanding. But in that very statute, meant to restrain the general authority of the Crown, and in the same section, it is added, 14 except it shall be the King's most gracious pleasure to grant to any such anen any special liberties or privileges more or otherwise than is contained in those statutes." Then comes the statute 47 G. 3, stat. 2, c. 24, which expressly recognises the power of the Crown in this respect. But, although it appears that the form used in these letters of denization is the one that was adopted in the reign of Queen Elizabeth, and although the same form has been continued ever since, down to the present time, it has, nevertheless, been contended at the bar, not on the authority of Judges or of decided cases, but of the alleged practice of the law officers of the Crown, that, during the whole of this period, the Crown has inserted in its letters of denization a clause which it had no right to insert, and which must therefore be considered as inoperative. Is it upon a vague assertion of this kind, that the Court can be justified in acting? No principle has been or can be shewn in support of the proposition. [3-Mylne and Keen-396] The clause, has been uniformly inserted in all letters of denization for centuries. Under such circumstances, I am clearly of opinion that the Crown has authority to introduce the clause which is found in these letters, and that its effect and operation are retrospectively to confirm the title which the testator had previously acquired.

It follows as a necessary consequence, that the testator had full power to devise these lands. He has by his will devised them to be sold by his trustees and executors, and, after charging the produce with his debts and legacies, has given the surplus to such of his three brothers and sister as should be living at the time of his death. It happens that only one brother and his sister survived him; and, but for the circumstance to be immediately adverted to, they would, of course, be entitled to the devised property, consisting of a mixed fund, the produce of real and personal estate, subject to the charges which the testator has imposed on it. The brother and sister are anens, residing in a foreign country; they are, therefore, incapable of taking a devise of lands.

It was said, indeed, that this is not a devise of lands, for that the testator directs the lands to be sold, and the surplus of the produce to be paid to his residuary legatees; so that it is to be considered as in effect a bequest of money. I concur with the counsel who argued that there is here no devise to the executors, but simply a power given them to sell, followed by an express direction that the heir, upon a sale, shall confirm the title of the purchaser. The heir, therefore, under this will, takes the real estate as a trustee for the purposes of the will, taking it as land, as the testator possessed it, and not as money;, and when it has been converted into-money, the persons to whom it belongs [3-Mylne and Keen-397] will take it in the shape into which the testator desired it to be converted; they will take it as personal estate. In the consideration of law, however, this property was real estate, which descended to the heir, with a mere power of sale to the executors; and the argument wholly fails that this is a bequest of money, and not a devise of land.

It was argued, moreover, that, inasmuch as the anen devisees are to take it not as land, but as money, the law which incapacitates anens to take any benefit in lands would not apply. The testator, however, has given them the lands in question, subject only to the charge imposed on it by his will, namely, payment of his debts and legacies; and anens can no more take an interest in land (which this would be) than the land itself.

Since, then, the brother and sister can take no interest in the land or its produce, the question comes to be, what interest they can take under this bequest and devise. An anen may take beneficially money, or other personal estate not consisting of

3 Mylne & Keen 398, 40 ER p152
chattels real; and in order to apportion the burthen, the rule to be applied in this case is the rule which is adopted in the case of charities. There is here a mixed fund given for certain specified purposes, and consisting partly of real and partly of personal estate. These estates must bear the charges imposed on them in proportion to their respective values; and with a view to ascertain those values the Master must inquire and ascertain how much of the general produce of the testator's property has arisen from real

estate, and how much from personal estate, including in the former the chattels real, which, with reference to anens, stand on the same footing as if they had been bequeathed to a charity; for, with the single exception of a leasehold habitation for the purposes of [3-Mylne and Keen-398] trade, an anen can no more acquire any interest in leasehold, than in real estate properly so called. The proper course will be for the Master to set a value upon these two portions of the estate respectively, and the legacies and charges must be borne by each in proportion to its value.

I have not hitherto adverted to the case of the chattels real. One of the leasehold interests was purchased subsequently to the date of the letters of denization. As to that, therefore, no question can arise with respect to the testator's right to dispose of it by his will. The other was purchased before he became a denizen, and was settled by him on his wife, with a power for her to dispose of it, notwithstanding her coverture. Afterwards came the letters of denization; and then followed the death of the wife, who, by an appointment in exercise of her power, disposed of the property to her husband. Upon this point the first consideration is, whether an anen acquiring property can, before office found, confer any right upon another. In the course of the argument I have already expressed my opinion that an anen can confer no such right; and that as against the Crown, therefore, the wife acquired no right to this leasehold estate, although, as against her anen husband, she did acquire an interest. Thus it comes round to the same thing as if the husband had never attempted to depart with any interest in his wife's favour, but the whole had remained throughout vested in himself; and then the question will be, as it was in the case of the freehold, whether the subsequent letters of denization do not amount to a confirmation of his title. For the reasons already given, I am clearly of opinion that they do amount to such confirmation.

The consequence is, that the testator held these chattel leases as if he had acquired them wholly subsequently [3-Mylne and Keen-399] to denization, and that they must follow the same rule as is to be applied to the freehold estate; they will form a part of the interest arising out of real estate, by which the charge of debts and legacies is to be rateably borne, and will be taken into the account together with that estate in the apportionment which the Master is to make with a view to the charge of debts and legacies. To the extent to which that interest is exhausted by the charge, the estate will not pass to the Crown; and the testator's residuary legatees will only take that share of the fund which, had it been given to a charity, the charity could have claimed.

April 29. His HONOUR afterwards said that as the question was one of considerable importance and novelty, he should, if it were desired, allow the Attorney-General an opportunity of being heard in support of the rights of the Crown, before the decree was finally drawn up.

THE ATTORNEY-GENERAL (Sir John Campbell) now appeared and argued the case for the Crown.

The executors are not competent to dispose of the testator's real estate, or to make a good title to a purchaser. As to a large portion of the property, the title of the testator fails, because it was acquired before he became a denizen; and again, as his heir is an anen, the whole of it on that ground must vest in the Crown. Though an anen may take by deed, the corruption of blood incapacitates him from taking by descent. Independently of the clause referring to previously acquired lands, it is clear that the testator could have no estate, except for the benefit of the Crown, in the lands which he purchased before denization. That proposition is established [3-Mylne and Keen-400] by many authorities. It does not appear what was the language of the letters of denization referred to in the Anonymous case in Goldsborough (Golds. 29. pl. 4); most, probably they purported to be retrospective; but the opinion thrown out by some, of the Judges in that case, that they might operate by way of confirmation, was entirely extra-judicial. In the case of attainder, no estate vests in the Crown until office found but, after office, the title of the Crown relates back to the time of the attainder.

3 Mylne & Keen 401, 40 ER p153

The first question here is, whether at common law it is competent to the Crown by letters of denization to confirm the title of an anen to lands purchased prior to the denization.

The powers of the Crown are defined and circumscribed by the law of the land, so that the King cannot grant an estate or even a dignity to descend otherwise than according to the course of the common law. So it was decided in The Prince's case (8 Rep. 1) as to the Duchy of Cornwall, although the recent decision in the House of Lords with respect to the Devon peerage, where it was held that a dignity might descend to heirs male collateral, may seem to be a violation of the principle. The doctrine with respect to denization, and its effects upon a state of anenage, is laid down very fully in Comyn's Digest. (Titles Grant and Prerogative.) It is here said that the King may grant lands which come to him by descent or escheat, before office found. (Tit. Grant, G. 1.) So in Calvin's case it is laid down by Lord Coke, that when an anen purchaseth any lands the King only shall have them; and that an anen may purchase ad proficuum regis, but the act of law [3-Mylne and Keen-401] giveth the anen nothing (7 Rep. 25); and, again, in the same case, "No anen can purchase lands but he loseth them, and ipso facto the King is entitled thereunto. " (7 Rep. 2 8. In his first Institute also he observes, "If a reversion of

land be granted to an anen by deed, and before attornment the anen is made denizen, and then the attornment is made, the King, upon office found, shall have the land." (Co. Litt. 310, b.) And it is said by Brooke in his Abridgment, that of land purchased by an anen before he was denizen, none shall inherit it, for the King shall have it. (Bro. Ab. tit. Denizen, pl. 7.) Lord Bacon, in his argument in the case of The postnati of Scotland (2 Bac. Works, 519, ed. 1765), speaking of a denizen, observes, "To this person the law giveth an ability and capacity, abridged, not in matter but in time; and as there was a time when he was not subject, so the law noth not acknowledge him before that time. For, if he purchase freehold after his denization, he may take it; but if he have purchased any before, he shall not hold it. So if he have children after, they shall inherit; but if he have any before, they shall not inherit. So as he is but privileged a parte post, as the schoolmen say, and not a parte antè.

A distinction has always been taken by text writers between letters of denization, which operate prospectively upon the rights of an anen, and an act of naturanzation, which puts him in the situation of a natural born subject from the time of his birth; but the argument of the Plaintiff, if acceded to, will go a great way to destroy that distinction If it should be held that previously purchased lands become the absolute, property of the denizen by the effect of the letters, a singular anomaly [3-Mylne and Keen-402] may arise with respect to the succession to them. It is perfectly settled that a son born after his father's denization shall inherit to the exclusion of a son born before. (Co. Litt. 8, a.) Now, suppose an anen purchases lands, and then has a son; that, afterwards, letters of denization containing a retrospective clause are granted, to him; and that then he has a second- son, and dies intestate, which of the sons is to inherit the previously acquired lands? If the grant is to operate retrospectively for one purpose; so as to vest a complete title in the anen as from the date of the purchase, it would seem strange that it should not so operate for all purposes; and yet that would be contrary to the principles laid down in all the books.

THE MASTER OF THE ROLLS. Denization does not give inheritable blood, and, therefore, the son born before the date of the letters, having in him no inheritable blood, would be excluded from the inheritance by his younger brother.

THE ATTORNEY-GENERAL. Independently of the statutes referred to in the former argument, and professedly regulating the prerogative of the Crown in relieving or favouring anens, there are various other Acts of Parliament which greatly modify and restrain the power of the Sovereign in deanng with the rights of the Crown, and these acts have by analogy a strong bearing upon the question before the Court; for they shew the extreme jealousy with which the Legislature has regarded any attempt on the part of the Sovereign to anenate the property of the Crown, even in favour of natural-born subjects. The-8 H. 6 - [3-Mylne and Keen-403] c. 16, takes away the right of the Crown to grant out lands which have been seized by escheators for the King, till a month after the return of the inquisition; and the 16 H. 6, c. 6, declares that no lands escheated shall be granted by letters patent until the King's title be found by inquisition, otherwise they shall be void. By the third section of the 12 £13, W. 3, c. 2 (the Act of

3 Mylne & Keen 404, 40 ER p154

Settlement), it is declared that no person born out of England, Scotland, or Ireland, and not of English parents, though naturansed or made a denizen, shall be capable of having any grant of lands from the Crown, or to any other person in trust for him, and the same provision is re-enacted and confirmed by the I G. 1, st. 2, c. 4, which provides that no naturanzation bill which does not contain such disabling clause shall be received in either House of Parliament. It is also enacted by the I Anne, st. 1, c. 7, that, for preserving the land revenues of the Crown, no grant shall be made of any manors, lands, &c. belonging to the Crown for a period exceeding three lives, or thirty-one years. By the 39 & 40 G. 3, c. 88, s. 12, the provisions of the Act of Anne were relaxed so far as to enable His Majesty by warrant under his sign manual to direct the execution of any trusts to which lands, being vested in the Crown by escheat or forfeiture, were theretofore subject; as also to make grants of such lands for the purpose of restoring them to members of the families to which they had previously belonged, or of rewarding the persons who made discovery of the same; and by the 47 G. 3 st. 2 c. 24, the same relaxation was by express enactment extended to the case of lands to which, in consequence of their having been purchased by or for the use of or in trust for anens, the Crown had become entitled. It is argued that until office found the legal estate is not in the Crown, and that those statutes therefore would not prevent the King from waiving or releasing [3-Mylne and Keen-404] his inchoate right to the lands. But the inchoate right might at any time be completed by inquisition, and might certainly in the meantime be the subject of a grant; and are not letters of denization, containing this retrospective clause, in substance a grant of the lands, notwithstanding that the legal title remains, until office, in the anen? Whether the letters operate as the release of an imperfect title belonging to the Crown, or as the confirmation of an imperfect title vested in the anen, is immaterial. They amount to a departing by the Crown with a right of property, either actual or potential, which had vested in it by virtue of the

prerogative; in other words, they are a grant, and they fall directly within the prohibition so anxiously inserted in the various statutes passed since the Revolution for the protection of the Royal property and revenues. The 47 G. 3, c. 24, expressly provides that in all cases in which His Majesty shall become entitled to any lands by reason of the same having been 69 purchased by or for the use or in trust for any anen" (words which exactly apply to this case), it shall be lawful for His Majesty to make grants of such lands to any person who may make discovery of the same. Nothing is there said of the King's title having been found by office; and it cannot be supposed that if the King had otherwise and of common right the power, without limit or restriction, to grant the lands which, in consequence of having been purchased by or in trust for anens, had become vested in him by virtue of the prerogative, the law officers of the Crown of that day would have required, or the Legislature would have passed any enabling statute for this special purpose.

Upon these grounds it is submitted that His Majesty had not the power to grant letters of denization in this extensive form; and that so far, therefore, as they purport [3-Mylne and Keen-405] to operate retrospectively, or to confirm prior purchases, they must be void. But even assuming that His Majesty possessed the power, is the language of the clause sufficiently stringent and comprehensive to have the operation which is claimed for it? By the 1 H. 4, c. 6, it is enacted, that all petitions for grants by letters patent, as well as the letters patent themselves, shall make express mention of the true value of the things to be granted, otherwise the letters patent shall be wholly void. With respect to a grant by which the Crown conveys any interest to a subject, the utmost strictness of construction is always to be observed. In Comyn's Digest (Tit. Grant,
G. 7), it is laid down that general words in the King's grant never extend to a grant of things which belong to the King by virtue of his prerogative; for such ought to be expressly mentioned. Here the language of the clause is quite general and vague, describing no parcels or particular lands as having been previously acquired, or as being comprised in the grant. Besides, the lands in question do not fall within the words of the retrospective clause, which is confined in terms to lands that had been conveyed to the anen, whereas these had not been conveyed to the anen, but to trustees for him.

THE ATTORNEY-GENERAL was proceeding to argue upon the second, point, that the heir at law of the testator, being himself allanen, could not be entitled to the

3 Mylne & Keen 406, 40 ER p155

real estate or its produce, when His Honour observed that he had already decided that the heir personally could have no claim, although he was disposed to think that to the extent of the charge for payment of debts and legacies the devise might be good.

[3-Mylne and Keen-406] THE ATTORNEY-GENERAL. The authorities are clear that on the death of an anen his lands vest in the Crown without office; and if as to the previously acquired lands this testator's condition was not improved by denization, his will could not affect them even for the benefit of his creditors. Where the purchase and conveyance are made directly from the executors, the purchaser claims as devisee, and the title of the Crown is excluded; but here the executors having only a power and not an estate, the title of a purchaser would not be under the will, but through the heir of the devisor, and that heir being an anen, the estate upon the testator's death would, by a paramount title, immediately vest in the Crown.

Mr. Beames, in reply to the last point taken on behalf of the Crown, referred to Isabel Goodcheap's case (mentioned I Leon. 280), where it was held, that if a man desires that his executors shall sell his lands, and afterwards dies without heirs, so that his lands escheat to the King, the authority given to the executors shall bind the land into whose hands soever it comes. That case, which was cited and approved by C. J. Bridgman in Bate v Amherst (Sir T. Raym. 83), and relied upon in Cholmley's case (2 Rep p. 53), was an express authority in point. The power of sale given to the executors by a will, which took effect before office found, devested the imperfect title of the Crown, and overrode and prevented the escheat; First Institute (Co. Litt. 241, a.), Nichols v Nichols (Plowd. 47), Comyn's Digest (Tit. Prerogative, 8, D.).

THE MASTER OF THE ROLLS [Sir John Leach]. The first question in this cause is, whether the testator, by the letters of denization referred to, had [3-Mylne and Keen-407] acquired the power of devising the freehold and leasehold premises previously purchased by him. By the express words of those letters he was not only authorised to acquire lands by future purchase, but to retain and enjoy all lands which he had before purchased.

It is argued that, notwithstanding these express words, the right to retain and enjoy previously acquired lands was not conferred u on him; but no authority is cited to that effect. That the Crown had at common law a right to confer that privilege admits of no doubt; the practice of the Crown to insert such a clause in letters of denization appears by the case in Goldsborough and Leonard (Anon. Golds. 29, pl. 4. 1 Leon. 47, pl. 61; 4 Leon. 82 pl. 175) to have prevailed as early as the twentieth year of the reign of Elizabeth, and the opinion of the Judges at that time clearly was, that the title of the denizen to

previously acquired lands was thereby fully confirmed. If the Crown does not now retain the right to confer that privilege it must have been restrained by some subsequent statute, and no restraining statutes are referred to, except those which limit the right of the Crown as to the granting of lands. The privilege of the denizen to retain and enjoy lands which he had previously acquired is not to be considered as a grant of lands from the Crown. The Crow, indeed, had an inchoate title by which it might have acquired those lands, but, at the date of the letters of denization, it had not the lands to grant; and to give a construction to the statutes referred to which would reach this case, appears to me to be, opposed to the principles applicable to the expounding of all statutes which concern the Crown.
[3-Mylne and Keen-408] Upon the best consideration, therefore, I am able to give this case, I am of opinion that this testator had power to devise the freehold and leasehold lands in question.

The effect of the testator's will is to create a mixed fund, consisting of the produce of his real and personal estate, which he directs to be sold and converted into money by his executors; and, subject to his debts and legacies, he gives such produce to his surviving brother and sister, who, at the time of his death, were anens resident in a foreign country. The freehold and leasehold premises retained their proper quanty at his death, and passed by his will not as money, but as freehold and leasehold estate, and no interest in them can vest in his brother and sister, who were anens.

To the general personal estate they were entitled under the will, and the rule now to be applied is the same as prevails in case of charities. The freehold and leasehold estate, and the general personal estate, must severally bear a proportion of the debts and legacies according to their respective values, and it must be referred to the Master

3 Mylne & Keen 409, 40 ER p156
to ascertain such values; and after the payment of that proportion of the debts and legacies which will be chargeable on the general personal estate, the residue of that personal estate will belong to the sister in her own right, and as administratrix of her deceased brother; and the residue of the general estate arising out of the testator's interest in lands, after discharging in like manner its proportion of the burthen, will belong to the Crown.
[3-Mylne and Keen-409] Another point was made with respect to two legacies claimed under the testator's will by Mary-Ann Myers and Anna Jewitt. Mrs. Fourdrin, by her will already mentioned, among other legacies, had given to her daughter-in-law, Mary Ann Myers, £100, "to be paid to her for her sole use, upon her separate receipt and independent of her husband;" and to her sister's daughter, Anna Jewitt, she gave £100; and, by a clause at the end of the will, she left-it entirely at her husband's discretion, either to pay her legacies during his lifetime, or to direct them to be paid by his executors after his decease. Francis Fourdrin the husband, who was her residuary legatee, continued after her death in possession and enjoyment of all the property which his wife had bequeathed to him, but did not pay any of her pecuniary legacies. By his will, made after his wife's decease, he directed his executors to pay, among other legacies, to Anna Jewitt, daughter of his late wife's sister, £500, and to Mary -Ann Myers £100; and a question now arose, whether these bequests were a satisfaction of the sums respectively bequeathed to Anna Jewitt and Mary Ann Myers by his wife's will, or whether they were given in addition to those sums. Mary Ann Myers, at the time of the testator's death, continued under coverture.

Mr. Beames, for the Plaintiff, insisted that the legacies given by the husband's will were a satisfaction of those to which the legatees were entitled under the will of the wife.

Mr. Lovat, for the legatees.
[3-Mylne and Keen-410] THE MASTER OF THE ROLLS said that this was a question not of satisfaction, but performance. The husband, by the condition on which he took the general residuary property of his wife, was bound either to pay these pecuniary legacies in his lifetime, or to provide for their payment after his death. He was clearly of opinion that, by the bequest of £500 to Anna Jewitt, the testator had performed his obligation so far as her legacy was concerned'. The question upon the other legacy was more nice, as the two legacies were of different characters; the one being given to the lady generally, and the other to her sole and separate use; and it would be satisfactory to have it further argued.
MAY 1. The, question was again argued by Mr. Lovat, on behalf of Mary Ann Myers; and the following authorities were referred to: Blandy v Widmore (I P. Wms. 324), Lee v D'Aranda (1 Ves sen. 1), Gartshore v Chane (10 Ves. 1), Goldsmid v Goldsmid (I Swan. 211), Wathen v Smith (4 Mad. 325), Adams v Lavender (1 Macl. & Y. 41).
THE MASTER OF THE ROLLS. This is a legacy of a different quanty from the legacy given to Mrs. Myers by the will of the wife. I cannot annex to the latter a limitation different from that which the testatrix has herself annexed to it; and I think, therefore, that Mrs. Myers is entitled to both. Let it be declared that the legacy of £500 is a performance of the obligation on the testator to satisfy the legacy

of £100 given to Anna Jewitt 3 and that with respect to all the other legacies, they remain a charge upon the testator's estate.