that the point as to showing the letter to Nail was not decided at the trial, for that he treated it as immaterial whether the letter was disclosed or not, thinking that Dawson, the agent at Liverpool, had violated his duty by employing another agent in London, and that he was responsible for the whole amount of the policy. There is some difference of opinion in the Court as to whether or not Dawson did in any way violate his duty by transferring to Lewis the order to effect the policy; but all the Court think that the true measure of damages was not that which the learned judge stated. This was an action on the case for negligence; and therefore, if that letter was exhibited to Nail, Nail could acquire no right to retain the proceeds of the policy as against Lewis, because he then would have knowledge that Lewis was acting only as agent for Dawson, and that he had no claim against him; and consequently Nail's retention of the money being unlawful, could not give Cahill a right of action against Dawson to recover the whole amount, although Dawson might be liable for nominal damages in respect of a breach of his duty as agent. That question cannot be decided unless we first ascertain whether the letter of instructions was exhibited or not; and therefore there must be a new trial. It being an important question on the law of agency, if the parties think fit they can put it in any course of investigation they think expedient. *Rule absolute for a new trial.*

LEGAL MISCELLANY.

JUDICIAL ROMANCE.

It is said, and very justly, that in construing a will, the court should endeavor as far as possible to place itself in the position of the testator, and, by means of proper evidence of the circumstances in which he was situated, to read his language with his own eyes, and interpret it by the relations in which he stood to his property and his beneficiaries. In the case of recent testamentary dispositions, where the facts are readily ascertainable, the application of this rule does not usually require in a judge

much beyond good common sense and a general knowledge of the principles of law. But where many years have elapsed, the task becomes more difficult, and, as it would seem from a recent case in Massachusetts, demands far higher qualities of mind. The outlines of those "surrounding circumstances," of which the law books speak, soon fade away into the dim haze of the past, and the yellow sheet of paper and quaint old writing alone remain to tell us whom it was the testator most loved, and what ties bound him strongest to the earth, when the final separation came. Outside the corners of his will, his hopes, his affections, his avarice or his pride, all the passions that agitated his heart, as his feet first touched the cold waters of the great river, are a mere blank to us; and whether he sent his treasures before him on his long journey, or left them here to the corruption of the moth and the rust—even this we can never certainly know. The imagination alone, if we dare use it, can enable us to revivify the past, and decipher from the vague hints and brief dispositions of a dying man, his true relations to his fellows, and the paramount interests of his life. And yet this faculty, fascinating as it is, when exercised by the novelist or poet, has not hitherto been reckoned among those which are most useful to lawyers and judges. Its high but irregular flight is clogged by the leaden rules of the law of "the construction of wills," and its fires chilled by the cold logic of "reported cases." The most vivid illusions of a poetic mind will be dispelled by the xv. chap. of 1st Greenleaf on Evidence, and vanish utterly before the plain prose of Doe dem. Hiscocks *vs.* Hiscocks, 5 Meeson & Welsby, 363.

These observations have been suggested to us recently, on reading the case of *Popkins* vs. *Sargent*, which is reported in 10 Cushing, 327,—quite a singular case, indeed. It seems that one Eliakim Willis, of the pleasant little town of Malden, in Massachusetts, a "clerk," (or clergyman,) as he styles himself, and doubtless a simple God-fearing old man, in the year 1800, coming towards the natural term of his life, bethought him of putting his house in order, and so wrote his last will and testament in the following words, he having therein, probably, no other assistance than his honest kind heart, and an old form-book:

"In the name of God, Amen. I, Eliakim Willis, of the town of Malden, in the county of Middlesex, and Commonwealth of Massachusetts, clerk, being at present in the exercise of my reason, and of a disposing mind, do make this last will and testament, apprehensive of my mortality. My soul I commit into the hand of God who gave it, humbly and entirely relying on the merits and mediation of Jesus Christ, for pardon and acceptance

with him; my body I resign to the dust, to be buried at the direction of my executor and executrix, whom I shall hereafter appoint, in hope of a joyful resurrection to immortal life. As to the interest I have in worldly things, which a kind Providence hath given me, I dispose of it, upon mature deliberation, in the following manner and form:

"Imprimis. I will that all my just debts be paid by my executor and executrix.

"Item. I give unto the church of Christ, in Malden, a quarto Bible, English print, to be read in public on every Lord's day.

"*Item. I give towards the propagation of the gospel among the savages and other inhabitants of America, $200, to be paid by my executor or executrix, to the Massachusetts Society for that purpose, their committee or their treasurer, in one year after my decease; and to enable my executor or executrix to pay this legacy, I give unto them, or either of them forever, a lot of land lying on the east side of the road leading to Malden bridge, &c. This lot of land, being devoted for the payment of this legacy, is to be delivered to the Society, &c., unless payment is made by my executor or executrix of the sum, and at the time above mentioned.*

"Item. I give unto my niece Elizabeth Kempton, ten dollars, also an English print bible to each of the daughters of my late brothers, Benjamin and Samuel, and to each of the children of my late niece Mercy Dexter.

"Item. I give unto my sister, Mercy Marchant, a comfortable support in life, and a decent interment at death.

"Item. I give unto Colonel John Popkin, fifty dollars.

"Item. I give unto my brothers Ebenezer and Jireh Willis, my wearing apparel, to be equally divided between them.

"I give unto the church of Christ, in New Bedford, the annual profits of my pew in the north meeting-house in said town, forever, after the decease of my brother Ebenezer Willis and his wife.

"Item. All the rest and residue of my estate, both real and personal, I give as follows:

"Unto my niece Sarah Popkin and her daughters, Patty Willis and Betsy Howes Sargent, one-half of my real and all my internal personal estate, and to Ebenezer Willis Popkin, I give one-half of my real and all my external personal estate, to be theirs forever.

"Item. Be it known, however, that my will and pleasure is, that my niece Sarah Popkin shall have the improvement of my whole estate during her natural life, if it is not contrary to the laws of this Commonwealth,

(the preceding article notwithstanding,) if it is contrary, this item I hereby make null and void, so as no way to affect the other items of this my last will.

"Item. I give unto my executor and executrix, jointly and severally, full power and authority to sell and dispose of so much of my real and personal estate, or lots of land, as may be necessary for the payment of my debts and legacies.

"*Lastly. I do by these presents, constitute, appoint, and empower Colonel John Popkin my executor, and my niece Sarah, his wife, before mentioned, my executrix, jointly and severally, of this my last will and testament.*

"In testimony whereof, &c."

This will contains all we now know about good Eliakim Willis, "of the town of Malden, in the county of Middlesex, and Commonwealth of Ma sachusetts," and his relations to "surrounding circumstances," and the little world in which he lived. At least, when the subsequent Popkins, and the descendants of "Sally Willis and Betsey Howes Sargent," came, fifty years afterwards, to have a suit about a bit of land, *unius lacertæ*, which passed under this will, their counsel had nothing else to tell about him, in the case which they thereupon stated for the opinion of the court. And we might have supposed that the court would not have any very elaborate duty to perform in expounding this instrument, quaint and somewhat strange though its phraseology may seem to a lawyer's eye.

It was the will of a plain, humble country clergyman, who thought no doubt that the fifty dollars he left "Colonel John Popkin," was a splendid legacy. He knew and cared little about rules of law and Shelley's cases, and such like bewildering processes for stultifying testators. He had a few objects which were near to his affections, which he desired to accomplish. He wished a Bible, "English print,"—none of those dingy, blurred American editions, with Noah Webster's spelling, just invented, you may be sure—to go to the "church of Christ" at Malden, his *own* church plainly; and other copies of the same good book, "English print," too, to his nephews and nieces. Then he provides a comfortable support for sister Mercy, during her life, and "a decent interment at death," a somewhat vague provision, to be sure, in a pecuniary point of view, but the testator doubtless knew that he could safely trust her to Colonel and Mistress Popkin. But the great event of his will, and that on which his mind most dwelt, quite to the exclusion even of the Colonel, was his great bequest of $200 "toward the propagation of the gospel among the savages *and other inhabitants* of America;" and doubtless, in his rather uncertain

notions of the geography and population of that continent, his simple heart glowed, as he thought of the immense good his legacy would work, as it radiated from Malden to Patagonia, and contemplated, with secret pride, a long line of little Choctaws and Esquimaux, on whom it would confer the blessings of Christianity, and the grateful patronymic of Eliakim W. If we cannot help smiling a little at this, and at the idea of "Ebenezer and Jireh," after they had divided the "wearing apparel" of the honest minister, going about thenceforward each dressed as half a clergyman, still it is with the utmost respect and kindly feeling, and without the least intention of ridicule. And though we might, as lawyers, be somewhat puzzled to understand his distinction between his "internal" and his "external" personal estate, as an object of gift, except upon some painful theory of cannibal propensities among his legatees, to which he weakly accommodated himself, or why he supposed that it might perhaps be contrary to the laws of the Commonwealth, for Mistress Popkin *to improve* his estate during her natural life, still, on the whole, his meaning in the material parts of the will is plain enough in 1857, and doubtless was still more so to his executor and executrix, who "jointly and severally" enjoyed his confidence in 1800. Even the question which gave rise to the controversy in the particular case, really does not strike us as presenting the difficulty which the court seem to have felt in its determination.

That question was this: Colonel Popkin alone qualified as executor under the will, and afterwards paid the legacy of $200 to the Massachusetts Society for the Propagation of the Gospel; did he thereby become the owner in the fee of the lot of land devised for that purpose? The court decided that he did, upon a critical consideration of the will, and by the application, in what strikes us as a very liberal and extended manner, of tho rule which we stated at the beginning of these observations.

We must confess, with great respect to the learned court, it does not seem to us clear that this was the true conclusion. The case, we apprehend, does not fall under that class of decisions, where an estate in fee has been held to pass, without words of inheritance, because of a personal charge on the devisee by the testator. The question rather is,—were the executors to take beneficially *any* estate. The legal fee undoubtedly passed, if only by force of the word "forever." But that there was no purpose of benefit to the devisees, seems tolerably plain, because the devise is to the executor and executrix, *or either of them;* and is thus, as well as the payment of the legacy, annexed to the office, and not the person; the lot is

declared to be *devoted* to the payment of the legacy, and there is a devise over to the society on its non-payment, which would make it rather a charge on the estate than the person; there is a gift of a pecuniary legacy to the executor by name, and of a life estate in the whole, and of an absolute interest in part of the residue, to the executrix, also, by name; and, finally, there is an express power to sell for the payment of debts and legacies. All these circumstances thus combine to present a different case, from that of a devise to one, he *paying debts or legacies*; where the implication of a gift in fee arises because it may be doubtful whether a less estate would recompense the devisee for the duty imposed on him. Here the acceptance of the devise involved no obligation to pay, for in case of failure the devise over would have taken effect. On the whole, then, it rather seems to us that this was a devise of the lot to the executors, in trust, either to raise a legacy thereout, or else to be conveyed directly to the society, and that *ultra* these purposes they had no interest.

But whether we are right or wrong in this, is not material. Our purpose is merely to show in what a curious and remarkable manner the court, in their opinion, have endeavored, from the very meagre materials furnished by this will, to reconstruct the Rev. Eliakim Willis and his social relations, and what great latitude of imagination they have permitted themselves in this biographical employment.

The court first state the general rule, in the following comprehensive terms:—

"In order, therefore, to determine the legal effect of the present devise, we have to identify ourselves, so far as we may, with the testator; to put ourselves in his place and his mind; to take into view his character, his time of life, his personal and social relations, the character and condition of his connections; nay, the state of society in which he lived, its knowledge its convictions, and even its prejudices and its passions. All these considerations are essential to the perfect understanding of his intention."

Then, after some preliminary remarks with regard to the will, they proceed:

"It appears by the facts agreed, that, on the death of Mr. Willis, Col. Popkin proved the will alone, and himself paid the legacy to the Society de Propaganda; that he and his wife occupied the Willis homestead until his death; that Mrs. Popkin survived, and continued in occupation until the year 1847; and now, upon process of partition between the two sets of heirs, the question is presented, whether the four acres of land, charged

with the legacy of two hundred dollars, became the property of Col. Popkin, or of Col. Popkin and Mrs. Popkin as tenants in common, or as joint tenants, with survivorship to Mrs. Popkin.

"Or, to commence the inquiry further back, are the four acres of land in the clause quoted, devised to the Massachusetts Society for the Propagation of the Gospel among the savages and other inhabitants of America? Or is it a devise to John Popkin, who alone qualified as executor, in fee? Or to John Popkin in fee, defeasible? Or to John Popkin and Sarah Popkin, as tenants in common under the general rule of the statute? Or to John Popkin and Sarah Popkin as joint tenants, under the statute exception to the general rule of the statute?

"All these intricate questions of law are to be determined with so much of precision as the case admits, by looking into the contents of the will, and deducing therefrom the probable intention of the testator. It involves, not only examination of his own thoughts, as he lay, *in the infirmity of age, and in the near approach of death*, meditating how best to dispose of his worldly goods, but investigation also of the history and condition of his family, of which a first and second generation are both gone, and a third is now maturing into old age. In fact, we have them all here before us in this will, every word of which is pregnant with meaning in respect of their relation to his estate, and his intentions.

"Eliakim Willis was pastor of the parish of Malden; a bachelor or a widower without children; a devout old man of the state of theological opinion prevailing at the close of the last century, when Puritanism, though ceasing to be exclusive, was not the less earnest and sincere. He was from New Bedford, where he had a brother, Ebenezer Willis, still living; and he retained there, as a reminiscence of his youth, the old family pew in the North Meeting House. By prudence and care, he had economized, out of his modest salary as a country clergyman, a decent estate, consisting chiefly of land. His brothers, Ebenezer and Jireh, were, it may be presumed, reasonably well off, for he bequeathed to them by his will some personal objects only, as tokens of remembrance and affection. He had a widowed sister, Mercy Marchant, for whose comfortable support through life he provided. He remembered the church in which he had so long ministered, and gave to it his favorite copy of the Bible, to be read in public on every Lord's day.

"He then *looked around for some object* of general philanthropy worthy of his regard. He *doubted*, but, on the whole, came to a *wise conclusion*,

and resolved to make a donation to the Society for the Propagation of the Gospel among the *Indians*, who, he might have reflected, had *not been over-well treated, either by England or by her colonies in New England.* As to family connections, he had a favorite niece, who had passed *through her romance of youth*, had married and been left by her deceased husband a widow, with two children, but without property, and had been *invited by her good uncle* to look to him for support, and probably been taken into his family. Among the parishioners of Mr. Willis was a substantial and worthy gentleman, himself a widower, apparently with a child or children. A very *natural event* followed. Colonel Popkin *married the still comely widow*, and a third family grew up under the eyes, and enjoying the affection of Mr. Willis. Such was the condition of the family when the will was made.

Mr. Willis looked considerately after his own affairs; but consulted Colonel Popkin, and was tenderly cared for by his niece, Mrs. Popkin. They were his children in affection. Accordingly, in making general disposition of his property, he divided the bulk of it equally between the fruits, respectively, of the first and second marriages of his niece, providing, however, that she should have the improvement of the whole estate during her natural life. But here, doubts as to the law came into his mind. *The spectre of the celebrated rule in Shelley's case rose before him.* Perhaps—for it happened during his life—he *had read or heard* of the *tribulation and the perplexities* of the Earl of Mansfield, in the case of *Perrin* vs. *Blake.* And accordingly, after making the devise to the two sets of his niece's children, with reservation of a life-estate in his niece, he added the following words: 'If it is not contrary to the laws of this Commonwealth—the preceding article notwithstanding—if it is contrary, this item I hereby make null and void, so as in no way to affect the other items of this my last will.' In this way, his niece and her children were amply considered, and the whole office of gratitude and love to them, and each of them respectively, was faithfully performed, so far as the law would allow it to be done."

The italics are our own.

Now, we must respectfully protest against such an extension as this of the rule of *Doe d. Hiscocks* vs. *Hiscocks.* Surely it cannot be that the fancy of a court may play at will with the naked facts of a testamentary instrument, and shape out of their meagre details, historical romances or pastoral stories. This certainly would constitute a new species of "legal

fictions." If it were so, the lawyer would have to be like the poet, "made of imagination all compact," capable of giving to forgotten manners, and departed generations "a local habitation and a name." No doubt, such a faculty, if indulged, would greatly alleviate the tediousness of law books. Nothing could be more pleasant, for instance, than to have the old reports rewritten on this principle. How one would like to see old "Archer," depicted afresh in 1 Rep., as he sat with his "heir male," in the fine old baronial hall of my "Lady Shrewsbury," and hobnobbed with those grave knotty fellows "Shelley" and "Chudleigh," in their slashed doublets and peaked hats, and discussed in confidence with them, the details of those wills which were to distract legal posterity, to the remotest time. A bit of legal dialogue might be thrown in with much effect, too; as, e. g:

CHUDLEIGH.—"By'r lady, but your statute of our late King Henry, about uses, is a merry thing to us devisors."

"ARCHER.—(Despondingly turning towards the heir male.) Nay, but, ifakins, this new business of recoveries and vouchers is playing closh cayles with our estates tail, as my old gossip Taltarum found."

And so on. Then, what charming illustration of the manners of the gay 'prentices of London town, in the reign of Queen Bess, could be introduced, in describing how those roystering blades, the "Six Carpenters," swaggered, half tipsy, into that famous tavern, and like true types of the perennial Anglo-Saxon b'hoy, instead of paying their reckoning, made a row, and broke things generally, having first taken legal advice to the effect that they would not thereby become trespassers *ab initio*. To this extent, indeed, if there must be a relaxation of the severe tone which has hitherto characterized judicial opinions, we could go with pleasure. But, it seems to us, that to proceed further might not always be consistent with judicial dignity. This business of "indentifying oneself with the testator," and putting "ourselves in his place and mind," if carried out literally, might prove troublesome to judges who have not much histrionic talent, or play of feature. We cannot bear to think of our venerable Chief Justice Taney being obliged, in construing the will of some revolutionary patriot, to sit in continental uniform before a glass, surrounded by the family pictures of the testator, or perhaps lay figures in the costume of the period, in order to identify himself with the decedent, and to realize his feelings. Surely this would never do, and cannot seriously be intended. There is one modification, however, which we feel that we might agree to. If this imaginative faculty is to be hereafter indulged by the judiciary, we

think they ought also to be allowed the usual license of novelists, in dispensing poetical justice. Surely, if they may invent their characters, they may also modify the plot, to suit their artistic exigencies. We are always distracted in actual life, by finding the estates going to the wrong person, by reason of mere legal technicalities. Of course we would not expect a judge to change the rules of law to suit the development of his plot; this can be conceded only to Sir E. Bulwer Lytton, and feminine novelists generally. But while rigidly adhering to the doctrines of the common law, the court might exercise a wholesome control over the *dramatis personæ*, through the medium of their affections or passions. A decree in equity is peculiarly plastic, and could be used with much effect for this purpose. For instance, there is the great Thellusson property, and its stagnant pond of wealth, which has been the cause of unintermitted litigation and unhappiness for half a century. Why might not the Chancellor order that on a given day, all the next of kin should meet together at Exeter Hall, embrace in mutual affection, and after reserving a comfortable subsistence for themselves, agree that the rest of the fund should be employed in paying off the National debt, or in the gradual extinction of pauperism. Or, if the sentimental style should become necessary, in a litigated estate, we should be delighted to publish in this journal the elaborate opinion of some Mr. Justice G. P. R. James, commencing with the usual two horsemen ascending the hill, and ending by a decree that Clara, the residuary devisee, should immediately marry Charles, the heir at law, and thus merge in their prospective issue, the claims of their respective families.

But seriously, and in conclusion, we must object to the practice, which is becoming too common among judges, of making their opinions the medium of fine writing. Simple language and plain logic are all that is necessary; anything beyond, diverts the attention and weakens the reasoning. "The speech of Mercury is harsh after the songs of Apollo," it is true. But it is best to keep the gods separate, and let each do his appointed work. We cannot but think that the saying of Swift is as true in law as in divinity, "Fine rhetoric in sermons, is like the flowers among the corn; they are pleasant to the eye of the passer by, but they much hinder him who seeks to reap the profit."