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**Decisions, statutes, &c. concerning the law of estates in land / comp.
by John R. Rood**

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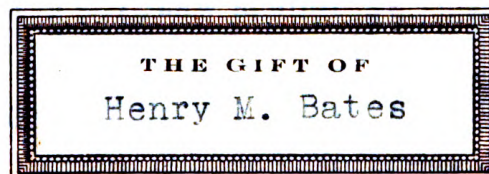


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DECISIONS, STATUTES, &c.

CONCERNING THE LAW OF

ESTATES IN LAND

COMPILED BY
JOHN R. ROOD

CHICAGO
CALLAGHAN & COMPANY
1909

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PREFACE.

The mystery of the obsolete and forgotten involves the law of real property more than any other part of the law student's work; and most of the solvents of that mystery lie hidden here and there in the year-books, statutes, and old reports, and locked from the average student in a dead and barbarous language. This mystery has been a great embarrassment to me, especially since my attempts to teach the subject; and most of the modern texts and readings have been found to emphasize the last application of the rules or the effect of late American statutes, rather than to expound the original doctrines, without knowledge of which the statutes cannot be understood. Of all the recent publications, Professor Digby's History of the Law on Real Property has been found most helpful.

The following pages have been printed from the notes made from time to time while preparing to conduct exercises in the first course on real property at the University of Michigan, using Blackstone's Commentaries as the text. The design has been to present the great monuments which mark epochs in the various branches of the subject, with only an occasional late example. The prolixity of the originals has often made imperative the alternative to abridge or omit, and abridgment has been preferred. The present is a temporary edition, made to try out the serviceability of such a book by use in class, and trusting to experience to fill the gaps and prune the exuberance of special topics. The editing has been rather hurriedly done, and the charity of the reader is requested.

JOHN R. ROOD.

Dated, Ann Arbor, March 5, 1909.

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DECISIONS, STATUTES, &c., CONCERNING ESTATES IN LAND.

CHAPTER I.

TENURES.

MAGNA CHARTA, HENRY III (1217) c. 39.

No freeman from henceforth shall give or sell any more of his land but so that of the residue of the lands the lord of the fee may have the service due him which belongs to the fee.

MAGNA CHARTA OF HENRY III (1217) c. 43 on Mortmain.

It shall not be lawful from henceforth to any to give his lands to any religious house, and to take the same land again to hold of the same house. Nor shall it be lawful to any house of religion to take the lands of any, and to lease the same to him of whom they were received to be holden. If any from henceforth so give his lands to any religious house, and thereupon be convict, the gift shall be utterly void, and the land shall accrue to the lord of the fee.

BRACTON, Book 1, c. 19, Sec. 2, ff. 46 a & b—A. D. 1260?

Likewise it is to be seen whether he to whom a thing has been given may further give the thing given to him without prejudice to the chief lords; and it appears so; because if a donation be further made, although the chief lord suffers damage by it, nevertheless injury is not done to him, because all damage does not inflict injury, but on the contrary injury implies damage. Because the term injury is applied to everything which is done not rightfully, and upon injury there follows an action to remove the injury and that from which the injury results; but where there is damage and no injury an action does not follow to remove the nuisance from which the damage results. But some person may say, that from the fact that the donatory further gives and transfers the thing given to others, that he cannot do this, because the lord through this loses his service, which is not true, with all due respect and reverence for the chief lords. And it is generally true that a donatory may give to whom he pleases realty and land given to himself, unless it be specially provided in

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the possession that he may not. For when a person has given a tenement he gives a certain tenement in such a manner, that he is to receive certain customs and a certain service, according as has been said above. And hence he cannot claim more of right, if he shall have had what is agreed upon, and so he takes what is his own and goes his way. * * * It appears, therefore, from the premises, that when a donation by a lord to his tenant is perfect and free, absolute and not conditional nor servile, no injury is done to the lord from the fact, that the tenant has further given it, for injury results from the fact if (he has done so) against a mode or a covenant. If my tenant has made a donation it is asked to whom he has done an injury? Not to the lord, for the lord has whatever belongs to himself, and the tenement charged and burdened, whatever may be said to whomsoever it may have come. Likewise neither the feoffee, for it matters not to the chief lord whosoever has his fee, since the tenant is his tenant, although through an intermediate tenant. And if he shall say that he has entered his fee unjustly, I say not so; because the fee is not his in the domain, but is his tenant's, and the lord has nothing in the fee except a service; and so the tenant will have the fee in the domain, and the lord will have the fee in the service. And if the lord shall prohibit his tenant to work his pleasure with the tenement, which he holds in domain, the lord so enters into the tenement of his tenant and causes him a disseisin, unless a mode or covenant added to the donation itself induces otherwise, since anyone may add in a donation a mode or covenant and a law which shall always be observed. But the fee of the lord is said to be this, homage and service and not the tenement in domain, and therefore he who enters upon the homage and his service does him an injury, and not he who enters upon the tenement, which his tenant holds in domain, as above said.

BRACTON, Book 2, c. 35, fol. 81.—A. D. 1260?

In the same way the tie of homage may be dissolved and extinguished as regards the person of the tenant, and attach to the person of another, as for instance, where the tenant, when he has done homage to his lord has altogether relieved himself of his inheritance and has enfeoffed another to hold of the chief lord, and in that case the tenant is released from the duty to render homage, and the homage is extinguished, whether with or against the will of the chief lord, and the tie attaches to the person of the feoffee, who is bound because of the tenement which he holds, because it is the fee of the chief lord.

STATUTE QUIA EMPTORES or Statute of Westminster III, 18, Edw. I, Statute 1.—A. D. 1290.

c. 1. For as much as purchasers of lands and tenements of the fees of great men and other lords have many times heretofore entered into their fees, to the prejudice of the lords, to whom the freeholders

of such great men have sold their lands and tenements to be holden in fee of their feoffors and not of the chief lords of the fees, whereby the same chief lords have many times lost their escheats, marriages and wardships of lands and tenements belonging to their fees, which thing seems very hard and extreme unto those lords and other great men, and moreover in this case manifest disheritance, our lord the king in his parliament at Westminster after Easter the eighteenth year of his reign, that is to-wit in the quinzine of St. John Baptiste, at the instance of the great men of the realm granted, provided, and ordained, that from henceforth it should be lawful to every freeman to sell at his own pleasure his lands and tenements or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before.

c. 2. And if he sell any part of such lands or tenements to any, the feoffee shall immediately hold it of the chief lord, and shall be forthwith charged with the services for so much as pertaineth or ought to pertain to the said chief lord, for the same parcel, according to the quantity of the land or tenement so sold, and so in this case the same part of the service shall remain to the lord, to be taken by the hands of the feoffee, for the which he ought to be attendant and answerable to the same chief lord, according to the quantity of the land or tenement sold for the parcel of the service so due.

c. 3. And it is to be understood that by the said sales or purchases of lands or tenements or any parcel of them, such lands or tenements shall in no wise come into mortmain, either in part or in whole, neither by policy nor craft, contrary to the form of the statute made thereupon of late. And it is to-wit that this statute extendeth but only to lands held in fee simple, and that it extends to the time coming. And it shall begin to take effect at the feast of St. Andrew the apostle next coming.

NOTE, Yearbooks (Horwood), 21 & 22 Edw. I, p. 640.—A. D. 1294.

Note that a man may enfeoff another to hold to him and the heirs of his body begotten, to be holden of him (the feoffor) by a certain service by the year; and in this case there is no need that he be enfeoffed to hold of the chief lord of the fee; for the statute '*Quia Emptores Terrarum*,' &c., is understood of the case of one enfeoffing another in fee simple and not in fee tail.

STATUTE, 12 CHARLES II, c. 24.—A. D. 1660.

An Act for Taking Away the court of Wards and Liveries, and Tenures in Capite, and by Knight Service, and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof.

Whereas it has been found by former experience, that the courts of wards and liveries, and tenures by knight service, either of the king or others, by knight service in capite, or socage in capite of the king, and

the consequents upon the same, have been much more burdensome, greivous, and prejudicial to the kingdom, than they have been beneficial to the king; and whereas since the intermission of the said court, which hath been from the four and twentieth day of February which was in the year of our lord one thousand six hundred forty and five, many persons have by will and otherwise made disposal of their lands held by knight service, whereon divers questions might possibly arise, unless some seasonable remedy be taken to prevent the same; Be it therefore enacted by the king our sovereign lord, with the assent of the lords and commons in parliament assembled, and by the authority of the same, and it is hereby enacted, That the court of wards and liveries, and all wardships, liveries, primer-seisins, and ousterlemains, values and forfeitures of marriages, by reason of any tenure of the king's majesty, or of any other by knight service, and all mean rates, and all other gifts, grants, charges incident or arising, for or by reason of wardships, liveries, primer-seisins, or outerlemains, be taken away and discharged, and are hereby enacted to be taken away and discharged, from the said twenty-fourth day of February one thousand six hundred forty-five; any law, statute, custom or usage to the contrary hereof in any wise notwithstanding. And that all fines for alienations, seizures and pardons for alienations, tenure by homage, and all charges incident or arising, for or by reason of wardships, livery, primer-seisin, or ousterlemain, or tenure by knight service, escuage, and also, *aid pur file marrier*, and *pur fair fitz chivaler*, all other charges incident thereto, be likewise taken away and discharged, from the said twenty-fourth day of February one thousand six hundred forty and five; any law, statute, custom or usage to the contrary hereof in any wise notwithstanding. And all tenures by knight service of the king, or of any other person, by knight service in capite, and by socage in capite of the king, and the fruits and consequents thereof, happened or which shall or may hereafter happen or arise thereupon or thereby, be taken away and discharged, any law, statute, custom or usage to the contrary hereof in any wise notwithstanding; and all tenures of any honours, manors, lands, tenements or hereditaments, or any estate of inheritance at common law, held either of the king or of any other person or persons, bodies politic or corporate, are hereby enacted to be turned into free and common socage, to all intents and purposes, from the said twenty-fourth day of February one thousand six hundred forty-five and shall be so construed, adjudged and deemed to be from the said twenty-fourth day of February one thousand six hundred forty five, and forever thereafter turned into free and common socage; any law, statute custom or usage to the contrary hereof in any wise notwithstanding. * * *

BRADSHAW v. LAWSON, in King's Bench, Mich., 32 Geo. 3.—Nov. 18, 1791—4 Term. 443.

Action of debt for 2s. 6d. for not attending plaintiff's court baron for Halton manor in respect of a customary estate. Till the reign of

Queen Elizabeth all the lands of the manor were (except the lord's demesne lands) of customary tenure of inheritance, passing by customary deeds and the lord's admission. The tenure remains unaltered of several of these estates. The defendant's estate being then parcel of the manor, an indenture of feoffment with livery indorsed thereon was made Oct. 2, 18 Jac. I, whereby the then lord of the manor enfeoffed it for 80l. to C and his heirs in fee farm, reserving the yearly rent of 1l. 4s. 11d., therein called ancient rent, for all other rents. May 14, 1 Car. I, another deed reciting this deed covenanted that all holders of the estate should grind at the lord's mill and do suit at his court as formerly, and be subject to fines and amercements assessed by homage or jury, and that for each default 2s. 6d. should be paid. This deed was executed by C's son. Defendant's ancestor became possessed of the estate in 1742, since which time no owner had attended court nor been amerced except once in 1742. Case reserved.

LORD KENYON, C. J.—Notwithstanding all the industry that has been exerted on this occasion, I cannot entertain a doubt on the principal question, which was settled about five centuries ago by a positive act of parliament, the statute of *quia emptores*. And the objection to the plaintiff's claim, which arises on this statute, decides the merits of the cause, and renders it unnecessary to consider the other points that were made by the plaintiff's counsel, which perhaps upon examination would be found equally destitute of all legal principles. It is stated, as the foundation of the plaintiff's demand, that the relation between these parties is that of lord and tenant; as long as that continued, the services to be rendered by the latter were to be regulated by the custom of the manor; and among others was that of attending the lord's court. Now it is stated in the case that the lord of this manor in the reign of James I, by competent deeds of conveyance conveyed the property, of which the defendant is now seized, to the defendant's ancestor, then a customary tenant of the manor. But it has been said that the old services were reserved by the reservation of the fee-farm rent; but if the relation of lord and tenant absolutely ceased to exist, that rent can no longer be considered as rent-service, but a rent to be recovered according to the contract between the parties. After the statute of *quia emptores* the lord could not by any deed reserve the old services when he conveyed away the estate in respect of which those services were due; for the tenant must hold of the superior lord. By the conveyance the estate was no longer parcel of the manor, nor held of the manor; neither was the defendant's ancestor any longer a tenant of the manor. Therefore on that point, on which all the plaintiff's claim is founded, I am extremely clear that the defendant was not bound to attend the plaintiff's court baron as a tenant of the manor. * * * I am of opinion that the very foundation of his claim totally fails, and that a judgment of nonsuit should be entered. ASHURST, BULLER, and GROSE, JJ., assenting.

Judgment of nonsuit.

MATTHEWS v. WARD'S LESSEE, in Md. Ct. of App., Dec. 1839—10 Gill & J. 443.

Ejectment by plaintiff as lessee of Sarah Ward et al., against Henry Matthews, for a lot of land in the city of Annapolis. From judgment for plaintiff, defendant appeals.

Leonard Scott and wife being seised of the lot in fee on Oct. 18th, 1817, by indenture in consideration of five dollars, gave, granted, bargained, and sold it to Henry Price, "in trust for the use of John Henry Scott and his heirs forever; and in case the said John Henry Scott should die without lawful issue, then to have and hold" it for the use of the heirs of Lucy Ward, daughter of said Leonard Scott. The grantors in the deed died; John Henry Scott died, intestate, unmarried, and without heirs; later Lucy Ward died; and plaintiff's lessors claim as her children and heirs. Defendant claims by virtue of a patent issued to him on an escheat warrant taken out by him, claiming that the land escheated to the state on the death of John Henry Scott without heirs. After the patent to Matthews, but before this suit was commenced, Price and wife made a deed, reciting the facts and purpose of the first deed, and granting, bargaining, selling, conveying, and enfeoffing to plaintiff's lessors.

ARCHER, J.—It is contended by the appellant, that the deed from Scott and wife to Price is a deed of feoffment; and as such, the legal title of the property vested by the statute of uses in John Henry Scott in fee; that the remainder over, as being too remote, was void, and that upon the death of John Henry Scott without heirs, the property of course became liable to escheat.

If by the words of the deed and the intention of the parties we could construe this as a deed of feoffment, there would arise no objection to such a result, from an absence of evidence of livery of seisin. The ancient law on the subject of feoffments, which demanded livery of seisin to give them efficacy, we consider as having been abolished, and that now enrollment takes the place of livery and is equivalent to it. The act of 1766 provided for the enrollment of deeds of feoffment, as well as other deeds, and the act of 1715 declared that livery should not be necessary where the deed was enrolled. (*449) * * *

If this be a deed of bargain and sale, as we think it is, then the use was executed in the bargainee, and the limitations to use are merely trusts in chancery, and the *cestui que trusts* are seised only of an equitable estate, and the question has been discussed whether such an estate is liable in this state to escheat. The case of *Burgess v. Wheat*, 1 Eden 177, 1 Wm. Bl. 123, may be considered as having settled the English rule on this subject, though much dissatisfaction (*450) has at various times been expressed at the decision. That the death of the *cestui que trust*, without heirs, did not operate as a forfeiture to the lord was founded on the feudal idea of tenure, the trustee being *in esse*, and being the legal seisin of the land, was the tenant possessing capacities to perform the feudal

services; as against him the king possessed no equity. Judge Tucker, in 3 Leigh 518, in speaking of *Burgess v. Wheat*, says, there can be nothing more unreasonable than this decision of *Burgess v. Wheat*, if we consider it in any other light than as a mere question of tenure; that the trustee should be permitted upon the death of the beneficial owner without heirs, to hold the estate to his own use, is utterly at variance not only with the principles of equity, which consider him a mere machine, an instrument, a conduit, * * * but it seems to me at variance with the natural justice of the case. It is right and proper, that, when the owner of property dies without giving it away, and without leaving any objects having natural claim to his bounty, such as heirs or next of kin, his prosperity should go to the community of which he is a member. The ground upon which the English rule on this subject can alone be maintained, and upon which it was established, is on the principle of tenure; and it becomes therefore important to inquire, whether the doctrine of that case would be supported in this state upon the same ground.

The lord proprietary, by the express terms of the charter, held his lands in free and common socage, and his grantees, or tenants, anterior to the revolution held by the same tenure. Service of a feudal character, or of the nature of feudal services, were attached to his grants; and the incidents of fealty, rent, escheat, and fines for alienation or some of them, were the necessary incidents thereto. At the revolution, when the people of the state assumed the powers of government, and the right theretofore existing in the proprietary, these services and incidents were in effect abolished; thus the oath of allegiance to the state superseded the incidents of fealty; quit rents were abolished, and grants were made without being subject to fine on the alienation of the grantee; and escheats, though they existed, had essentially changed their nature, no longer being technically founded on the same principles. Instead of going to the lord of the fee, who took the land in lieu of the services, because by the death of the tenant without his heirs there was no one to perform the feudal services; they reverted to the state as property without an owner, upon a principle of justice, that the whole community should hold the direlict property for the benefit of all. After the revolution, therefore, lands became allodial, subject to no tenure, nor to any of the services incident thereto; and if allodial, the supreme power of the state would succeed to them as the king would succeed to allodial property in England by the common law, upon the death of the owner without next of kin. It was said by Lord Mansfield, in 1 Wm. Bl. 163-4, "In personal estates which are allodial by law, the king is the last heir where no kin, and the king is as well entitled to that as to any other personal estate." * * * In analogy, therefore, to the admitted condition of allodial property, and in conformity to the reason and justice of the thing, when the owner of real estate dies without heir, the state is *ultimus haeres*, and takes the property for the benefit of all. * * * [Here the court discusses the state statutes regulating escheat, and holds them to apply to equitable interests.]

If these views be correct, and we think they are, the land held in trust in this case was liable to escheat. Matthews having taken out an escheat warrant, and procured a patent thereon, the next inquiry is, whether it gave him the legal title; and it is insisted that it did, in virtue of the statute of 1 Rich. 3, c. 1. This statute was confined by its terms to uses. It may therefore be doubted whether it applies to modern trusts, and it is questionable whether it is in force in this state. Cases coming as it would appear within the terms of the statute, if it applies at all to trusts, have been excluded. Thus it has (*455) been held, that this statute does not apply to the trusts of a term. [*Goodtitle d. Jones v. Jones*], 7 Term 47. So it has been held, that a feoffment by a *cestui que trust* of a term, without the consent of the legal termor, does not destroy the term. *Doe ex dem. Maddock v. Lynes*, 3 Barn & Cres. 388. The universal practice never to rely on the conveyance of the *cestui que trust* for passing the legal title, but to require the conveyance of the trustee for that purpose, which practice is admitted to exist, in *Cornish on Uses*, 33, is very strong to show that the statute of 1 Rich. 3, c. 1, does not apply to trusts; for if it did apply to trusts, then the *cestui que trust* could convey the legal title, and the concurrence of the trustee would be wholly unnecessary. * * * We are therefore of opinion that the plaintiff is entitled to recover at law, and that the remedy of the defendant is in equity.

Judgment affirmed.

VAN RENSSELAER v. HAYS, in New York Ct. of App., March, 1859.—
19 N. Y. 68-99.

Action for rent 16 years arrear under a deed made Feb. 15, 1796 by plaintiff's father and deviser in consideration of 5s., and the yearly rents covenants and conditions contained in the deed, which bargained and sold, released and confirmed, 274 acres to Jacob Dietz (defendant's grantor) his heirs and assigns, "yielding and paying therefor yearly and every year" to the grantor his heirs and assigns the yearly rent of 30 bushels of good wheat, four fat fowls, and a day's service with carriage and horses. The grantee covenanted for himself his heirs and assigns to pay &c. At the close of the trial the court found these facts, and that the proper portion of the rent and interest for the portion of the granted premises held by defendant was \$485.07, for which he directed judgment for plaintiff. This judgment was affirmed by the general term and defendant appealed here.

DENIO, J. The defendant's position is, that the covenant for the payment of the rent is, in law, personal between the grantor and grantee, or what is sometimes called in the books a covenant in gross, and, consequently, that after the death of the original parties, no action to recover rent can be maintained in favor of or against any persons except their respective executors or administrators. As the law contem-

plates that the estates of deceased persons shall be speedily settled, and in the natural course of things the personal representatives of a man disappear with the generation to which they belong, the intention of the parties to the indenture to create a perpetual rent issuing out of the premises will, if that position can be maintained, be entirely disappointed; and the argument is, in effect, that the law does not permit arrangements by which [*71] a rent shall be reserved upon a conveyance in fee, and that where it is attempted the reservation does not affect the title to the land, but the conveyance is absolute and unconditional. The design of the parties to create relations which should survive them, and continue to exist in perpetuity by being annexed to the ownership of the estate of the grantee of the land on the one hand, and of the rent on the other, is manifest from the language of the instrument. They were careful to declare that the obligation to pay the rent should attach to those who should succeed the grantee as his heirs and assigns, and should run in favor of the heirs and assigns of the grantor; and the nature of a perpetually recurring payment requires that there should be an endless succession of parties to receive and to pay it. We have a legislative declaration, in an act of 1805, passed about ten years after this conveyance, that grants in fee reserving rents had then long been in use in this state (*Ch.* 98); and the design of the legislature by that enactment was, not only to render such grants thereafter available according to their intention, but to resolve, in favor of such transactions, the doubts which it is recited had been entertained respecting their validity. Still, if, by a stubborn principle of law, a burden in the form of an annual payment cannot be attached to the ownership of land held in fee simple, or if the right to enforce such payment cannot be made transferable by the party in whom it is vested, effect must be given to the rule, though it may have been unknown to the parties and to the legislature; unless indeed the interposition of the latter by the statute which has been mentioned, can lawfully operate retrospectively upon the conveyance under consideration. It is not denied but that, by the early common law of England, conveyances in all respects like the present would have created the precise rights and obligations claimed by the plaintiff; but it is insisted that the act respecting tenures, called the statute of *quia emptores*, enacted in the eighteenth year of King Edward I, and which has been adopted in this country, rendered such transactions no longer possible. The principles of that statute have, in my opinion, always been the law of this [*72] country, as well during its colonial condition as after it became an independent State. A little attention to the pre-existing state of the law will show that this must necessarily have been so. In the early vigor of the feudal system, a tenant in fee could not alienate the fued without the consent of his immediate superior; but this extreme rigor was soon afterwards relaxed, and it was also avoided by the practice of subinfeudation, which consisted in the tenant enfeoffing another to hold of himself by fealty and such services as might be reserved by

the act of feoffment. Thus a new tenure was created upon every alienation; and thence there arose a series of lords of the same lands, the first, called the chief lords, holding immediately of the sovereign: the next grade holding of them; and so on, each alienation creating another lord and another tenant. This practice was considered detrimental to the great lords, as it deprived them, to a certain extent, of the fruits of the tenure, such as escheats, marriages, wardships, and the like, which, when due from the terre-tenants, accrued to the next immediate superior. This was attempted to be remedied by the 32d chapter of the Great Charter of Henry III (*A. D.* 1225), which declared that no freeman should thenceforth give or sell any more of his land, but so that of the residue of the lands the lord of the fee might have the service due to him which belonged to the fee. 1 *Ruffhead's Statutes at Large*, 8. The next important change was the statute of *quia emptores*, enacted in 1290, which, after reciting that "forasmuch as purchasers of lands and tenements (*quia emptores terrarum et tenementorum*), of the fees of great men and other lords had many times entered into their fees to the prejudice of the lords," to be holden of the feoffors and not of the chief lords, by means of which these chief lords many times lost their escheats, etc., "which thing seemed very hard and extreme unto these lords and other great men," etc., enacted that from henceforth it should be lawful for every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee should hold the same lands and tenements of the chief lord of the same fee by such services and customs as his feoffer held [*73] before. (*Id.* 122.) The effect of this important enactment was, that thenceforth no new tenure of lands which had already been granted by the sovereign could be created. Every subsequent alienation placed the feoffee in the same feudal relation which his feoffer before occupied; that is, he held of the same superior lord by the same services, and not of his feoffer. The system of tenures then existing was left untouched, but the progress of expansion under the practice of subinfeudation was arrested. Our ancestors, in emigrating to this country, brought with them such parts of the common law and such of the English statutes as were of a general nature and applicable to their situation 1 Kent, 473, and cases cited in note a to the 5th ed.; *Bogardus v. Trinity Church*, 4 Paige, 178; and when the first constitution of this state came to be framed, all such parts of the common law of England and of Great Britain and of the acts of the colonial legislature as together formed the law of the colony at the breaking out of the revolution, were declared to be the law of this state, subject, of course, to alteration by the legislature. Art. 35. The law as to holding lands and of transmitting the title thereto from one subject to another must have been a matter of the first importance in our colonial state; and there can be no doubt but that the great body of the English law upon that subject, so far as it regarded the transactions of private individuals, immediately became the law of the colony, subject to such changes as

were introduced by colonial legislation. The lands were holden under grants from the crown, and as the king was not within the statute *quia emptores*, a certain tenure, which, after the act of 12 *Charles II*, ch. 24 abolishing military tenures, must have been that of free and common socage, was created as between the king and his grantee. I have elsewhere expressed the opinion that the king might, notwithstanding the statute against subinfeudation, grant to his immediate tenant the right to alien his land to be holden of himself, and thus create a manor, where the land was not in tenure prior to the 18th *Edward I*. *The People v. Van Rensselaer*, 5 Seld., 334. But with the exception of the tenure arising upon royal grants, [*74] and such as might be created by the king's immediate grantees under express license from the crown, I am of opinion that the law forbidding the creating of new tenants by means of subinfeudation was always the law of the colony, and that it was the law of this state, as well before as after the passage of our act concerning tenures, in 1787. A contrary theory would lead to the most absurd conclusions. We should have to hold that the feudal system, during the whole colonial period, and for the first ten years of the state government, existed here in a condition of vigor which had been unknown in England for more than three centuries before the first settlements of this country. We should be obliged to resolve questions arising upon early conveyances, under which many titles are still held, by the law which prevailed in England during the first two centuries after the Conquest, before the commencement of the Year Books, and long before Littleton wrote his *Treatise upon Tenures*.

The fact that the statute we are considering was re-enacted in this State in 1787, has no tendency to show that it had not the force of law prior to that time. Indeed, the contrary inference is nearly irresistible, when it is seen how it came to be re-enacted. The compilation of statutes prepared by Jones and Varick, and enacted by the legislature, embracing the statute of tenures and a great number of other English statutes was made in pursuance of an act passed in 1786. It recited the constitutional provision which I have mentioned, and that such of the said statutes "as had been generally supposed to extend to the late colony and to this state, were contained in a great number of volumes, and were conceived in a style and language improper to appear in the statute books of this state. The persons mentioned were, therefore, authorized to collect and reduce them into proper form, in order that such of them as were approved might be enacted into laws of this state, to the intent that thereafter none of the statutes of England or Great Britain should be in force here. 1 Jones & Var., ch. 35, 281. The statute of tenures was not, therefore, understood as introducing a new law, but was the putting into a more [* 75] suitable form certain enactments which it was conceived had the force of law in the colony, and which the constitution had made a part of the law of the state. My views upon this question correspond with those expressed

by Mr. Justice Platt, in 18 Johnson, 186. The English crown lawyers appear never to have doubted but that the statute was the law of the colonies. Sir John Somers, attorney-general, and afterwards lord keeper of the great seal in the reign of William III, and who is pronounced by Macaulay to have been, in some respects, the greatest man of his age, together with the solicitor-general, Trevor, gave a written opinion to the king in council, that all the lands in Virginia were held immediately of the crown, and that the escheats and tenure accrued to him and not to the grantors of the lands. The like opinion was given by Sir Edward Northey, attorney-general to Queen Anne, in 1705, in respect to lands in New Jersey. He said that the grantees of the proprietors to whom the Duke of York had assigned his patent, held of the queen and not of these proprietors; and in another opinion, by the same law officer, respecting quit-rents in the colony of New York, he states that no tenure arose upon grants by the Duke of York before he came to the crown, he being a subject; but that where the grant was by the crown there was a tenure, "the crown not being within the statute of *quia emptores terrarum*." *Chalmer's Colonial Opinions*, 142, 144, 149.

These opinions assume that the statute prevailed here to the same extent as in England, and subject to the same exception in favor of royal grants, upon which a tenure always arises. Judge Ruggles, in giving the opinion of the court in *DePeyster v. Michael*, 2 Seld. 467, was led to doubt whether the statute was ever in force in the colonies, from finding that several patents, issued by the colonial governors, purported to create manors and to authorize the patentees to grant lands to be holden of the patentees. But if the king could, notwithstanding the statute, license his immediate tenants to create seigniories, as was attempted to be shown by one of the opinions in *The People v. Van Rensselaer*, and is as I am satisfied is the case, these [*76] instruments are quite consistent with the idea that the statute was in force in the colony of New York. Assuming this to have been so, our own law, in the particular under consideration, is and has at all times, since the organization of political society here, been the same as the law of England.

We are then to ascertain the effect of a conveyance in fee reserving rent, upon the assumption that the statute of *quia emptores* applies to such transactions. In the first place, no reversion, in the sense of the law of tenures, is created in favor of the grantor; and as the right to distrain is incident to the reversion, and without one it cannot exist of common right, the relation created by this conveyance did not itself authorize a distress. The fiction of fealty did not exist. The rent in terms reserved was not a rent-service. Litt., §§ 214, 215. It was, however, a valid rent-charge. According to the language of Littleton, "if a man, by deed indented at this day, maketh a feoffment in fee, and by the same indenture reserveth to him and to his heirs a certain rent, and that if the rent be behind it shall be lawful for him and his heirs

to distrain, etc., such a rent is a rent-charge, because such lands or tenements are charged with such distress by force of the writing only, and not of common right." *Id.*, §§ 217, 218. And the law is the same where the conveyance is by deed of bargain and sale under the statute of uses. Co. Litt., 143, b. Mr. Hargrave, in his note to this part of the Commentaries, expresses the opinion that a proper fee farm rent cannot be reserved upon a conveyance in fee, since the statute of *quia emptores*; but he concedes that where a conveyance in fee contains a power to distrain and to re-enter, the rent would be good as a rent-charge. Note 235 to Co. Litt., 143, b. Blackstone says that upon such a conveyance the land is liable to distress, not of common right, but by virtue of the clause in the deed. 2 Bl. Com., 42. The case of *Pluck v. Diggs*, 2 Dow & Clark's Parl. Rep., 180, much relied on by the defendant, concedes that rent reserved upon a conveyance of the grantor's whole estate may be distrained for by virtue of a clause of distress. That case turned wholly upon a question of [*77] pleading. The House of Lords held that the Irish statute, corresponding to the 11 George II, ch. 19, § 22, allowing a general avowry, did not extend to a rent-charge, but was limited to cases of rent-service, and that the defendant ought in that case to have set out his title. It was for this reason that the judgment in his favor was reversed. Lord Wynford said, "it is a dreadful thing to be obliged, for a defect in form, to give a judgment contrary to the real merits of the case."

These authorities establish the position that upon the conveyance under consideration a valid rent was reserved, available to the grantor by means of the clause of distress. This rent, though not strictly an estate in the land, *Payn v. Beal*, 4 Denio, 405, is nevertheless a hereditament, and in the absence of a valid alienation by the person in whose favor it is reserved, it descends to his heirs. Its nature, in respect to the law of descents, is explained by Lord Coke, who at the same time points out the distinction between such a rent as we are considering, and a rent-service reserved upon a feoffment which created a tenure. He says that if a man seized of a manor, as heir on the part of his mother, before the statute of *quia emptores*, had made a feoffment in fee of parcel, to hold of him by rent and service, albeit they [the services] are newly created, yet for that they are parcel of the manor, they shall, with the rest of the manor, descend to the heir on the part of the mother. If a man so seized, that is by inheritance from his mother, maketh [now] a feoffment in fee, reserving a rent to him and his heirs, this rent shall go to the heirs on the part of the father. Co. Litt., 12, b. The reason is given in a case in *Hobart*, thus: "If, upon a feoffment of lands which I have on the part of the mother, or in borough English [where the youngest son is the heir] I reserve a rent to me and to my heirs, it shall go to my heirs at common law, for it is not within the custom, but it is a new thing divided from the land itself." *Counden v. Clerke*, 31, b. The distinction is this: A rent-service, such as arose upon an alienation of a fee at common law,

was incident to the reversion, and therefore a part of the estate remaining in the feoffor [*78] and upon his death it passed in the same channel of descent as the estate would have done if there had been no alienation. But where there is no reversion, as in the case of a conveyance in fee since the statute, the rent reserved is an inheritable estate newly created, and descends according to the general law of inheritance, to the heirs of the person dying seized, with regard to the heritable quality of the estate, the conveyance of which formed the consideration of the rent. Preston states the principle thus: "A rent incident to the reversion will descend with the reversion as a part thereof; but a rent reserved on a grant in fee, or limited by way of use in a conveyance to uses, will be descendible as a new purchase from the person to whom it is reserved or limited." 3 *Essay on Abstract of Title*, 54. Further on he says that in such cases "the instrument amounts to, 1st. A grant of the land from the owner of the same; and, 2dly. A grant of the rent on the part of the grantee." *Id.*, 55. To the same purpose see 3 *Cruise*, 313 (N. Y. ed. of 1834.) The descendible quality of these rents was early established in this state in the case of *The Executors of Van Rensselaer v. The Executors of Platner*, decided in the year 1800. The action was for nine years' rent to May 1, 1783, reserved upon a grant in fee by the plaintiffs' testator to the testator of the defendants, executed in 1774; and it appeared that the testator of the plaintiffs died on the 22d of February, 1783, seven days before the last year's rent sued for became payable. The plaintiffs, however, recovered the rent for the whole period; and the defendants moved in arrest of judgment, on the ground that the recovery embraced one year's rent which did not belong to them as executors; and the judgment was arrested for that reason. Kent, J., said, it was clear that the executor could only go for rent due and payable at the testator's death, "where the rent, as in the present case, goes, on the testator's death, to his heirs." 2 *John. Ca.*, 17. There can be no pretense that the court considered the rent to be a rent-service, on the notion that the statute of *qui emptores* had not been enacted in this state when the deed was executed; for in the next case in the book, which [*79] was an action for subsequent rent on the same conveyance, and was decided at the same time, it was expressly declared to be "a fee farm rent, or *rent-charge*." If the annual payments provided for in these conveyances were merely sums in gross secured by personal covenants, the action would have been rightly brought by the executors for the last year's rent, though it fell due after the testator's death. The contract, upon that theory, would have been of the same character as a bond for the payment of moneys by annual installments in perpetuity, in which case, if we can conceive of such a security, the personal representatives of the obligees would have been the proper parties to bring the action, whether the payments sought to be recovered matured before or after the testator's death. It was only upon the assumption that the right to the rent reserved was a heritable estate, which, so far as it

had not become payable at his death, descended to the heirs of the grantor, that the judgment can be sustained. The case was argued by eminent counsel—the late Ambrose Spencer, and James Emmot—and appears to have received full consideration; three of the judges delivering opinions. It may therefore be considered an authoritative precedent for the doctrine that rents of the character of these we are considering are heritable estates, descending to the heirs of those in whose favor they are reserved.

But the plaintiff in this case sues as devisee of the grantor, and must establish the position that he is entitled, in that character, to sue upon the covenant. In England, it is perhaps a debatable question at this day, whether the assignee of the grantor can maintain the action. In *Brewster v. Kidgill*, 12 Mod., 166, Holt, Ch. J., said he made no doubt but that the assignee of the rent should have covenanted against the grantor, "because," he said, "it is a covenant annexed to the thing granted." It was the case of a rent-charge in fee, granted by the owner of the lands out of which it issued, with a covenant to pay it. In *Milnes v. Branch*, 5 Maule & Sel., 411, Lord Ellenborough, Ch. J., stated that he was inclined to think that the language of Lord Holt, in this respect, was [*80] extra-judicial; and putting aside that *dictum*, he said he did not find any authority to warrant the position that such a covenant ran with the rent. There are several other English cases bearing more or less directly upon the question, which it is unnecessary particularly to notice, since they have all been examined by Sir Edward Sugden, in a late edition of his *Treatise on the Law of Vendors and Purchasers*. His conclusion is, that there appears to be no foundation for shaking Lord Holt's opinion. The rent-charge, he says, is an incorporeal hereditament, and issues out of the land, and the land is bound by it. The covenant, therefore, he adds, may well run with the rent in the hands of an assignee; the nature of the subject, which savors of the realty, altogether distinguishes the case from a matter merely personal. Vol. 2, p. 482, W. Brookfield ed. of 1843. The great learning of the author—afterwards as Lord St. Leonards, Lord Chancellor of England—would incline me to adopt his conclusion, were it not that we have a precedent the other way in this State. In *The Devisees of Van Rensselaer v. The Executors of Platner*, 2 John. Ca., 26, to which I have already briefly alluded, the plaintiffs made title to the rent under the will of the grantor of the land, and the defendants were the executors of the grantee, the grantor of the rent-charge. It was held—Lansing, Ch. J., giving the opinion—that the action could not be sustained. The statute 32 *Henry VIII*, chapter 34, which had been re-enacted in this state, it was said did not apply, as it was limited, as appeared by the preamble, to cases of grants for life or years, where there was a reversion; and, moreover, by the common law, such covenants did not pass to the assignee of the covenantee. It was intimated that the difficulty might not have existed if the action had been against the owner of the land charged with the rent, as the

assignee of the original grantee, instead of his executors; for, as it was suggested, the common ligament—the estate charged—would have united them in interest as privies. But I do not see that this would have helped the plaintiffs. The defendants, as executors of Platner, the covenantor, were liable to an action upon his express covenant, [*81] at the suit of any one entitled to prosecute upon it, and if the plaintiffs, the devisees, were entitled to avail themselves of the covenant they could do so, as it seems to me, against any party chargeable upon it, whether the covenantor himself, his personal representatives, or those who represented him as privies. The question was not whether the defendants were liable to be sued on the express covenant, for they clearly were, whether it ran with the land or not. But the doubt was whether the plaintiffs so represented the original covenantee as to be able to sue on the contract made to him; and this depended on the question whether the covenant ran with the rent; and it was held that it did not. It was probably in consequence of this decision that the act of 1805 was passed; and assuming that this case was correctly decided, the present question must turn upon the effect of that statute. It seems to have been considered that at common law the assignee of a reversion expectant upon an estate for life or years could not maintain an action upon the covenants of his lessee, though such covenants ran with his estate. It is so expressly recited in the preamble to the statute 32 *Henry VIII*, already mentioned, though it was not universally true. *Vyvyan v. Arthur*, 1 Barn. & Cress., 410; 2 Sugd., 468. During the reign of that sovereign the charters and estates of the monasteries, chantries and other religious houses were, by the coercion of the government, surrendered to the king, or came to his hands by force of the statutes made for the suppression of these establishments; and the lands were, for the most part, granted by him to individual subjects. The estates being out on terms for life or years, there was, upon the assumption of the preamble, no person in existence by whom an action could be maintained on the covenants in the lease. After the recital of this matter, the statute proceeds to give an action upon the covenants, not only to the patentees of the king of the estates of the religious houses and their heirs and assigns, but to all others being grantees or assignees of “any other person or persons than the king’s highness,” and their heirs and assigns. A second section gave the like remedies by the grantees and their assigns [*82] against the assignees of the grantors. 2 Stat. at Large, 294. Although the statute was made to meet a special occasion, which mainly interested the purchasers of the confiscated property of the church, the language which extended its operation to other grantees of reversions, introduced a valuable amendment into the law of property. When the commissioners under our act of 1786 came to report as to the English statutes suitable to be re-enacted, the act respecting the grantees of reversions was selected for that purpose, and was re-enacted in 1788, with certain changes of language—dropping out the reference to the religious

houses, and substituting the people of this state for the crown of England—but retaining the words which adapted it to the case of the grantees of private persons. 2 Jones & Var., 184. It stood in this form when the conveyance to Dietz was executed in 1796, and had not then, as I conceive, any operation upon covenants in conveyances in fee. The opinion of Sir Edward Sugden, that such covenants as last mentioned ran with the rent, was not based upon the 32 Henry VIII, which was admitted to be inapplicable, but upon what was considered the true theory and legal effect of such covenants.

But while Van Rensselaer, the grantor in the indenture under consideration, remained the owner of the rents reserved, and no assignee of those rents had intervened, the act of 1805 was enacted, by which it was declared that all the provisions of the act concerning grantees of reversions, passed in 1788, and the remedies thereby given, should be construed to extend as well to leases in fee reserving rents as to leases for life or years. (Ch. 98.) In the subsequent revision of the statutes, this amendment has been added as an additional section to the substance of the act of 1788. 1 R. L., 364, § 3; 1 R. S., 748, § 25. As the Revised Statutes of 1830 contained the enactment in force when this grantor died, it will be useful to give the precise language of the 23d section of the title referred to. It is as follows: "The grantees of any demised lands, tenements, *rents* or other hereditaments, or of the reversion thereof, the assignees of the lessor of any demise, and the heirs and [*83] personal representatives of the lessor, grantee or assignee, shall have the same remedies by entry, action, distress or otherwise, for the non-performance of any agreement contained in the lease so assigned, or for the recovery of any rent, or for the doing of any waste or other cause of forfeiture as their grantor or lessor had, or might have had if such reversion had remained in such lessor or grantor." 1 R. S., 747. This provision is, as I have stated, by force of the 25th section, to extend as well to grants or leases in fee reserving rents as to leases for life or for years. Thus it appears that the grantees of demised lands, and the grantees of rents, and the grantees of the reversion of demised lands, are to have the same remedies which the grantors or lessors would have been entitled to if no change in their title had taken place, and that grants in fee with a reservation of rent are to be considered as within the provision. Reading the language in connection, the enactment in terms is, that the grantee of rents reserved upon grants in fee shall have the same remedy which his grantor had. Applying the statute to this case, the provision is that the plaintiff shall be entitled to the same remedy which Stephen Van Rensselaer, the Patroon, would have had if he were alive and were now suing. It is added—"if such reversion had remained in such grantor;" and it is argued that as Mr. Van Rensselaer never had a reversion the provision does not apply. But it applies in express terms to reservations of rents upon conveyances in fee, and in such cases I concede that there can be no reversion; and it applies equally to rents upon leases,

for life and for years, where there is a proper reversion. Now, the qualification which alludes to the reversion may well be taken distributively and be confined to the cases within the provision where a reversion existed, *reddendo singula singulis*. It should be applied, in furtherance of the intention, to the subject-matter to which it appears by the context most properly to relate. 2 *Dwar. on Stat.*, 617. But independently of this answer, the Legislature had the right to consider the interest of a grantor in fee reserving rent, as a reversion *pro hac vice*, if it thought proper to do so; though by the general [*84] rules of law it would not be called by that name. The intent to embrace within the purview of the enactment a rent reserved upon a grant in fee is plain and certain; and effect must be given to that intent, though some of the language should seem to be incongruous.

Two positions were taken at the bar to avoid the effect of this statute upon the case. In the first place, it was assumed that before the passage of our statute of tenures, a reversion did arise upon a grant of lands in fee, and that the act of 1805 should be understood as limited to conveyances executed prior to 1787, and as having, therefore, no effect upon the present case. It was in part to furnish an answer to that suggestion that I have taken pains to show that there was never a period in this state when conveyances between individuals created a tenure, except in the special cases of a grant from the crown of a power to erect a manor. But without reference to that principle, I am unable to find anything in the statute which countenances the distinction contended for. The act of 1805, which first brought grants in fee reserving rents within the remedies of the 32 Henry VIII, chapter 34, recited, as the motive for the enactment, that such grants had long been in use in this state. The argument supposes that it was intended to give effect to such only as had been executed in colonial times and during the first eleven years of the state government. If such were the intention, it is inconceivable that some idea of the kind was not expressed. The language used certainly conveys the understanding that such transactions had been in use up to the time when the legislature was speaking. I am of opinion that the legislature considered such conveyances lawful contracts, and intended to render them effectual in the hands of those to whom they should be transferred equally as when they belonged to the original parties to whom the rents were reserved, without regard to the time when the grants were made.

The other answer given to the statute is, that these grants in fee were within the protection of the provision of the Constitution of the United States which forbids the state [*85] governments to pass any law impairing the obligation of contracts. But this statute has no such effect. The parties bound to pay these rents were liable, independently of the statute, to an action at the suit of the grantor of the conveyances and of his heirs in perpetuity. Upon the failure of heirs, the state would take them as an escheat. If it be admitted that they were not assignable before the statute, so as to give the assignee an

action in his own name, they were, like other choses in action arising upon contract, assignable in equity; and if the statute had not been passed, the assignee could have prosecuted in the name of the grantor or his heirs for the benefit of the equitable owner. In making them assignable at law and giving the assignee an action in his own name, the legislature acted only upon the remedy, which all the cases agree it was competent for it to do. The same thing in effect was done by the Code of Procedure in abolishing the distinction between legal and equitable remedies, and requiring all actions to be brought in the name of the real party in interest. (§§ 69, 111.)

There are several precedents of actions of covenant to recover rents of the kind in question, by parties claiming by devise or assignment from the party in whose favor the rent was reserved. *Watts v. Coffin*, 11 John., 495, A. D. 1814, was an action for rent reserved upon a conveyance of land in fee, brought by the assignee of the grantor by virtue of several mesne conveyances, against the assignee of the grantee, and a verdict, subject to the opinion of the court, was sustained. *Van Rensselaer v. Bradley*, 3 Denio, 135, A. D. 1846, was a like action for rent on the covenants in a similar conveyance by the devisee of the grantor, against an assignee of the grantee; and the plaintiff prevailed. *Van Rensselaer v. Jones*, 5 Denio, 449, A. D. 1848, was another case of precisely the same character, where the plaintiff had judgment.

Ejectment is a remedy given by statute for the recovery of rent. Stat. 4 Geo. II, ch. 28, § 2; 2 Jones & Var., Laws of N. Y., 238, § 23; 1 K. & R. 134, § 23; 1 R. L., 1813, 440, § 23; 2 R. S. 505, § 30. The statutes prescribe that it may be brought in cases between landlord and tenant, where there is [*86] rent in arrear for which no distress can be found, and the landlord has a subsisting right to re-enter. When we consider that, at common law, conditions subsequent could only be reserved for the benefit of the grantor and his heirs, and that a stranger could not take advantage of a breach of them (4 *Kent's Com.* 127; *Litt.*, § 347 and *Coke's Com. thereon*; *Nicholl v. The N. Y. and Erie R. R. Co.*, 2 Kern. 121), and that the only change which this principle has undergone was that wrought by the act of 1805 and its subsequent reenactment, the cases in which the devisee or grantee of one who has conveyed in fee, reserving rent with a clause of re-entry, has sustained ejectment for non-payment of that rent, are in point to show the construction which has been given to that act upon the point under consideration. Such cases have frequently occurred in this state and many have been reported. In the following cases the action was prosecuted by the devisee or grantee of the original grantor. It could only be sustained by virtue of the statute, and yet no objection to the plaintiff's title was made. In two of the cases the plaintiff prevailed, and in the others he was defeated upon grounds not material here. *Jackson v. Collins*, 11 John. 1, A. D. 1814; *Van Rensselaer v. Jewett*, 5 Denio. 121; *The same v. Hayes, id.*, 477; *The same v. Snyder, in the Court of Appeals*, 3 Kern. 299.

We have come to the conclusion that the covenant of Dietz was one upon which the plaintiff, as the devisee of Van Rensselaer, has a right to sue any one upon whom that covenant was binding. We do not determine whether this would or would not have been so at the common law, but we place the decision upon the effect of the act of 1805, which, in our opinion, precisely meets the case. * * *

It is argued by the defendant's counsel that a reversion in the grantor is essential to enable an obligation to pay rent to attach to any one except the party originally bound to pay it, or to enure to the benefit of any one deriving title from the party in whose favor it was reserved; and the want of a reversion in Van Rensselaer is the circumstance which is [*99] supposed to create the difficulty under which the plaintiff labors. But there are several cases in hostility to this doctrine. In *McMurphy v. Minot*, 4 N. H. 251, the plaintiff, tenant for life, demised the premises to the owner of the reversion, reserving an annual rent, which the latter covenanted to pay, and afterwards conveyed the premises to another, under whom the defendant entered. The action was covenant for rent in arrear, and it was urged that the lessee, being seised of the whole estate in fee simple, his covenant to pay the rent could not be enforced against his grantee; but it was held that a reversion in the plaintiff was not essential, and the plaintiff had judgment. It is settled, by a series of adjudications in England and in this country, that if one possessed of a term for years demise it, reserving rent, and afterwards assign the rent, the assignee may maintain debt for the rent against lessee. *Allen v. Bryan*, 5 Barn & Cress., 512; *Demarest v. Willard*, 8 Cow., 206; *Willard v. Tillman*, 2 Hill, 274; *Childs v. Clark*, 3 Barb. Ch. 52; *Kendall v. Carland*, 5 Cush., 74.

The result of the examination which we have given to this case is, that these covenants are available in favor of the plaintiff; and that the defendant, as the owner under Dietz of a portion of the land granted, is liable in this action for a breach of them: and we, therefore, affirm the judgment of the Supreme Court.

JOHNSON, Ch. J., COMSTOCK, GRAY and GROVER, Js., concurred; SELDON and STRONG, Js., delivered opinions in favor of affirming the judgment upon grounds differing, in some respects, from those adopted by the court; ALLEN, J., being interested in the question, took no part in the decision.

Judgment affirmed.

MICHIGAN STATUTE, R. S. 1846 c. 66, § 31; C. L. 1857, § 2804; C. L. 1871, § 4301; How Ann. St. 1883; § 5771; C. L. 1897; § 9254.

Every person in possession of land, out of which any rent is due, whether it was originally demised in fee, or for any other estate of freehold, or for any term of years, shall be liable for the amount or proportion of rent due from the land in his possession, although it be only a part of what was originally demised.

CHAPTER II.

ESTATES OF INHERITANCE.

Classified and Defined.

BRACON, Liber 1, c. 6, fo. 17.—A. D. 1256? (1240-1267)

[*Classification of Fees.*] There is another division of donations, for instance, one is simple and absolute, another is conditional, another is modified, made to one person or to several successively.

[*Fee Simple.*] It may be termed simple and absolute, when there is no condition or mode attached to it, for it may be said to be given simply whatever is given with nothing added to. As if it should be said, I give to such a person so much land in such a vill for his homage and service, to have and to hold to such a one, and to his heirs, of me and of my heirs, rendering thence annually, himself and his heirs to me and my heirs, so much for such terms, for all service and secular custom and demand, so that the thing may be certain which is given, and the services certain, and the customs which are due to the lord, although the other things are uncertain, which are tacitly remitted, and I and my heirs shall warrant, acquit, and defend forever so-and-so aforesaid and his heirs, against all persons, through the aforesaid service. And so the donatory acquires the thing given by reason of the donation, and his heirs after him by reason of their succession, and the heir acquires nothing from the gift made to his ancestor, because he is not enfeoffed with the donatory. And by the expression, to so-and-so and his heirs (the word *heirs* being taken in a wide sense) all heirs are contained as well near as remote, as well present as future; but nevertheless one of them, or several who are equivalent to one, and the nearer are preferred to the more remote, as will be explained hereafter on the subject of successions.

[*Modified Fees—Heirs and Assigns.*] Likewise, he may increase the donations and make, as it were, heirs, although in truth they are not heirs. As if he should say in the donation, to have and to hold to such an one and his heirs, or to him to whom he shall wish to give or assign the land; and I and my heirs will warrant to the same so-and-so and his heirs, or to him to whom he shall wish to give or assign that land, and to their heirs, against all persons. In which case, if the donatory has given or assigned that land, if the donatory and his heirs fail, the donor and his heirs will begin to take the place of the donatory and his heirs,

and the donatories will take the place of heirs as far as regards the warranty to be made to the assigns and his heirs, through the clause contained in the deed of the first donor; which would not be the case unless mention had been made of assigns in the first donation. But as long as the first donatory or his heirs survive, they are themselves bound to the warranty and not the first donor.

[*Same—Restricted to Special Heirs—Fee Conditional at Common Law.*] Likewise, as heirs may be enlarged in number, as has been afore-said, so they may be narrowed in number by the mode of the donation, whereby all the heirs are not called generally to the succession. For a mode sets law to the donation, and a mode is to be upheld against the common right and against the [general] law, for a mode and an agreement must prevail against the [general] law. As if it should be said: I give to so-and-so that land, with its appurtenances, in N, to have and to hold to him and to his heirs, whom he shall have procreated from himself or his espoused wife. Or thus: I give to so-and-so and so-and-so his wife (or with so-and-so my daughter &c.) to have and to hold to himself and to his heirs, issuing or procreated or to be procreated, of the flesh of such wife (or daughter); in which case, if (since certain heirs are expressed in the donation) it can be seen that the descent is only made to their common heirs according to the mode appointed in the donation, all other his heirs being excluded altogether from the succession, because the donor so willed. Whence if heirs of this kind are procreated, they only are called to the inheritance; and if a person so enfeoffed has further enfeoffed some person, he holds the enfeoffment; and his [the first feoffee's] heirs are held to the warranty since they can claim nothing except from the succession and the descent of parents; although it appears to some that they were themselves enfeoffed at the same time with their parents, which is not true. But if he shall have no heirs, that land shall revert to the donor, through a tacit condition, even if there be no mention made in the donation that it should return, or if express mention has been made in the donation. And so it will happen, if there have been at some time heirs and they have failed. But in the first case, where there has been no heir, the thing given to the donatory will always be a free tenement and not a fee. Likewise, in the second case, until heirs have begun to exist, it is a free tenement; but when they have begun to exist, the free tenement begins to be a fee; and when they have ceased to exist it ceases to be a fee, and again begins to be a free tenement. And so there will never be an exaction of dower unless there be an absolute donation, since there is no mention of an express reservation.

It is to be noted, that a donor may well impose at the beginning from the commencement of his donation, a law upon the donation, and of his own will may exonerate the thing given for the advantage of the donatory, and contrary to the law of the land; provided this be not done to the prejudice of others, who are not at all concerned with their contract. As if a person has given land for a less service than that by which he

held it from his lord and his feoffor; provided that he can warrant his act as regards his own service, so that no prejudice shall be worked to the chief lord, as respects the service due to him.

Words Sufficient to Limit a Fee.

LITTLETON'S TENURES, § 1. (Littleton died in A. D. 1482.)

Tenant in fee simple is he who has lands or tenements to hold to him and his heirs forever; and it is called in Latin *feodum simplex*, for *feodum* is the same that inheritance is, and *simplex* is as much as to say, lawful or pure. And so *feodum simplex* signifies a lawful or pure inheritance. For if a man would purchase lands or tenements in fee simple, it behooves him to have these words in his purchase: *To have and to hold to him and to his heirs*; for these words *his heirs* make the estate of inheritance. For if a man purchase lands by these words: *To have and to hold to him forever*, or by these words: *To have and to hold to him and his assigns forever*—in these two cases he has but an estate for term of life, for that there lack these words *his heirs*, which words only make an estate of inheritance in all feoffments and grants.

ANON., 32 Hen. 8, A. D. 1541—Brooke Abr. t. "Conscience" 25.

If a man purchased land, and the vendor execute the estate to the vendee, habendum to him forever without the word *heirs* where the intent of the bargain is to pass a fee-simple, and the vendor on request refuses to make another assurance, there lies a writ of subpoena on the liberal principles of the English law; and it was conceded by AUDLEY, chancellor, clearly, in the time of Henry 8, that if a man sold his land before the statute of uses this would change a use of the fee-simple; and the same is the law of vendors by indenture under the statute 27 Hen. 8 [c. 10 of uses] without the word *heirs*; which note well,

ANON, in K. B, 4 Edw. 6.—A. D. 1550—Brooke's New Cases pl. 406, Marsh's translation, t. Estates, Brooke's Abr. t. Estates 78.

By opinion of the king's bench, if a man devise his land to W. N. paying 10*l.* to the executors, and dies, the devisee has a fee simple, by reason of the payment, without the words, *heirs* or *in perpetuity*, and this shall be supposed the intention of the devisor. The same is the law if a man sell his land to W. N. for 20*l.*, this shall be intended a sale in fee simple without the words *heirs*, for conscience &c., and it is just and right, which is a ground in every law.

ESTOFT'S CASE, in C. B., Hilary, 10 Eliz., A. D. 1568—1 And. 45, pl. 114.

Between Estoft and others, it was adjudged that if land was given to a man and wife and a third person in fee, and the third person releases to the man all the right he has in the land without these words *to him and his heirs*, the man has a fee-simple without words of enlargement.

BALDWIN v. MARTON, Paschae, 31 Eliz., in Common Pleas.—A. D. 1589—1 And. 223, Abridged.

Trespass for breaking close, on not guilty, and special verdict. Earl W., by indenture made a grant of land to Agnes and Anthony Baldwin (now plaintiff) "and to the heirs of the said Anthony from the date, &c., to the end of 99 years, and from 99 years to 99 years, till such time as 300 years be spent and expired," reserving rent one penny yearly, covenanted to be paid, and with covenant to renew the lease at the end of the 300 years, and without impeachment of said earl or his heirs. After many arguments and citing many cases similar, it was held to be a lease for years only and not a fee or freehold.

DICKINS v. MARSHALL, in Queen's Bench, Trinity, 36 Eliz.—A. D. 1595.—Cro. Eliz., 330.

Toby devised land and goods, after his debts and legacies paid, to R. and M., his children, equally to be divided between them.

The court resolved that an estate for life only passed; for although the devise of land and goods are coupled together, and it be a devise forever of the goods; yet for the land, there being no words to pass the inheritance, only an estate for life passes. And although it was objected that the devise of the land is after his debts and legacies paid, so this is limited after he has made an end of disposing of anything; and though it was to his children, of which his heir was one, so that he intended to give as much to one as to the other; yet the court held, that only an estate for life passed. POPHAM, C. J., said he doubted if any land did pass, in case he had a term for years in any lands, so that the devise of land shall be supplied.

WHITLOCK v. HARDING, A. D. 1614?—Moor 873.

One devised his lands for 99 years, and after, by these words: "I give Agnes, my daughter, all my lands of inheritance, if the law will permit." It was adjudged that Agnes should have the fee simple of the land before devised for the 99 years, without the words to her heirs. The words refer to the land and not to the estate in strict construction; but from the whole the intent appears to pass the inheritance, for the

estate for life after the 99 years would be of small value, and it cannot be so understood.

SCEAL v. OXENBRIDGE, in Common Bench, Trinity 12 Jac. I, A. D. 1615.
—Moor 871.

In waste the plaintiff made title by a certain feoffment to another to the use of the plaintiff and his heirs, and omitted that he enfeofed the other and his heirs; and on view of the precedents the writ was adjudged good.

MICHIGAN LAWS of 1881, No. 187. How Stat. § 5730, Comp. Laws, 1897, § 9016.

It shall not be necessary to use the words "heirs and assigns of the grantee" to create in the grantee an estate of inheritance, and if it be the intention of the grantor to convey any lesser estate, it shall be so expressed in the deed.

To same effect New York, R. S. 1829. Part II, c. I, Title V, § 1.

Base Fees.

KING ALEXANDER'S CASE, 1272-1307—Hargrave's note 6 to Coke 1d. 27a, 1 Cruise Dig. 24; Hale's MSS.

King Henry III gave the manor of Penreth and Sourby to Alexander King of Scots and his heirs kings of Scotland; and Alexander, having daughters of which one was married to the Earl of Hunt, died not having any heir king of Scotland; and for this reason King Edward I recovered seisin, and the coheirs of Alexander were excluded. Lib. Parl. E I, 134, 308.

FIRST UNIVERSALIST SOCIETY OF NORTH ADAMS v. BORLAND, in Sup. Judicial Ct. of Mass., Jan. 6, 1892—155 Mass. 171, 29 Atl. 524.

Bill in equity to enforce a contract to purchase land of plaintiff. Decree for plaintiff. Defendant appeals.

ALLEN, J. The limitation over, which is contained in the deed of Clark to the plaintiff in 1854, is void for remoteness. *Wells v. Heath*, 10 Gray, 17, 25, 26. *Brattle Square Church v. Grant*, 3 Gray, 142, 152. The fact that the grantor designated himself as one of the persons amongst many others to take under this limitation, does not have the effect to make the limitation valid. He was to take with the rest, and stand upon the same footing with them.

Where there is an invalid limitation over, the general rule is that

the preceding estate is to stand, unaffected by the void limitation. The estate becomes vested in the first taker, according to the terms in which it was granted or devised. *Brattle Square Church v. Grant*, 3 Gray, 142, 156, 157. *Sears v. Russell*, 8 Gray, 86, 100. *Fosdick v. Fosdick*, 6 Allen, 41, 43. *Lovering v. Worthington*, 106 Mass. 86, 88. *Lewis on Perpetuity*, 657. There may be instances in which a void limitation might be referred to for the purpose of giving a construction to the language used in making the prior gift, provided any aid could be gained thereby. In the present case, we do not see that any such aid can be gained. The estate given to the first taker does not depend at all upon the validity or invalidity of the limitation over, and the construction of the language used is not aided by a reference thereto.

The grant to the plaintiff was to have and to hold, etc., "so long as said real estate shall by said society or its assigns be devoted to the uses, interests, and support of those doctrines of the Christian religion," as specified. "And when said real estate shall by said society or its assigns be diverted from the uses, interests, and support aforesaid to any other interests, uses, or purposes than as aforesaid, then the title of said society or its assigns in the same shall forever cease, and be forever vested in the following named persons," etc. These words do not grant an absolute fee, nor an estate on condition, but an estate which is to continue till the happening of a certain event, and then to cease. That event may happen at any time, or it may never happen. Because the estate may last forever, it is a fee. Because it may end on the happening of the event, it is what is usually called a determinable or qualified fee. The grant was not upon a condition subsequent, and no re-entry would be necessary; but by the terms of the grant the estate was to continue so long as the real estate should be devoted to the specified uses, and when it should no longer be so devoted, then the estate would cease and determine by its own limitation. Numerous illustrations of words proper to create such qualified or determinable fees are to be found in the books, one of which, as old as *Walsingham's Case*, 2 Plowd. 557, is "as long as the church of St. Paul shall stand." *Brattle Square Church v. Grant*, 3 Gray, 142, 147; *Easterbrooks v. Tillinghast*, 5 Gray, 17; *Ashley v. Warner*, 11 Gray, 43; *Attorneys General v. Merrimack Manuf. Co.*, 14 Gray, 586, 612; *Fifty Associates v. Howland*, 11 Met. 99, 102; *Owen v. Field*, 102 Mass. 90, 105; 1 Washb. Real Prop. (3d.) 79; 2 Washb. Real Prop. (3d ed.) 20, 21; 4 Kent Com. 126, 127, 132, note; 2 Crabb, Real Prop. §§ 2135, 2136, 2 Flint. Real Prop. 230, 232; *Shep. Touchst.* 121, 125.

A question or doubt, however, has arisen, though not urged by counsel in this case, whether after all there is now any such estate as a qualified or determinable fee, or whether this form of estate was done away with by the statute *Quia Emptores*. See Gray, Rule against Perpetuities, §§ 31-40, where the question is discussed and authorities are cited. We have considered this question, and whatever may be the true solution of it in England, where the doctrine of tenure still has some significance,

we think the existence of such an estate as a qualified or determinable fee must be recognized in this country, and such is the general consensus of opinion of courts and text writers. *Jamaica Pond Aqueduct v. Chandler*, 9 Allen, 159, 168; *Leonard v. Burr*, 18 N. Y. 96; *Gillespie v. Broas*, 23 Barb. 370; *State v. Brown*, 27 N. J. L. (3 Dutch.) 13; *Henderson v. Hunter*, 59 Penn. St. 335; *Wiggins Ferry Co. v. Ohio & Mississippi Railway*, 94 Ill. 83, 93; 1 Washb. Real Prop. (3d ed.) 76-78; 4 Kent Com. 9, 10, 129; See also, of English works in addition to citations above, Shep. Touchst. 101; 2 Bl. Com. 109, 154, 155; 1 Cruise Dig. tit. 1, §§72-76; 2 Flint. Real Prop. 136-138; 1 Prest. Est. 431, 441; Challis, Real Prop. 197-208.

Since the estate of the plaintiff may determine, and since there is no valid limitation over, it follows that there is a possibility of reverter in the original grantor, Clark. This is similar to, though not quite identical with, the possibility of reverter which remains in the grantor of land upon a condition subsequent. The exact nature and incidents of this right need not now be discussed, but it represents whatever is not conveyed by the deed, and it is the possibility that the land may revert to the grantor or his heirs when the granted estate determines. Challis, Real Prop. 31, 63-65, 153, 174, 198, 200, 212; 1 Prest. Est. 431, 471; *Newis v. Lark*, 2 Plowd. 403, 413; [post—] Shep. Touchst. 120; 2 Washb. Real Prop. (3d ed.) 20, 579; 4 Kent Com. 10; *Smith v. Harrington*, 4 Allen, 566, 567; *Attorney General v. Merrimack Manuf. Co.*, 14 Gray, 586, 612; *Brattle Square Church v. Grant*, 3 Gray, 142, 147-150; *Owen v. Field*, 102 Mass. 90, 105, 106; *Gillespie v. Broas*, 23 Barb. 370; Gray, Rule against Perpetuities, §§ 33, 34, 39, and cases cited.

Clark's possibility of reverter is not invalid for remoteness. It has been expressly held by this court, that such possibility of reverter upon breach of a condition subsequent is not within the rule against perpetuities. *Tobey v. Moore*, 130 Mass. 448; *French v. Old South Society*, 106 Mass. 479. If there is any distinction in this respect between such possibility of reverter and that which arises upon the determination of a qualified fee, it would seem to be in favor of the latter. But they should be governed by the same rule. If one is not held void for remoteness, the other should not be. The very many cases cited in Gray, Rule against Perpetuities, §§ 305-312, show conclusively that the general understanding of courts and of the profession in America has been that the rule as to remoteness does not apply; though the learned author thinks this view erroneous in principle.

We have no occasion to consider whether the possibility of reverter would or would not pass to an assignee in bankruptcy or insolvency, because the plaintiff expressly waived any right it might have under the second deed from Clark, and we have not, therefore, felt at liberty to consider the second deed, and have been confined to the construction and effect of the first deed. See *Rice v. Boston & Worcester Railroad*,

12 Allen, 141. This being so, the plaintiff's title must be deemed imperfect, and the entry must be.

Bill dismissed.

WEED v. WOODS, in New Hampshire Sup. Ct., Dec. 4, 1902—71 N. H. 581, 53 Atl. 1024.

Trespass *quare clausum* for entry by defendant into the chapel enclosure and removing fences, sheds, &c., claiming under a deed by which plaintiff conveyed to defendant her farm with the reservation stated in the opinion. Case transferred from Superior Court.

BINGHAM, J. A construction of the clause in the deed, "reserving, however, the building situated on the last described premises, known as the chapel, together with the right to the land on which such building stands, said building to remain so long as the association owning the same may want it" necessitates a determination of the extent of territory in which the plaintiff retained a property interest and the nature of that interest. * * *

It matters not whether this clause is technically a reservation or an exception; such a classification lends no aid to its interpretation. The estate retained by the plaintiff in the lot is a fee, not because as a matter of law it "is an exception and not a reservation," but because the clause, "understood in the ordinary and popular sense of its terms," reserves an estate which may be of perpetual continuance. *Cole v. Lake Co.*, 54 N. H. 242, 277, 278; *Smith v. Furbish*, 68 N. H. 123, 141-5, 44 Atl. 398, 47 L. R. A. 226; 1 Wash. R. P. (6th ed.), s. 162. It is not an estate for the life of the plaintiff, for the particular limitation agreed upon by the parties might happen either before or after her decease, or it might never happen. For the same reasons, it is not an estate for years or for any shorter period. It is an estate in fee, determinable upon the association ceasing to want it for chapel purposes. It is not "an absolute fee, nor an estate on condition, but an estate which is to continue till the happening of a certain event, and then to cease. That event may happen at any time, or it may never happen. Because the estate may last forever, it is a fee. Because it may end on the happening of the event, it is what is usually called a determinable or qualified fee." *First Universalist Society v. Boland*, 155 Mass. 171, 174; 15 L. R. A. 231, note; 1 Wash. R. P., s. 167. By such a construction, the intention of the parties will be carried out and effect given to this clause of the deed. So long as this estate continues, and the plaintiff and her successors in title retain the possession, they will have all the rights in respect to it which they would have if they were tenants in fee simple. 1 Wash. R. P., s. 168.

All concurred.

Judgment for the plaintiff.

Fee Conditional at the Common Law.

NEVIL'S CASE, before all the judges of England, Mich., 2 Jac. I.—A. D. 1605—7 Coke 33.

In this term, this case by the command of the king, was propounded to all the judges. Anno 21 Ric. II, Ralph Nevil, Lord of Raby, was by letters patent under the great seal created Earl of Westmoreland, to him and the heirs males of his body; which Ralph, by Margaret Stafford his first wife, had issue Ralph, Earl of Westmoreland, to whom Charles, late Earl of Westmoreland, was lineal male heir of the body of said Ralph the first donee; and the said Ralph the first donee, by Joan daughter of John of Gaunt, Duke of Lancaster, had issue George, Lord Latimer (for all his elder brothers were dead without issue male) from whom was lineally descended Edward Nevil, who now is the nearest issue male to the said donee; and afterwards Charles, Earl of Westmoreland, was attained by outlawry and by parliament, of high treason, and died without issue male; and now the said Edward Nevil claimed to be Earl of Westmoreland.

And in this case three questions were moved to all the judges of England: 1. If the said limitation of the said dignity to the said Ralph and the heirs males of his body be within the statute *De donis conditionalibus*, or a fee-simple conditional at the common law. 2. Admitting that it was an estate-tail within the said statute, if by the attainder of treason the estate-tail was forfeited by a condition in law *tacite* annexed to the state of the dignity. 3. If the estate of the dignity was forfeited by the act of 26 Hen. VIII, c. 13, or that the said Edward Nevil as heir male of the body of the first donee ought to be Earl of Westmoreland.

And these three points were argued and debated at Sergeant's Inn in Fleet street by the king's attorney and by the counsel of the said Edward Nevil. And as to the first it was objected that the said dignity was not within the said statute *de donis*, &c., for diverse causes: (1) Because it was a great dignity, derived from the king as the fountain of all dignity, and therefore it is not within the said act, which speaks only of *tenement' quae multoties dantur sub conditione, viz: cum aliquis terr' suam dat alicui viro* &c.; so this dignity cannot be included within the words *tenements or land*. (2) The statute saith *in omnibus praedict' casibus post prolem suscitata hujusmodi feofaffati habuerunt potestatem alienandi*, &c. But this dignity was adherent in the blood of the donee, and could not be alienated or granted, neither after nor before issue; and therefore such cases of dignities were out of the mischief, the words and the intent of the makers of the act *de donis*, &c. And the opinion in Manxel's Case in Pl. Com. the grant of a thing which doth not concern land or tenements, nor exercisable in lands and tenements, as an annuity, which is personal, is not within the statute, *de donis*, &c. * * *

As to the second point it was resolved that although this dignity be within the statute *de donis conditionalibus*, yet by the attainder of

treason, if the statute 26 Hen. VIII* (c. 13) had not been made, this dignity had been forfeited by force of a condition in law *tacite* annexed to the estate of the dignity. * * *

As to the third point it was resolved by all the justices that if it had not been forfeited by the common law, that by the statute of 26 Hen. VIII, c. 13, the said Charles had forfeited the dignity. * * *

At the common law before the statute *de donis conditionalibus*, if land had been given to one and the heirs males of his body, in that case, as well the donor as the donee had a possibility—the donor of a reverter if the donee died without issue male, and the donee to have power to alien if he had issue male. For if the donee had issue a son, now to some intent the condition was performed, for *post prolem suscitatum* he had *potestatem alienandi*; and the reason thereof was because he having a fee-simple and having issue, his issue could not avoid the alienation, because he claimed fee-simple, whereof his father might bar him. And although the donee and his issue also after such alienation died without issue, yet the donor who had but a possibility or condition in law and no reversion or estate in him, could not recover the land against the alienee; for by the having of issue the condition was performed to this intent, *scil.* to make an alienation. But in the same case at the common law, if the donee had issue a son and died, yet the son had not an absolute fee-simple in him, but only the same power which his father had, *scil.* to alien; and if such issue died without issue, and without any alienation made, the land should revert to the donor, as Brian held, 12 Edw. IV, 3, and 18 Edw. III, 46, by Huse. For a collateral heir who is not heir of the body of the donee is not within the form of the gift, the limitation being to the heirs males of the body of the donee, which limitation of heirs males of the body doth exclude all collateral heirs to inherit. But the policy of the law was to give power after issue to alien for two causes: 1, that the estate of a purchaser should not be avoided by a remote possibility, *scil.* if the donee and his issue also should die without issue; 2, if he having a fee-simple should not have power after issue to alien it would be in a manner a perpetuity and a restraint of alienation forever, which the common law for many causes will not suffer. And in 4 Hen. III, (Fitz. Abr.) Formedon 64 it is adjudged, that where lands are given in frank-marriage, and the donees had issue and died, and afterwards the issue died without issue, that his collateral heir should not inherit, for the donor recovered the lands in a formedon in the reverter; and in the said case if the donee had issue two sons and died, and the elder son had issue a daughter and died without issue male, the younger son should inherit a fee-simple *per formam doni* at the common law. So if lands were given to one and to his heirs females of his body, and he had issue a son and a daughter and died, the daughter should inherit an estate in fee-simple *per formam doni*. And mark well the statute *de donis*, &c., doth not create an estate tail but of such estate as was fee-simple conditional and descendible in such form at the common law, as now by the statute the land shall descend; and the only

mischief was that the donee after issue had power to alien in disinherison of his issues, and bar of the reversion. But it doth not appear by the said act that although the donee had issue, yet he had not an absolute fee, so that the collateral heir of the issue should inherit; for the words of the act are *Et praeterea cum deficiente exitu de hujusmodi feoffatis, tenementum sic datum ad donatorem vel ad ejus haeredem reverti debuit per formam in carta de dono expressam, licet exitus, si quis fuerit obisset, per factum et feoffamentum ipsorum, quibus tenementum sic fuit datum sub conditione, exclusi fuerunt hucusque de reversione, &c.*; by which it appears that if the heir in tail dies without issue, and without any alienation male, that the land shall revert, and by consequence shall not descend to the collateral heir; 30 Edw. I, (Fitz. Abr.) Formedon 65. If the donee in tail had aliened before the statute and afterwards had issue, and then the issue had died without issue, the land should revert; for he had not power to alien at the time of the alienation, but such alienation should bar the issue as it is adjudged in 19 Edw. II, (Fitz. Abr.) Formedon 61, because he claimed fee-simple. N. B.—These rules yet hold place in case of a grant of an annuity to one and the heirs males of his body, and all other inheritances which are not within the statute *de donis conditionalibus*.

Estates Tail.

STATUTE DE DONIS CONDITIONALIBUS, Westm. 2, c. 1, 13 Edw. I.—
A. D. 1285.

First, concerning lands that many times are given upon condition, that is, to wit, where any giveth his land to any man and his wife, and to the heirs begotten of the bodies of the same man and his wife, with such condition expressed that if the same man and his wife die without heir of their bodies between them begotten, the land so given shall revert to the giver or his heir; in case also where one giveth lands in free marriage, which gift hath a condition annexed, though it be not expressed in the deed of gift, which is this, that if the husband and wife die without heir of their bodies begotten, the land so given shall revert to the giver or his heir; in case also where one giveth land to another and the heirs of his body issuing, it seemed very hard and yet seemeth to the givers and their heirs, that their will being expressed in the gift was not heretofore nor yet is observed. In all the cases aforesaid after issue begotten and born between them, to whom the lands were given under such condition, heretofore such feoffees had power to aliene the land so given, and to disinherit their issue of the land, contrary to the minds of the givers, and contrary to the form expressed in the gift. And further, when the issue of such feoffee is failing, the land so given ought to return to the giver or his heir by form of gift expressed in the deed, though the issue, if any were, had died; yet by the deed

and feoffment of them, to whom land was so given upon condition, the donors have heretofore been barred of their reversion of the same tenements which was directly repugnant to the form of the gift: wherefore our lord the king, perceiving how necessary and expedient it should be to provide remedy in the aforesaid cases, hath ordained, that the will of the giver according to the form in the deed of gift manifestly expressed shall be from henceforth observed, so that they to whom the land was given under such condition shall have no power to aliene the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver or his heirs if issue fail, either by reason that there is no issue at all, or if any issue be, it fail by death, the heir of such issue failing. Neither shall the second husband of any such woman from henceforth have anything in the land so given upon condition after the death of his wife, by the law of England, nor the issue of the second husband and wife shall succeed in the inheritance, but immediately after the death of the husband and wife, to whom the land was so given, it shall come to their issue or return unto the giver or his heir as before is said. And forasmuch as in a new case new remedy must be provided, this manner of writ shall be granted to the party that will purchase it. * * * The writ whereby the giver shall recover when issue faileth is common enough in the chancery. And it is to wit that this statute shall hold place touching alienation of land contrary to the form of gift hereafter to be made, and shall not extend to gifts made before. And if a fine be levied hereafter upon such lands it shall be void in the law, neither shall the heirs or such as the reversion belongeth unto, though they be of full age, within England, and out of prison, need to make their claim.

BRITTON, 1 Liber c. 5, Sec. 2, p. *93.—A. D. 1275—1300.

If any one purchase to himself and his wife and their issue begotten in lawful matrimony; by such a purchase the purchasers have only a freehold for their two lives, and the fee accrues their issue if there be any already born; and if not, then the fee remains in the person of the donor until they have issue.

Some have thought that this was written after the statute de donis was passed but before it was understood.

ANON., in the Common Pleas, 2 Edw. 2, A. D. 1308-9—Selden Soc. Year-books, Vol. 1 (1 & 2 Edw. 2), case No. 19, pp. 70-72, also noted in Fitzherbert's Abr. t. Rescalt 147.

This case is a writ of dower. The tenant has made default after default. Now here comes A and says that the tenements were given to his father and the heirs of his body begotten, and that he (A) is the

eldest son and heir apparent; and he prays to be received to defend his right.

BEREFORD, C. J.* Heir you cannot be during your father's life, for you cannot know which of you will be the survivor. And I put the case that lands are given to a man in fee-tail, and he to whom the gift is "tailed" engenders a daughter, and is afterwards impleaded, and the daughter comes and prays to be received to defend her right and she is received, and then pending the plea he engenders a son, and then the daughter makes default, and the son comes into court and prays to be received:—How can he be received, and how could the right jump across to the male when she has been received as heir? And it is certain that the daughter cannot be heir so long as there is a male; thence it follows [in the present case] while his ancestor is living he cannot be heir.

Toudeby [sergeant arguing for A]. These tenements were given to [his father] and the issue of his body, and he is issue and is the eldest.

Herle [sergeant for the plaintiff.] You will never make out that he is "heir;" and if you leave out this word *heir*, then he will not be within the statute [Westm. II, c. 3], for the statute says the *heirs shall be admitted*.

Toudeby. These tenements are given to [the father] and to the heirs of his body engendered, so that the father is only tenant for his life, and for [a mere] freehold, and the right dwells in the person of the issue.

Passeley [also for the plaintiff]. I will show that that is not so; for the father by himself can vouch to warranty in the right, and the warrantor in the right can join battle and the grand assize, and if he [the father thus] loses, he [the son] never shall have recovery of the same land.

Toudeby. If no issue issues he to whom the reversion belongs shall be received, and (what is more) so shall a remainderman who is a total stranger. Why not then the issue, who is more privy?

BEREFORD, C. J. If the tenements were given to the father and mother and the heirs of their two bodies begotten, and the one of them died and the survivor was impleaded, in that case peradventure the issue should be received, for in that case one can know for certain that an heir there cannot be other than one who is begotten of their two bodies.

Toudeby. There may be just the same uncertainty in the one case that there is in the other, for albeit [in the case that you put] one of the two donees is dead, it may be that he has issue three or four sons, and we cannot say which of them will be the heir.

Passeley. If the father desired to pray aid of the son he should not be received, and no more shall the issue [be received in this case].

Toudeby. We have seen before now that a linen-draper of London purchased tenements to himself and his wife and to the heirs of their two

*Whether Bereford was chief justice when this case was decided does not appear from the report, but I take it that he was from the fact that he alone speaks for the court. He became chief justice March 15th, 1309.

bodies begotten; and [the husband and wife] were impleaded and made default; and, because there was no issue, he to whom the reversion belonged came and prayed to be received; and pending the plea a son was born, who was brought into the bench before you in a cradle and prayed to be received and was received; and yet the father and mother were in full life, as they are to this day. Wherefore we pray to be received.

And he was received, etc.

HELTON v. BRAMPTON, in Common Bench, Mich. term, 18 Edw. III,—
A. D. 1344.—Yearbooks (Pike) 18 & 19 Edw. III, p. 194-206; also reported
in 18 Lib. Ass. 5, Fitzh. Abr. t. Taille 16.

John, son of William de Holton, brought an assise of novel disseisin against two men and their wives and others in the county of Westmoreland. The men and their wives pleaded in bar on the ground that one John De Halton, grandfather of the wives, had two sons, John the elder, and Thomas, the younger. John, the ancestor, &c., gave the tenements to his younger son, Thomas, in fee simple. After the death of Thomas (John), who died seised, Thomas¹ entered as son and heir and died without issue of his body, and after his death the wives, with their husbands, entered as sisters and heirs. John, the plaintiff, as cousin, abated, claiming as heir. We ousted him; judgment whether the assize, &c. To this the plaintiff said that the gift was made to Thomas [John] and the heirs male of his body, and inasmuch as Thomas, the son of Thomas [John], died without heir male of his body, he entered, as heir of the donor, upon his reversion. And he prayed the assise for damages. The tenants not denying the gift in tail as above, demanded judgment inasmuch as the plaintiff admitted the issue in tail to have been seised, and so the limitation was brought to an end, and the wish of the donor accomplished, and consequently a fee simple adjudged in the issue by force of this gift confessed by the plaintiff; and (said the tenants) we demand judgment whether there ought to be an assize. And thereupon they were adjourned into the bench by reason of difficulty.

* * * *R. Thorpe*. Anyone who is a female is a stranger to such a form of gift; and this is not like *Multon's Case*, on which judgment was given in parliament, and in which the sisters had the inheritance, because in that case the gift was to him and his heirs male, so that his collateral heirs as well as the lineal heirs had the capacity of inheriting, wherefore on such a gift he had a fee simple. Not so in the case before us, in which the reversion of the fee simple was saved by the gift. *HILLARY (J.)*: Then will you say that in this case in which you are, the daughters, if he had any, would not have the inheritance? *R. Thorpe*: It is certain that they would not. * * * *STONORE (C. J.)*: It is necessary to look at the statute which states the case

¹John's son Thomas apparently.

of entail, and this particular case is not among any of the cases expressly mentioned by the statute, and therefore it is at common law and consequently a fee simple. *Seton*: Certainly, Sir, we rely greatly on that on our side. *Sadelyngstanes*: We understand that in case of such a gift the issue had at the common law, an inheritance in fee simple, for it is certain that they could have aliened; and although alienation is restrained by statute, the estate, when it continued remains as it was at common law, that is to say, one of fee simple. *Maubray*: This limitation by which the gift is made to a man and the heirs male of his body is more restricted, and does not give inheritance so largely as if the gift were made to one and the heirs of his body; in which case the twentieth in descent would have only a fee tail, and in default of issue the land would be revertible, &c.; and all the more in this case.

WILLOUGHBY (J.) [to the plaintiff]. It is still necessary to take the assise, because another tenant has, in the same assise, pleaded to the assise with respect to a part of the land; therefore as to this sue an assise in respect to the damages, and as to the rest sue an assise also. And so note that female issue will not inherit by such a gift, even though the issue male was seised.

ABRAHAM v. TWIGG, in *B. R., Trinity*, 38 Eliz.—A. D. 1597.—*Cro. Eliz.* 478, *Moor* 424. Abridged from *Croke*.

Avowry for rent. On demurrer. Peter, seised in fee, made a feoffment to the use of himself and the heirs of his body, and in default of such issue to Gabriel and his heirs males, and in default of such issue, to the right heirs of Peter. Peter died without issue; Gabriel entered, devised the rent out of the land to the avowant, and died having issue. It was argued that Gabriel had an estate tail, though it was not limited to the heirs of his body; because it is by way of use, which is to be expounded according to the intent, and as wills, citing 9 Edw. 3, "Tail" 21; 5 Hen. 6, pl. 6.

All the Justices (Popham, C. J., absent) held that it was an estate in fee in Gabriel; and although it were by way of use, it differs from other gifts by deed, and shall not have any other construction. And it cannot be an estate tail, because there is not any body from whom this heir male should come. And so it is in a case by devise, as appears by 9 Hen. 6 pl. 25. Wherefore it was adjudged for avowant.

WILLION v. BERKLEY, in *Common Bench, Trinity*, 4 Eliz.—A. D. 1562—*Plowd. Com.* *223-252. Abridged.

[*Ejectione Firmæ*. It appears by the record that Henry Willion sues Henry Lord Berkley and Richard Knight, for ejecting him from seven acres of wood in Weston, and declares that Henry Cook, being seised in fee of the land, May 5th, in the 4 & 5 years of Phil. & Mary, demised

to the plaintiff for seven years, by virtue of which plaintiff was possessed, and the next day, May 6th, of said year, defendants ejected him. Defendants plead in bar, that long before the time of the supposed ejectment, one Wm. Berkley was seised in fee of the manor of Weston, of which the land in dispute is a part; and being so seised, levied a fine in the king's court 5 Hen. 7, A. D. 1490, by which the land was limited to said Wm. Berkley and the heirs of his body, remainder to King Henry 7, and the heirs of his body, remainder to the right heirs of said Wm. that afterwards said William died without issue, after whose death King Henry 7 entered in his said manor in his estate tail, male and died leaving issue his son, King Henry 8, who entered and was seised in the same estate and died leaving issue his son, King Edward 6, who entered and was seised likewise in tail male and died without issue male; and then the late King Henry 7 being dead without issue male, these defendants lawfully entered in their remainder as heirs of said William Berkley, on whom said Henry Cook entered and made the said lease to the plaintiff, on whom defendants rightfully re-entered; and so they demand judgment. Plaintiff rejoined confessing the matter alleged in the plea, and alleging an act of parliament, 35 Hen. 8, and alleging that by birth of issue to King Henry 7 the land became his in fee-simple. Defendants demurred. Many points were argued that are not given in this abridgment, which the curious reader will find reported at large by Mr. Plowden. One point made was that the replication does not state that there was office found on the death of Wm. Berkley, without which King Henry 7 could not lawfully enter.]

ANTHONY BROWN (J.) said: If land is leased to the king for his life, upon condition that if the lessor dies his heirs shall enter, and the lessor dies; there his heir shall not enter without office finding the death, and without *ouster le main* sued. But if it was upon condition that if the king, who is lessee, dies, the lessor shall enter; there if the king dies, the lessor shall enter without office, or *ouster lemain* sued. For in the first case the condition is merely a condition, which abbreviates the estate, but in the other case the condition is joined to the limitation of the estate, and the condition and the limitation tend to one end, and the condition does not abridge the limitation as it does in the other case. And therefore when the king dies, the freehold is by act of law cast upon the lessor before entry. So in our case, when King Edward 6 died without heir male, the freehold was cast upon the Lord Berkley, and his entry was lawful without office or *ouster le main*; and the bar reciting that he entered is good enough in this point. Which was agreed by the whole court. Also admitting that an office was necessary here, yet the defendants, by their plea in bar, have amended the fault which they have excepted to. For they themselves, in conveying their title to them have shown that the marquis died without issue, and that King Henry 7 entered. * * *

[Counsel for the plaintiff argued at length that a grant to the king and

the heirs male of his body is not a fee-tail, but a fee conditional at common law, and the statute *de donis conditionalibus* does not extend to him; which the defendant's counsel denied. The judges took time to consider, and later in Trinity 4 Eliz. argued upon the matter as follows]:

WESTON, justice. It seems to me that the plaintiff shall recover. * * * By the common law before the statute *de donis conditionalibus*, there were two estates of inheritance, the one a fee-simple absolute, as where a man had lands to him and his heirs generally, and the other a fee-simple conditional, as where a man had lands given to him and to his heirs of his body, which estate to him and to his heirs of his body was greater than an estate for life, for the word *heirs* makes it greater than for life, so that if he had aliened before issue the donor should not have entered for a forfeiture, as the lessor shall do upon the feoffment of tenant for life. * * * It seems to me that the estate shall be adjudged a fee-simple conditional in the king, and that the remainder shall be void, and that the king shall not be bound by the statute *de donis conditionalibus*. For inasmuch as all justice, tranquility, and repose are derived from the king, as the fountain thereof, the law shows him special favor in all his business [*243] as being the cause and origin thereof. * * * If the king, should be restrained he would be in a worse condition than any other; for every one else may suffer a common recovery, and so make the most of the land and bar their issues, but no recovery can be had against the king, for no *praecipe* lies against him. * * *

ANTHONY BROWN, justice: I am of opinion to the contrary. * * * The person of the king is not to be respected in gifts of land, but the quality of the estate is to be considered; and the person of the king shall not rule the estate in the land. * * * When [*248] the statute ordained that the will of the donor should be observed, from thence it followed consequently that the donee was restrained from alienating lawfully the fee-simple, and from doing other acts which a tenant in fee-simple might do. And when he was thereby restrained from doing lawfully those acts which attended the fee-simple estate, and from meddling with the fee-simple; from thence they took it to be the intent both of the legislature and of the donor, that he should not have a fee-simple; for it would have been an idle intent to have adjudged the fee-simple in him, when he could not lawfully do anything with it. And therefore upon this reason they took it that the fee-simple was left in the donor, and yet that the estate of the donee was an estate of inheritance, because the heirs of his body should inherit it; but this inheritance could not be a fee-simple, for then there would be two fee-simples of the same land; but they took it to be a baser estate of inheritance, and gave it the name of an estate tail, which is an estate of inheritance certainly limited. So that upon good reason, in order to perform the will of the donor and of the legislature also, they took it by the perview that the estate was divided, and that the donee had an estate tail and the donor

the fee-simple, which he might grant over to another, or give to another by way of remainder, and that he could not do before the statute; for then the donee had a fee-simple, and one fee-simple cannot depend upon another. For in 3 Edw. 3 a man levied a fine *sur consance de droit come ceo que il ad de son done*, and he could not make a remainder over upon such fine, because the gift shall be as a fee simple. [See H. 42 Ed. 3, 5b, per Finchd., Brooke Abr. t. Estates 65 in fine.] But now that the estate is divided, the donor may grant a the fee-simple over by way of remainder. So that the reason of the purview of the act instructed the expositors of it to divide the estate, and continual use ever since has confirmed the exposition. Wherefore the estate is divided by the intent of the act without precise words, as fully and perfectly as if the act had expressly divided it; for that which is done by the intent of the act, without precise words, is equivalent to that which is done by precise words. So that now the estate is restrained and abridged and altered by the act; and therefore when the king took the estate, he took it restrained and abridged, and he could not take it otherwise. * * *

And, sir, if the king would say that the estate was not divided at common law, and that as to him it shall be at this day as it was at the common law, whereby he would have a fee-simple, and [*249] the remainder would be void; by this, I say, he destroys his own estate for the estate-tail precedes his remainder, and if it should be a fee-simple conditional, then the remainder of the king would be void, for a remainder cannot be limited upon a fee-simple precedent. And if the king would say that his remainder is a fee-simple, he cannot say otherwise but that the estate precedent is also a fee-simple; for both estates are made by one same fine at one same time, and both estates are by the donor limited to be in tail. And the king cannot say that the one is in tail and the other in fee, for thereby he affirms and disaffirms at the same time. * * *

He is bound by the statute as well as another; and as proof that it has been so taken before, the case of P. 4 Hen. 6 [19 pl. 6; Fitz. Abr. t. Gard 50; Brooke Abr. 52 Tenures 21] has been well cited; where the tenant, who held of the king in capite by knight's service, made a gift in tail, and the donee died, his issue within age, and it was there adjudged that the king should not have the ward, but the donor should have it; for the estate is divided, and the reversion is in the donor, and the donee held of him. * * *

DYER, chief justice: As to the matter in law, I am of the same opinion. * * *

Afterwards on the quinzaine of St. Martin, in the fifth year of the reign of Queen Elizabeth, the justices at the prayer of the Lord Berkley, who had often prayed their judgment after their arguments, gave judgment for him against the plaintiff.

HISTORY OF RESTRAINTS ON ALIENATION BY LIMITING THE FEE.

Heir's Right to Fee Simple Against Alienation by Ancestor.

LAWS OF ALFRED THE GREAT, c. 37.—A. D. 871—901.

Si quis terram haereditariam habeat, eam non vedat a cognitis haeredibus suis, si illi viro prohibitum sit qui eam ab initio acquisivit, ut ea facere nequeat. If any have hereditary land he may not sell it from his kindred heirs if he who acquired it in the beginning provided that it should be impossible to do so.

Laws of Alfred the Great (cir. A. D. 890) c. 41. The man who has boecland, and which his kindred left him, then ordain we that he must not give it from his maeg-burg, if there be writing or witness that it was forbidden by those men who at first acquired it, and by those who gave it to him, that he should do so; and then let that be declared in the presence of the king and of the bishop before his kinsmen.

LAWS OF HENRY I, c. 70.—A. D. 1100.

Si bockland habeat, quam ei parentes dederint, non mittat eam extra cognationem suam. If one has bookland which the parents gave to him he shall not alienate it from his kindred.

GLANVIL (*Tractatus de Legibus et Consuetudinibus**) Liber 7, c. 1.—A. D. 1180?

[*By Livery*]. Every free-man possessed of land may give a certain part of it with his daughter, or with any other woman in marriage-hood, whether he has any heir or not; or whether his heir, supposing he has one, consent to such a disposition or not; nay, though the heir expressly dissent from, and forbid it. Every one may also give a certain part of his freehold estate to any person he chooses, in remuneration for his services, or to a religious establishment in free-alms; that, if seisin follow up the donation, the land shall perpetually remain to the person to whom it is given and his heirs, if the terms of the gift go to that extent. But, if such a donation should not be followed up by seisin, nothing can, after the death of the donor, be claimed with effect in virtue of it contrary to the will of the heir; because such a disposition is usually interpreted by the law of the realm, rather as a naked promise, than a real promise or donation.

[*By Will*]. It is thus, generally speaking, lawful for a man, in his lifetime, freely to dispose of the reasonable part of his land in such manner as he may feel inclined, yet the same permission is not allowed

*Written about A. D. 1180, when the author was Chief Justicar of England. This is one of the first treatises on English Common Law.

to anyone on his death-bed; because the distribution of the inheritance would, probably, be then highly imprudent, were such an indulgence conceded to men, who, in the glow of sudden impulse, not unfrequently lose both their memory and reason. Hence, it is to be presumed, that if a man laboring under a mortal disease, should then for the first time set about making a disposition of his land, a thing never thought of by him in the hour of health, that the act is rather the result of the mind's insanity than of its deliberation. But yet a gift of this description, if made to any one by the last will, shall be valid, if done with the consent of the heir, and confirmed by his acquiescence in it.

[*Distinction of Purchased from Inherited Land.*] If he possesses inheritable land only he may, as we have already observed, give a certain portion of it to any stranger at his pleasure. But if he has many sons born in wedlock, he cannot, correctly speaking, without the consent of his heir, give any part of his inheritance to a younger son, because if this were permitted, it would then frequently happen that the eldest son would be disinherited, owing to the greater affection which parents often feel toward their younger children. But it may be asked whether a man having a son and heir, can give any part of his inheritance to his illegitimate son? If he can, it follows, that the condition of the illegitimate son would, in this respect, be preferable to that of the younger son born in wedlock; and yet the law is so. But if a person desirous of making a donation of part of his lands possess only such as he has purchased, he may then make such gift; provided it does not extend to the whole of his purchased lands, because he cannot disinherit his son and heir. Yet, if he has not any heir, male or female, of his own body, he may, indeed, consult his own inclination in making an absolute gift, either of part or of the whole of his purchased lands. And if the person to whom the gift be made obtain seisin of it during the life of the donor, it is not in the power of any more remote heir to invalidate such gift. Thus a man may give in his lifetime the whole of his purchased land. But he cannot make anyone an heir of it, neither a college, nor any particular individual, it being an established rule of law, that God alone, and not man, can make an heir. If, however, a man possess both inheritable and purchased lands, it is then unquestionably true, that he may absolutely give any part or the whole of the latter to such persons as he pleases; and of his inheritance, he may notwithstanding dispose, according to what we have already observed, provided such disposition be a reasonable one. It should be observed, that if a man having lands in free socage, has many sons, who are all in equal proportions to be admitted to the inheritance, then it is unquestionably true, that their father cannot give a greater part of his inheritable land, or of his purchased if he possess no inheritable, to any one of the sons, than the reasonable part which would fall to such son of the whole inheritance. But the father can in his lifetime give to either of his sons such part only of his inheritable free socage land as such son would be entitled to upon the death of his father by the rule of succession.

Establishment of Doctrine That Heir Takes by Descent.

WILLIAM DeARUNDEL'S CASE, Pleas at Westminster, Hilary Term, 9 Hen. III.—A. D. 1225—Bracton's Note Book, Cas 1054.

Radulfus, son of Roger, demanded of William de Arundel five and a half acres of land with appurtenances at Trelley, three acres with appurtenances in Treberned, two acres with appurtenances in Tredeiset, and one acre with appurtenances in Hendr, as his right, of which Roger, his father, was seised as of right in fee and demesne in the time of Henry, king, &c., and which right of Roger to this land descended to said Radulfus as his son and heir. And William came and defended his right; and said that this Roger, plaintiff's father, rendered all this land with appurtenances as his sole and peaceable inheritance to William, the defendant's father, and in the court of our lord the king quit-claimed for himself and his heirs in perpetuity to said William and his heirs; and he produced the charter of Roger which witnessed it. And Radulfus came and acknowledged his father's charter and said quit-claim; but he demanded judgment whether his father could give all the land which he held by knight service reserving no service to himself or his heirs. And because Radulfus acknowledged his father's charter and the charter proved that Roger, his father, rendered this land and quit-claimed it for himself and his heirs it is held that William go hereof discharged and that Radulfus be in mercy.

Note that in writing his treatise later—1250-67?—Bracton lays down the law in accord with this case as unquestioned. See ante p. 21.

BRITTON, Liber II, c. 5, Sec. 1, p. *93.—A. D. 1275—1300.

Notwithstanding heirs are named in a purchase, yet no purchase thereby accrues to the heirs. And it must be understood that where any one purchases to himself and his heirs, he purchases to himself and his heirs near and remote, and to have and to hold from heir to heir, as well to those begotten as to those which are to be begotten.

Alienation Restrained by Creating a Fee Conditional At Common Law.

ANON, Cornish Iter, 30 Edw. I.—A. D. 1302;—FitzHerbert Abr. Formedon 65, 1 Gray's Cases on Property p. 412.

Formedon in reverter because the donee died without issue. *Asseby*: The donee alienated before the statute (13 Edw. I. c. 1) and had issue. *Heyham*: He had no issue when he made the alienation. *Asseby*: It may be that he had no issue when he alienated but that he had issue afterwards, and then is the alienation good. *Heyham*: No. *Asseby*: He had had issue. **PER CURIAM**: It is nothing to the point that he had had issue alive when he alienated; for there might have been issue and the issue might have died; by that alienation the plaintiff will

not be barred. *Asseby*: He had issue alive when he made alienation. And the others said the contrary.

The following cases at the same term, if not different reports of the same case, seem to be to the same effect: *Kilcart v. Hevys*, 30 & 31 Ed. I. p. 196; *Waryn de Traneryon v. Thomas de Traneryon*, 30 & 31 Edw. I. p. 128; *Anon.*, Id. 384.

BRIAN'S CASE, Trinity term, 32 Edw. I.—A. D. 1304.—Year-books (Horwood) 32 & 33 Edw. I, p. 278. Abridged.

Formedon because the donee had died without issue. *Touthby* (for the defendant): Robert (the donee, to him and the heirs of his body) had issue, and alienated before the statute (of Westm. 2, c. 1), ready, &c. *Friskney* (for the demandant): The statute states "that such feoffees had power to alienate after issue begotten," and we will aver that Robert had not any issue at the time of or before the alienation, ready, &c. * * * *Malberthorp* (also for defendant): Our case is at the common law; so it seems that it is sufficient for us to say that he had issue and alienated, &c. *HENGHAM (J.)*: They say that at the time when Robert alienated he had no issue; and this they offer to aver; Do you accept the averment or not? * * * (Holding the previous answer insufficient.)

Land was given to a man and woman and the heirs of their bodies and thereafter they had issue and later the wife died, the statute *de donis* was passed, he married again and died, and the second wife was endowed of this land. Year-books (Pike) 33 & 35 Edw. III, p. 286.

Alienation Restrained by Creating Estate Tail.

NOTE in Yearbook of 20 & 21 Edw. 1, p. 302.—A. D. 1292.

One Adam purchased a tenement, to hold to him and the heirs of his body begotten, and afterwards took a wife with a good estate, and begot a son. Adam aliened the land so purchased, in despite of the form, &c.; and afterwards he and his wife died; then came the son and brought a writ of formedon against the tenant, and the tenant vouched him to warranty by virtue of his father's deed, and the son said that it was not due course of law to vouch the demandant. And so in this case the voucher was of no avail. But can the objection in this case avail against the father's deed? I say no, because the alienation was made against the form of the gift, unless he has something by descent *ex parti patris*.

TALTARUM'S CASE, Mich. Term, 12 Edw. IV.—A. D. 1473—Year-Books 12 Edw. IV, 19.

In a writ of entry on the statute of 5 Rich. II, (c. 8) '*Ubi ingressus non datur per legem*,' &c., sued against one J. Smith, the defendant said that the plaintiff ought not to have his action, for before the alleged entry one T. B. was seised of the tenements in fee, and gave them to one W. Smith to have and to hold to him and to the heirs of his body

begotten, by force of which he was seised, &c., and had issue one Richard and died so seised, and the tenements descended to Richard, and he entered and was seised, and had issue the said J. Smith, and died seised, and the tenements descended to the said J.; and the plaintiff claiming by color of a deed of feoffment, before the gift, &c., entered, on whose possession the said J., as son and heir of the said R. at the time of the alleged entry, entered, &c., on which entry the plaintiff had based his action. To which the plaintiff said, true it is that T. B. gave the tenements as above, &c.; but he said that the said W. had issue one Humphrey an older (son,) and the said Richard, the younger, and died, after whose death H. entered and was seised by the form of the gift, &c., and being so seised, one T. Taltarum sued a writ of right against said Humphrey, returnable, &c.; on which day the parties appeared, and said Taltarum counted on his possession, and the said H. made defense, and vouched to warranty one R. King, who was ready and entered into the warranty, and joined issue on the mere right; and the said Taltarum imparled (with him) and then returned (into court) and the tenant by the warranty did not return but in contempt of court made default, by which the demandant had final judgment against said H., and he over against the tenant by the warranty; by force of which said Taltarum entered and was seised, &c.; and then said H. died without heirs of his body, &c.; and later Taltarum enfeofed the present plaintiff, &c., whereby he was seised when the defendant entered, &c. To which the defendant said, true it is that the said W. had issue Humphrey the elder and R. the younger, and died; and that after his death the tenements descended to Humphrey as son and heir, and he entered and was seised as son and heir by the form of the gift, &c.; but he said that the aforesaid Humphrey before the writ purchased (in Taltarum's suit) enfeofed the said tenements to one Tergos in fee, who before said writ purchased gave the tenements back to said H. and one Jane his wife to have and hold to them and to the heirs of their bodies begotten, remainder to the right heirs of said H. in fee, &c., by force of which they were seised, &c.; and later Jane died, after whose death H. was sole seised of said tenements as tenant in tail after possibility, &c.; and while he was so seised said Taltarum sued his writ of right, and recovered against said H. in manner and form as he had alleged; the which H., continually after the said judgment during his life was seised of said tenements by force of the gift to him and his wife, and died without issue; after whose death said Richard as brother and heir of said H., of the body of W. begotten, entered and was seised by force of the gift made to W., and died seised, and it descended to said J. Smith, and he entered and was seised by force of the gift, &c.; without this that the said T. Taltarum, after the said recovery in the life of the said H. entered on the said tenements as he had alleged; and without this that the said H. had any other estate in the said tenements at the day of the purchase of the writ of right or afterwards, except that by force of the gift to him and his wife, &c.; and without this that the said Taltarum was seized of the said tenements as of fee

and of right at the time of the king, as he had alleged; and so the said recovery was false and feigned in law. * * *

In place of the long and confusing argument given in the original, the following synopsis of the decision is given from *Challis on Real Property* *250: "It would appear, so far as the rambling obscurity of the report allows anything to appear, that in the present case the question at issue was whether a person claiming under the original entail, which had been discontinued by Humphery Smith's (*251) feoffment to Tergos was barred by this recovery. And it appears to have been held that he was not barred, upon the ground that Humphery Smith (who was really seised under the tortuous seisin acquired by his own feoffment to Tergos) had not been seised by force of the original entail, which was now sought to be barred, at the time when the recovery was suffered. From this the inference is deduced, that if Humphery Smith had been so seised by force of the original entail, the recovery would have been a good bar to the issue in tail claiming thereunder. And this inference being acted upon in practice, was subsequently recognized by the courts, and became the foundation of common recoveries."

ANON., before all the judges, Easter, 19 Hen. 8.—A. D. 1528—Dyer 2b.

Before all the judges at Sergeant's Inn, a great question was agitated, which was this: Tenant in tail levied a fine of his land with proclamations, and the five years passed during his life-time, and [*3a] afterwards he died. Whether his issue should be barred by this fine or not? ENGLEFIELD, SHELLY and CONINGSBY, thought that the issue shall not be barred; for the statute 4 Hen. 7, c. 24, is, that such fine shall be final, and shall conclude as well privies as strangers to it, saving to all persons and their heirs (other than such as shall be parties to the fine) their right interest, &c., which they had on the day of engrossing the fine, so as they bring their action or enter lawfully within five years after the engrossing; saving also to all other persons such right, title, and interest in the said tenements as should first grow, remain, descend, or come to them after the fine engrossed, or proclamations made by force of any estate-tail, or other cause and matter made before the fine levied; so by this last saving, &c., the issue in tail is aided, for he is the first to whom the right descends after the fine engrossed. * * *

FITZJAMES, BRUNDEL, FITZHERBERT, BROOKE, and MOORE, to the contrary, for the intent of those who made the statute was (as appears by the words of the said statute) that such fine, &c., should be a final end; and besides that such fine, &c., shall conclude as well privies as strangers. * * * And the intention of the makers of the statute was, not that such as claim by the same title that his ancestor, who levied the fine, had, shall be aided, &c., for such issue in tail is privy to the fine levied by his ancestor, through whom he shall make his descent, although he

be not party to the fine, and all privies are concluded by such fine; and so such issue in tail shall be barred by a fine by his ancestor, &c. And in this case it was agreed by all the judges, that if he who is a stranger to the fine, to whom a remainder in tail, or other title, first accrues after the fine, do not put in his claim within five years after, &c., his issue is barred by that fine forever. Which note.

JACKSON & DARCYES CASE, in Common Bench, Mich. 16 Ellz.—A. D. 1574. 3 Leon. 57.

In a writ of partition *facienda* between Jackson and Darcy, the case was: tenant in tail, remainder to the king, levied a fine, had issue, and died; in that case, it was adjudged that the issue was barred, and yet the remainder which was in the king was not discontinued; for by that fine, an estate in fee-simple determinable upon the estate tail, did pass unto the conusee.

MARY PORTINGTON'S CASE, in C. B., Trinity, 11 James 1, A. D. 1614—Abridged from 10 Coke 35 b.

Speaking of this case in the preface to the report, Lord Coke said: "Then have I published in Mary Portington's case, for the general good both of the prince and country, the honorable funeral of fond and new-found perpetuities—a monstrous brood carved out of mere invention, and never known to the ancient sages of the law. I say monstrous, for that the naturalist saith, *quod monstra generantur propter corruptionem alicujus principii*; and yet I say honorable, for these vermin have crept into many honorable families. At whose solemn funeral I was present, accompanied the dead to the grave of oblivion, but mourned not, for that the commonwealth rejoiced, that fettered free-holds and inheritances were set at liberty, and many and manifold inconveniences to the head and all the members of the commonwealth thereby avoided."

Trespass by Mary Portington against Robert Rogers and Thomas Barley for breaking a close and house in York County. Defendants pleaded in bar, that Herceus Sanford, being seised in fee in socage of the land devised it in writing to Elizabeth, his youngest daughter, in tail, when she should be 18; that the testator died when she was five years old, and when she was of age and seized under the devise she married defendant Rogers, &c. Plaintiff replied that the testator had issue, Mary, the plaintiff, his eldest daughter, Helen, his second, and said Elizabeth, and that for want of issue of said Elizabeth, the same will limited the remainder to said Mary in tail, remainder to Helen in tail, with divers remainders over in tail; "Provided always, that if my said daughters or any of them * * * jointly or severally, by themselves or together with any other person or persons, willingly, apparently, and advisedly conclude and agree to" any act to alienate the land or bar or destroy the entails, such person shall immediately lose and forfeit and be utterly barred and excluded from every estate, remainder, and benefit that she or they might claim by virtue of the will, immediately from such act as if she or they were dead without heirs, and that said Elizabeth and Robert had bargained for and suffered a recovery; where-

fore the plaintiff entered for the said forfeiture, as in her remainder. Upon which the defendant demurred. This Plea was entered, Mich. 7 James, in the common bench, and had depended fourteen terms and been argued at the bar more than half as many times; and now it was argued by the judges, and at last unanimously resolved by the whole court that judgment should be given against the plaintiff.

On the Plaintiff's Part divers objections or rather declamations were made: 1. That from the time of the making of the act of 13 Edw. 1, c. 1, *de Donis Conditionalibus*, till *Taltarum's Case*, 12 Edw. 4, 19, there was no opinion that a recovery against the tenant in tail with voucher over would bind the estate tail on the pretense of a feigned recompence, which was then newly invented and never before imagined by any of the sages of the law in so many generations and ages incurred after the act. 2. Although the donor cannot restrain the common recovery after it is suffered and executed, he may restrain the conclusion and agreement to suffer, and so prevent the bar by the recovery, and preserve his remainder or reversion. 3. Such recoveries are by divers acts of parliament marked and branded with the blemish of fiction and falsity, as in 34 H. 8, c. 20, they are styled feigned and untrue recoveries; and so in 11 H. 7, c. 20; 32 H. 8, c. 31; 14 Eliz. c. 8, &c. And therefore it stands with law and reason to provide for the preservation of reversions and remainders against such feigned, false, and covinous recoveries. 4. That this opinion that a common recovery cannot be restrained by condition or limitation was new and of late invention, and never heard of before *Mildmay's Case*. 6 Coke 40. For it was admitted to be restrained in the *Case of Earl of Arundel*, 17 El., Dyer, 342, and in the argument of *Scolastica's Case*. [post] And therefore it was thought to stand with the honor and gravity of the court that this point had been so often argued at the bar, and therefore now was ripe for judgment.

The Court confuted all the said objections, and thereby the point in judgment was confirmed. As to the first objection two questions were moved and resolved: 1, that judgment given against a tenant in tail with voucher and recompence in value would bind the estate tail, notwithstanding the said act of 13 Edw. 1, c. 1, be the recovery upon good title or not; 2, that the judgment given in such case for the tenant in tail to have in value, would bind the estate tail, although no recompence be had.

It appears by our books, that the opinion that a recovery against tenant in tail with voucher would bar an estate tail, and was not restrained by the statute *de Donis Conditionalibus* was not newly invented in 12 E. 4, but often affirmed for law by the most knowing of the law that ever were; for Sir Wm. Thirning in the time Hen. 4, C. J. of the Com. Pl., anno 12 Hen. 4, 13 b, saith that the most learned of the law that ever were, were in the reign of Edward 3, which also were near the making of the statute. Let us see then how the law was held in their days on this point. By 15 Ed. 3, Brief 324, by recovery in value by the tenant in tail

the estate tail is barred, and he shall have a formedon of the land so recovered in value. And therewith agrees 42 Ed. 3, 53; for there it is held that in some case a man shall have a writ of formedon of land which was never given—as if tenements in tail be lost, and the tenant in tail recover other land in value, the issue shall have a formedon of the land recovered in value, and yet that land was not given. In *Octavian Lombard's Case*, 44 Edw. 3, 21, 22, tenant in tail grants a rent charge to one in consideration that the grantee having right to the land in tail releases to him, it shall bind the issue in tail. In *Jeffery Bencher's Case*, 48 Edw. 3, 11 b, a recovery in value by tenant in tail shall bind the tail, and a formedon lies of the land recovered in value; and therewith agree 1 Ed. 4, 5; 5 Ed. 4, 2b. And that also appears by the like cases: For if a tenant in tail aliens with warranty, and leaves assets to descend it is a bar to the issue, by reason of the warranty and assets descended; but neither the warranty without the assets, nor the warranty and assets without judgment in a formedon shall bar the estate tail; and therewith agree Temp. Ed. 1, tit. Garr. 89; 34 Ed. 1, tit. Garr. 88; 11 Ed. 2, tit. Garr. 83; *Hen. Sommer's Case*, 4 Ed. 3, 24; 3 Ed. 4, 14; 40 Ed. 3, 9; 14 Hen. 4, 39a; 24 Hen. 8, Br. Tail 33; 4 Mary, Dyer 139. Therefore these resolutions and opinions of law produced the judgment in *Taltarum's Case*, 12 Ed. 4, which was not of any new invention, but proved and approved by the resolutions of the sages of the law at all times after the said act until 12 Ed. 4; and the judges of the law then perceiving what contentions and mischiefs had crept into the quiet of the law by these fettered inheritances; upon consideration of the said act, and of former expositions thereof by the sages of the law, gave judgment that in such case the estate tail should be barred.

As to the second objection, it is absurd to say, that the recovery itself cannot be prohibited by any condition or limitation and yet that the conclusion and agreement to suffer a recovery shall be prohibited; and such condition to prohibit a conclusion or agreement savors of a new device or invention; for till now of late, none ever heard of any condition or limitation to prohibit *goings about*, nor any conclusion or agreement, but they are altogether unknown to the law. The makers of the statute *de Donis* ought to be taxed with great ignorance, and the act was not necessary, if the going about or conclusion to alien might have been prohibited, for then when a man had made a gift to one and the heirs of his body, he might have added the condition that if the donee in tail at the common law after the donation had gone about or concluded to alien, that then the donor should re-enter, and so have preserved his possibility of reverter.

As to the third objection and aspersion of a scandal upon common recoveries, which is one of the main pillars which supports the estates and inheritances of the kingdom, it was answered that there was never anything by the wisdom of man so well devised, or so surely established upon law and reason, which the wit and craft of those who are subtle and wicked has not abused. In the great case betwixt T. Vernon and

Sir Ed. Herbert, which was argued by learned counsel before the lords in parliament, there Hoord, an utter barrister of counsel with Vernon, who was barred by a common recovery, rashly and with great ill will inveighed against common recoveries, not knowing the reason and foundation of them; who was with great gravity and some sharpness reproved by Sir James Dyer, then Chief Justice of the common pleas, who said he was not worthy to be of the profession of the law, who durst speak against common recoveries, which were the sinews of assurances of inheritances, and founded upon great reason and authority. As to *Scholastica's Case*, I respect much the reporter, and attribute due honor and reverence to the judges who argued in the case; but the resolution in the case is founded upon two authorities in law, which do not warrant the conclusion which is made upon them arguendo in the said case, but to say the truth the contrary.

The Rule in Shelley's Case.

ABEL'S CASE, Mich. term, 18 Edw. II.—A. D. 1325—Year-books (Maynard) 18 Edw. II, f. 577. Abridged.

John Abel, having two sons, Walter and John, purchased the manor of Fortysgray in Kent; to hold to himself and Matilda his wife, and Walter Abel, his eldest son, and to the heirs of the body of Walter begotten; and, if Walter died without heir of his body, the manor should remain to the right heirs of John the father. Matilda, the wife, died; and Walter, the son, also died without heir of his body. John, the father, became bound in a statute merchant to pay £100 to B. at a day certain; and died, leaving his younger son John his heir. After the day of payment was elapsed the creditor sued out a writ to the sheriff of Kent, to extend and deliver to him all the lands which John Abel the father had, on the day of acknowledging the statute. The sheriff returns, that he had delivered to other creditors upon recognizances all the lands which John Abel had in fee, except the manor of Fortysgray, in which he had only an estate for term of life. Upon this return it was argued, that John the father had only the freehold for term of life, the fee simple being limited to his heirs, who therefore took by purchase and not by descent. But the court held the contrary; for which this reason (among others) is given by Stonor, J. viz., because otherwise the fee and the right after the death of Walter, the eldest son, would have been in nobody. And therefore Bereford, C. J., gave the rule, that execution should be awarded upon this manor of Fortysgray.

ANON., in C. B., Trinity, 6 Eliz.—A. D. 1564—1 And. 42, pl. 105.

Grandfather, father, and son; and land held of the king *in capite* by knight-service was given to the grandfather for life, remainder to the father for life, remainder to the son for life, remainder to the right heirs

of the grandfather, father, and son. The grandfather died, and the question was whether the father should sue livery; and the opinion of the justices of the common bench was that the father need not sue livery; for he and his son had the fee-simple by survivorship and not by descent.

SHELLEY'S CASE, in B. R., Trinity, 23 Eliz.—A. D. 1581. 1 Coke 93b, 1 Anderson 69, Moor 136, 3 Dyer 373, Abridged from 1 Coke 93b.

Nicholas Wolfe brought *ejectione firmæ* of land in Sussex against Henry Shelley, declaring on a lease to him by Richard Shelley. Plea not guilty. It was found by special verdict that Edward Shelley and Joan, his wife, being seised of the land in question, in special tail, to them and the heirs of their two bodies, Joan died, leaving by him two sons, Richard, the younger, under whom the plaintiff claims, and Henry, defendant's father, who died before defendant was born. After Henry's (Sr.) death Edward covenanted by indenture to suffer a recovery to his own use for life, then to the use of one Carill and others for 24 years, then to the use of the heirs male of the body of said Edward, with remainder in tail over. Said Edward died while the land was in possession of a tenant for years, and later on the same day the said recovery passed with a voucher over, and, immediately after judgment given *habere facias seisinam* was awarded and ten days later the recovery was executed. Edward died Oct. 9th, A. D. 1553, and Henry, the defendant, was not born till Dec. 4th following. After the death of said Edward said Richard entered and leased to the plaintiff, on whom defendant entered and ejected him.

The principal questions in the case were four: 1, whether execution may be sued against the issue in tail if the tenant in tail suffers a common recovery with voucher over and dies before execution; 2, whether the reversion is in the recoverer presently by the judgment before execution sued when a recovery is suffered while a tenant for years is in possession; 3, whether the entry by Henry was lawful under the facts of this case, and this was the great doubt in the case; and, 4, whether Richard may take as a purchaser in this case, for as much as the elder brother (Henry) had died leaving a daughter living, who was general right heir of Edward at the time of the execution of the recovery.

Anderson, queen's sergeant, and *Gawdy* and *Fenner*, sergeants, for the plaintiff, argued, that, this use originally vested in Richard Shelley, and never vested in Edward Shelley; and therefore it vested in Richard by purchase, for that which originally vests in the heir and was never in the ancestor always vests in the heir by purchase. That the use never vested in Edward is manifest, for the use ought to rise out of the estate of the recoverers, which could not arise during his life, for it was not executed during his life. This case is like the case in 5 Edw. 4, 6a, where the wife consents to a ravisher, having issue a daughter the daughter enters by the statute of 6 R. 2, a son is afterwards born, he shall never divest it, for it vested in the daughter by purchase; so in the case agreed

in 9 Hen. 7, 25a, if a lease be made to one for life, the remainder to the right heirs of J. S., if J. S. dies leaving a daughter, his wife with child with a son, the daughter claims it by purchase, and therefore the son born afterwards shall never devest it. But they relied principally upon the case in 9 Hen. 7, 25a, that if a condition descends to a daughter, and she enters for the condition broken, the son born afterwards shall never enter upon her, and yet there she is in by descent and has the condition and right of entry as heir, which is a stronger case than ours.

It was further argued that the manner of the limitation of the use ought to be observed in this case, for it is to the heirs male of the body of Edward and the heirs male of the body of said heirs male. If heirs male of the body of Edward should be words of limitation, then the subsequent words would be void, for words of limitation cannot be added to words of limitation, but to words of purchase; and such construction is always to be made of a deed that all the words, if possible, agreeable to reason and conformable to law, may take effect according to the intent of the parties. If a man makes a feoffment in fee to the use of himself for life, and after his decease to the use of his heirs, the fee simple is executed; but if the limitation be to the use of himself for life, and after his decease to the use of his heirs and their heirs female of their bodies, his heirs in this case are words of purchase and not of limitation, for then the subsequent words would be void.

Therefore they concluded that no use could arise till execution sued, and then it vested in Richard as purchaser before defendant was born as heir of the elder son; and admitting the recovery had been executed the use first settled in Richard as a mere purchaser.

Popham, solicitor general, *Cowper* and *Coke*, for the defendant. Execution could not be sued against the issue in tail. He who vouches shall never have execution against the vouchee before execution sued against him; so that the judgment to recover over in value is not material, as this case is, unless execution may be sued against the issue, which cannot be in this case. For he who is in of an estate in possession by title paramount to a recovery shall not be bound by the same recovery; and the issue in tail in our case is in of an estate in possession which he had paramount the recovery, and therefore he shall not be bound.

For as much as the land was in lease for years, the recovery was executed by operation of law without execution; in which there is a difference between lands in possession and lands in lease for years. Because the recoverer cannot sue execution, the law will adjudge him in execution presently. Those things which lie in grant pass to the conusee immediately by a fine levied; and so in case of a common recovery. If the judgment was executed by operation of law, then the estate tail to his heirs male of his body was in Edward Shelley, and consequently the entry of the defendant was without doubt lawful.

But if execution may be sued against issue in tail, and if the recovery was not executed by operation of law in the life of Edward, still the entry of the defendant was lawful. 1. If everything be performed with-

out laches that the parties could perform, they shall not be prejudiced by those things which the act of God made inevitable. 2. Where the heir takes anything which should have vested in the ancestor, then although it first vests in the heir and never in the ancestor, yet the heir shall take it in the nature and course of a descent. In the case here the use might have vested in Edward, and if it had vested in him Richard would have taken it by descent, and therefore he ought to take this use in the nature and course of a descent. Otherwise it is when the remainder is limited to the right heirs of J. S. &c., for there it begins in the son by name of purchase, and never could have vested in the brother, as the book, 9 Hen. 7, 25a, cited on the other side is agreed. So it is in the case of ravishment, 5 Edw. 4, 6a, which was cited on the other side.

What is it that governs and directs the use raised after the execution was had? The answer is, the indentures. And what is their direction? That Edward shall have it, and after his death the heirs male of his body. But the indentures direct that the heirs male of the body shall take it by limitation of estate and not by name of purchase, and therefore Richard ought to have it as heir by limitation of estate and not by name of purchase; so the entry by the afterborn son of his elder brother was lawful.

Admitting the remainder had been limited to the right heirs of the body of Edward, yet Richard could not have it; for he must have both qualities, male and right heir, but the daughter of his elder brother was right heir, so he could not take by purchase. And so is the opinion of *Ellerker, J.*, expressly in 9 Hen. 6, 24a, if a man makes a lease for life, remainder to the right heirs female of the body of J. S., who has issue a son and daughter and dies; in this case the daughter shall not take the remainder, for she is not right heir female.

As to the objection that the limitation was to the heirs male of the body of Edward and the heirs male of the body of the heirs male, and so the heirs male of the body of Edward should be purchasers; the defendant's counsel answered, that it is a rule of law, that, when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, in fee or in tail, that always in such cases, "the heirs" are words of limitation of the estate, and not words of purchase. And that appears in 40 Edw. 3, 9a and b, in the *Provost of Beverley's Case*, in 38 Edw. 3, 31 d; 24 Edw. 3, 36 b; 27 Edw. 3, 87 a; and in divers other books. So inasmuch as in this case Edward Shelley took an estate of freehold, and after an estate is limited to his heirs male of his body, the heirs male of his body must of necessity take by descent and cannot be purchasers. Otherwise it is where an estate for years is limited to the ancestor, remainder to another for life, remainder to the right heirs of the lessee for years; there his heirs are purchasers. If the right heirs male should have by purchase to them and their heirs male, a violence would be done to the words and meaning of the party, for then all the other male issue of the body of Edward would be ex-

cluded to take anything by the limitation, which would be against the express words of the party.

Lastly if Richard should not take in nature and course of descent he cannot take at all; for when an estate is made to a man, and after in the same deed, to limit the quality of the estate, another limitation is made to his heirs, or to the heirs of his body; in all these cases his heirs or the heirs of his body shall never take as purchasers. In this case the words "*heirs male of the body of Edward Shelley*" were words of limitation; and therefore his heir male cannot take as a purchaser. This proposition is proved by the reason of the book in 40 Assize pl. 19, and by the case put by Littleton § 128, that if a man grant a reversion of a seignior by deed to J. S. and his heirs, and the grantee dies before attornment, attornment to his heirs is void, for if it should be good the heir would take by purchase under words of limitation in the grant. On the same reason *Brett v. Ridgden*, Plow. Com. 342, is a stronger case than this; for a man devised lands to a man and his heirs, and the man died before the deviser, and it was adjudged that the heir should not take by the devise, for in that case the word "*heirs*" is not named as a word of purchase, but only to limit the estate which the devisee should have. So in our case the words *heirs male of the body of Edward Shelley* are only to give him an estate tail, and not to make any other a purchaser; and therefore Richard cannot claim the land by purchase.

After the case had been argued, openly and at large, by counsel on both sides, on three several days, in the queen's bench, the queen hearing of it (for such was the rareness and difficulty of the case, being of importance, that it was generally known), of her gracious disposition, to prevent long, tedious, and chargeable suits between parties so near in blood, which would be the ruin of both, being gentlemen of good and ancient family, directed her gracious letters to *Sir Thomas Bromley*, lord chancellor of England, who was of great and profound knowledge in the law, thereby requiring him to assemble all the justices of England before him, and upon conference had between them touching the questions, to give their resolutions and judgments thereof. And thereupon the lord chancellor, in Easter term, 23 Eliz., called before him at his house, called York-house, *Sir Christopher Wray*, lord chief justice of England, and all his companions justices of the queen's bench; *Sir James Dyer*, lord chief justice of the court of common pleas, and all his companions justices of the same court; *Sir Roger Manwood*, chief baron of the exchequer, and the barons of the exchequer; before whom the questions aforesaid were moved and shortly argued by *Fenner* serjeant for the plaintiff, and by one on the defendant's part.

Opinion of the Judges. At this time the lord chancellor was of opinion for the defendant, and openly declared his opinion before all the justices, that the third question of law was for the defendant, and therefore the defendant's entry upon his uncle was lawful. But the

questions were not resolved at that time, the justices desiring time to consider. Eight or nine days after in the same term, all the said justices and barons met together in Serjeants' Inn in Fleet street, for the resolution of the case, and there it was argued by them shortly; after which arguments the justices at that time conferred amongst themselves, and took further time to consider till the trinity term following. Accordingly at the beginning of trinity term, after great study and consideration, all the justices and barons met again in Serjeants' Inn in Fleet street; at which time, upon conference amongst themselves, all the justices of England, the lord chief baron and the barons of the exchequer, except one of the puisne justices of the common pleas, agreed that the defendant's entry upon the said Richard the uncle was lawful. Four or five days after their last meeting, one of the defendant's counsel came to the bar in the queen's bench, and moved the justices to know their resolution in the case, for their resolution was not before known to the defendant nor his counsel. WRAY, C. J. answered, that they were resolved, and asked plaintiff's counsel if they could say any more, who answered that they had said as much as they could; and likewise asked defendant's counsel if they had any new matter to say for defendant, who said: "No." And then the chief justice gave judgment that the plaintiff take nothing by his bill. Because counsel on both sides were desirous to know on which of the points their resolution did depend, the chief justice openly declared, that as to the first point the greater part of the justices and barons held that execution might be sued against the issue in tail, because the right of the estate tail was bound by the judgment against the tenant in tail, and the judgment over to have in value. As to the second point, they were all agreed, that the reversion was not in the recoverers immediately by the judgment. But he said that all the justices of England and barons of the exchequer, except one of the justices of the common pleas, were agreed as to the third point, viz: that the uncle was in in course and nature of descent, although he should not have his age, nor be in ward: (1) because the original act, the recovery, out of which the uses and estates had their essence, was had in the life of Edward, to which the execution after had retrospect; (2) because the use and possession might have vested in Edward, if execution had been sued in his life; (3) because the recoverers by their entry, nor the sheriff by doing the execution, could not make whom they pleased inherit; and (4) because the uncle claimed the use by force of the recovery, and of the indentures by words of limitation and not of purchase. And it was resolved by them all that the recovery was good enough, notwithstanding the death of Edward in the morning on the same day. And judgment was given accordingly.

At the end of his report of this case, Judge Anderson says judgment was given for Henry, and agreed that he should have the land; but the reason was not published by the court. Then he adds a note, saying that Coke has now made report in print of this case with arguments and the agreements of the chancellor and judges, but nothing of this was said in the court nor in the report of the judges.

CLERK v. DAY, in B. R.; Hilary, 36 Eliz.—A. D. 1593.—Cro. Eliz. 313.

The case on special verdict was, Joan Marsh devised land to Rose, her daughter, for life; and, "If she marry after my death, and have heir of her body then lawfully begotten, I will that the heir after my daughter's death shall have the land, and to the heirs of their body begotten; and if my daughter die without issue of her body begotten, then Philip shall have it to him and his heirs." Joan died. Rose married Silly and had issue. The question was, if Rose had an estate tail or for life only?

First, it was agreed by all the judges that a devise to one and the heir of his body, is an estate tail, and shall go to all the heirs of her body; for *heir* is *nomen collectivum*, and one can have but one heir at a time, and this shall go from heir to heir. GAWDY and FENNER, JJ., held that Rose had but an estate for life, for so it is limited by express words that she shall have for life; and then her heir shall take as a purchaser, and it shall not execute in Rose. POPHAM, C. J., contra, for the estate is limited to the ancestor, and after limited to the heir, and shall execute in the ancestor; especially, the words being, "if she hath any heir," and therefore intended that any heir should have it. *Et adjournat.*

No judgment was entered on the roll, yet Moor (593) says the opinion of the court was given. Hale cites it as such a case in *King v. Melleng*, 1 Ven. 214, 225. The true name of this case is *Cheat v. Day*. See 2 Stra. 804.

SPARK v. SPARK, begun in C. B., Mich. 40 & 41 Eliz.—A. D. 1599. Cro. Eliz. 666.

Ejectione Firmae. Upon special verdict the case was, Nicholas Spark seised in fee, by indenture let it to William Spark for 80 years, if he live so long, the remainder after his decease to the executors or assigns of said William Spark for 40 years. William Spark died intestate, his wife (now plaintiff) took letters of administration, and entered, claiming the term. The lessor (now defendant) ousted her. The sole question was whether this remainder for 40 years vested in William Spark, or failed because he had not made any executor.

All the Justices delivered their opinions severally, that this term vested in William, and that the plaintiff should have it as administratrix to him, and it should be assets in her hands; for the intention of the lessor appears, that the executors or assigns of William should have it. So by the word "assigns" it is intended that William may dispose and make an assignment thereof; and therefore it vested in him, and shall go to his executors or administrators as assigns in law, and as a thing which came to them from their testator, and not as a perquisite by themselves. WALMSLEY, J., said it never yet was questioned by any, that if these two terms had been in one clause, but that they should have vested in William as if it had been habendum for 80 years, if he

lived so long, and for 40 years after his decease to his executors. But it is here demised to William for 80 years, if he live so long, remainder to his executors for 40 years; yet notwithstanding it is all one, and the executor shall have it as executor, and it shall be assets in his hands, it being in the testator to dispose of. And it was afterwards adjudged accordingly. In this case WALMSLEY, J., said, the difference betwixt this case and *Cranmer's Case*, 14 Eliz., Dyer 309, Moore 100, is because it is there limited by way of use, and by the party himself, so he shows his own intent that it should not vest in himself, but in his executors. But here the limitation is by a stranger, wherein there is not any intention appears, but that it should vest in the lessee himself. And by this difference all the books are reconciled.

ARCHER'S CASE. In Common Pleas, Mich. 39 & 40 Eliz.—A. D. 1598—1 Coke 66b, Skinner 430.

Between Baldwin and Smith in the common pleas, in a replevin; upon a special verdict, the case was such: Francis Archer was seized of land in a fee, and held in socage, and by his will in writing devised the land to Robert Archer the father for his life, and afterwards to the next heir male of Robert, and to the heirs males of the body of such next heir male; Robert had issue John, Francis died, Robert enfeoffed Kent with warranty, upon whom John entered, and Kent re-entered, and afterwards Robert died, &c.

And first it was agreed by ANDERSON, WALMSLEY & *Totam Cur'*. that Robert had but an estate for life, because Robert had an express estate for life devised to him, and the remainder is limited to the next heir male of Robert in the singular number; and the right heir male of Robert cannot enter for the forfeiture in the life of Robert, for he cannot be heir, as long as Robert lives: Secondly, that the remainder, to the right heir male of Robert is good, altho' he cannot have a right heir during his life, but it is sufficient that the remainder vests *eo instante* that the particular estate determines. And so it is agreed in 7 H. 4. 6. b. and *Crammer's Case*, 14 Eliz. Dyer 309 a. Thirdly, (which was the principal point of the case, it was agreed *per totam Cur'*, that by the feoffment of the tenant for life the remainder was destroyed, for every contingent remainder ought to vest, either during the particular estate, or at least *eo instante* that it determines: for if the particular estate be ended, or determined in fact, or in law before the contingency falls, the remainder is void. And in this case, inasmuch as by the feoffment of Robert, his estate for life was determined by a condition in law annexed to it, and cannot be revived afterwards by any possibility; for this reason the contingent remainder is destroyed against the opinion of Gascoigne in 7 Henry 4. 23 b. But if the tenant for life had been disseised, and died, yet the remainder is good, for there the particular estate doth remain in right, and might have been revested, as it is said in 32 H. 6. But otherwise is it in the case at the bar, for by his feoffment no right

of the particular estate doth remain. And it was said it was so agreed by POPHAM, chief justice, and divers justices in the Argument of the case between *Dillon* and *Frein*, [Pop. 70, And 309, 1 Coke 120 a, Jenk. Cent. 276 post] and denied by none. See [Fitz. Abr.] 11 R. 2. Tit. Detinue 46. And note the judgment of the book, and the reason thereof, which case there adjudged is a stronger case than the case at the bar. But note reader, that after the feoffment, the estate for life to some purpose had continuance; for all leases, charges, &c., made by the tenant for life shall stand during his life, but the estate is supposed to continue as to those only who claim by the tenant for life before the forfeiture; but as to all others who do not claim by the tenant for life himself, the particular estate is determined: And by the better opinion the warranty shall bind the remainder, altho' the warranty was created before the remainder attached or vested, and altho' the remainder was in the consideration of the law, and he who shall be bound by it, never could have avoided it by entry, or otherwise.

GOODRIGHT v. PULLIN, in King's Bench, Mich., 13 Geo. III.—A. D. 1727
—2 Strange 729, 2 L. Raym. 437.

Special verdict in ejectment on this devise: "I, Nicholas Liste give and bequeath unto my wife all that my messuage or tenement called Hattersfield, to hold for the term of her natural life, and after her decease, then to my kinsman Nicholas Liste, for and during the term of his natural life, and after his decease unto the heirs males of the body of the said Nicholas lawfully to be begotten and his heirs forever; but in case the said Nicholas die without such heir male, then I give and bequeath the said premises unto my kinsman Edward Liste, for and during his natural life, and after his decease to the heirs males of his body lawfully begotten and his heirs forever," and for default of such heir male, remainder over. Edward Liste, the lessor of the plaintiff claims as heir male to Edward Liste the remainder man in the will, supposing this to be only an estate for life to Nicholas, and that therefore a recovery suffered by him and Mary (the widow) could not bar the remainders. The defendant claims as heir in fee to Nicholas.

Bootle, for the plaintiff, argued, that it appeared plainly to be the intention of the deviser, that Nicholas should take an estate for life only; for the premises are expressly limited to him for life; and if the testator had intended him an estate tail, why is this restriction?

RAYMOND, C. J. It will be a difficult thing to make this an estate for life; and the case of *King v. Melling*, (1 Vent. 225, 2 Lev. 58) answers all the objections as to the limitation to Nicholas for life. The word *issue* is a proper word of purchase, but the word *heirs* is always a word of limitation; and the word *heirs* being used in this case, the words *after his decease* are of no force. The words *heirs* and *heirs male* are *nomina collectiva*, and include all the heirs of the devisee, and in *Archer's Case*

it was the word *next* which confined it to one particular person, for without that word, it would have been a limitation, and not a purchase. The word *his* is the word which makes the difficulty in this case; but I think that it may very properly be referred to Nicholas himself. Suppose Nicholas had had several sons; if the eldest had been made a purchaser by this will, the other sons could not have taken; and there must be stronger words than these to control the words *heirs male* and make them words of purchase. I therefore think this clearly to be an estate tail in Nicholas. FORTESCUE, REYNOLDS and PROBYN, JJ., of the same opinion; and judgment was given for the defendant by the whole court.

PERRIN v. BLAKE, in the English Court of Exchequer Chamber.—A. D. 1771.—Hargrave's Law Tracts 489, 10 English Ruling Cases 689.

This is a feigned action of trespass brought in the Court of King's Bench by Perrin and Vaughan, as surviving trustees for Sarah, the widow of John Williams, against Hannah Blake, for forcibly entering a plantation in Jamaica, with *videlicet* to lay the action in Middlesex. Defendant pleaded not guilty as to the force and claimed title under the will mentioned below. Plaintiff's replied setting up the will at length and alleging a common recovery suffered by John Williams as tenant in tail under the will and a subsequent conveyance by him to the plaintiffs. To this defendant demurred. From a judgment for defendant in the Court of King's Bench (See 4 Burrows 2579, 1 Wm. Blackstone 672), plaintiffs bring the case here by writ of error. Reversed.

This action was brought at the suggestion of the committee of the King's Privy Council to obtain an adjudication by the courts of Westminster Hall upon the point arising on the will mentioned below involved in an appeal before the Privy Council from a judgment of the Court of Appeals of the Island of Jamaica affirming a judgment of the Supreme Court of Judicature at St. Jago, Jamaica, in favor of defendant in an action of ejectment by the plaintiffs herein against the defendant herein. The committee advised that this course be pursued because Lord Mansfield, who was the only law lord then attending the Council, preferred that a question of so much importance on the land titles of all England should not be decided by his sole opinion.

The facts involved in the ejectment suit were these: William Williams, of Jamaica, Esq., being seised in fee of a plantation in that island, and having one son and three daughters, duly executed his will bearing date March 13, 1722. On February 4, 1723, the testator died, leaving issue John Williams his only son and heir, and the three daughters named in the will. His wife died March 1, 1723. In February, 1743, John came of age; and conceiving himself to be seised in fee tail under the will of his father, he immediately made such conveyance of the devised plantation in Jamaica as by the law of that island is equivalent to a common recovery here. In March following John Williams executed a settlement in pursuance of marriage articles made whilst he was under

age: and by this settlement the plantation entailed by his father's will was conveyed to trustees and their heirs to the uses following: namely, to the use of John Williams for life; remainder to the use of trustees, during his life, to preserve contingent remainders; remainder to the use and intent that Sarah, his wife, if she survived him, might receive out of the premises, during her life, a clear yearly rent charge of £1000, British money, payable at the Royal Exchange, London, quarterly, with powers of distress and entry; and subject to this rent-charge to the use of John Sharpe, William Perrin and Thomas Vaughan, their executors, administrators, and assigns for 400 years, for securing the rent-charge; remainder to the first and other sons of John Williams by the said Sarah his wife, successively in tail male; remainder to John Williams in fee. Dec. 31, 1744, John Williams died without issue, leaving Sarah his widow, and his two sisters, Bonella, the wife of Norwood Wilter, and Hannah, the wife of Benjamin Blake, his co-heirs, Anna, the other sister, having died unmarried in his lifetime. In 1745, immediately after the death of John Williams, the husbands of his two surviving sisters and co-heirs in their right entered into the plantation so devised and settled and became seised. The wife of Wilter died, leaving William Wilter her son and heir; and Benjamin Blake also died, leaving the said Hannah his widow. Both William Wilter and Hannah Blake controverted the validity of the jointure of £1000 a year to Mrs. Williams the widow, on the ground, that her deceased husband John Williams was a mere tenant for life under the will of his father, and therefore could not bar the entail thereby created. Perrin and Vaughan, (the surviving trustees of the term of 400 years), brought the action of ejectment mentioned above, to try this point.

The feigned case was several times argued before the Court of Exchequer Chamber and lastly in May 1771. After several months the judges of the Exchequer Chamber disposed of the case, each delivering a separate opinion as follows: For reversal: Lord Chief Justice Parker, Mr. Baron Adams, Mr. Baron Perrott and the Justices Nares, Blackstone and Gould. For affirmance: Lord Chief Justice De Grey. The following opinion of Mr. Justice Blackstone, according to Mr. Hargrave, is generally accepted as expressing the reason of the decision in the Exchequer Chamber:

BLACKSTONE, J. Upon the fullest consideration which I have been able to give to this case, I am of opinion, that the judgment of the Court of King's Bench is erroneous and ought to be reversed.

I conceive that the great and fundamental maxim, upon which the construction of every devise must depend, is "that the intention of the testator shall be fully and punctually observed, so far as the same is consistent with the established rule of law; and no further."—If it did not go so far, it would be an infringement of that liberty of disposing of a man's own property, which is the most powerful incentive to honest industry, and is, therefore, essential to a free and commercial country.

If it went farther, every man would make a law for himself; the metes and boundaries of property would be vague and intermediate, which must end in its total insecurity.

But there is, I will acknowledge, a distinction to be made, though too often confounded or forgotten, in what is meant by those rules of law, which must co-operate with the intention of the testator, in order to effectuate his devise. Some of these rules are of an essential, permanent, and substantial kind; and may justly be considered as the indelible landmarks of property, irrevocably established by the well-weighted policy of the law, which have stood the test of ages, and which cannot be exceeded or transgressed by any intention of the testator, be it ever so clear and manifest. Such as, that every tenant in fee-simple or fee-tail shall have the power of alienating his estate, by the several modes adapted to their respective interests; that no disposition shall be allowed, which in its consequence tends to a perpetuity; that lands shall descend to the eldest son or brother alone, or to all the daughters or sisters in partnership. These, and a multitude of other fundamental rules of property in this kingdom, are founded on the great principles of public convenience or necessity, and therefore cannot be shaken or disturbed by any whim or caprice of a testator, however, fully or emphatically expressed. A condition not to alienate is void, when annexed to a devise in fee, or in tail: an executory devise which tends to a perpetuity, by depending on so distant a contingency as the general failure of issue, is toally null from the beginning; and no man would be suffered to direct, that his lands shall be descendible for the future to all his male issue, or only to the eldest of his female. But there are also certain other rules of a more arbitrary, technical, and artificial kind, which are not so sacred as these, being founded upon no great principles of legislation or national policy. Some of these are only rules of interpretation or evidence, to ascertain the intention of parties, by annexing particular ideas of property to particular modes of expression: so that when a testator makes use of any of these technical modes of expression, it is evidence *prima facie*, that he means to express the self-same thing which the law expresses by the self-same form of words. Thus, if a man devises his land, being freehold, to another generally, without specifying the duration of his estate, the devisee shall be only tenant for life: if he devises in like maner a chattel interest, the devisee shall have the real property: a devise to a man and his heirs shall give him the full and absolute dominion; to a man and the heirs of his body, shall give him a more limited inheritance. Lastly, there are some rules, which are not to be reckoned among the great fundamental principles of judicial policy, but are mere maxims of positive law deduced by legal reasoning from some or other of these great fundamental principles. Such as, that a man cannot raise a fee-simple to his own right heirs, by the name of heirs, as a purchase; or, to bring it home to the case now before the court, that a devise of lands to a man for his life, and afterwards in any part of the same will a devise of the

same land to the heirs of his body, shall constitute an estate tail in the first devisee for life.

But some of these rules, of the second and third class, are rules of a more flexible nature than those of the preceding kind, and admit of many exceptions; whereas those admit of none. For, if the intention of the testator be clearly and manifestly contrary to the legal import of the words, which he has thus hastily and unadvisedly made use of, the technical rule of law shall give way to this plain intention of the testator. This has been clear law for four centuries at least, if not longer. It is said by the judges in 9 Hen. VI. fol. 24, that a devise is marvelous in its operations; and many instances are given, where it may countervail the ordinary rules of law. The like doctrine is to be met with in every reporter since; and is the same that obtained in equity for the construction of uses before the statute. In the case of uses (says Lord Bacon of Uses, 308, 8vo. edit.), the chancellor will consult with the rules of law, where the intention of the parties does not specially appear. But then, this intention of the testator, which is to ride over and control the legal operation of his own words, must be "manifest and certain and not obscure or doubtful," as was resolved by all the judges of England in *Wild's Case*, 6 Coke 16 [post 73]. Or, according to the emphatical words of Lord Hobart 33, "the intent must not be conjectural, but by declaration plain." Which words of Lord Hobart, as they are adopted and construed by Lord Hardwicke in *Garth v. Baldwyne*, 2 Ves. Sen. 646, must mean, "plain expression or necessary implication of his intent. But if that intent be uncertain, if it be in *æquilibrium*, or even in suspense or doubt, then (he afterwards adds) the legal operation of the words must take effect." And most certainly his lordship has laid down and explained the rule with that sagacity and caution, which so eminently distinguished his decisions. For as, on the one hand, it would be very unreasonable to control the plain intent of a testator by technical rules, which were principally contrived to ascertain it; so, on the other hand, where the intent is obscure or even doubtful, and liable to a variety of conjectures, it is the best and the safest way to adhere to these criterions, which the wisdom of the law has established for ages together, for the certainty and quiet of property. Every testator, when he uses the legal idiom, shall be supposed to use it in its legal meaning, unless he very plainly declares that he means to use it otherwise. And if the contrary doctrine should prevail; if courts either of law or equity (in both of which the rules of interpretation must be always the same), if these or either of them should indulge an unlimited latitude of forming conjectures upon wills, instead of attending to the grammatical or legal construction, the consequence must be endless litigation. Every title to an estate, that depends upon a will, must be brought into Westminster Hall; for if once we depart from the established rules of interpretation, without a moral certainty that the meaning of the testator requires it, no interpretation can be safe till it has received the sanction of a court of justice. For how can a client or purchaser

be assured that the conjectures of the most able counsel, or the most experienced conveyancer, will be in all points the same as the conjectures of the judges or the chancellor? A civilian of some eminence, Mantica, has written a learned treatise on their law, which he has entitled, *de conjecturis ultimarum voluntatum*; but I hope never to see such a title in the law of England. For, should such a doctrine ever prevail in this country, it were better that the statute of wills should be totally repealed than be made the instrument of introducing a vague discretionary law, formed upon the occasion from the circumstances of every case; to which no precedent can be applied, and from which no rule can be deducted.

The principles being thus cleared, upon which I have endeavored to found my present opinion, I shall now proceed to state what is the legal and technical import of the words made use of in this devise; and will then consider whether there is any plain and manifest intention of the testator, to be gathered from any part of his will, which may control and overrule the legal operation of the words, and at the same time be consistent with the fundamental and immutable rules of law.

The words which are material to be considered, in the event that has happened (when stript of all embarrassment from the contingency, which never arose, of the birth of a posthumous son) are the following:—"Item, and it is my intent and meaning, that none of my children should sell and dispose of my estate for longer time than his life; and to that intent I give, devise, and bequeath all the rest and residue of my estate to my son John Williams for and during the term of his natural life; the remainder to my brother-in-law Isaac Gale and his heirs, for and during the natural life of my said son John Williams; the remainder to the heirs of the body of my said son John Williams, lawfully begotten or to be begotten; the remainder to my daughters for and during the term of their natural lives, equally to be divided between them; the remainder to my said brother-in-law Isaac Gale and his heirs during the natural lives of my said daughters respectively; the remainder to the heirs of the bodies of my said daughters, equally to be divided between them. And I do declare it to be my will and pleasure, that the share or part of any of my said daughters, that shall happen to die, shall immediately vest in the heirs of her body in manner aforesaid."

It is necessary to take notice, that Isaac Gale died in the lifetime of the testator, whereby the remainder limited to him and his heirs for the life of John Williams became, in point of law, a lapsed devise. The disposition, therefore, at the death of the testator, stood thus: "To John Williams for the term of his natural life; the remainder to the heirs of his body," without any interposing estate. The legal consequence of which is, that if this be an estate tail in John Williams, it is an estate tail in possession, by immediately uniting with the

life-estate; and not an estate tail in remainder, as in the cases of *Duncomb v. Duncomb* (3 Levinz, 437), and *Coulson v. Coulson* (2 Atk. 250), it was held to be, by reason of the interposing estate, which subsisted in both these cases. And indeed, were it otherwise, the plaintiff's replication could not be supported upon this general demurrer; for therein he pleads, that "by virtue of the said will, John Williams entered into the close in question, and became seised thereof in his demense as of fee tail, to wit, to him and to the heirs of his body issuing." How far the interposition of this estate to Isaac Gale and his heirs, though it never took effect, is an evidence of the testator's intention, will afterwards come to be considered. At present the only question is, what estate is by these words devised to John Williams, according to the general rule of law, uncontrolled by other considerations? And I apprehend there is no doubt, but that the words, in their legal construction, convey an estate tail to John Williams.

For the rule of law, as laid down in *Shelley's Case*, 1 Coke 104, [ante] and recognized in Co. Litt. 22, 319, 376, is, that, "where the ancestor takes an estate of freehold, with a remainder, either mediate or immediate, to his heirs, or the heirs of his body, the word 'heirs' is a word of limitation of the estate and not of purchase;" that is, in other words, that such remainder vests in the ancestor himself, and the heir (when he takes) shall take by descent from him, and not as a purchaser. This rule, though too plain and positive to be openly questioned, or denied has yet been obliquely reflected on; and insinuations have been thrown out, that it is a strict and a narrow rule,—founded upon feudal principles, which have long ago ceased;—that in *Shelley's Case* it is only laid down *arguendo* by the counsel, and not by the court;—and that too in the case of a deed and not of a will. It will not therefore be foreign to the present question, to make a short inquiry into the reason, the antiquity, and the extent of the rule.

Were it strictly true, that the origin of this rule was merely feudal, and calculated solely to give the lord his profits of tenure (either wardship or relief) upon the descent of the heir from the ancestor, of which the lord might be defrauded if the heir was to take by purchase, of which (by the way) I have never met with a single trace in any feudal writer; still it would not shake the authority of the rule, or make us wish for an opportunity to evade it. There is hardly an ancient rule of real property, but what has in it more or less of a feudal tincture. The common law maxims of descent, the conveyance by livery of seisin, the whole doctrine of copyholds, and a hundred other instances that might be given, are plainly the offspring of the feudal system; but, whatever their parentage was, they are now adopted by the common law of England, incorporated into its body, and so interwoven with its policy; that no court of justice in this kingdom has either the power or (I trust) the inclination to disturb them. The benefit of clergy took its origin from principles of popery; but is there a man breathing that would therefore now wish to abolish it? The law of real property in this country, wher-

ever its materials were gathered, is now formed into a fine artificial system, full of unseen connections and nice dependencies; and he that breaks one link of the chain, endangers the dissolution of the whole.

But it is by no means clear, that this rule took its rise merely from feudal principles. I am rather inclined to believe, that it was first established to prevent the inheritance from being in abeyance. For, though it has been the doctrine of modern times, in order to effectuate executory devises, that, where a limitation of the inheritance depends in contingency, an interim estate may descend to the heir until the contingency happens, yet it is manifest to any one the least conversant in our ancient books, that during the pendency of a contingent remainder in fee or in tail, the inheritance was formerly always (and in some case is to this day) held to be in abeyance, or *in nubibus*, as they then expressed it. Thus, if a gift be made to one for life, remainder to the right heirs of J. S., then living, the fee simple is in suspense or *abeyance during the life of J. S. Bro. t. Done. 6. And so is Co. Litt. 342 b. But this state of abeyance was always odious in the law; and therefore the whole freehold or frank-tenement could not be in abeyance, except in the single case of the death of a parson, or other corporation sole. Dyer 71; Hob. 338. For in that interval there could be no seisin of the land, no tenant to a præcipe, no one of ability to protect it from wrong or injury, or to answer its burthens or services. And this is one principal reason, why a particular estate for years is not allowed to support a contingent remainder; that the freehold may not be in abeyance: as is laid down in Hob. 153.

But when the first or particular estate was a freehold, there in some cases the law allowed the inheritance to be put in abeyance, by the creation of a contingent remainder; but this very sparingly and with great reluctance. For, during such abeyance of the inheritance, many operations of law were totally suspended. The particular tenant was rendered dispunishable for waste; for the writ of waste can only be brought by him who is entitled to the inheritance. The title, if attacked, could not be completely defended; for there was no one in being, of whom the tenant of the freehold could pray in aid to support his right. The mere right itself, if subsisting in a stranger, could not be recovered in this interval; for, upon a writ of right patent, a lessee for life cannot join the mise upon the mere right. 1 Roll. Abr. 686. For these among other reasons, the law was extremely cautious of admitting the inheritance to be in abeyance, unless in very particular cases; as is laid down by Hobart and Doddridge, 2 Roll. Rep. 502, 506, Hob. 338. Indeed, where the particular estate was made to A. for life, with remainder to the right heirs of B. then living, there till the death of B. the inheritance was necessarily in abeyance; for B. the ancestor was entitled to nothing. But, where the ancestor had already an estate of freehold limited to him, the law, (to prevent such abeyance) adjudged that a subsequent remainder to his heirs (who, during his life, are uncertain) was a remainder vested in the ancestor himself, and that his heirs shall claim by descent from him. For, as

Hankford, J., says in 11 Hen. IV. 74: "If land be given to a man for term of his life, the remainder in tail, and for default of issue the remainder to the right heir of the first tenant, the remainder in fee simple takes its being by the possession which the first tenant hath." And though in this case it was argued at the bar, that the fee was *in nubibus*, or in suspense, yet this was strongly denied both by him and by Hill, another of the Judges. And, indeed, if we consider it attentively, the whole of this rule amounts to no more than what happens every day in the creation of an estate in fee or in tail, by a gift to A. and to his heirs forever, or to A. and to the heirs of his body begotten. The first words (to A.) create an estate for life: the latter (to his heirs, or the heirs of his body) create a remainder in fee or in tail; which the law, to prevent an abeyance, refers to and vests in the ancestor himself; who is thus tenant for life, with an immediate remainder in fee or in tail; and then, by the conjunction of the two estates, or the merger of the less in the greater, he becomes tenant in fee or tenant in tail in possession. Hence therefore I am induced to think, that one principal foundation of this rule was to obviate the mischief of two frequently putting the inheritance in suspense or abeyance.

Another foundation might be, and was probably, laid in a principle diametrically opposite to the genius of the feudal institutions; namely, a desire to facilitate the alienation of land, and to throw it into the track of commerce, one generation sooner, by vesting the inheritance in the ancestor, than if he continued tenant for life, and the heir was declared a purchaser. Therefore, where an estate was limited to the ancestor for life, and afterwards (mediately or immediately) to his heirs, who are uncertain till the time of his death; the law considered the ancestor as the first and principal object of the donor's bounty; and therefore permitted him (who, as it is said, Co. Litt. 22, beareth in his body all his heirs, and who had the only visible and notorious freehold in the land) to sell it, devise it, where the custom would permit, or charge it with his debts and incumbrances. And however narrow and illiberal the original establishment of this rule, or the adhering to it in later times, many have been represented in argument, I own myself of opinion, that those constructions of law, which tend to facilitate the sale and circulation of property in a free and commercial country, and which make it more liable to the debts of the visible owner, who derives a greater credit from that ownership; such constructions, I say, are founded upon principles of public policy altogether as open and as enlarged as those which favor the accumulation of estates in private families, by fettering inheritances till the full age of posterity now unborn, and which may not be born for half a century.

Then as to the antiquity of the rule in question, it hath been said, that in *Shelley's Case*, it is only urged by the counsel for the defendant in their argument, and not relied on by the court. But the determination of the Court is grounded on this rule, as well in

Shelley's Case, as in the *Case of the Earl of Bedford*, Moor. 720, where the same rule is likewise argued from by the counsel as a known and undeniable maxim. And Lord Coke in his Commentary on Littleton (*the great result of all his experience*) has often adapted and relied upon it; and has cited, in his margin, to support it, a long list of authorities from the Year Books; chiefly those of Edward the Third. I have looked into all these, and into some besides; and shall only say that they do most explicitly warrant the doctrine extracted from them by that great and learned judge.

There is one case which I have never seen cited, and which is by far the earliest of any that have occurred to me upon a diligent search. In this the question before the court was, whether an estate thus circumstanced (that is, settled on a man for life, and after an immediate remainder in tail, to the right heirs of the tenant for life) was, on failure of the remainder in tail, liable to the debts of the tenant for life; and it was determined to be liable, upon the ground of its being a fee simple vested in the ancestor; and therefore vested in him, in order to prevent the inheritance from being in abeyance. This, I believe, is the very first case in our books, wherein this principle was established. It is in the Year Book of Edward II. published by Serjeant Maynard, M. 18 Edw. II. fol. 577. [*Abel's Case* ante 48, stating it in full] * * * The rule of law, deducible from hence, is well and emphatically collected by Fitzherbert, in his abridgment, tit. Feoffment, pl. 109, who refers (I presume) to this case (although it was not then in print) when he says, that it was resolved in M. 18 Edw. II. "that if a man give land to B. for term of life, remainder to C. in tail, remainder to the right heirs of B. in fee, this remainder in fee vests in B. as much as if the remainder was limited to B. and his right heirs in fee; and the right heir of B. shall have this by descent and not as purchaser."

And from all these authorities I infer, that the rule in question is a rule of the highest antiquity; not merely grounded on any narrow feudal principle, but applied, in the first instance we know of, to the liberal and conscientious purpose of facilitating the alienation of the land by charging it with the debts of the ancestor.

However, it hath been urged, that though the rule must be allowed with respect to estates created by deed; yet it doth not follow, that it also extend to devises: and so the master of the rolls is said to have declared (in the case of *Papillon v. Voice*, 2 Wms. 477) "that he knew of no case, where lands being devised to A. for life, remainder to the heirs of the body, this (in case of a will) had been construed an estate tail in A." But either the reporter has misapprehended his honour's meaning or else he had surely forgotten the cases of *Whiting v. Wilkins*, 1 Bulstr. 219, *Rundle v. Healy*, Cart 170, and *Broughton v. Langley*, Lutw. 814, wherein that point is resolved *in terminis*. It will therefore be sufficient to observe upon this head, that the rule in Co. Litt. 22, 319, is laid down in general terms, "where and wheresoever the ancestor taketh an estate for life, &c.," and in Co. Litt. 376, and also in

Shelley's Case, and in *Moor. 720, Earl of Bedford's Case*, it is extended to all conveyances. And devises of land (which differ totally from testaments of chattels) are held in all our books, and particularly in *Widnham v. Chetwynd*, 1 Burr. 429, to be a species of conveyance; and this is the reason why lands purchased after the execution of it cannot pass by such a devise.

But, however strongly this rule may be founded in antiquity, and supported by reason and authority, I have in the outset conceded, that when it is applied to devises, it may give way to the plain and manifest intent of the devisor; provided, that intent be consistent with the great and immutable principles of our legal policy; and provided it be so fully expressed in the testator's will, or else may be collected from thence by such cogent and demonstrative arguments, as to leave no doubt in any reasonable mind, whether it was his intent or no. Which leads me to the last consideration. Whether there is any such plain and manifest intent of the devisor, expressed in or to be collected from any part of this devise, as may control the legal operation of the words, and at the same time be consistent with the fundamental rules of law? And I am of opinion, that there is no such plain intent.

In order to decide this question clearly, it is necessary to state it accurately. And first, let us see what the question is not. The question is not, whether the testator intended that his son John should have a power of alienation. If that was all, the dispute would be soon at an end; for his intention is most clearly expressed (and it is the only clear intent I can find) that the son should not have such a power. And, if a conveyance were now to be directed of this estate by a court of equity, it would probably be in strict settlement, according to the case of *Lennard v. Earl of Sussex*, 2 Vern. 526. But that and all similar cases (of directing a conveyance by a court of equity) must be laid out of the present question; for we are now in the case of a legal estate, executed either one way or the other, and not of an executory trust. And if the testator has in fact devised an estate to John, with which such a restriction of alienation is incompatible by the fundamental rules of law, the restriction is null and void. Again: the question is not, whether the testator intended that his son John should have only an estate for life. I believe there never was an instance, when an estate for life was expressly devised to the first taker, that the devisor intended he should have anything more. But if he afterwards gives an estate to the heirs of the tenant for life, or to the heirs of his body, it is the consequence or operation of law that in this case supervenes his intention (as Lord Hale expresses it, 1 Vent. 225, 379), and vests a remainder in the ancestor: which remainder, if it be immediate, merges his estate for life, and gives him the inheritance in possession: but if mediate only, by reason of some interposing estate, then it vests the inheritance in the tenant for life, as a future interest, to take effect in possession when the interposition is determined. And therefore it has been frequently adjudged, that though an estate be devised to a man for life only, or for

life *et non aliter* or with any other restrictive expressions; yet, if there be afterwards added apt and proper words to create an estate of inheritance in his heirs or the heirs of his body, the extensive force of the latter words shall overbalance the strictness of the former, and make him tenant in tail or in fee. These therefore are not the true questions in the present case.

But I apprehend the true question of intent will turn, not upon the quantity of estate intended to be given to John the ancestor; but upon the nature of the estate intended to be given to the heirs of his body. That the ancestor was intended to take an estate for life, is certain: that his heirs were intended to take after him, is equally certain: but how those heirs were intended to take, whether as descendants, or as purchasers, is the question. If the testator intended they should take as purchasers, then John the ancestor remained only tenant for life. If he meant they should take by descent, or had formed no intention about the matter, then, by operation and consequence of law, the inheritance first vested in the ancestor. The true question therefore is,—Whether the testator has or has not plainly declared his intent, that the heirs of the body of John Williams shall take an estate by purchase, entirely detached from and unconnected with the estate of their ancestors? or, in other words, Whether he meant to put an express negative on the general rule of law which vests in the person of the ancestor (when tenant of the freehold) an estate that is given to the heirs of his body? But, in order to say this, we must suppose, that the testator was apprised of this rule, and meant an exception to it; of which there is no evidence whatsoever. And here lies the great difficulty, which the defendant in error must encounter. It is not incumbent on the plaintiff to show, by any express evidence, that this testator meant to adhere to the rule of law; for that is always supposed till the contrary is clearly proved: but it is incumbent on the defendant to show, by plain and manifest indications, that the testator intended to deviate from the general rule; for that is never supposed, till made out, not by conjecture but by strong and conclusive evidence.

Let us therefore see what evidence has been usually required to demonstrate such a devious intention, and what the evidence is that is relied on in the present case. I am far from maintaining, that by a devise to a man's heirs or the heirs of his body, they shall never take as purchasers in any case. But I have never observed it to be allowed, excepting in one of these four situations; not one of which will apply to the present case.

1. *Where no estate at all, or* (which is the same thing in the idea of our ancient law) *where no estate of freehold is devised to the ancestor.* Here the heirs cannot take by descent, because the ancestor never had in him any descendible estate. And this must always be the case, where the ancestor is dead at the time of the devise, as in the known case of *John de Mandeville* (Co. Litt. 26), the heir then taking a

vested estate by purchase. It is also the same, if the ancestor be living and has no sort of estate devised to him; only that then the estate of the heir is contingent, because *nemo est haeres viventis*. And, if the ancestor has only the devise of a chattel interest, with a subsequent estate to his heirs, the heirs must likewise take as purchasers, or not take at all. For, if between the term of the ancestor and the estate of his heirs, there is no vested freehold remainder, the heirs can only take by way of executory devise; which, *ex vi termini*, implies an estate not executed in the ancestor. Or, if there be any such vested estate of freehold, interposed between the ancestor's term and the contingent remainder to his heirs, that contingent remainder is supported entirely by the interposed estate, and does not derive its being or any degree of assistance from the chattel estate of the ancestor.

2. The next case is, *where no estate of inheritance is devised to the heirs*; as in the case of *White v. Collins*, Com. 289 (cited by the counsel for the defendant). There the devise was to Frank Mildmay for life, with a power of jointuring, and after his death (and jointure, if any be) to the heir male of his body lawfully begotten, during the term of his natural life; remainder over. Common sense will here tell us, that when no estate of inheritance is devised to the heir male of the body, he cannot take by descent as heir.

3. The third case is, *where some words of explanation are annexed* by the deviser himself to the word heirs, in the will; whereby he discovers a consciousness, distrust, or apprehension that he may have used the word improperly, and not in its legal meaning; and therefore he in a manner retracts it, he corrects the inaccuracy of his own phrase, and tells every reader of his will how he would have it understood. Thus, in *Burchel v. Durdant*, (2 Ventr. 311, Carth. 54), the devise was, "in trust for Robert Durdant for life, and after his decease to the heirs male of his body, now living." As if the testator had said, "I do not mean a perpetual succession in the male line of Robert Durdant, which perhaps may be the legal sense of heirs male of his body; but I mean by that expression only such of his sons as are at present born and known to me." And accordingly the court held that George Durdant, the son of Robert, and living when the will was made, should take the estate as a purchaser. So in *Lisle v. Gray* (2 Lev. 223), the words were, "to Edward for life remainder to his first, second, third and fourth sons in tail male; and so to all and every other the heirs male of the body of Edward." Which words "and so" (together with the manifest reason of the thing) plainly showed that the "other heirs male of the body" in the subsequent clause of the will, were to be understood just so as the "first, second, third and fourth sons" were to be understood in the preceding. And in *Lowe v. Davis* (Lord Raym. 1561), when the testator had first devised, in a loose unguarded manner, to "his son Benjamin and his heirs lawfully to be begotten," he immediately recollects himself and adds, by way of explanation, "that is to say, to his

first, second, third, and every other son and sons successively, lawfully to be begotten of the body of the said Benjamin, &c." This devise to the heirs, thus explained was held to be by way of purchase. So in the case of *Doe on demise of Long v. Laming*, (Burr. 1100), the devise was of gravelkind lands, "to Anne Cornish and the heirs of her body begotten, as well female as male, to take as tenants in common." Now, since gravelkind lands cannot descend to heirs female as well as males (as is expressly declared by the statute De Procerog. Regis, 17 Edw. II. c. 16), nor can heirs, as such, be tenants in common but coparceners, it is clear, that by the words heirs of the body (thus explained by the words female as well as male, and to take as tenants in common), the deviser could only mean to describe the children of Anne Cornish.

4. The last case, wherein heirs of the body have been held to be words of purchase, is *where the testator hath superadded fresh limitations*, and grafted other words of inheritance upon the heirs to whom he gives the estate: whereby it appears, that those heirs were meant by the testator to be the root of a new inheritance, the stock of a new descent; and were not considered merely as branches derived from their own progenitor. Where the heir is thus himself made an ancestor, it is plain, that the denomination of heir of the body was merely descriptive of the person intended to take, and means no more than "such son or daughter of the tenant for life, as shall also be heir of his body." The cases of *Lisle v. Gray*, and *Lowe v. Davis* and *Long v. Laming*, fall under this head as well as the other; these having also words of limitation superadded to the word heirs, as well as the explanatory words I before took notice of. Thus too in *Cheek v. Day* (which, as Lord Raymond observes, Fitzg. 24, Fortesc. 77 is the true name of the case usually called *Clerk v. Day*), the devise, as there cited from the roll, was "to my daughter Rose for life, and if she marry after my death, and have any heirs lawfully begotten, I will that her heir shall have the lands after my daughter's death, and the heirs of such heir." So likewise *Archer's Case*, 1 Coke, 66, is "to the right and next heir." of Robert Archer (the tenant for life), and to the heirs of his body lawfully begotten for ever." And the case of *Backhouse v. Wells*, 2 Wms. 476, is "from and after the decease of the tenant for life to the issue male of his body, and to the heir male of such issue male."

All the cases therefore that have hitherto occurred, from the statute of wills to the present time (a period above two centuries)—all the cases, I say, in which heirs of the body have been construed to be words of purchase, are reducible to these four heads: either where no estate of freehold is given to the ancestor; or where no estate of inheritance is given to the heir; or where other explanatory words are immediately subjoined to the former; or, lastly, where a new inheritance is grafted on the heirs of the body,—none of which is the present case. We have therefore no authority from precedents to warrant such a construction as is now contended for. I do not however say, that this construction can never be made under other circumstances than those which I have now men-

tioned, but only that at present I am not aware of any other circumstances that can warrant the same construction. At the same time I allow, that the same construction may and ought to be made, whenever the intent of the testator is equally clear and manifest.

What then is the evidence of this intention in the present case? It may be resolved into two particulars: 1. The testator's previous declared intention, "that none of his children should sell or dispose of his estate for longer term than his own life," together with his consequent disposition "to that intent;" and, 2, The interposed estate of Isaac Gale, and his heirs, during the life of the testator's son. For, as to what was mentioned at the bar, of his making the daughters and the heirs of their bodies tenants in common, and directing the share of each daughter immediately upon her death to vest in the heirs of her body;—that is plainly done to prevent the inconvenience of survivorship among the daughters; which must otherwise have been the consequence, according to the rules laid down, Co. Litt. 25 *b*, that "where there is a gift to two women, and the heirs of their bodies, they have a joint estate for life, and several inheritances."

Nor indeed do I think much stress can be laid on the second particular, the interposed estate of Isaac Gale, and his heirs. For had that been expressly created to preserve contingent remainders, the case of *Coulson v. Coulson* (2 Atk. 250), is an express authority, that this will not make the heir of the body a purchaser. Much has been said, and much has been insinuated at the bar to discredit that case. But I hold it to have been determined upon sound legal principles. For the misapprehension of a testator, in thinking the remainders were contingent when they were not so, cannot alter the rule of law. But were it otherwise, had the case of *Coulson v. Coulson* been decided upon dubious grounds, I should tremble at the consequence of shaking its authority, after it has now been established for thirty years, and half the titles in the kingdom are by this time built upon its doctrine. But there is no occasion, upon the present question, to disturb the case of *Coulson v. Coulson*, by either affirming or denying it. For, in the devise to Isaac Gale and his heirs, there is no such purpose avowed as the preserving contingent remainders: it is only to be conjectured and guessed at. The purpose of the testator might be (as in the case of *Duncomb v. Duncomb*), to prevent dower in the wife of his son, or tenancy by the curtesy in his daughters' husbands:—especially as he had, by another clause in his will, destroyed the joint-tenancy of his daughters, which would otherwise (according to 2 Roll. Abr. 90), have prevented the curtesy of their husbands. And where it is possible there may be more intents than one, the selecting of the true intent is at best but probability and guess-work; and does not amount to that declaration plain, which Lord Hobart and Lord Hardwicke require, before it shall set aside a positive rule of law.

If this be so, we are driven back to the introductory words as the only evidence of this intent: and then the result of the whole matter is,

that the testator, having declared his intent, that his son shall not alien his land, he to that extent gives his son an estate to which the law has annexed the power of alienation: an estate to himself for life, with remainder to the heirs of his body. Now, what is a court of justice to conclude from hence? Not, that a tenant in tail, thus circumstanced, shall be barred of the power of alienation; this is contrary to fundamental principles. Not, that the devisee shall take a different estate from what the legal signification of the words imports; this, without other explanatory words, is contrary to all rules of construction. But, plainly and simply this: that the testator has mistaken the law, and imagined that a tenant for life, with first an interposed estate, and then a remainder to the heirs of his body, could not sell or dispose of this interest.

My Lord Chief Baron on the argument put a question to the counsel for the defendant, to which no satisfactory answer was or could be given. Suppose, after the like declaration of his intent, the testator had devised the premises to his son and his heirs for ever: Would that have made the son tenant for life only, and his heirs take as purchasers? Most clearly not. This case is the same in kind, and differs only in species. The words now used are as apt legal words to create an estate tail, as those an estate in fee. And as I conceive, that when a testator has devised a vested estate, his creation of a trust to preserve contingent remainders will not turn it into a casual executory interest; so also I think, that when he has (though ignorantly) devised an estate that is alienable, no previous or concomitant intent to prevent his devisee from alienating shall alter the nature of that devise.

Will it be said, that when the testator's intent is manifest, the law will supply the proper means to carry it into execution, though he may have used improper ones? This would be turning every devise into an executory trust, and would be arming every court of law with more than the jurisdiction of a court of equity; a power to frame a conveyance for the testator, instead of construing that which he has already framed.

Will it then be said, that because the means marked out by the testator will not answer the end proposed, therefore he intended to use other means and not those which he has marked out? This consequence, I apprehend, will not follow by any rules of law or logic. For then it must be supposed, that every man, who has so in view a particular end, knows also and is sure to employ the most effectual means to carry it into execution; which is paying too great a compliment to human wisdom. Let us see how this argument will stand in form. The testator intended to use those which were the most effectual means to prevent his son from selling his estate; that the son's heir should take by purchase was the most effectual means: therefore the testator intended that the heir should take by purchase. Here the first proposition will not be granted, that he intended to use those which were the most effectual means; for this intent implies his knowledge of what were the most effectual, of which

there is no shadow of evidence. Or, put it otherwise; the testator intended to use what he thought the most effectual means: but he thought the heir's taking by purchase was the most effectual; therefore he intended that the heir should take by purchase. Here the second proposition can never be proved; that the testator thought any such thing. The true consequence I conceive to be this: that because the means marked out by the testator are not adequate to the end proposed, therefore he was mistaken in their efficacy.

If a man proposes to qualify a son to sit in the House of Commons, and to that intent devises to him an annuity of £300 per annum for 99 years, if he so long lives; we cannot argue from this declared intent of the testator, that this term of years shall be construed to be a freehold estate for life, because otherwise it would not answer the intent. We should rather conclude, that the testator was ignorant of the distinction between the two estates, and had unfortunately chosen that which was unfit for his purpose.

The case of *Popham v. Bamfield* (as the two parts of it are reported in 1 Vern. 79, 1 Wms. 54), was in this respect stronger than the present. One Rogers had devised a large estate to the testator's (Popham's) son, on condition that his father would also settle two-thirds of his estate on the son and his heirs male. Now, though the testator was under a strong obligation, by this condition, to give an estate to his son and his heirs male; though he recited in his codicil that he had devised the lands to his son and heirs male of his body; which were indisputable evidences of his intention to give his son an estate in tail male; yet, having in his will by express words made his son only tenant for life, with remainder to his first and other sons, in tail, the lord keeper, assisted by the two chief justices, the master of the rolls, and Mr. Justice Powell, all agreed that the estate must remain in strict settlement. And, if an intention of the testator (so manifestly and directly proved) was not in that case sufficient to make the words "first and other sons" be construed "heirs male of the body," much less in the present instance shall it turn the words "heirs of the body" into "first and other sons."

Upon the whole, I conclude, that though it does appear, that the testator intended to restrain his son from disposing of his estate for any longer term than his life, and to that intent contrived the present devise; yet, it does not appear by any evidence at all, much less by declaration plain, that in order to effectuate this purpose he meant that the heirs of the body of his son should take by purchase and not by descent, or even that he knew the difference.

The consequence is, that by the legal operation of the words, which are not in my opinion controlled by any manifest intent to the contrary, the heir could only take by descent, and of course John Williams, the son, was tenant in tail of the premises, and duly authorized to suffer the recovery, that has been pleaded; and therefore I am of opinion that the judgment below should be

Reversed.

Rule in Wild's Case.**ANON., in Common Bench, Hilary, 6 Eliz.—A. D. 1564—1 And. 43, pl. 110.**

One devised his land to William his son for term of life, and after his decease to the men-children of his body, and if the said William die without any man-child of his body then the land should remain over, &c. The testator died, William died without any issue male of his body; and on this the question was what estate he had. The justices held that he had an estate to him and the heirs male of his body.

WILD'S CASE, in B. R., Hilary, 41 Eliz.—A. D. 1599—6 Coke 16b, Moor 397, Golsb. 139, 1 Vent. 225, 2 Lev. 58. From Coke.

Ejectione Firmæ between Richardson and Yardly, and on not guilty pleaded the jury gave a special verdict to this effect. Land was devised to A for life, remainder to B and the heirs of his body, the remainder to Rowland Wild and his wife, and after their decease to their children, Rowland and his wife then having issue a son and daughter; and afterwards the devisor died, and after his decease, A died, B died without issue, Rowland and his wife died, and the son had issue a daughter and died. If this daughter should have the land or not was the question: and it consisted only upon the construction what estate Rowland Wild and his wife had, viz. if they had an estate tail, or an estate for life with remainder to their children for life. The case for difficulty was argued before all the judges of England, and it was resolved, that Rowland and his wife had but an estate for life, with remainder to their children for life, and no estate tail.

In the construction of the will the judges first considered the judgment of the common law, if the conveyance had been made by the devisor in his life, and second the reason and cause that the judgment shall not be according to the rule of law. And it was resolved without question, that at the common law they had but an estate for life, the remainder to their children for life. Then what shall be the reason and cause to give them an estate tail by construction in this case? It will be answered, the intent of the testator. But it was resolved, that such intent ought to be manifest and certain, and not obscure and doubtful; for at the common law lands were not devisable, but only by custom, and that in ancient cities and boroughs, of houses and small things, * * * for the ancient common law did favor him whom the common law made heir, because he was to sit in the seat of his ancestor, and to serve the king and commonwealth. * * * And therefore this difference was resolved for good law, that if A devises his lands to B and to his children or issue, and he hath not any issue at the time of the devise, that the same is an estate tail; for the intent of the devisor is manifest and certain that his children or issue should take, and as immediate devisees they cannot take, because they are not *in rerum natura*,

and by way of remainder they cannot take, for that was not his intent, for the gift is immediate. Therefore there such words shall be taken as words of limitation, *scil*, as much as children or issues of his body; for every child or issue ought to be of the body, and therewith agrees a case in *Trinity 4 Eliz.* () where one devised land to husband and wife and to the men-children of their bodies begotten, and it did not appear in the case that they had any issue male at the time of the devise, and therefore it was adjudged that they had an estate tail to them and their heirs male of their bodies.

But if a man devises land to A and his children or issue, and they then have issue of their bodies, there his express intent may take effect, according to the rule of the common law, and no manifest and certain intent appears in the will to the contrary. And therefore in such case, they shall have but a joint estate for life.

But it was resolved that if a man as in the case at bar, devises land to husband and wife, and after their decease to their children, or the remainder to their children; in such case, although they have not any child at the time, yet every child which they shall ever have after, may take by way of remainder, according to the rule of law; for his intent appears that their children should not take immediately, but after the decease of Rowland and his wife.

The rules declared in this case are generally known in the law as the Rule in *Wild's Case*.

The statutes enacted in all of the states, declaring that the devisee shall take as large an estate as the testator could give at the time of his death unless a different intent appears, result in a modification of the rules in this case to the extent that the children will take in fee if they take as purchasers.

OATES v. JACKSON, in King's Bench, Mich. 16 Geo. II.—A. D. 1743—2 Strange 1172.

Upon a case made at the assises, it was stated, that *Ralph Clay* being seised in fee of an estate called *Wolf's Park*, devised it in these words, "As to *Wolf Park* I give it to my wife *Annabella* for her life, and after her death to my daughter *Isabella Addibell* and her children on her body begotten or to be begotten by *William Addibell* her husband, and their heirs for ever." That the wife is dead, and *Isabella* at the time of making the will had one daughter *Elizabeth*, and afterwards two sons and one daughter, who are all dead without issue: that *Elizabeth* had issue the lessor of the plaintiff: that *Isabella* survived *William Addibell* and married *Jackson*, by whom she had a son the present defendant, who entered on her death.

The question was, what estate passed to *Isabella* and her children by *William Addibell*: the plaintiff insisting, that *Isabella* was only tenant for life, and the children of that marriage had the reversion in fee: the defendant insisting, that *Isabella* was jointly seised in fee with the chil-

dren, and having survived them all, and left him her son and heir, he is entitled.

And after several arguments the Chief Justice delivered the resolution of the court: that *Isabella* took as joint-tenant. It being stated, that at the time of making the will she had *a child*, which has been construed to be equal to *children*. 2 *Vern.* 106. *Co. Lit.* 9. is express, that to *A. et liberis suis* and their heirs, is a joint fee to all. And it is no objection, that by this means the several estates may commence at different times. *Co. Lit.* 188. *Pollexf.* 373. *Mo.* 220.

As *Isabella* therefore survived all the children she had by *William Addibell*, the whole fee vested in her, and descended to her son the defendant. Who had judgment accordingly.

BUFFAR v. BRADFORD, in English High Court of Chancery, Nov. 27, 1741—2 *Atkyns* 220.

Bill to have personal estate secured and the deeds and writings, involved in a will providing among other things: "I give the use of the whole to my sister Mary Bradford, for her support and maintenance during the time she shall remain a widow, sans waste, so as the same be divided on her marriage; two eights to herself, two other parts to her daughter my niece Ann, and the remaining four parts to my niece Buffar, and the children born of her body."

LORD CHANCELLOR HARDWICKE: The question is what estate the testator's niece Buffar and her children take. She had no child at the time the will was made, but the plaintiff was born afterwards in the life-time of the testator; the mother of the plaintiff died in the testator's life-time. It is insisted on the part of the defendant Mary Bradford, who had the estate for life, and who is likewise the heir at law, that it is a lapsed devise, for that the plaintiff's mother took an estate-tail, and *her children* are words of limitation and not of purchase where the devisee had none at the time the devise was made; and therefore, as the plaintiff's mother died before the testator, no estate vested in her, and consequently it is a lapsed legacy; and for an authority her counsel relied on *Wild's Case*, 6 *Coke* 17 (ante 73). On the other hand it must be admitted that children in their natural import are words of purchase and not of limitation, unless it is to comply with the intention of a testator, where the words cannot take effect in any other way. But suppose that a devise was to A and after his death to his children, here it is a word of purchase.

It has been admitted very candidly by the counsel that as to the personal estate the children, though born after the making of the will, must take equally with the mother as joint-tenants; for where a man gives personal estate to A and his children, to construe the word *children* to be a word of limitation and not of purchase would be a strained and remote construction, and would defeat the children entirely,

and the first taker would have all. Vide *Cook v. Cook*, 2 Vern. 545; and *Forth v. Chapman*, adjudged on the same words in Lord Macclesfield's time, 2 P. Wms. 663.

It is the time of possession in the present case which takes it out of the reasoning in *Wild's Case*; for here Mrs. Buffar and her children are to have four eighths, and to take at the same time as joint-tenants. The will in this case confines it to such children as should be born in the life-time of the testator, and therefore is not liable to the objection made by the defendant's counsel, that the remainder must divide and split as in common marriage settlements where there is an estate tail to daughters and one is born in the life-time of the father and another after his death. See *Stevens v. Stevens*, Cas. Temp. Talb. 228.

The plaintiff being born in the life time of the testator, would have taken with his mother as a joint-tenant if she had lived; and as she is dead, he shall take the whole by way of remainder. * * *

COURSEY v. DAVIS, in Pa. Sup. Ct., 1863—46 Pa. St. 25, 84 Am. Dec. 519.

Scire Facias to revive a judgment recovered by Wm. Davis and Mildred Ann Davis for damages, \$512.10 for breach by defendants of their contract to buy from plaintiffs the land mentioned in the opinion. The defense was that plaintiffs' title was not a fee. Judgment below was for the plaintiffs. Writ of error by defendants.

READ, J. The rule in *Wild's Case*, 6 Coke, 16 b, by which where lands are devised to a person and his children, and he has no child at the time of the devise, the parent takes an estate-tail, has no application to the present case, in which there was a child or children of the mother living, at the time of the execution of the deed. The word "children" is not therefore a word of limitation, but of purchase, and the question is, What is the estate taken by the mother and children respectively?

The deed was executed on the 23rd of October, 1843, and was a conveyance by Peter Mowen and wife to Mildred Ann Davis, a married woman, by whom the consideration of eight hundred dollars is said to have been paid. In the premises it is stated to be "unto the said Mildred Ann Davis and her children exclusively, and their heirs and assigns," and the *habendum*, although not strictly formal, is "unto the said Mildred Ann Davis and her children exclusively, and their heirs and assigns forever, to them and their only proper use, benefit, and behoof, and to and for no other use, intent, meaning, or purpose whatsoever." The warranty is special, and is "to and with the said Mildred Ann Davis and her children, and their heirs and assigns."

At the execution of the deed, Mrs. Davis had an illegitimate child born before her marriage, and a legitimate child by her present husband, William Davis, by whom she has since had four children who are now living. The illegitimate child has released to its mother, and the child living at the execution of the conveyance is dead.

In construing this deed, it is necessary to collate the authorities, both in England and in this state, in order to ascertain the legal as well as the natural meaning of the words used to describe the estate of the mother and of the children. In *Jeffrey v. Honywood*, 4 Madd. 398, Vice-Chancellor Leach held that a devise to the testator's daughter, a married woman, and to all and every the child and children, whether male or female, of her body lawfully begotten, and unto his, her, and their heirs or assigns forever, as tenants in common, and not as joint tenants, gave a life estate to the mother and a remainder in fee to the children. The mother died in the lifetime of the testator, leaving ten children, and it is probable that some of the children were living at the date of the will, although it is not so expressly stated.

In *Broadhurst v. Morris*, 2 Barn. & Adol. 1, a case stated by the master of the rolls for the opinion of the court of king's bench, the devise, which was of land, was in these words: "My will likewise is, that at the decease of my son-in-law, John Broadhurst, the same, the whole legacy to him, shall go to my grandson William Broadhurst, and to his children lawfully begotten, forever, but in default of such issue, at his decease, to my grandson Alexander Bridgok, natural son of my daughter, Rebecca Bridgok, him, his heirs and assigns forever." Until the testator's death, William Broadhurst had not been, nor was married. The court, Lord Tenterden and Justices Parke and Taunton, certified that William Broadhurst took an estate-tail, but assigned no reasons for their opinion. Mr. Jarman says (2 Jarman on Wills, 371): "The case of *Jeffrey v. Honywood*, 4 Madd. 398, seems to be inconsistent with, and must therefore be considered as overruled by, the case of *Broadhurst v. Morris*, 2 Barn. & Adol. 1." And in *Webb v. Byng*, 2 Kay & J. 673, V. C., said: "The contention was, that the devise was to the mother for life, with remainder to her children, as joint tenants in fee. The only authority for such a construction is the case of *Jeffrey v. Honywood*, 4 Madd. 398, and even that has been overruled by *Broadhurst v. Morris*, 2 Barn. & Adol. 1. Independently, however, of that consideration, what I chiefly rely upon is this: that the Quendon Hall estate,—the subject of this devise,—is the estate by means of which the testatrix intends by her will, to perpetuate the name of Cranmer; and if I were to hold that devise to have been a devise to Mary Ann Byng for life, with remainder to her children as joint tenants in fee, the estate would be divisible into eight separate estates, and as the parties who are to take the property are also to take the name and arms, the result would be to found as many small families, all bearing the name and arms of Cranmer, whereas the testatrix speaks of her estate as one and indivisible, and to be enjoyed in its entirety. In rejecting such a construction in favor of one which will treat the word 'children' as a word of limitation, and not of purchase, I do not depart from the spirit of the rule in *Wild's Case*, 6 Coke, 16 b,—the real rule in that case being that it is lawful, as Lord Hardwicke puts it, to construe the word 'children' as a word of limitation when the will necessitates such a construction. This is a case of that description, and as the only

means of keeping the property which the testatrix has described as her Quendon Hall estates in one mass, which is clearly the general intention of the will. I am compelled to hold that in this will the word 'children' is a word of limitation, and that the devise created is an estate-tail." In addition to the name and arms, there were various chattels, as a striking-watch and her diamond ear-rings, and pins devised as heir-looms with her estate, and the vice-chancellor commences his opinion with this sentence: "However bold the decision may appear, I must hold this devise of the Quendon Hall estates to be estate-tail."

Upon appeal, the lords justices (26 L. J., N. S., 107), considered the construction of the devise to be one of great difficulty Lord Justice Knight Bruce said: "The inclination of his opinion was, that notwithstanding the fact of Mrs. Byng having to the knowledge of the testatrix, when she made her will, several children, that lady was made by the devise, tenant in tail of the Quendon Hall estate. The vice-chancellor had adopted that view, and his lordship could not give his voice for varying that decision, as he was not persuaded that the effect of the devise was to make Mrs. Byng tenant for life, or joint tenant with her children." Lord Justice Turner said: "As to the other point, the devise of the Quendon Hall estate, he had rarely seen a will more difficult to interpret. Two things are, however, clear: that Mrs. Byng was the principal object of the bounty of the testatrix, and that she intended the Quendon Hall estate to be a family estate, with which the name of Cranmer was to be perpetuated. The first appeared from the whole will, and the other from the gift of the heirlooms, and the name and arms clause. Both these circumstances led to the conclusion that the children were to take through Mrs. Byng, not with her or after her." No observations, according to this report, were made by the lord justices upon either of the cases of *Jeffrey v. Honywood*, 4 Madd. 398, or *Broadhurst v. Morris*, 2 Barn. & Adol. 1. Upon appeal to the House of Lords, the decision of the lords justices was affirmed, and is reported under the name of *Byng v. Byng*, 31 L. J. Ch. 470. Lord Chancellor Westbury placed his opinion upon the peculiar terms of the will, and the evident intention of the testatrix, whilst lords Cranworth and Kingsdown, taking similar grounds, certainly expressed opinions hostile to the construction of the words we have been considering as giving a life estate to the mother with remainder to the children, and in favor of a joint tenancy, between the mother and children, without saying whether after-born children were to be included or not.

It is clear that *Webb v. Byng*, 2 Kay & J. 673, was decided upon the intention of the testatrix, which required the devise to be held to create an estate-tail, and it in no manner conflicts with the case of *Jeffrey v. Honywood*, 4 Madd. 398; nor does *Broadhurst v. Morris*, 2 Barn. & Adol. 1, which was a case where the father was not married until after the death of the testator. In arguing this case, Cowling said: "If the devise stopped at the words 'lawfully begotten forever,' the case would be governed by the rule in *Wild's Case*, 6 Coke, 16 b, viz., that where lands are devised to a person and his children, and he has no child at the time of

the devise, the parent takes an estate-tail;" and so little was it supposed to interfere with *Jeffrey v. Honywood*, *supra*, that it was neither cited nor referred to by either Mr. Cowling or Mr. Preston, both gentlemen of great learning and research. In *Bowen v. Scowcroft*, 2 Younge & C. 640, Mr. Campbell, in argument (p. 656), said: "There is a total distinction between this and *Wild's Case*, 6 Coke, 16 b. In that case the devise was to A and his children; in the present, the words are, 'to the children and their heirs'. This distinction was taken in *Ives v. Legge* [cited in 1 Fearn on Remedies, 377]; and the principle was acted upon in *Jeffrey v. Honywood*, 4 Madd. 398." Baron Alderson (p. 661) adopted this construction, and said: "Lastly, as to Lucy Bowen's share. It was contended as to this that she took an estate-tail, having no children at the time of the testator's death. But I think this is not so, and that it is distinguishable from *Wild's Case*, 6 Coke, 16 b, on the same grounds as were taken by Sir John Leach, in *Jeffrey v. Honywood*, 4 Madd. 398. Indeed, on this point of the case, *Jeffrey v. Honywood* seems precisely in point."

After some doubt and hesitation, it has been determined in England that *Wild's Case*, 6 Co. 16 b, does not apply to personalty. In *Audsley v. Horn*, 28 L. J., N. S. c. 293, the master of the rolls decided that a bequest of leasehold premises to A and her children (after a prior life estate), gave a life estate to A, with remainder to her children, although she had no children at the death of the testator, or of the tenant for life, and this decision, upon appeal, was affirmed by the lord-chancellor: 29 L. J., N. S. c. 201.

In *Haskins v. Tate*, 25 Pa. St. 249, this court held, the present chief justice delivering the opinion, that a devise by a testator in these words: "I further will that the plantation I bought of my son Robert, lying near Hill's mill, shall be equally divided amongst my son Robert's children, he and them enjoying the benefits of it whilst he lives," gave Robert a life estate, with remainder to all the children born before or after the death of the testator. The court did not determine whether Robert took a life estate in the whole or not, but they decided that the period of division was the death of Robert, and that the limitation to his children was to a class,—the time of distribution defining the members that were to constitute the class. In *Gernet v. Lynn*, 31 Pa. St. 94, where a testator devised land to his son J., to hold the same to him during his natural life, and after his decease to his children lawfully begotten, share and share alike, it was held that J. took an estate for life with a vested remainder in fee to his children in being at the death of the testator, which opened to let in after-born children. At the date of the will, the son had four children, and afterwards, four other children, some of whom were born after the death of the testator. The children, therefore, took as a class. In *Brink v. Michael*, 31 Id. 165, my brother, Woodward, for sufficient reasons on the face of the case, confined the word "children" to the then living children of William Brink by his first wife, he being a widower living on the farm conveyed by the deed, with his children.

He said: "The natural love and affection which constituted the consideration of the deed, and maintenance, and education, which were among the objects it aimed to promote, had reference, and in the nature of things must have had exclusive reference, to the children then in being; they were before the grandfather's eyes, and were more manifestly the objects of his bounty."

In *White v. Williamson*, 2 Grant Cas. 249, there was a declaration of trust for the use of Mary M. Weaver and her children, and a subsequent declaration of trust by Benjamin F. Weaver, to whom the premises had been afterwards conveyed, that he held the same in trust for Mary M. Weaver and her children, and their heirs. The question, as stated by my brother Strong, was, What interest did Mrs. Weaver take under the original declaration of trust? "Was it a life estate with remainder to her children, or was it a tenancy in common with them?"

The court adopted the first view, and held that the gift to the children was as a class, and not individually. This is the natural construction, and is now the established rule as to personal property; and we have seen that such has been the view taken as to real estate in two leading cases in England which have never been distinctly overruled. In this state, the only case cited for a contrary doctrine is *Shirlock v. Shirlock*, 5 Pa. St. 367, where the mother and all her children were living at the date of the conveyance. The court below held that they were tenants in common, and the mother taking one eleventh, her husband, the defendant below, on her death, became tenant by the curtesy of her share. The defendant, the husband, took a writ of error, on the ground that his wife's estate was a tenancy in tail of the premises conveyed. In a *per curiam* opinion, the court say: "There is no error in the record of which the defendant below can avail himself;" and here the case really terminated, for if not an estate-tail, which it clearly was not, then the decision below was the most favorable for him; for if his wife's interest was only a life estate, then he had no claim whatever to any part of the premises. The rest of the opinion is extrajudicial, but sustains the view taken by the court below. The subsequent cases, however, have sustained what appears to be the true construction, and with the light afforded by them, we proceed to examine the case before us.

The words used are, "unto the said Mildred Ann Davis, and her children exclusively, and their heirs and assigns." By giving the mother a life estate, and regarding her children as a class, we provide not only for those in existence at the date of the conveyance, but for those, also, a married woman might reasonably expect to have, and the period of distribution would be the termination of the life estate by her death. This would give effect to the word "exclusively," for upon the construction adopted by the court below, her husband would have a curtesy estate, if he survived his wife, in the whole or a part of the premises. Any other construction would cut off the subsequently born children, which we do not feel disposed to do, unless compelled by a settled rule of law, which we do not find to be the case. Adopting, therefore, this

benign construction of this conveyance, the judgment is reversed, and judgment entered for the defendant for costs upon the case stated.

A life estate to the grantee first named and remainder to his children born and to be born was held to be created by a deed in these words: "This March 21 day 1885: This indenture made and entered into between Eli Hall and Polly Hall of the first part and Joseph Hall and his children of the second part. * * * Know all men that I Eli Hall and Polly Hall of the first part hath this day bargained and sold unto Joseph Hall of the second part a certain tract * * * We the party of the first part doth bargain sell and convey the above named tract of land and will warrant and defend the title of the same from us and our heirs and assigns and from all other unto the said Joseph Hall and his children forever," &c. *Hall v. Wright* (1905), 121 Ky. 16, 27 Ky. L. R. 1185, 87 S. W. 1129, reviewing the Kentucky decisions.

A devise of land in trust for testator's daughter "and all her children if she shall have any" was held to give the daughter a fee, she having no children at testator's death. *Silliman v. Whitaker* (1896), 119 N. C. 89, 25 S. W. 742, reviewing several decisions.

The stepmother and her children were held to take jointly under a devise of the residue "to my first husband's stepmother and her children," *Gordon v. Jackson* (1899), 58 N. J. Eq. 166, 43 Atl. 98.

"I leave to my dear wife and our sweet little children all that I possess," made them joint-tenants. *Fitzpatrick v. Fitzpatrick* (1902), 100 Va. 552, 42 S. E. 306.

It was held that the daughter took a life estate with remainder in fee to the children in the following devise to her "in trust for her sole use and benefit, and of her children and their children thereafter. But in the event that my daughter should die and leave no children as heirs to the within mentioned property, then it is my will and desire that all of said property shall go to my brother." *Schaefer v. Schaefer* (1892), 141 Ill. 337, 31 N. E. 136.

The statute having abolished estates-tail, a fee simple was given by a devise "to said W. and his heirs being his own children." *Moore v. Gary* (1897), 149 Ind. 51, 48 N. E. 630.

CHAPTER III.

ESTATES OF FREEHOLD NOT OF INHERITANCE.

For Several Lives.

ANONYMOUS, in Common Pleas, Trinity Term, 3 Edw. 6.—A. D. 1550.—Moor 8.

Land was leased to I. S., *habendum* to him for life and for the lives Jane his wife and William his son. HALES, J. It seems that he shall have an estate for his own life, and that the limitation for the lives of the others is void, and that there was no right to the occupant in the case. BROWN, J., agreed that there was no right of occupant, but he held that this inured by way of remainder, the one after the other. MONTAGUE, C. J., held that they should have an estate for the lives of all, and that the occupant had right.

UTTY DALE'S CASE, in Common Pleas, 32 Eliz.—A. D. 1591, Cro. Eliz. 182.

A lease was made to J. S. "to have and to hold to him and his assigns for his own life, and for the life of A and B." J. S. died. Is his estate determined, because one cannot have a greater estate of freehold than his own life?

ANDERSON, C. J., and the court held clearly that it is a good limitation, and he has an estate for all their three lives; for although he himself cannot have an estate but for his own life, yet he may have it to grant to another, and the *habendum* for their three lives is a good limitation, and by his death the estate is not determined, but *occupanti conceditur*.

HILLS v. HILLS, Moor 876. Jac. I.—A. D. 1605-15?

A man made a lease for years rendering rent during his life and the life of his wife. This is during the life of the longest liver of them. So adjudged.

ROSSE'S CASE, in King's Bench, Mich., 41 & 42 Eliz.—A. D. 1600—5 Coke 13, Moor 398, 399, Gold. 157, Cro. Eliz. 491.

Ejectione firmæ between Peter Rosse and Aldwick. A lease is made to A and his assigns, *habendum* to him during his own life and the lives of B and C. If this limitation during the lives of B and C was

void or not was the question. It was adjudged that the limitation was good. It was objected that when a man has two estates in him, the greater shall drown the less, and that an estate for his own life is higher than for the life of another; and therefore an estate for his own life and for lives of others cannot stand together. It was answered and resolved, that in the case at bar the lessee had but one estate, which has limitation during his own life and the lives of two others, and he had but one freehold; and therefore there cannot be any drowning of estates in the case, but he had an estate of freehold to continue during these three lives and the survivor of them.

Waste by Life Tenant.

ANON, in the Common Pleas.—A. D. 1303, Mich., 31 Edw. I, Horwood's Year Books 480.

In a writ of waste of a mill, if the defendant say that the post and other timbers were carried away by an inundation, and can aver it, he shall not answer for the waste. *per* BEREฟอร์ด.

ROLT v. LORD SOMMERVILLE, in English High Court of Chancery, Trinity Term.—A. D. 1737—2 Eq. Cas. Abr. 759.

A very considerable real estate was limited to Mrs. Rolt (who afterwards married the defendant the Lord Somerville) for life, *without impeachment for waste*, remainder to the plaintiff Rolt for life, without impeachment for waste, with several remainders over. The defendant the Lord Somerville, to make the most of this estate during the life of his wife, pulled down several houses and out-buildings upon the estate, and sold the same, and took up lead water pipes that were laid for the conveyance of water to the capital messuage and disposed thereof; and he also cut down several groves of trees that were planted for the shelter and ornament of the capital messuage. Upon this a bill was brought by the plaintiff to compel the defendant to account for the money raised by the particulars before mentioned, and to put the estate in the same plight and condition that it was before. To this the defendant demurred, and thereby insisted that this waste was committed by tenant for life without impeachment for waste, and therefore he was not liable to be called to account for what he had done, either in law or in equity; and if he was, yet the plaintiff could not call him to account, because he was not a remainder man of the inheritance.

LORD CHANCELLOR HARDWICKE:—Though an action of waste will not lie at law for what is done to houses or plantations for ornament or convenience by tenant for life without impeachment for waste, yet this court hath set up a superior equity, and will restrain the doing such things on the estate. In *Lord Barnard's Case* the court restrained him and ordered

the estate to be put in the same condition. In *Sir Blundel Charleton's Case* the master of the rolls decreed that no trees should be cut down that were for the ornament of the park; but Lord Chancellor King reversed that, and extended it only to trees that had been planted in rows. My only doubt is as to the trees that have been cut down, for if this bill had been brought before such trees had been cut down as were for the ornament and shelter of the estate, this court would have interposed. But here the mischief is done, and it is impossible to restore it to the same condition as to the plantations, and therefore it can lie in satisfaction only; and I cannot say the plaintiff is entitled to a satisfaction for the timber which is a damage to the inheritance; yet as to the pulling down of the houses and buildings and laying the lead pipes, they may be restored, or put in as good condition again. In the case of my Lord Bernard there were directions for an issue at law to charge his assets with the value of the damages, he not having performed the decree in his life-time.

The demurrer was allowed as to satisfaction on account of the timber, but overruled as to the rest.

CLEMENCE v. STEERE, R. I. Sup. Ct., 1850.—1 R. I. 272, 53 Am. Dec. 621.

ACTION of waste. The defendant was devisee of a life estate in the premises under the will of W. C. Steere. The plaintiff, who was also executor of the will, claimed under a conveyance from a devisee of the reversion. The facts sufficiently appear from the charge of the court.

By Court, GREENE, C. J. This is an unusual form of action in our courts; but it is an action well known to the law, and established in our state by statute nearly two centuries ago. And it is a wise provision; for unless there were some such remedy provided, the owner of the reversion, having no right to enter upon the premises, would be left at the mercy of the tenant for life. Although very stringent, causing a forfeiture of the estate wasted, it was designed to promote good husbandry, and should be fairly and reasonably enforced. You are, therefore, to entertain no prejudices on account of the nature of the suit, nor on account of the relations of the parties. They should stand before you divested of everything calculated to move either sympathy or prejudice.

The question for you is, Has waste been committed in any or all the ways in which it has been charged? I will go over the charges separately.

The defendant is charged with having converted meadow land into pasture land. In England this would be waste. But we are not to apply the English law too strictly. Our lands are, in many respects, cultivated differently from land in England; and this difference is to be taken into account. Here it is necessary to show that the change is detrimental to the inheritance, and contrary to the ordinary course of good husbandry. If in this case the change injured the farm, or was such a change as no good farmer would make, it was waste: Greenl. Cruise,

tit. 3, c. 11, sec. 18; 3 Dane's Abr., c. 78, art. 5; *Harrow School v. Alderton*, 2 Bos. & Pul. 86.

It is said that the pastures have been permitted to become overgrown with brush. In England that would be waste, but you would not expect so high a state of cultivation in Burrillville as in England, or as in the vicinity of a populous city. There must be such neglect in cutting the brush as a man of ordinary prudence would not permit; and if there was in this case such neglect, it is waste.

Another item is the cutting and selling off the farm fifteen cords of wood. The tenant for life has a right to cut only so much wood as is necessary for fuel and repairs. Therefore to cut wood and sell it off the farm is waste, beyond a doubt. The defense set up is that the plaintiff assented to it. If he has assented, either before or after the cutting, he has no right to claim a forfeiture of the estate on that account. You will consider in connection with this point the relations sustained by the parties. This estate was charged with the comfortable support of the defendant. As owner of the reversion, the plaintiff is bound to provide for her; and as executor, the will obliges him to sell the estate for her maintenance if necessary. Now if the sale of the wood went for the support and so relieved the estate of the charge for her support, this is a fact for you to consider in connection with other facts bearing upon the question of his assent.

Another charge is cutting hoop-poles. Hoop-poles are timber trees in the earlier stages of their growth. This would be waste, unless it is the ordinary mode of managing the farm. It may be as usual for tenants to cut hoop-poles, when of the proper size, as to harvest the potatoes or fruit; and it would be wrong to make that waste which would not be waste in an ordinary tenant for a term of years: Greenl. Cruise, tit. 3, c. 11, sec. 5, and note; 4 Kent's Com. 76, 77.

Then there is a charge not only for not repairing the house, but also for tearing it down. Now, in regard to the question of repairs, if the life tenant receives a house in such a state as not to be reparable, or so dilapidated that the expense of repairing would be beyond the value of the house, he is not bound to repair, and may leave it to its natural destruction. But if the house is such that repairs would make it tenantable, he is bound to make them. But in regard to the charge of tearing the house down, the fact that it was not tenantable is no excuse. Whatever may have been its value the reversioner had a right to it. If he consented to the demolition, that indeed alters the case; and you are to look to all the circumstances of the transaction and the parties for the evidence of the consent. If the house was torn down after she left the premises, and neither by her direction nor permission, she is responsible: Greenl. Cruise, tit. 3, c. 11, secs. 21, 30; 4 Kent's Com. 77; *Fay v. Brewer*, 3 Pick. 203.

She is charged with removing the crib. The defense is that it did not belong to the inheritance, that it was placed by the life tenant upon a rock and not affixed to the freehold. If this was the case, it

is not waste. She is charged with tearing down the barn. This is an important part of the farm. The defense set up is that it was so old and unstable that she feared it would fall upon her cow. If there was any such danger she had a right to tear it down, unless its dilapidated condition resulted from her neglect to repair. There are also charges of tearing boards from the buildings and destroying the fences, which if proved amount to waste.

You will perceive that there are various portions claimed to be wasted. Waste in any particular place forfeits the place, as waste in the woods forfeits the woods, in the meadow forfeits the meadow. A destruction of the dwelling-house forfeits the whole place. You are to find the place forfeited where the waste was committed. And, in addition, you are also to assess the damages for the place wasted, over and above the value of the place.

Verdict for the plaintiff, in that there has been waste of hoop-poles in the pasture, with damages in the sum of twenty-five dollars.

CALVERT v. RICE, in Ky. Sup. Ct., May 12, 1891.—91 Ky. 533, 16 S. W. 351, 34 Am. St. Rep. 240.

PRYOR, J. This is a controversy between the appellants who are the life tenants, and the appellees, who own the inheritance, and are entitled to the possession when the tenancy expires. It is a petition in equity, with an injunction to stay waste. W. H. Duvall owned at his death a tract of three hundred and twenty-five acres of land lying on the Maysville and Mt. Sterling Turnpike, in the county of Mason. At his death seventy-five acres of this tract including the dwelling, was allotted to his widow as her dower. She subsequently married the appellant, Jesse Calvert, who has been cutting the timber on the dower land, and converting it into rails for the use of the dower tract. The first husband, Duvall, left one child surviving him, who married the appellee, Rice, and they instituted this action, asking that the appellants be enjoined from cutting any trees on the dower and from committing waste.

The testimony is conflicting as to the number of trees cut and used on the premises by the appellants in repairing the buildings and the fencing. The appellant admits the cutting about fifteen trees, and the appellees say that he cut at least twenty. The main contention arises from the scarcity of timber on the entire farm, it appearing that all the timber is on the dower tract, and covers only about ten or twelve acres of the dower land, and some of that timber is in the yard. It appears that only one tree was cut that was standing in the yard, and that seems to have been decayed, and in such close proximity to the dwelling as subjected it to danger if the tree should fall.

If this case is to be determined upon the idea that there is not a sufficiency of timber on the dower to keep in repair the entire tract, then the injunction ought to go, for it is evident that there is not more

than a sufficiency of timber to keep up and continue in permanent repair the dower tract. The scarcity of timber, however, does not prevent its use by the life tenant in repairing the buildings and fencing on the premises. It only requires that he should be the more careful in its use, and only cut so much as would be used by a prudent man when in possession and the owner of the fee, and necessary to keep the premises in repair. It is the duty of the life tenant not to permit the premises to go to destruction for the want of repairs, and particularly when there is timber on the place from which the repairs may be made. It is better for those in remainder that the life tenant should keep the premises in repair, so that when the term expires the owner of the fee receives it in good condition, than to be compelled to receive it as a ruined and dilapidated farm. There is no doctrine better settled than that of the right of the tenant for life to take reasonable estovers from the estate, but not to such an extent as to work an injury to the inheritance; and what is meant by this injury is, that the tenant shall not make an unreasonable use of this right. The right to timber for firewood and repairing buildings is an incident to every life estate to be used for such purposes when on the land. The tenant has no right to cut and use rail timber for firewood when there is other timber that might be used for that purpose, or to even cut and use young and growing timber that would not make more than four or five rails to the cut for fencing purposes. This would be an unreasonable use of it. The proper use of the timber by the tenant, as is said in the text-books and reported cases, "is to give the tenant necessary fuel that he may remain on the premises, and sufficient timber to keep the fences and buildings in repair": 2 Bla. Com.; *Padelford v. Padelford*, 7 Pick. 152; *Miles v. Miles*, 32 N. H. 147; 64 Am. Dec. 362.

Why is it not to the advantage of the remainder-man that the premises should be kept in repair? It is not required or expected of the tenant that he shall expend his money in buying plank or lumber to improve fences and keep the premises in repair, so that the timber may pass from him to the inheritance untouched, although its judicious use may lessen the value of the estate. The owner of the fee would use this timber if without means to purchase other material, and so would any prudent farmer. He would not cut the timber in the yard left for ornamental purposes, nor could the tenant, without being guilty of waste; but ordinary woodland can be used in a prudent manner for the use of the premises, and that use or the right to use the timber not having been abused by the tenant, we see no reason for an injunction, the effect of which would be to enrich the inheritance at the expense of the life tenant.

The judgment is, therefore, reversed, with directions to dismiss the petition.

MARSHALL v. MELLON, in Pa. Sup. Ct., Jan. 4, 1897—179 Pa. St. 371, 36 Atl. 201, 57 Am. St. Rep. 601, 35 L. R. A. 816.

Assumpsit for rent due on an oil lease. Judgment for defendants. Plaintiff appealed.

GREEN, J. In *Stoughton's Appeal*, 88 Pa. St. 198, we said: "Oil, however, is a mineral, and, being a mineral, is part of the realty: *Funk v. Haldeman*, 53 Pa. St. 229. In this it is like coal or any other mineral product which *in situ* forms part of the land." In *Gill v. Weston*, 110 Pa. St. 312, we said of petroleum, "It is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands." In *Westmoreland Nat. Gas Co. v. De Witt*, 130 Pa. St. 235, we said: "Gas, it is true, is a mineral, but it is a mineral with peculiar attributes." In *Blakely v. Marshall*, 174 Pa. St. 425, a lease for oil and gas purposes was made by lessors who were tenants for life and also as trustee for those in remainder. The leased premises proved to be productive. A question arose upon a case stated as to the interests respectively of the life tenants and those in remainder. The life tenants claimed the whole of the oil, and for those in remainder the same claim was made. The court below appointed a trustee to receive all the oil due to the lessors, and to invest the proceeds, and pay the interest annually realized therefrom to the life tenants during their joint lives and the life of the survivor, and, at the death of the latter, to pay the principal to the remaindermen. This court sustained the court below and said: "As was said in *Stoughton's Appeal*, 88 Pa. St. 198, and other cases in the same line, oil in place is a mineral, and, being a mineral, is part of the realty. An oil lease investing the lessee with the right to remove all the oil in place in the premises, in consideration of his giving the lessors a certain per centum thereof, is, in legal effect, a sale of a portion of the land, and the proceeds represents the respective interests of the lessors in the premises. If there be life tenants and remaindermen, the former are entitled to the enjoyment of the fund (interest thereon) during life, and at the death of the survivor the corpus of the fund should go to the remaindermen." This distribution was made because all the interests concurred in making the lease, and it was to the manifest interest of all that the oil should be taken from the land lest it should be drawn away by other wells on adjacent premises. In that respect, of course, there is a difference between oil and gas, and solid minerals, but in respect of the interests of life tenants, as contrasted with those in remainder, there was no departure from the common-law rule that tenants for life only may not open new mines or take minerals from the premises, except in case of mines opened by the former owner. This was recognized in *Westmoreland Coal Co's Appeal*, 85 Pa. St. 344, where we held that while the life tenant's right to work previously opened mines was undoubted, there was no right in a life tenant of sev-

eral tracts to open a new mine on one of the tracts upon which no previous opening had taken place. Mercer, J., said, in the opinion: "Neither tract is appendant or appurtenant to the other. If she had a life estate in the distant tract only, the fallacy of claiming a right to remove the coal therefrom would be most manifest. The unanswerable reason would be that the mine on that tract had never been opened."

We see no difference between the present case and those cited, so far as this question is concerned. The plaintiff was but a tenant for life of the premises in question. There had never been any oil or gas operations commenced on the land before her estate for life accrued. She had no right therefore, to operate for oil or gas herself, and she could not give such a right to any lessee from her. Neither the original lessee nor the defendants, his assignees, ever held any such right. They would have been trespassers if they had undertaken to exercise such a right. The lease was "for the sole and only purpose of drilling and operating for petroleum, oil, or gas," and "to have and to hold the said premises for the said purpose only." All the terms and conditions of the lease relate to that purpose alone, and no right to the use of the surface for any other purpose is conferred. It is manifest, therefore, that as no interest whatever was acquired under the lease, the lessees are under no obligation to pay for a right or privilege which they never obtained, or in damages for not performing an illegal covenant therein. We think the judgment entered by the court below was entirely right.

It seems to us, however, in view of the peculiar character of oil and gas as being fugacious in their nature, and liable to be diverted by operations upon other adjoining or near-by lands, in order to preserve the interests of both life tenants and remaindermen, it would be well for the legislature to make such enactments as would enable the owners of this class of lands to secure to themselves the benefits of such minerals as these. As it is now, the law is not efficacious to that end.

Judgment affirmed.

To the same effect see *Swayne v. Lone Acre Oil Co.* (1905), 98 Tex. 597, 86 S. W. 740; *Keon v. Bartlett* (1895), 41 W. Va. 559, 23 S. E. 664, 56 Am. St. Rep. 884, 31 L. R. A. 128.

Acquiring Adverse Title.

WHITNEY v. SALTER, in Minn. Sup. Ct., Nov. 22, 1886—36 Minn. 103, 30 N. W. 755, 1 Am. St. Rep. 656.

Ejectment by the administrator of Ann Salter; who died possessed of a term for 100 years subject to a mortgage for \$555 and a mechanic's lien for \$884, and left a will by which she devised the term to the defendant William Salter, her husband, for life. After her death the liens were foreclosed and the purchasers at the sale conveyed their interests to defendant William. The court directed a verdict for defendant, and plaintiff appeals from an order denying a motion for a new trial.

BY COURT, MITCHELL, J. The established doctrine is, that a tenant for life in possession, in the purchase of an encumbrance upon, or an adverse title to, the estate, will be regarded as having made the purchase for the joint benefit of himself and the reversioner or remainderman. The law will not permit him to hold it for his own exclusive benefit, if the reversioner or remainderman will contribute his share of the sum paid. If the life tenant in such case pays more than his proportionate share, he simply becomes a creditor of the estate for that amount: 1 Washburn on Real Property, 96; *Daviess v. Myers*, 13 B. Mon. 511. It is also the settled doctrine, that if a life tenant of a renewable leasehold estate renews the lease, the law will not permit him to do so, for his own exclusive use, but will make him a trustee for the reversioner or remainderman. And this is so even although he was not required to renew: Bissett on Estates for Life, [26 Law Lib.] 248. The renewed lease in such a case is subject to the same equities as the original. Thus far we agree with the appellant. But this is not the whole law applicable to the facts of this case. Salter, the life tenant, was under no obligation to pay off or buy up these outstanding claims against the estate. The will under which he held the life estate imposed no such duty upon him. Neither did the law: 1 Washburn on Real Property, 96.

Whether in this case the life tenant should contribute towards the amount paid to remove these encumbrances is not here important. Undoubtedly, the general rule in regard to the apportionment of the contribution towards paying off encumbrances between the life tenant and the remainderman is, that the life tenant shall contribute in proportion to the benefit he derives from the liquidation of the debt: Story's Eq. Jur., sec. 487; 1 Washburn on Real Property, 96, 97.

In view of the fact that this life estate was given to Salter "in lieu of all estate, right, title, or interest" he might otherwise have in the estate of his wife, the testatrix, there may be some question whether he would be bound to contribute anything towards taking up these outstanding claims against the estate: See *Brooks v. Harwood*, 8 Pick. 497. But as the point is not really before us, we neither decide nor consider it. It is, however, certain, in any event, that Salter became a creditor of the estate for the amount he paid out, less his proportionate share, if any. To that extent he would be subrogated to the rights of the parties from whom he bought, and would be entitled to hold the property until the other parties interested paid their share. He and those claiming under him would occupy a position analogous to a mortgage in possession after condition broken, who cannot be ejected until all sums due on the mortgage have been paid.

Order affirmed.

That the life tenant cannot acquire and use an adverse title against the remainderman: *De Freese v. Lake* (1896), 109 Mich. 415, 67 N. W. 505, 63 Am. St. Rep. 584, 32 L. R. A. 744, tax-title; *Boynton v. Veldman* (1902), 131 Mich. 555; 91 N. W. 1022; *Stewart v. Matheny* (1888), 66 Miss. 21, 5 So. 387,

14 Am. St. Rep. 538, tax-title; Cockrill v. Hutchinson (1896), 135 Mo. 67, 36 S. W. 375, 58 Am. St. Rep. 564; Weaver v. Wible (1855), 25 Pa. St. 270, 64 Am. Dec. 696.

Numerous decisions to the effect that possession by or under a life tenant cannot be set up as adverse to the remainderman or reversioner are collected in 19 L. R. A. 839, in a note to Gindrat v. Western Ry. of A., 96 Ala. 162, 11 So. 372. See also King v. Rhew, post.

Time for Executors of Life Tenant to Remove.

STODDEN v. HARVEY, in *King's Bench, Trinity*, 5 Jac. 1.—A. D. 1608—*Cro. Jac.* 204.

Trespass. Upon demurrer the case was, lessee for life of a house and pasture land dies, his executors suffer his cattle to go there for six days after his death, and then remove them, and in trespass justify for that time, averring that in that time of six days they could not procure any other land or place to put in the cattle; whereupon it was demurred. And whether that were a convenient time to remove them was the question. The court seemed to incline that six days is but a convenient time to remove the cattle; and the law allows a convenient time for their removing, especially it being averred that they had not any other place to remove them. See 18 Edw. 4; 22 Edw. 4, pl. 27. But for a fault in the plea * * * it was adjudged for the plaintiff.

Curtesy Initiate.

ANON., in *Common Bench, Hilary*, 28 Hen. VIII.—A. D. 1537—1 And. C. P. 35 (Case 88), *Dyer* 25b, *Bendloes* 21.

If a man espouse a woman and have issue, which issue is born in life and baptised, and the issue dies not yet heard to cry; or if the issue is born in life and not baptised nor heard to cry; yet the husband shall be tenant by the curtesy. By opinion of the justices of the common bench.

Dower—How Barred. In *Hereford*, in *Eyre*, 20 Edw. 1, A. D. 1292, p. 21.

If a woman covert make quit-claim of her dower for her whole life it is worth nothing. Otherwise, if she is single.

CHAPTER IV.

ESTATES LESS THAN FREEHOLD.

ESTATES FOR YEARS.

Nature of Terms for Years.

BRACON, book II, c. 9, fol. 27.—1260?

If, moreover, a gift be made for a term of years, though of exceeding length longer than the life of man—nevertheless this will not give the donee a freehold, since a term of years is fixed and certain, and the limit of life is uncertain, and because, although nothing is more certain than death, nothing is more uncertain than the time of death. Moreover, if land be granted to a person for a term of years, the grantor may during the same term grant the same land to another or to the same person in fee; thus, if he enfeoffs the lessee, changing one kind of possession for another. If, however, he enfeoffs another, both kinds of possession will continue, because the term and feoffment of the same land may well coexist, since in that case there are different sorts of rights; the ownership of the fee and the freehold belong to the feoffee, while the lessee can claim nothing for himself except the usufruct, that is to say, he may freely and without hinderance on the part of the feoffee take the produce. Further one may give to another land to hold at will, or so long as he pleases, from term to term, or from year to year, in which case the donee has no freehold, for the lord of the fee may reclaim land thus granted as from one holding by mere grace and favor.

LITTLETON'S TENURES. (Littleton died in 1482.)

§ 58. Tenant for term of years is where a man lets lands or tenements to another for a term of certain years, after the number of years that is accorded between the lessor and the lessee. And when the lessee enters by force of the lease, then is he tenant for term of years. * * *

§ 59. And it is to be understood, that in a lease for years, by deed or without deed, there need be no livery of seisin made to the lessee, but he may enter when he will by force of the lease. * * *

§ 66. Also, if a man lets land to another for term of years, although the lessor die before the lessee enters into the tenements, yet he may enter into the same tenements after the death of the lessor, because the lessee, by force of the lease, has presently a right to have the tenements according to the form of the lease. But if a man makes a deed of feoffment to

another, and a letter of attorney to one to deliver to him seisin by force of the same deed; yet if livery of seisin be not executed in the life of him who made the deed, this avails nothing. * * *

Original Remedies of Ejected Termors.

BRACON, Book 4, c. 36, fol. 220.—A. D. 1260?

I must now speak of the case of a person being ejected from the use and occupation of any tenement which he holds for a term of years before the expiration of his term. For in one and the same tenement one man may have a freehold and another use and occupation. The usual remedy open to such lessees, when they are ejected before the expiration of their term is by action of covenant. But inasmuch as this action is not available except as between lessor and lessee, and third persons could not be bound by the covenant, and even as between lessor and lessee it was an insufficient and inconvenient mode of determining the matter, by the advice of the Curia Regis a remedy was provided which the farmer could avail himself of as against any person whatsoever who should turn him out of possession. This was by means of the following writ: 'The king, to the sheriff greeting. Command A that he duly and without delay do restore to B so much land with the appurtenances in such a township, from which the said A who demised the land to B' (had wrongfully ejected him, &c.), Or thus: 'If A gives proper security, summon B to show cause why he ejects and keeps ejected A from so much land with the appurtenances which C demised to A for a term which is not yet passed, and within the said term the said C sold the said land to B, by reason of which sale the said B afterwards ejected A from the said land as he saith;' &c. And if such a writ is available against a stranger on account of a sale to him, much more is it available against the lord himself who demised to and without reason ejected the lessee, than against a stranger who had no sort of excuse if at the time of the sale made to him his vendor ejected the farmer, or if on any other ground any one other than the original lessor has ejected the lessee. In that case the writ speaks of 'the land which C of N demised for a term which has not yet expired, within which term the aforesaid A or C wrongfully ejected B from the said land as he alleges;' &c. * * * No one can eject a farmer from his farm any more than he can eject a tenant from his freehold. Hence if it be the lessor who ejects the farmer let him restore the possession with damages for such a right of restitution does not differ much from the case of disseisin. But if the ejector be some person other than the lessor, if he have done the wrong by the authority and at the bidding of the lessor, both of them are liable to judgment, one because he did the act, and the other because he authorized it. But if the act was done against the will of the lord, then the wrongdoer is liable both to the lord of the fee and to the farmer, to the farmer by the writ which I have mentioned, to the lord of the fee by the assize of novel disseisin,

so that the one may recover the term with damages, and the other his freehold without damages. Further if the lord of the fee gives to anyone a tenement to hold in demesne which has been granted to another for a term of years, he may well grant to him the seisin without prejudice to the term of the farmer. For the lord may confer upon the grantee the seisin which he vacates so far as relates to himself and those claiming under him, and he can cause the farmer to attorn to the grantee and to render to him services, provided always that the feoffee may not enter into the occupation of the land itself, nor take any part of its produce, and in particular may not hinder the farmer in his enjoyment, nor eject him.

STATUTE, 21 HENRY VIII, c. 15.—A. D. 1529.

Fermors shall enjoy their leases against recoveries by feigned titles, &c..

Where afore this time divers persons have made leases of their manors, lands, tenements, and other hereditaments, sometime by their indentures, and sometime without writings, to other persons for term of years, taking of them great fines for the incomes of the same leases; and after the same lessors, their heirs, or assigns, have caused and suffered recoveries to be had against them in the court of our sovereign lord the king, and in other lords courts, upon feigned and untrue titles, by craft or covin to put the same termers from their said terms; and after such recoveries had the same recoverees, by reason of such recoveries and judgments, have entered into the same manors, lands, tenements, and other hereditaments so to ferm letten, and thereof have expelled the said fermers, contrary to their said leases, covenants, and agreements; and because it was doubted to some persons, whether the said termers might falsify such recoveries, or not:

2. Be it therefore enacted, * * * that all such termers shall and may falsify, for his term only, such recoveries, as well heretofore had as hereafter to be had, in such wise and form as a tenant of a freehold shall and may do by the course of the common law, where such tenant of freehold was neither privy nor party to the same recovery.

3. And that the same termers, their executors and assigns, notwithstanding such recoveries so had, shall retain, hold, and enjoy their said terms, according to their said leases, against all such recoverees, their heirs and assigns, as they should or might have done against the said lessors, if such recovery had not been had he suffered; and that the said recoverers, their heirs, and assigns, after such recovery so had, shall have like remedy against the said termers, their executors or assigns, by avowry or action of debt, for the rents and services reserved upon the same leases, being due after the same recoveries; and also like actions against them for waste done, after the same recoveries so had; in like manner and form as the said lessors should or might have had, if the same recoveries had never been had. * * *

Term Void for Uncertainty.**ANON, in Common Bench, 7 Edw. 6.—A. D. 1553.—Brooke Abr. t. Leases, 66.**

A man possessed of a lease for a term of 40 years granted to J. N. as many of these years as should be arrear at the time of his death. This grant was held void by HALES and all the other justices, because of the uncertainty; for this is not like where a man leased land for the term of his life and four years more; this is certain that his executors shall have it for four years after his death. But in the other case the grantor may live the whole 40 years, and then nothing would be in arrear at the time of his death.

NOTE, by BROMLEY and the other justices, 2 Mary.—A. D. 1555.—Brooke Abr. t. Leases 67.

If I lease land to W. N. *habendum* until it should pay 100 l and without livery this is merely a tenancy at will for the uncertainty, but if livery is made the lessee thereby shall have it for life on condition to cease when he has made the 100 l. And in Easter term 3 Mary, this lease was held good by all.

ANON., in chancery. A. D. 1583?—1 And. 122.

W. Kingswell, possessed of a lease for years, gave it in these words: "I give my lease of and in" &c., "after my decease to my son Swithin and his wife." The question was if this manner of grant was void or not; and this in the chancery, was referred by the chancellor to the chief justices of the king's bench and common pleas to consider; who thought that the assignment or grant of the lease was void, and cannot take effect according to the words of it; for to make a lease so commence or end, as one had a lease in possession, may not be, and it is no more than to grant so much of his term as shall be to come after the death of the father; which is entirely void, for this that there is no knowing what thing in this case passes, and this for the uncertainty; and to hold that these words, *after the death*, &c., shall be void and on this to say that it is an assignment or gift of his term, viz., the residue, is against reason; for this is not the intent of the grantor. And of this opinion also were Mead and Peryam, JJ.

SAY v. SMITH, in Common Pleas, Easter term, 6 Eliz.—A. D. 1564—1 Plowd. Com. 269. Abridged.

Replevin by William Say against John Smith and Thomas Fuller, for taking nine cows. The defendants justified the taking as bailiffs of Edmond Smith in whose freehold of 20 acres the cows were doing damage. Say rejoined that said Edmond had the freehold by devise

in writing of William Norton, who in his lifetime, viz, 4 Hen. 8, leased the same to John Kirton, whose executor assigned said lease and term to Say, which lease produced in court demised the land to the lessee and his assigns for the term of ten years reserving to the lessor and his heirs and assigns a yearly rent of 4 *l.* 16 *s.* 8 *d.*, and a rent of 10,000 tiles, or their value in money payable at the end of said term; and further by said lease it was agreed and granted that, if at the end of said term and every succeeding term, the rent should be duly paid, said lessee, his heirs and assigns, should have a perpetual demise, farm, and grant of the premises from ten years to ten years on like rent continually and ensuing out of the memory of man. It was further alleged that the rent had been duly paid, and that by virtue of the lease and assignment the plaintiff was lawfully possessed of the premises, and being so possessed, the defendants wrongfully entered and took the cows.

To this the defendants demurred.

OPINION. I heard the arguments of all the justices except WALSH, the latter end of whose argument I only heard; but they all argued to one effect, and agreed that the title of the plaintiff was not good, and that the defendants should have a return. * * * Then as to the principal matter, every contract sufficient to make a lease for years ought to have certainty in three limitations, viz. in the commencement of the term, in the continuance of it, and in the end of it. So that all these ought to be known at the commencement of the lease, and words in a lease which don't make this appear are but babble, as BROWN said. And these three are in effect but one matter, showing the certainty of the time for which the lessee shall have the land, and if any of these fail it is not a good lease, for then there wants certainty. * * * So here the first term of ten years is good without question, but the term afterwards for other ten years is limited to commence after the performance of a condition, so that until the condition is performed the term cannot commence. And then if the condition ought first to be performed, it is first to be considered whether or no it is possible to be performed, and if it is now performed. And BROWN said that it is not possible to be performed, because the words of it are, that he shall have the lease if he pay the tiles or the value of them in money at the end of every ten years from thence next following. So that *every* ten years which shall next follow ought to precede the payment, and the payment the lease. And if the next ten years be passed he cannot pay the tiles or the value of them, for the payment ought to be at the end of every ten years. * * * So that until all ten years are passed the end of every ten years next following the date of the said indenture is not passed; and all ten years are not passed until the end of the world. Wherefore the end of the world ought to come before the payment, and the payment ought to come before the lease, and so the lease shall never commence. * * *

Then as to the certainty of the time of the continuance of the lease, although it should be here admitted that there is a certainty of the commencement of it, yet there is no certain space of time expressed by which the length of the term may be known, for it is appointed that upon the payment the lessee shall have a perpetual demise from ten years to ten years, which is as much as a demise for 20 years, and which words would have made a good lease for 20 years if he had stopped there, but he has coupled them with other words which make the whole uncertain, viz. that the demise shall be perpetual, and from ten years to ten years continually and out of the memory of man, which words, *perpetually, continually, and out of memory*, don't contain any certain term, but time without a term. * * *

From the above cases it will be seen that if it had not been for the fact that the form of the conveyance was insufficient to pass a freehold the titles of the lessees would have been sustained as creating estates for life, in which the uncertainty of duration is a common element. Therefore, since livery is no longer necessary to pass a freehold, and the word heirs is made unnecessary to pass a fee by deed, the questions discussed in these cases will now seldom arise. They might arise on a contest between the heir and the administrator as to whether it was a freehold or a chattel real. But that uncertainty as to the term would not now avoid the contract and estate is shown by the following cases: *Reed v. Lewis* (1881), 74 Ind. 433, 39 Am. Rep. 88; *School Dist. No. 5 v. Everett* (1883), 52 Mich. 314, 17 N. W. 926; *D'Arcy v. Martyn* (1886), 63 Mich. 602, 30 N. W. 194; *Horner v. Leeds* (1855), 25 N. J. L. 106; *Lemington v. Stevens* (1875), 48 Vt. 38.

"Said Crow hereby agrees to lease unto said Meinhart the following piece of ground [describing it] for the purpose of carrying on the business of a creamery thereon, and for the term of so long as said creamery is carried on as said business, for the sum or rent of one dollar for said lease in full," was held not to create a term nor any interest in the land, but a mere license; and therefore an attachment of the interest of the licensee as a leasehold was not sustained. *Melhop v. Meinhart* (1886), 70 Iowa, 685. 28 N. W. 545. To the same effect see also: *Western Transp. Co. v. Lansing*, 49 N. Y. 499.

ST. AUBY'S CASE, in the Exchequer, Easter, 31 Eliz.—A. D. 1590.—Cro. Eliz. 183.

Earl of Arundel being possessed of a term for years in lands, grants a rent to St. Auby for his life, issuing out of said lands, and dies. This is found by office, and the land now being in the queen's hands, *Drew* prays an allowance of this rent, the term yet having continuance for divers years. *Popham*, Att. Gen., moved that it was void to charge the land, for he cannot have a frank-tenement out of a chattel, and if he has not a frank-tenement according to the word of the grant, he can have no other estate, for it is not granted for any time certain.

MANWOOD, Chief Baron.—Although this cannot be a grant to make a freehold, yet it shall be a grant as it may be, viz., a grant for so many years as the term endures, if he live so long; for it is not a frank-tene-

ment in law, but a chattel. To this opinion were GENT and CLERK, Barons, inclined, but said they would advise.

For the later history of this question see the cases on executory devises post—.

Validity of Oral Lease.

STATUTE OF FRAUDS, 29 Car. II. c. 3, Secs. 1-3.—A. D. 1676.

For prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury be it enacted by the kings most excellent majesty by and with the advice and consent of the lords spiritual and temporal and the commons in this present parliament assembled and by the authority of the same that from and after the four and twentieth day of June which shall be in the year of our Lord one thousand six hundred seventy and seven. All leases, estates, interests of freehold or terms of years or any uncertain interest of in to or out of any messuages, manors, lands, tenements or hereditaments made or created by livery and seisin only or by parole and not put in writing and signed by the parties so making or creating the same or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only and shall not either in law or equity be deemed or taken to have any other or greater force or effect. Any consideration for making any such parole leases or estates or any former law or usage to the contrary notwithstanding.

SEC. 2. Except nevertheless all leases not exceeding the term of three years from the making thereof whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at the least of the full improved value of the thing demised.

SEC. 3. And moreover that no leases, estates or interests either of freehold or terms of years or any uncertain interest not being copyhold or customary interest of in to or out of any messuages, manors, lands, tenements or hereditaments shall at any time after said four and twentieth day of June be assigned, granted or surrendered unless it be by deed or note in writing signed by the party so assigning, granting or surrendering the same or their agents thereunto lawfully authorized by writing or by act and operation of law.

WHITING v. OHLERT, in Mich. Sup. Ct. 1884—52 Mich. 462, 18 N. W. 219, 50 Am. Rep. 265.

Assumpsit. Plaintiff brings error from judgment for defendant.

CAMPBELL, J. This was an action by a tenant against his landlord for disturbance in his enjoyment. The main dispute was concerning the validity of the lease. The testimony tended to show an agreement by parol in April for a year's tenancy from the beginning of May. The court below held that an agreement by parol for a full term of a year,

to begin in the future, was void under the Statute of Frauds. That statute provides that all contracts for the leasing for more than one year of lands shall be void unless in writing. Comp. L. § 4694? [How. St. § 6181.] The only other provision supposed to be involved is that which declares that every agreement which by its terms is not to be performed within one year must be in writing. Comp. L. § 4698.

The distinction between an agreement for a lease and the lease itself was pointed out in *Tillman v. Fuller* 12 Mich. 113. It is very well settled that a lease may be made to take effect in future, and that the estate does not begin with the contract, but with the future period. *Young v. Dake* 5 N. Y. 463; *Trull v. Granger* 8 N. Y. 115; *Wood v. Hubbell* 10 N. Y. 479. It is held in New York, under a statute corresponding to ours, that an agreement by parol for a future term not exceeding one year is valid, and not within the statute, *Young v. Dake* 5 N. Y. 463. That case is well considered, and is, we think, a fair construction of the statute, which ought not to be given a strained meaning. The same doctrine has been adhered to in that state, and is re-affirmed emphatically in *Becar v. Flues* 64 N. Y. 518, where a tenant was held liable for the agreed rent, who had never gone into possession, and had declined to do so.

Concurring, as we do, in this view of the law, we think the court below erred in its ruling, and should have allowed a recovery of damages for the injury done plaintiff. We note further in the record that the right of possession seems to have been determined in plaintiff's favor in proceedings before a commissioner, and we cannot understand why on any theory his recovery, to some extent at least, was questionable. But as tenant for a year he was of course entitled to larger damages.

Judgment reversed.

Accord: *Sears v. Smith*, 3 Colo. 277; *Steininger v. Williams*, 63 Ga. 475; *Huffman v. Starks*, 31 Ind. 474; *Gregory, J.*, dissenting; *Sobey v. Brisbee*, 20 Iowa, 105; *Paulton v. Kreiser* (1904), 18 S. Dak. 487, 101 N. W. 46.

The weight of authority is against this case. *Bain v. McDonald*, 111 Ala. 272, 20 So. 77; *Wickson v. Monarch Cycle Mfg. Co.* (1900), 128 Cal. 156, 60 Pac. 764, 79 Am. St. Rep. 36, and cases there cited. *Wheeler v. Frankenthal*, 78 Ill. 124; *Wolf v. Dozer*, 22 Kan. 436; *Mathews v. Carlton* (1905), 189 Mass. 285, 75 N. E. 637; *Jellett v. Rhode*, 43 Minn. 167, 45 N. W. 13, 7 L. R. A. 671; *Johnson v. Albertson*, 51 Minn. 335, 53 N. W. 642; *Whiting v. Pittsburgh Opera*, 88 Pa. St. 100, "from the making thereof."

Tenant or Servant.

HAYWOOD v. MILLER, in N. Y. Sup. Ct., May 1842—3 Hill 90.

Miller sued Haywood in trespass for ejecting his goods from a dwelling house on Haywood's *lower* farm, which plaintiff occupied under an agreement that he would labor on the farm for a year and that his wife would do the house-keeping; for all of which Haywood agreed to pay him \$160. Haywood asked Miller to work on the *upper* farm, which

Miller refused to do, whereupon Haywood discharged him, gave him notice to leave, and finally entered and put out his furniture. From judgment for \$200 for plaintiff, Haywood brings error.

PER CURIAM. The contract was not in the nature of a lease. Whether the lower farm was intended as the place of labor or not, the relation between these parties was merely that of master and servant. True, it is assumed by the contract that the defendant below should furnish a house; and so does every master agree to furnish a house, or house-room, which is the same thing, for his domestic servants. It does not follow that, when he becomes dissatisfied and gives his servant warning to depart, and the latter refuses, that the master may not turn the servant away and remove his goods. To be sure, the master does this under the peril of paying damages for a breach of the contract with his servant, if he cannot show good grounds for dismissing him. But he is not a trespasser, whether he have good cause or not. Here the labor was to be on a salary of so much for the year. Suppose the plaintiff below had refused to work and held over the year; could the defendant have distrained for rent, or sued for use and occupation? Or could the plaintiff have had ejectment for the ouster within the year? Clearly neither; and that shows there was no more a tenancy created, than there would be under any other retainer for a year's service. The mistake lies in the form of action—in bringing trespass, and not assumpsit. The judgment must be reversed.

Judgment reversed.

LIGHTBODY v. TRUELSEN et al., in Minn Sup. Ct., Nov. 2, 1888—39 Minn. 310, 40 N. W. 67.

The plaintiff claiming to be tenant of some boarding houses, sues the defendant sheriff and under-sheriff for wrongfully ejecting him.

The Minnesota Granite & Stone Co., needing some place to house its employees at its quarry, built these houses, and the plaintiff went into possession under a contract with the company, by which he agreed to furnish the house and board and lodge all the men sent him by the company for \$4.50 per week, to be paid him by the company and by it deducted from the men's wages, the company also deducting from the board money \$60 per month for the rent of the houses. The plaintiff agreed to give personal and constant supervision to the house and not to be absent without the consent of the company's superintendent. The superintendent becoming dissatisfied, ordered plaintiff to leave and remove his goods. This being refused, he had the defendants remove them. The court below gave plaintiff judgment for \$1,000 damages and the defendants appeal.

MITCHELL, J. * * * If plaintiff was merely the servant of the Company, employed to manage the boarding-houses for them, there could be

very little doubt but that his use or occupancy of the buildings was also as servant, and not as tenant, being merely accessory to the more convenient performance of his duties as servant. If the use or occupancy be as servant, the law is well settled that the master does not part with the possession, the servant's possession being the master's. If the servant is discharged, he must, on request, quit the premises; and, if he refuses to go, the master may eject him, and for that purpose use such force as is reasonably necessary. The master's right in this respect does not depend upon the question whether the servant is rightfully or wrongfully discharged, but exists in the one case as well as the other; the master incurring the risk of paying damages for breach of the contract of employment, which would be the servant's only remedy. But the question here is, was plaintiff the servant of the company at all, or was he their tenant? A tenant may be defined to be one who has possession of the premises of another in subordination to that other's title, and with his consent. No particular form of words is necessary to create a tenancy. Any words that show an intention of the lessor to divest himself of the possession, and confer it upon another, but of course in subordination to his own title, is sufficient. While, of course, the existence of certain things is necessary to constitute a lease, there is no artificial rule by which the contract is to be construed. It is largely a question of the intention of the parties, to be collected from the whole agreement. It seems to us that the agreement in the present case all looks to a leasing of these boarding-houses to plaintiff, and not to an employment of him as agent to manage them for the company. Every provision of the contract contemplates his occupancy as landlord or proprietor. There is nothing to indicate that his possession of the buildings was not to be exclusive; on the contrary, the nature of the business, and the manner in which it was to be run, necessarily imply that it was to be exclusive. He was to run the business, not for the benefit of the company, but for himself; the profits, if any, being his, and the losses, if any, he would have to stand. He took his chances on the number of boarders he would get; the company did not obligate themselves to furnish any particular number. He furnished the houses and provided the supplies at his own expense, just as any boarding-house keeper would do, if running the business as principal, and not as agent for another. What was paid him was for boarding the men, and not as compensation for services as agent. Moreover, he had to pay a fixed rent for the use of the buildings, the amount of which was not at all dependent upon the number of boarders the company furnished. It was to be the same whether they furnished one or one hundred. The manner in which the board-bills of the men or the rent for the buildings were paid is unimportant. That was a mere question of convenience. The fact that plaintiff was obligated to board the company's men, and that he was to give his time to the supervision of the boarding-houses, is not at all inconsistent with the idea of a lease. In short,

the whole contract, in our judgment, shows an intention, not to employ plaintiff's services as agent, but to lease the buildings to him, with just such covenants and conditions as to the manner of their use and the mode of conducting the business as would naturally be incorporated into a lease, in view of the relation the buildings bore to the company's business. * * *

Judgment affirmed.

BOWMAN v. BRADLEY, in Pa. Sup. Ct., Oct. 3, 1892—151 Pa. St. 351, 24 Atl. 1062, 17 L. R. A. 213.

Action in trespass. From judgment for defendant, plaintiff appeals.

WILLIAMS, J. The question on which this case turns is one of considerable practical importance, and in this state it seems to be an open one. The learned trial judge finding no precedent in our own reports to guide him turned to the English courts, and followed what he believed to be the rule held by them. He stated at the same time that the question was one that could "only be settled by a decision of the supreme court." The facts on which the question arises are mainly undisputed. They show that Bradley owned a farm in Dauphin county containing about twenty-nine acres. About four or five acres of this were occupied by a mill and pond operated by the owner. To care for the balance and the stock upon it he hired Bowman and his family. The farm work and the care of the cattle were to be looked after by Bowman. His wife was to milk the cows. His son was to deliver the milk each morning to Bradley in the city of Harrisburg. For this labor Bowman was to receive one dollar per day and the use of a house upon the premises to be occupied by himself and family. The only fact in dispute was the duration of the contract. The plaintiff alleged it was to continue for one year. The defendant asserted that it was terminable at his pleasure. He says that he told Bowman "I will try you, and on your terms, and if you don't suit me I will discharge you and expect you to leave the premises on sight." Which was the true version was a question of fact for the jury. If they found with the defendant that was an end of the plaintiff's case unless by some arbitrary rule of law the employee was turned into a tenant for years. On the other hand if they found the contract was for one year the plaintiff was entitled to recover unless the defendant could show a sufficient reason for terminating it sooner. The first question therefore that presented itself on the trial was over the nature and extent of Bowman's right to the house from which he was ousted by the defendant. Was that right an incident of the hiring and dependent on the continuance of the relation of employer and employee, or had it an independent separate existence, so that he was to be treated as a tenant for years with a right to remain in possession for one whole year whether he remained in the employment of the owner or not?

This was a question of law. The terms of the contract, so far as the parties differed, it was the duty of the jury to determine; but the terms being fixed, their legal import was for the court to declare. This should be determined upon a consideration of the nature and purpose of the contract, and the character of the business to which it relates; and analogies furnished by cases arising under the poor laws in England or in this country, while they may be helpful in some respects, ought not to be controlling. The subject of this contract was labor. Labor was what Bradley needed and undertook to pay for. It was what Bowman offered to furnish him at an agreed price. The labor was to be performed upon the land in its cultivation, in the care of the cows, and the delivery of the milk. As Bowman was not a cropper, or tenant paying rent, his possession of the land and the cows, and the implements of farm labor, was the possession of his employer. The barn was used to stable the cattle and store their feed. The house was a convenient place for the residence of the laborer. The house, the barn, the land, the cattle, the farming tools were turned over into the custody of the man who had been hired to care for the property; but he had no hostile possession, no independent right to possession. His possession was that of the owner whom he represented, and for whom he labored for hire.

This is not denied as to the farm, the barn, the stock, or the tools, but an attempt is made to distinguish between the house and everything else that came into the possession of the employee in pursuance of the contract of hiring. There is no solid ground on which such a distinction can rest. If the possession of the house be regarded as an incident of the hiring, the incident must fall with the principal. If it be regarded as part of the compensation for labor stipulated for, then the right to the compensation ceased when the labor was discontinued.

Bowman had the same right to insist on the payment of the cash part of his wages as on that part which provided his family a place to live. His right under the contract of hiring was like that of the porter to the possession of the porter's lodge; like that of the coachman to his apartments over the stable; like that of the teacher to the rooms he or she may have occupied in the school buildings; like that of the domestic servants to the rooms in which they lodge in the house of their employers. In all these cases and others that might be enumerated the occupancy of the room or house is incidental to the employment. The employee has no distinct right of possession, for his possession is that of the employer, and it cannot survive the hiring to which it is incidental, or under which it is part of the contract price for the services performed. So in this case, if the contract was simply a contract for labor at one dollar per day and a house to live in, the plaintiff held the house by the same title and for the same purpose that he did the land or the cattle in the care of which his labor was to be performed. When his contract ended, his rights in the premises were extinguished, and it was his duty to give way to his successor. The jury might have found the disputed term of the contract in the plaintiff's favor and that the

contract was made in express words for one year. In this case the defendant would be called upon to explain his conduct in discharging the plaintiff before the time for which he was hired had expired; and the jury would have to determine whether his conduct was a violation of the contract on his part, or was justified by the reasons assigned. But the plaintiff's declaration is not drawn upon this basis. It does not allege a violation of contract but a trespass. It asserts that the plaintiff was "in the lawful and peaceful possession of a certain dwelling-house, messuage and tract of land," and that the defendant "with a high hand entered upon said close * * * and forcibly threw out of said dwelling the furniture and property of said plaintiff and exposed the same to the weather and broke and injured the same." The damages alleged are for injury to the furniture, and money paid to secure another house for himself and family. The case seems to have been begun, and tried, by the plaintiff on the theory that his right to the possession of the house was superior to his right to remain in the defendant's service; and that while his employer might dismiss him from the one at any time, he could not oust him from the other until the expiration of one full year. Such a theory cannot be sustained by proof of a contract for labor at a fixed price per day and a house to live in. It can only be supported by proof of a contract for one year's occupancy of the house. Both parties agree that the contract in this case was one of hiring. There is no pretense of a separate lease for the house. The compensation for its use was in the labor to be performed on the premises. When the labor ceased on the nineteenth of July, the plaintiff ceased to pay for his occupancy. By ceasing to labor without remonstrance or objection he must be held to acquiesce in the defendant's right to terminate the contract for labor. If that contract was rightfully terminated then the plaintiff's right to the house was at an end and he could be lawfully put out of possession.

These views sustain the first and second assignments of error. The fifth assignment is also sustained. It is not necessary that occupation of a house, or apartments, should be a necessary incident to the service to be performed in order that the right to continue in possession should end with the service. It is enough if such occupation is convenient for the purposes of the service and was obtained by reason of the contract of hiring.

For the reasons thus given the judgment in this case is reversed.

Farm Hand in Cottage.—A tenant under a lease containing a condition not to sublet, employed a man to work on the farm, and gave him possession of a house on it. The court held this was not a subletting within the terms of the lease, and no forfeiture, because the man let into the house was there as servant and not as tenant. *Vincent v. Crane*, (1903), 134 Mich. 700, 97 N. W. 34, citing *Kerrains v. People*, and *Chatard v. O'Donovan*, below.

A Mill Hand hired for the year at thirteen shillings per day was furnished a cottage near the mill for his family, so he could be near his work, paying no rent. The employer discharged him, and in an attempt to remove him and his goods from the house was resisted. This is a prosecution of the

servant for assault with intent to kill. The case turned on whether the defendant was tenant, in which case he could use all force necessary to protect his house from unlawful intrusion; or whether he was a servant merely, in which case he could make no resistance except to avoid bodily harm to himself or family not avoidable by retreat. The court held he was a mere servant. *Kerrains v. People* (1875), 60 N. Y. 221, 19 Am. Rep. 158, Finch Cas. 713.

A Methodist Parson was removed from the parsonage by the trustees of the church, leased to the church ladies guild and occupied by the parson without rent. In a suit by him in trespass for the removal, the court held that defendants were liable, because he was tenant, not servant—certainly not their servant because not employed by them but sent by the conference. *Bristol v. Burr* (1890), 120 N. Y. 427, 24 N. E. 937; 8 L. R. A. 710.

A roman catholic priest was removed from office by the bishop in charge of the diocese, who owned the parsonage in fee in trust for the congregation; and was given notice to quit, which was too short if he was tenant at will. In an action to recover possession, the court held that he was servant and not tenant, and so entitled to no notice to quit. *Chatard v. O'Donovan* (1881), 80 Ind. 20, 41 Am. Rep. 782.

License or Lease.

KITCHEN v. PRIDGEN, in N. Car. Sup. Ct., Dec., 1855—3 Jones Law 49, 64 Am. Dec. 593.

Trespass quare clausum fregit. Plaintiff claimed possession under one Herring, and alleged that he had occupied a house on the land for several months where he lived, had a cook, and employed several men cutting wood, and that he was in possession of the land. A witness testified that he saw plaintiff pay Herring \$7, and heard him say: "You can go on and cut as long as you choose, paying 25 cents per cord." The jury were charged that plaintiff was a tenant from year to year and entitled to notice to quit, and in absence of evidence of such notice, plaintiff was entitled to recover. Verdict and judgment for plaintiff. Defendant appealed.

BY COURT, BATTLE, J. A tenancy from year to year is a species of term for years, from which, however, it is distinguished, inasmuch as the duration of the term is not limited. It is distinguished from a tenancy at will, inasmuch as it is raised only by construction of law as a substitute for an estate at will; therefore, although *prima facie* all leases for uncertain terms create a tenancy at will, courts of law have for a long time construed such leases to constitute a tenancy from year to year, especially where an annual rent is reserved. Thus, where land was leased to A. for a year, and so from year to year, as long as both parties should agree; so, a general parol demise at an annual rent; so, where the occupier, under an agreement for a lease at a certain rent, pays the rent; so, where a tenant for life, under a limited power of leasing, granted a lease exceeding his power, but the remainderman accepted the rent; so, a tenant who holds over after his term has expired, and the lessor accepts rent; so, a parol demise for a longer term

than three years, which is void by the statute of frauds: 2 Crabbe on Real Estate, 416, 417; 55 Law Lib. 265, 266. All these are cases where the law will, by implication, raise a tenancy from year to year; and it will be seen that in them all there is a reference to an annual occupation of the premises, and a corresponding payment of rent. The mode of determining this tenancy by a notice to quit is what properly distinguishes it from an estate at will; for, although this latter estate cannot, as a rule, be determined without a demand of possession, yet this is for the most part all that is necessary, though there are cases still occurring where the estate is so strictly at will that even a demand of possession is not required: 2 Crabbe on Real Estate, 418. A tenancy from year to year can be put an end to only by either party's giving a regular notice to quit, which must be given half a year previous to the expiration of the current year of tenancy, so as to expire at the period of the year at which the tenancy was commenced: *Id.* 423. Tenancies from year to year do not determine by the death of the tenant, but devolve on his personal representative, who must have half a year's notice to quit: 1 Cru. Dig., tit. Estate at Will, 285; *Doe v. Porter*, 3 Term 13.

Such being a tenancy from year to year, we shall look in vain for anything in the testimony set out in the bill of exceptions which shows, or has a tendency to show, that it existed in the present case. Neither of the plaintiff's witnesses says a word about a lease, an annual occupation, or the payment of an annual rent. One of them does indeed state that Herring, who then owned the land, and from whom the defendant soon afterwards purchased it, complained that the plaintiff had not paid him "the rent which he had agreed to pay;" but this we soon afterwards learn was not for the occupation of the land, but for wood for which Herring had permitted him to cut at twenty-five cents per cord; and then, upon his paying seven dollars, Herring told him he might cut as long as he chose upon the same terms. This agreement certainly did not constitute a lease for a year, or a tenancy from year to year, even of the trees which were to be cut into wood. No particular time is mentioned at which it had commenced, or was to commence. There was no reference to a year, or a number of years, for its continuance, or for the payment of an annual rent. It did not seem to be contemplated that the plaintiff should be compelled to continue the business until he had given half a year's notice of his intention to quit; and we can hardly think that he had such an interest as would, upon his death, have devolved on his executor or administrator. In the absence of these qualities, the agreement between Herring and the plaintiff could not create a tenancy from year to year. If this be so, the purchase of the land by the defendant did not alter the nature of the transaction. At most, it was but a tenancy at will of the trees, and such portion of the land as was necessary to enable him to cut them; and it may well be doubted whether it was anything more than "a mere personal contract, not attaching to the land, or passing, or in-

tending to pass, any estate in it, but resting entirely in contract." See *Mhoon v. Drizzle*, 3 Dev. L. 414. It is sufficient for us to say that it was not a case of tenancy from year to year; which puts an end to the action, without reference to any other question. The judgment must be reversed and a *venire de novo* awarded.

Judgment reversed.

Farming on Shares.

KELLY v. RUMMERFORD, in Wis. Sup. Ct., May 8, 1903—117 Wis. 630, 94 N. W. 649, 98 Am. St. Rep. 951.

Replevin for half of crop of potatoes raised by defendant on plaintiff's land. Defendant at the time of digging notified the plaintiff of his intention to divide the crop in the field, and accordingly left half in a pile in the field and took half away as his own, for which this suit is brought. Plaintiff objected to the right of the defendant to divide the crop, but not to the manner of division. Defendant had judgment for the return of the property or its value (\$30) and costs. Plaintiff appeals.

CASSODAY, C. J. It is sometimes difficult to determine whether a person who works the land of another on shares is a tenant in common of the crop with the owner of the land or a mere cropper. Much depends upon the wording of the contract between the parties. *Lanyon v. Woodward*, 55 Wis. 652, 13 N. W. 863; *Carrier v. Atwood*, 63 Wis. 301, 24 N. W. 82; *Wood v. Noack*, 84 Wis. 398, 54 N. W. 785; *Rowlands v. Voechting* (Wis.) 91 N. W. 990; *Warner v. Abbey*, 112 Mass. 355. In the case at bar there is practically no dispute as to the facts. The plaintiff furnished the land and the seed. The defendant was to plow the ground, plant and care for and harvest the potatoes, and have one-half of what should be raised. After plowing the ground and planting the potatoes, the defendant moved away. Finally, his son-in-law came, and went over the potatoes with a cultivator one way and partly over them the other way. But the potatoes became badly damaged for want of care, and finally the plaintiff got another man to care for the potatoes, and agreed to give him a share of the crop for doing so. The defendant testified to the effect that the plaintiff was to furnish the land and the seed, and that he was to cultivate the ground and have half of the crop, provided he stay there; and, if he did not stay, and no one else would buy, then the plaintiff would buy his share of the potatoes. The trial court manifestly held that the parties were tenants in common of the crop. If such was the relation of the parties, then the decision may be justified. Section 4257, Rev. St. 1898; *Foley v. The S. L. Co.*, 94 Wis. 329, 68 N. W. 994; *Sullivan v. Sherry*, 111 Wis. 476, 87 N. W. 471, 87 Am. St. Rep. 890; *Orcott v. Moore*, 134 Mass. 48, 45 Am. Rep. 278. If, on the other

hand, the defendant was a mere cropper, then the decision was wrong. The general rule is that: "The legal possession of the land, as well as the title to the entire crop, is in the owner of the soil. The possession of the cropper being merely that of a servant, and incident to his right and duty of entering the close for the purpose of planting, cultivating, and gathering the crop, it is not the legal possession of premises which usually gives the possessor the title to the produce. He has no property in his share of the crop until the division which is made by the owner of the land." 8 Am. & Eng. Ency. Law (2d Ed.) 324, 325. It is there said that: "The term 'cropper' is applied to a person hired by the landowner to cultivate the land, receiving for his compensation a portion of the crop raised." Id. So it was said in an early case in Pennsylvania that: "If one hires a man to work his farm, and gives him a share of the produce, he is a cropper. He has no interest in the land, but receives his share as the price of his labor. The possession is still in the owner of the land, who alone can maintain trespass." *Fry v. Jones*, 2 Rawle, 12. In a later case in the same state it was held that an "agreement to farm land on shares is a contract of service, and not of lease, and a person doing the farming is a mere cropper, and not a tenant, and has no interest in the land." To the same effect, *Steele v. Frick*, 56 Pa. 172; *Adams v. McKesson's Ex'x*, 53 Pa. 81, 91 Am. Dec. 183. Thus it has been held in North Carolina that: "Where a person agrees to work on the land of another for a share of the crop, the cropper cannot convey a legal title to his share of the crop to a third person before an actual division and appropriation." *McNeely v. Hart*, 32 N. C. 63, 51 Am. Dec. 377. To the same effect, *Brazier v. Ansley*, 33 N. C. 12, 51 Am. Dec. 408; *Harrison v. Ricks*, 71 N. C. 11. In this last case it is said that: "A cropper has no estate in the land. That remains in the landlord. Consequently, although he has, in some sense, the possession of the crop, it is only the possession of a servant, and is in law that of the landlord. The landlord must divide off to the cropper his share. In short, he is a laborer receiving pay in a share of the crop." That is referred to approvingly in *Strain v. Gardner*, 61 Wis. 184, 21 N. W. 35. Perhaps it would have been more proper to have used the word "landowner" instead of "landlord." We must hold that the defendant was a mere cropper, and that the plaintiff remained all the time the legal owner of the whole crop, and hence was entitled to recover in replevin.

The judgment of the circuit court is reversed, and the cause is remanded, with direction to enter judgment in favor of the plaintiff in accordance with this opinion.

FARROW v. WOOLEY, in Ala. Sup. Ct., Feb. 12, 1903.—138 Ala. 267, 36 So. 384.

This is an action by Wooley & Jordan of two counts, one in trespass for taking, the other in trover for converting, two bales of cotton;

which was grown by Pratt on Tillman's land under an agreement by which Tillman furnished the stock and land and Pratt the labor, the crop to be divided equally. Pratt gave Wooley & Jordan a mortgage on the crop in February, and delivered these two bales to them in the fall to apply on the mortgage. Tillman took the cotton from their premises and delivered it to defendant, Farrow, who gave him credit on account for it, knowing all the circumstances. The justice's judgment for plaintiffs was affirmed in the circuit court, and the defendant appeals.

DOWDELL, J. The undisputed evidence showed that no force or violence was used in taking the cotton, and that the legal title to the cotton was in Tillman, from whom the defendant purchased it. The defendant was entitled to the affirmative charge as requested and the court erred in its refusal. *Jordan v. Lindsay*, 132 Ala. 567, 31 So. 484; Code 1896. § 2712. The cases of *Collier v. Faulk*, 69 Ala. 58; and *Adams v. State*, 87 Ala. 89, 6 So. 270, and the other cases following the Collier-Faulk decision, in addition to those mentioned in *Jordan v. Lindsay*, supra, must be overruled.

Reversed and remanded.

MEYER v. LIVESLEY, in Ore. Sup. Ct., Nov. 28, 1904.—45 Ore. 487, 78 Pac. 670, 106 Am. St. Rep. 667.

BEAN, J. This is a suit to restrain the defendants from trespassing upon or interfering with the plaintiff's possession of a hop-yard. On March 7, 1900, I. M. Simpson, being the owner of a certain tract of land in Polk county, upon which the hop-yard in question was situated, leased the yard, with the improvements thereon, consisting of dry kiln, hop poles, etc., to the defendants, for the years 1900 to 1904, inclusive. On October 25, 1902, the defendants sublet the yard, together with the hop kilns, baler and farming implements mentioned in the lease from Simpson to them to W. D. Huston, agreeing to furnish Huston one of the dwelling-houses on the Simpson place, or to remodel another building thereon, and the use of Simpson's horses in the cultivation of the hops at a certain stipulated rate per day, in consideration of which Huston agreed to pay them, as rental, one-fourth of the "average quality" of the hops produced on the land during the years of 1903 and 1904. On January 11, 1904, Huston assigned to the plaintiff all his right and interest in and to the lease or contract between himself and the defendants. This assignment was not recorded, and on January 23, 1904, the defendants, without knowledge or notice thereof, entered into a new lease with Huston for the current year, taking from him a mortgage on his interest in the crop to be grown during that year to secure a balance due for advances made the previous year. It was stipulated in the new lease that, in case of a violation of any of its terms by Huston, the defendants should have the right to re-enter and take possession of the hop-yard, to complete the cultivation of the crop, and harvest and sell it, paying over the surplus, if any, to Huston. In March, 1904, the defendants attempted to enter

and take possession of the hop-yard, on account of a violation of the provisions of the lease or agreement between them and Huston, when this suit was brought by the plaintiff to enjoin them from doing so.

The only question we deem it necessary to consider is whether the lease from the defendants to Huston, made in October, 1902, was assignable by Huston without the consent of the defendants. The plaintiff claims title under such an assignment, but, unless Huston had authority to assign the lease to him, he has no standing in court, and the other questions become immaterial.

As a general rule, the power of assignment is incident to the estate of a lessee of real property, unless it is restrained by the terms of the lease: Wood on Landlord and Tenant, p. 529; Taylor on Landlord and Tenant, 9th ed., sec. 402. But a lease of land upon shares, including the use of buildings, farm implements, stock and other personal property is regarded as a personal contract, and not assignable without the consent of the lessor, because the amount to be received by the lessor, and the care of the property depend upon the character, industry and skill of the lessee: Taylor on Landlord and Tenant, 9th ed., secs. 24, 24a; *Randall v. Chubb*, 46 Mich. 311, 41 Am. Rep. 165, 9 N. W. 429; *Lewis v. Sheldon*, 103 Mich. 102, 61 N. W. 269. *Randall v. Chubb* is much in point. Chubb leased certain premises to Stoddard upon shares for the term of three years with the privilege of five. Stoddard was to do all the work, find all the seed, and deliver to the lessor one-third of the crop. The farm was to be cropped in a certain specified way, and, as in the case at bar, the lessee was to have the use of certain property belonging to the lessor. The court held that the lease was not assignable, and that an attempt to assign it worked a forfeiture of the estate of the lessee, and the lessor could take immediate steps to recover possession. "The very nature and character of the lease or agreement," says Mr. Chief Justice Marston, "shows that it was a personal one to the defendant, and could not be assigned by him to a third party without the consent of his lessor. The rent or share which the latter would receive must depend very much upon the character of the lessee, and the latter could not place a party in possession of the premises who might not be a good husbandman, and who might not be able to carry on the farm operations in a good, careful and proper manner. Under such a lease the landlord has a right to choose his tenant, and he may be willing to lease upon shares to one man, and yet be wholly unwilling to let another have possession upon any terms. So, with reference to the use of his farm implements, one might be a careful, prudent man, who would take good care of them, while another, more reckless, would not by the owner be permitted to use them upon any terms." The same principle was reaffirmed in *Lewis v. Sheldon*, 103 Mich. 102, 61 N. W. 269.

The cases of *Dworak v. Graves*, 16 Neb. 706, 21 N. W. 440, and *Yates v. Kinney*, 19 Neb. 275, 27 N. W. 132, are not in fact in conflict with this doctrine. They involve the right of a lessee of property on shares to sell or mortgage his interest in the crop after it has been grown without

the consent of the lessor, and not the right to assign or transfer all his estate or interest under the lease to another before the crop is raised. The terms of the lease from the defendants to Huston bring it directly within the doctrine of the Michigan cases. The lease included not only the hop-yard, the successful cultivation of which necessarily depended upon the industry and skill of the lessee, but also the use of certain buildings, farm implements, and personal property the care of which likewise depended upon the character of the lessee. In addition to this, the lease is indefinite as to its terms. It does not contain any stipulation as to the manner in which the hops shall be cultivated, cared for, harvested, or prepared for the market—provisions usual in leases of real property. Its nature and terms would seem to indicate that it was made by the defendants in reliance upon the ability, character, and skill of Huston. From the character of the agreement and the subject-matter thereof, we are led to conclude that it was a personal contract, which Huston could not assign or transfer so as to substitute another in his place as lessee without the consent of the defendants.

These views result in the reversal of the decree and the dismissal of the bill, and it is so ordered.

Right to Rent Arrear on Death of Lessor.

TEMPLE v. TEMPLE, in *Common Bench*, 42 & 43, *Ellz.*—A. D. 1601.—*Cro. Ellz.* 791.

Debt. A rent was granted to baron and feme for their lives, the rent was arrear; the baron dies; another rent was arrear; the feme dies intestate; and her administrator brings debt for the arrearages due in the life of the baron and after.

The Court resolved that it well lay, because the arrearages survived to the feme as well as the rent itself. * * *

Landlord's Right to Enter and Inspect During—Term.

HUNT v. DOWMAN, in *King's Bench*, *Trinity*, *Jac.* 1.—A. D. 1618.—*Cro. Jac.* 478.

Action on the case; whereas the defendant, being lessee for years, the reversion in fee to the plaintiff (and shows how), the plaintiff coming to the house to see if any waste was committed therein, or any defect in the reparations, that the defendant disturbed him, and would not suffer him to enter and view the waste, by reason whereof he is without remedy to punish the same; and after verdict for the plaintiff upon not guilty pleaded, it was moved in arrest of judgment, that this action lay not: 1. because it was not shown that waste was done * * * 2, that it was never seen before this present that such an action had been brought, and therefore it is not allowable. But ALL THE COURT, held, that the action was maintainable; for, as to the first objection, the law will

not presume that he can come to a precise knowledge what waste is done without a view. * * *

Warranty of Safety and Fitness.

LIBBEY v. TALFORD, in Me. Sup. Ct., 1861—48 Me. 316, 77 Am. Dec. 229.

Assumpsit to recover for damages to goods in plaintiff's store by want of repairs promised by defendant after leasing to plaintiff. Non-suit ordered. Plaintiff appealed.

By Court, APPLETON, J. In the lease of a store or warehouse, there is no implied warranty that the building is safe, well built, or fit for any particular use: *Dutton v. Gerrish*, 9 Cash. 89 [55 Am. Dec. 45]. So, in a lease of a house, there is none that is reasonably fit for habitation: *Foster v. Peyser*, Id. 243 [57 Am. Dec. 43]; *Cleves v. Willoughby*, 7 Hill, 83. On a demise of the vesture of land for a specific term, and at a certain rent, there is no implied obligation on the part of the lessor that it shall be fit for the purpose for which it is taken: *Sutton v. Temple*, 12 Mee. & W. 52. Nor of a house that it shall be reasonably fit for habitation: *Hart v. Windsor*, Id. 68. Nor is it implied that it shall continue fit for the purpose for which it is demised, as the tenant can neither maintain an action, nor is he exonerated from the payment of rent if the house is blown down or destroyed by fire, or the occupation rendered impracticable by the act of God or the king's enemies: Id. When it is agreed that the landlord shall do the repairs, there is no implied condition that the tenant may quit if the repairs are not done: *Surplice v. Farnsworth*, 7 Man. & Gr. 576; S. C., 49 Eng. Com. L. 574.

In *Gott v. Gandy*, 2 El. & Bl. 845, S. C., 75 Eng. Com. L. 843, the plaintiff brought an action against his landlord for neglecting to make substantial repairs to the premises, after notice that they were in a dangerous state, by reason of which the premises fell during the tenancy, and injured his goods. The court held that no obligation on the part of the landlord to make repairs arose from the relation of landlord and tenant. "The absence of authority to show a duty, as between landlord and tenant," marks Erle, J., "is very strong against the existence of such a duty." In the absence of any special agreement, the tenant takes the risk of the future condition of the premises leased. "The tenant," remarks Savage, C. J., in *Mumford v. Brown*, 6 Cow. 475 [16 Am. Dec. 440], "takes the premises for better and for worse, and cannot involve his landlord in expense for repairs without his consent."

In the present case, it does not appear that there was any agreement, when the contract of leasing was entered into, that the landlord should keep the premises in repair. If there be no stipulation between the parties to a lease on the subject of repairs, the tenant is bound to keep the premises in repair: *Long v. Fitzsimmons*, 1 Watts & S. 530.

The lease and its terms and conditions were made. The duties of the parties were left as at common law. The landlord was under no

obligation to repair, either by express contract or by implication of law. By law, the duty to repair devolved upon the tenant. It is not in proof that the premises were out of repair when the tenant entered upon their occupation. The landlord, being under no legal obligation to make repairs, promised the tenant, who was under such obligation, to make them. The promise was without consideration. It was no part of the original agreement. It was made while the tenant was occupying the premises. The action cannot be maintained.

Exceptions overruled.

INGALLS v. HOBBS, in Mass. Sup. Ct., 189—156 Mass. 348; 31 N. E. 286, 16 L. R. A. 51, 32 Am. St. Rep. 460, Tiedeman R. P. Cas. 126.

KNOWLTON, J. This is an action to recover \$500 for the use and occupation of a furnished dwelling house at Swampscott during the summer of 1890. It was submitted to the superior court on what is entitled an "agreed statement of evidence," by which it appears that the defendant hired the premises of the plaintiffs for the season, as a furnished house, provided with beds, mattresses, matting, curtains, chairs, tables, kitchen utensils, and other articles which were apparently in good condition, and that when the defendant took possession it was found to be more or less infested with bugs, so that the defendant contended that it was unfit for habitation, and for that reason gave it up, and declined to occupy it. * * * Judgment was ordered for the defendant, and the plaintiffs appealed to this court. * * *

The facts agreed warrant a finding that the house was unfit for habitation when it was hired, and we are therefore brought directly to the question whether there was an implied agreement on the part of the plaintiff that it was in a proper condition for immediate use as a dwelling house. It is well settled, both in this commonwealth and in England, that one who lets an unfurnished building to be occupied as a dwelling-house does not impliedly agree that it is fit for habitation. *Dutton v. Gerrish*, 9 Cush. 89; *Foster v. Peyser*, Id. 242; *Stevens v. Pierce*, 151 Mass. 207; 23 N. E. 1006; *Sutton v. Temple*, 12 Mees. & W. 52; *Hart v. Windsor*, Id. 68. In the absence of fraud or a covenant, the purchaser of real estate, or the hirer of it for a term, however short, takes it as it is, and determines for himself whether it will serve the purpose for which he wants it. He may, and often does, contemplate making extensive repairs upon it to adapt it to his wants. But there are good reasons why a different rule should apply to one who hires a furnished room, or a furnished house, for a few days, or a few weeks or months. Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the contract than where there is a mere lease of real estate. One who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to a well-understood purpose of the hirer to use it as a habitation. An im-

portant part of what the hirer pays for is the opportunity to enjoy it without delay, and without the expense of preparing it for use. It is very difficult, and often impossible, for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine *caveat emptor*, which is ordinarily applicable to a lessee of real estate, would often work injustice if applied to cases of this kind. It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time. This distinction between furnished and unfurnished houses in reference to the construction of contracts for letting them, when there are no express agreements about their condition, has long been recognized in England, where it is held that there is an implied contract that a furnished house let for a short time is in proper condition for immediate occupation as a dwelling. *Smith v. Marrable*, 11 Mees. & W. 5; *Wilson v. Hatton*, 2 Exch. Div. 336; *Warehouse Co. v. Carr*, 5 C. P. Div. 507; *Sutton v. Temple*, *ubi supra*; *Hart v. Windsor*, *ubi supra*; *Bird v. Lord Greville*, 1 Cababe & E. 317; *Charsley v. Jones*, 53 S. P. Q. B. Div. 280. In *Dutton v. Gerish*, 9 Cush. 89, Chief Justice Shaw recognizes the doctrine as applicable to furnished houses; and in *Edwards v. McLean*, 122 N. Y. 302; 25 N. E. Rep. 483; *Smith v. Marrable*, and *Wilson v. Hutton*, cited above, are referred to with approval, although held inapplicable to the question then before the court. See *Cleves v. Willoughby*, 7 Hill, 83; *Franklin v. Brown*, 118 N. Y. 110, 23 N. E. 126. We are of opinion that in a lease of a completely furnished dwelling house for a single season at a summer watering place there is an implied agreement that the house is fit for habitation without greater preparation than one hiring it for a short time might reasonably be expected to make in appropriating it to the use for which it was designed.

Judgment affirmed.

MILES v. TRACEY, in Ky. Ct. of App., Jan. 3d., 1906—28 Ky. L. Rep. 621, 89 S. W. 1128.

Plaintiff appeals from a judgment sustaining a demurrer to her petition.

O'REAR, J. Appellees, landlords, owned a two-story building, the lower story of which was let to tenants and the upper story to appellant. The building fell because structurally insecure, and damaged appellant's furniture. She sues the landlords to recover the damages. In *Franklin v. Tracy*, 25 Ky. L. Rep. 1409, 77 S. W. 1113, 63 L. R. A. 649, it was held that there was no implied warranty by the landlord that the tenement was fit or safe; that the tenant leases, as one buys such property, with the duty to look and take notice for himself of its condition. In this case, to avoid the effect of the opinion above cited, it is admitted, and to conform presumably to the response to the petition for a rehearing in that case (25 Ky. L. Rep. 1409, 78 S. W.

1112, 63 L. R. A. 949), appellant here amended her petition in this case, and alleged that she was tenant of the upper story alone, that the defendants had let the lower story to other tenants, and that appellees had retained and reserved control and possession of the walls and foundation of the building. The desire was to bring the allegations of this pleading up to the rule as stated by some text-writers and courts, that where the landlord lets portions of a tenement to different tenants, reserving a common entry, hallway, or stairway, which is not let to any of them, but is reserved for the use of all, he is liable for injuries occurring in such reserved portion by reason of its defective condition. This case falls short of the doctrine relied on. Although it is stated that the landlords retained possession and control of the walls and foundation, the pleading shows the fact to be that the possession of the entire premises had been parted with. While if the landlord had reserved, for example, a stairway for the common use of all his tenants, it could not be said that any of them had exclusive control of it, or that all together had. It was then his duty to keep it in repair, not by reason of any implied covenant to that effect, but, as those using it were his licensees, he owed them the duty to keep the passageway in reasonably safe and fit condition for their use. But here there could have been in fact no reservation of possession or control. The technical averment is an ideality, and inconsistent with the essential conditions resulting from the facts alleged in the petition. It then is reduced to a legal conclusion, and does not help an otherwise defective pleading. There is no allegation that the defective condition of the building was known to the landlords, or that the defect was concealed or warranted against by them.

Judgment affirmed.

SIGGINS v. MCGILL, in New Jersey Court of Err. and App., Nov. 20, 1905
—72 N. J. L. 263, 62 Atl. 411, 111 Am. St. Rep. 666.

PITNEY, J. Plaintiff was a tenant of the defendants, occupying an apartment in a building owned by them in Jersey City. There were several apartments in the building, and these were separately rented out by defendants to different families. The halls and stairways of the building were used in common by several tenants. While descending one of these stairways the plaintiff stumbled and fell, sustaining personal injuries. This action was brought to recover compensation therefor from the landlords, upon the ground that the plaintiff's fall was due to the bad condition of the stair covering.

The verdict and consequent judgment were in favor of the plaintiff. There were motions for nonsuit and for direction of a verdict in favor of defendant, both of which were denied. They were based in part upon the ground that plaintiff knew, or ought to have known, the condition of the stair covering, and either had assumed the risk or by his own negligence had contributed to his injury. These grounds were untenable, there being at least disputable questions of fact for the

jury's determination with respect to the plaintiff's knowledge of the condition of the stairs and with respect to his care while using them.

The motions were based, also, upon the ground that there was no liability on the part of the landlords for the condition of the staircase. The learned trial justice, having refused the motions, submitted the case to the jury with this instruction—that since the building was occupied by several families, who had the use of the halls and stairways in common, there rested upon the defendants the duty of using reasonable care to keep the halls and stairways in proper condition for the common use of the tenants. To this instruction, as well as to the denial of the motions, exception was duly sealed.

In this state it is established as a general rule that the landlord is not liable for injuries sustained by a tenant or his family, or guests, by reason of the ruinous condition of the premises demised, there being upon the letting of a house or lands no implied contract or condition that the premises are or shall be fit and suitable for the use of the tenants. So it was held by the supreme court, in *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380; *Mullen v. Rainear*, 45 N. J. L. 520; *Clyne v. Helms*, 61 N. J. L. 358, 39 Atl. 767, and *Land v. Fitzgerald*, 68 N. J. L. 28, 52 Atl. 229, and, by this court in *Murray v. Albertson*, 50 N. J. L. 167, 7 Am. St. Rep. 787, 13 Atl. 394.

But it is recognized that this rule does not apply to those portions of his property (such as passageways, stairways and the like) that are not demised to the tenant, but are retained in the possession or control of the landlord for the common use of the tenants and those having lawful occasion to visit them, the ways being used as appurtenant to the premises demised. With respect to such ways it has been held by our supreme court that the landlord is under the responsibility of a general owner of real estate who holds out an invitation to others to enter upon and use his property, and is bound to see that reasonable care is exercised to have the passageways and stairways reasonably fit and safe for the uses which he has invited others to make of them: *Gillvon v. Reilly*, 50 N. J. L. 26, 11 Atl. 481; *Gleason v. Boehm*, 58 N. J. L. 475, 34 Atl. 886, 32 L. R. A. 645. This doctrine, we think, is indubitably sound. It is in nowise opposed to the rule which exempts the landlord from liability for the condition of the premises that are demised, but is plainly distinguishable therefrom. In the case of a demise, the entry and occupancy are pursuant to an estate vested in the tenant and are exclusive of the landlord, while in the case of passageways and stairways that are retained in the legal possession of the landlord and are simply used by the tenants as appurtenances to the property demised to them, their ingress and egress are by virtue either of invitation or of necessity. This is the ground of the distinction as pointed out in *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295, cited with approval in *Gillvon v. Reilly*, 50 N. J. L. 26, 11 Atl. 481. In *Phillips v. Library Co.*, 55 N. J. L. 307, 27 Atl. 478, which was a case of one of several tenants of a building injured while using a path to the rear that was arranged for the

common use of the tenants, this court affirmed the responsibility of the landlord for the condition of the path.

The judgment under review should be affirmed.

Right to Emblements.

OLAND v. BURDWICK, in B. R., Easter, 38 Eliz.—A. D. 1597, Cro. Eliz. 460. Same case 5 Coke 416, Godsb. 189, 190, Moor 394.

A feme holding land during widowhood sowed corn, and before harvest took baron; and in trespass by the baron against the lord of the manor for taking the corn, the question was who should have it. It was adjudged for the lord by POPHAM, C. J. and CLENCH, J.; FENNER, J., contra, and GAWDY, J., absent. CLENCH, J., said there is a difference when the estate of him who sows the land is determined by his own act, by a casualty, and when by the act of the law or by another man. And therefore in this case, if the feme had let the land, and the lessee had sown it, and afterwards the feme had taken baron, yet the lessee should have the corn. But if the determination be by the act of him who sows the land it is otherwise. * * *

Right to Estovers.

ANDERSON v. COWAN, in Iowa Sup. Ct., Oct. 20, 1904—125 Iowa, 259, 101 N. W. 92, 106 Am. St. Rep. 303.

Action by lessor to enjoin lessee for term of five years from cutting timber trees for fire wood.

LADD, J. The lease contains no reference to the use of timber for firewood, but appellees insist that the right to estovers is an incident to be implied from the mere leasing of the farm, and such was undoubtedly the rule at common law: 1 Wood on Landlord and Tenant, sec. 247; 1 Taylor on Landlord and Tenant, sec. 350. See 18 Am. & Eng. Ency. of Law, 448; *Van Deusen v. Young*, 29 N. Y. 9; *Wright v. Roberts*, 22 Wis. 161; *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705. This is conceded, but it is argued that the common of estovers is so out of harmony with the spirit of our institutions that it ought not to be adopted as a part of the law of the state. That the common law obtains in this state is not questioned, and appellant has not taken the trouble to point out any differences between our situation and that of the people of England which should lead to the rejection of this particular portion of it. Many decisions, in liberally interpreting the rules relating to estovers, have given as a reason therefor the existence of more extensive forests here than in England, and the necessity of reducing the land to cultivation; but we have found none suggesting the rejection of the doctrine entirely as inimical to our institutions. In many of the states woodland is abundant, and cutting

it down by a tenant for life or for years has been allowed under circumstances which would be regarded as waste there: Tiedeman on Real Property, 69; *Proffitt v. Henderson*, 29 Mo. 325; 4 Kent's Commentaries, 76. Mr. Washburn, in his work on Real Property, says that: "In respect to what timber and what trees may be used for firewood, and whether the cutting of trees, though for neither of these uses, would be waste, depends upon the usages of the country, the customary mode of managing lands, and the manner in which the inheritance would be affected by such cutting, rather than the rules of the English common law; the rule here as to waste being that nothing which does not prejudice the inheritance of those who are entitled to the remainder or reversion can be deemed waste": 1 Washburn on Real Property, 128 *et seq.*

In large portions of this state there were no native forests, and in these innumerable artificial groves have been planted. In others, native timber is found in abundance, and, while not enough in any part to permit of indiscriminate destruction, we cannot say that because of local conditions the common of estover ought not to be regarded as a part of the law of the land. Estovers are of three kinds: 1 Housebote, being a sufficient supply of wood to repair and burn in the house; 2. Plowbote for making and repairing instruments of husbandry; and 3. Haybote, for repairing hedges and fences. The tenant is allowed to cut only for present use on the premises, and not elsewhere, and only on such as may be suitable for the purpose. Few, if any, houses in this state have been constructed from native timber and rarely will timber be made use of in the repairs of the house, or in the making instruments of husbandry, or in the repair of fences, save in replacing of posts. The dead and fallen timber is usually of no value save for fuel, and ordinarily the only benefit the tenant obtains from the wood lots is the fuel for his stove. Indeed, it is of little value for any other purpose. This, undoubtedly, the tenant may burn as firewood. It is said in Coke on Littleton, 53b, that, if there is sufficient dead wood for fuel, the tenant has no right to cut down growing trees for that purpose, and in *Simmons v. Norton*, 7 Bing. 640, it was held that in felling trees for repairs only those suitable might be taken. According to Blackstone the tenant was not permitted to cut timber trees: See Cooley's Blackstone, 122, 144. And this appears to have been the view of Coke: Coke on Littleton, 53. In *McCullough v. Irvine's Exrs.*, 13 Pa. St. 438, the court held that whether cutting timber will be deemed waste depends on the custom of farmers, the situation of the country, and the value of the timber. If timber trees have been planted, they are presumed to have been placed to meet the special purposes of the owner, as to serve as an ornament to his farm, or as a windbreak for his stock; and in determining whether any may be appropriated by the tenant the use of the owner designed for them is always to be kept in view. Indeed, it may be safely laid down that the main object had in planting an artificial grove is not ordinarily to raise fuel, and

that growing trees so planted may not be cut down without the owner's assent. With respect to the native forests we are inclined, because of the conditions in this state, to adhere to the common law more strictly than has been done in other jurisdictions in this country, and, unless growing trees are such as are customarily cut down for firewood, the tenant ought not to be permitted to make use of them for this purpose. In the instant case the defendants cut for fuel, besides the dead and fallen timber, a number of live trees. They were of a kind ordinarily used in that vicinity for fuel, were suitable for that purpose only, and whether their removal worked any injury to the reversion was in dispute. The witnesses were before the court, and, in view of its superior opportunities of weighing the testimony, we are not inclined to interfere with the decree.

Affirmed.

Apportionment of Rent on Destruction.

ANON, Mich., 30 Edw. I, Year Book, 30 & 31, Edw. I, p. 476.

A man demanded arrears of a rent, &c. for a mill leased for a term of years. The defendant said that the mill was burned by the Scots &c.; and that consequently he ought not to pay the rent; and the same plaintiff brought a writ of covenant respecting the same mill, stating that the defendant ought to have left the mill at the end of the term in as good a state &c.; and the defendant gave the same answer, whereby he was bound without exception.

RICHARDS LeTAVERNER'S CASE, Trinity, 35 Hen. 8.—A. D. 1544—Dyer 56a.

A man makes a lease for years of land, and of a flock of sheep, rendering certain rent, and all the sheep died. It was asked upon indenture of Richards le Taverner, whether this rent might be apportioned. And some were of opinion that it should not, although it is the act of God, and no default in the lessee or lessor; as if the sea comes upon part of the land leased, or part is burned with wild-fire, which is the act of God, the rent is not apportionable, but the entire rent shall issue out of the remainder. Otherwise it is if part be recovered or evicted by an elder title, then it is apportionable. And of this opinion were BROMLEY, PORTMAN, HALES, sergeants, LUKE, justice, BROOKE, and several of the temple. But MARVYNE, BROWN, justices, TOWNSEND, GRIFFITH, and FOSTER, *e contra*. But all thought it was good equity and reason to apportion the rent. And afterwards this case was argued in the readings by MOORE, in the following lent. And it seemed to him and to BROOKE, HADLEY, FORTESCUE and BROWN, justices, that the rent should be apportioned, because there is no default in the lessee.

GRAVES v. BERDAN, in *New York Ct. of App.*, 1863—26 N. Y. 498, Finch 733, Pattee 367.

Action for rent on rooms on second story which had been destroyed by fire before the rent accrued.

ROSEKRANS, J.—The opinion delivered by Justice Emott in this case, in the Supreme Court, is a correct exposition of the law applicable to it, and for the reasons stated therein, the judgment should be affirmed. The case of *Stockwell v. Hunter*, 11 Metc. 448, may be added to the authorities cited by Justice Emott to show that a lease of basement rooms or chambers, in a building of several stories in height, without any stipulation, by the lessor or lessee, for rebuilding, in case of fire or other casualties, gives the lessee no interest in the land upon which the building stands, and that if the whole building is destroyed by fire, the lessee's interest in the demised rooms is terminated, and the lessor may, after the destruction of the building, enter upon the soil and rebuild upon the ruins of the former edifice.

It may be added that at common law, where the interest of the lessee in a part of the demised premises was destroyed by the act of God, so that it was incapable of any beneficial enjoyment, the rent might be apportioned. In Rolle's Abridgment, 236, it is said that if the sea break in and overflow a part of the demised premises, the rent shall be apportioned, for, though the soil remains to the tenant, yet as the sea is open to every one, he has no exclusive right to fish there. A distinction is taken between an overflow of the land by the sea, and fresh water, because, though the land be covered with fresh water, the right of taking the fish is vested exclusively in the lessee, and in that case the rent will not be apportioned. In the latter case the tenant has a beneficial enjoyment, to some extent, of the demised premises, but in the former he has none, and if the use be entirely destroyed and lost, it is reasonable that the rent should be abated, because the title to the rent is founded on the presumption that the tenant can enjoy the demised premises during the term. Com. Land. and Ten. 218; Gilb. on Rents, 182.

Where the lessee takes an interest in the soil upon which a building stands, if the building is destroyed by fire, he may use the land upon which it stood, beneficially, to some extent, without the building, or he may rebuild the edifice; but where he takes no interest in the soil, as in the case of a demise of a basement, or of upper rooms in the building, he cannot enjoy the premises in any manner after the destruction of the building, nor can he rebuild the edifice. He cannot have the exclusive enjoyment of the vacant space formerly occupied by the demised rooms. The effect of the destruction of the building, in such a case, is analogous to the effect of the destruction of demised premises by the encroachments of the sea, mentioned in Rolle's Abridgment; and the established rule for the abatement or apportion-

ment of the rent should be applied in the former as well as in the latter case. The same reason exists for its application in both cases.

But even if the lessee's interest in the demised apartment, in a case like this, was not terminated by the total destruction of the building, it may be doubted whether the lessor could recover rent so long as he failed to give the demised upper rooms the support necessary to them for special enjoyment. The rule seems to be settled in England, that where a house is divided into different floors or stories, each occupied by different owners, the proprietor of the ground floor is bound, by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property so that it may be able to bear such weight. The proprietor of the ground story is obliged to uphold it for the support of the upper story. *Humphrey v. Brogden*, 12 Q. B. 739; s. c. 1 Eng. Law and Eq. 241; *Rowbotham v. Wilson*, 36 Id. 236; *Harris v. Roberts*, 6 El. & Br. 643; s. c. 7 Id. 625. In the case last cited the duty of such support is recognized as a general common law right. In a lease of upper rooms by the owner of the entire building, a covenant should be implied on the part of the lessor to give such support to the upper rooms as is necessary for their beneficial enjoyment. It has been decided in this court that the statute forbidding the implication of covenants in conveyances of real estate, does not apply to leases for years. *Mayor of New York v. Maybee*, 3 Kern. 151; *Vernam v. Smith*, 15 N. Y. 332, 333.

The judgment should be affirmed. DENIO, C. J., SELDEN, BALCOM, and MERVIN, JJ., concurred.

The dissenting opinion of WRIGHT, J., concurred in by DAVIES, J., is omitted.

Liability for Waste.

ANON., in *Common Bench*, 6 Eliz.—A. D. 1564.—Cases rep. by *Dallson in Kellwey*, p. 206, pl. 10.

In waste. Waste was assigned in a parish, in that the lessee suffered a sea wall adjoining the parish to become ruinous, whereby the land became flooded by the tide. Carus moved that this could not be assigned for waste, because no limit can be put to the shore, and it is as if waste should be assigned of a house destroyed by tempest. DYER (C. J.) It seems reasonable that if there should be a small breach in the bank or wall, and the tenant suffers it to continue so that later the violence of the sea destroys the whole wall and floods the land, this is waste; for the lessee might easily have prevented it in the beginning. But if it was suddenly done by the violence of the water, that might be pleaded in bar. And he said that this was a rare case, and he demanded of the clerks if they had any precedent for such an assignment, and they said no. In another action of waste the same year it was held by DYER (C. J.) and WELSH (J.), that if the lessee for years permits the banks

of the sea to decay so that the adjoining land is flooded by the flowing sea, this is waste. But where it is by a storm of the sea it is otherwise, which note. * * *

And observe also, that the same year Walter Griffin brought waste, and assigned that the lessee permitted the banks of the river Trent to wash away and remain unrepaired, through which the water broke the banks and flooded the land, by his default. And it was held by all the judges that this was waste; for the Trent is not so violent but that the lessee by vigilance and industry might easily enough maintain the banks. But the violence of the sea is such that it could not by any care be restrained; so that if the sea tempestuously breaks its bounds, and floods the land, this is not waste.

COUNTESS OF SHREWSBURY'S CASE, in King's Bench, Mich. 42 & 43 Eliz.—A. D. 1600—5 Coke 13b.

The countess of Shrewsbury brought an action on the case against Richard Crompton, a lawyer of the Temple, and declared, that she leased to him a house at will, and that he so carelessly and negligently kept his fire that the house was burned; to which the defendant pleaded not guilty, and was found guilty, &c. And it was adjudged that for this permissive waste no action lay, against the opinion of Brooke in the abridgment of the case of 48 Edw. III, 25, Waste 52. And the reason of the judgment was because at the common law no remedy lay for waste either voluntary or permissive against a tenant for life or years, because the lessee had an interest in the land by the act of the lessor, and it was his folly to make such lease, and not restrain him by covenant, condition, or otherwise, that he should not do waste. So, and for the same reason a tenant at will shall not be punished for permissive waste. But the opinion of Littleton is good law, § 71: if lessee at will commits voluntary waste viz. in abatement of the houses, or in cutting of the woods, there a general action of trespass lies against him; for, as it is said in 2 & 3 Phil. & Mary, Dyer 122b, when a tenant at will takes upon him to do such things which none can do but the owner of the land, these amount to the determination of the will, and of his possession, and the lessor shall have a general action of trespass without any entry. * * *

As to liability on covenant to repair and return in good condition, see post, Covenants. —

Tenant's Right to Open and Work Mines.

SAUNDERS' CASE, in the Common Pleas, Trinity Term, 41 Eliz.—A. D. 1599—5 Coke 12.

Saunders brought an action of waste against Marwood, assignee of the term in the tenements, for waste done in digging seacoals. The defendant pleaded in bar, that the first lessee, who opened the mine,

granted to him all his interest in the land with all profits, excepting and reserving always to himself and his heirs all benefits and profits of the mine Anglice (the coal-mine), in the said parcel of land, and all fallen trees; and averred that the said mine was at the time of the assignment and yet is open. Whereupon the plaintiff demurred in law. And on great deliberation it was adjudged for the plaintiff: and in this case three points were resolved:

1. If a man hath land in part of which is a coal-mine open, and he leases the land to one for life or for years, the lessee may dig in it; for as much as the mine is open at the time, &c., and he leases all the land, it shall be intended that his intent is as general as his lease is, *scil.* that he shall take the profit of all the land, and by consequence of the mine in it. See 17 Edw. III, 7 a, b, John Hull's Case, accord; and so the doubt in Fitz. Nat. Brev. 149 C is well explained.

2. If the mine were not open but included within the bowels of the earth at the time of the lease made, in such case by leasing the land the lessee cannot make new mines, for that shall be waste. Fitz. Nat. Brev. 59, & 22 Hen. VI, 18b, accord.

3. If a man hath mines hid within his land, and leases his land and all mines therein, there the lessee may dig for them, for whenever anyone grants anything he is understood to grant that without which the thing itself may not be, and therewith agrees 9 Edw. IV, 8, where it is said, that if a man leases his land to another, and in the same there is a mine (which is to be intended of a hidden mine) he cannot dig for it; but if he lease the land and all mines in it, then although the mines be hidden, the lessee may dig for them; and by consequence the digging of the mine in the principal case was waste in the first lessee.

4. It was resolved that although the mine be first opened by the first lessee, yet if his grantee dig in it, it is waste in him.

5. It was resolved that the exception was void; for, first, by the exception of the profits of the mine, or of the mine itself, the land is not excepted; and then it follows, that he hath excepted that which he could not have or take; as if a man assigns his term, and excepts the timber trees on the land or the gravel or clay within the land, it is void, for he cannot except to himself a thing which doth not belong to him by the law. And although it was said, that forasmuch as the lessee first opened the mine, and thereby committed the waste, and so had *quodam modo* appropriated it to himself and by his wrong had subjected himself to lose the place wasted and treble damages, it should be a reason that he might keep it to himself and so continue punishable for the waste of which he was the first author; but notwithstanding that it was resolved as above, for his wrong which he committeth cannot divest the interest in the mine, being in the land demised to him out of the lessor; and therefore he cannot except that to himself which belongs to another.

* * *

ASTRAY v. BALLARD, in King's Bench, 29 Car. 2.—A. D. 1677—2 Lev. 185, 2 Jones 71. Abridged from Levinz.

Trover, not guilty pleaded, special verdict. One seised in fee of lands wherein were mines opened, by indenture leased the *lands* and *mines* therein to defendant, who opened a new coal mine and there dug the coals for which this action was brought. The question was whether the lease gave right to open new mines. It was said for the plaintiff that it did not, citing Coke Lit. 54 b, and *Liford's Case*, 11 Coke 46, For defendant it was agreed that Coke Lit. 54b is as cited; but to warrant his opinion he cites, *Saunders's Case*, 5 Coke, which does not warrant it, nor does any other book. But the COURT held, that by the words *land* and *mines*, there being mines open at the time of the demise, no mines pass but those open; and gave judgment for the plaintiff.

Termination of Relation.

LOW v. ELWELL, in Mass. Sup. Judicial Ct., Nov. Term, 1876—121 Mass. 309, 23 Am. Rep. 272.

Tort for assault in forcibly entering and ejecting plaintiff from her dwelling house. Plaintiff's husband had rented the house orally, occupied it two years, and been given notice to quit. The case comes here on agreed facts, by consent of parties without verdict. If the agreed facts justify defendant, there should be a nonsuit; otherwise, the case to stand for assessment of damages.

GRAY, C. J. A tenant holding over after the expiration of his tenancy is a mere tenant at sufferance, having no right of possession against his landlord. If the landlord forcibly enters and expels him, the landlord may be indicted for the forcible entry. But he is not liable to an action of tort for damages either for his entry upon the premises, or for an assault in expelling the tenant, provided he uses no more force than is necessary. The tenant cannot maintain an action in the nature of trespass *quare clausum fregit*, because the title and the lawful right to the possession are in the landlord, and the tenant as against him, has no right of occupation whatever. He cannot maintain an action, in the nature of trespass to his person, for a subsequent expulsion with no more force than necessary to accomplish the purpose; because the landlord having obtained possession by an act which, though subject to be punished by the public as a breach of the peace, is not one of which the tenant has any right to complain, has, as against the tenant, the right of possession of the premises; and the landlord, not being liable to the tenant in an action of tort for the principal act of entry upon the land, cannot be liable to an action for the incidental act of expulsion, which the landlord merely because of the tenant's own unlawful resistance, has been obliged to resort to in order to make his entry effectual. To hold otherwise would enable a person, occupying land utterly without right, to keep out the

lawful owner until the end of a suit by the latter to recover the possession to which he is legally entitled.

This view of the law, notwithstanding some inconsistent opinions, is in accordance with the current of recent decisions in England and in this Commonwealth.

In *Turner v. Meymot*, 7 Moore, 574, S. C. 1 Bing. 158, it was decided that a tenant whose term had expired could not maintain trespass against his landlord for forcibly breaking and entering the house in his absence. In *Hillary v. Gay*, 6 C. & P. 284, indeed, Lord Lyndhurst at *nisi prius*, while recognizing the authority of that decision, ruled that if the landlord, after the expiration of the tenancy, by force put the tenant's wife and furniture into the street, he was liable to an action of trespass *quare clausum fregit*. And in *Newton v. Harland*, 1 Man. & Gr. 644; S. C. 1 Scott N. R. 474; a majority of the court of common pleas, overruling decisions of Baron Parke and Baron Alderson at *nisi prius*, held that under such circumstances the landlord was liable to an action of trespass for assault and battery.

But in *Harvey v. Brydges*, 14 M. & W. 437, Baron Parke stated his opinion upon the point raised in *Newton v. Harland*, as follows: "Where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly; even though, in so doing, a breach of the peace was committed." Baron Alderson concurred, and said that he retained the opinion that he expressed in *Newton v. Harland*, notwithstanding the decision of the majority of the court of common pleas to the contrary. The opinion thus deliberately adhered to and positively declared by those two eminent judges, though not required by the adjudication in *Harvey v. Brydges*, is of much weight. In *Davis v. Barrell*, 10 C. B. 821, 825, Mr. Justice Cresswell said, that the doctrine of *Newton v. Harland* had been very much questioned. And it was finally overruled in *Blades v. Higgs*, 10 C. B. (N. S.) 713, where, in an action for an assault by forcibly taking the defendant's property from the plaintiff's hands, using no more force than was necessary, Chief Justice Erle, delivering the unanimous judgment of the court, approved the statement of Baron Parke, above quoted, and added: "In our opinion, all that is so said of the right of property in land applies in principle to a right of property in a chattel, and supports the present justification. If the owner was compellable by law to seek redress by action for a violation of his right of property, the remedy would be often worse than the mischief, and the law would aggravate the injury, instead of redressing it. See also *Lows v. Telford*, 1 App. Cas. 414, 426.

In *Commonwealth v. Haley*, 4 Allen, 318, the case was upon an indict-

ment for forcible entry, and no opinion was required or expressed as to the landlord's liability to a civil action.

The judgment in *Sampson v. Henry*, 11 Pick. 379, turned upon a question of pleading. The declaration, which was in trespass for an assault and battery (alleged that the defendant assaulted the plaintiff, and with a deadly weapon struck him many heavy and dangerous blows. The pleas of justification merely averred that the defendant was seised and had the right of possession of a dwelling house, that the plaintiff was unlawfully in possession thereof and forcibly opposed the defendant's entry, and that the defendant used no more force than was necessary to enable him to enter and to overcome the plaintiff's resistance; but did not deny the use of the dangerous weapon and the degree of violence alleged in the declaration; and were therefore held bad, in accordance with *Gregory v. Hill*, 8 T. R. 299, there cited. The remarks of Mr. Justice Wilde, denying the right of a party dispossessed to recover possession by force and by a breach of the peace, would, if construed by themselves, and extended beyond the case before him, allow the tenant to maintain an action of trespass against the landlord for entering the dwelling-house, in direct opposition to the judgment delivered by the same learned judge, in another case, between the same parties, argued at the same term and decided a year after. *Sampson v. Henry*, 13 Pick. 36.

In the latter case, which was an action for breaking and entering the plaintiff's close, and for an assault and battery upon him, the court held the plea of *liberum tenementum* was a good justification of the charge of breaking and entering the house, but not of the personal assault and battery. That decision, so far as it held that the landlord was not liable to an action of trespass *quare clausum fregit* by a tenant at sufferance for a forcible entry, has been repeatedly affirmed. *Meador v. Stone*, 7 Met. 147; *Miner v. Stevens*, 1 Cush. 482, 485; *Mason v. Holt*, 1 Allen 45; *Curtis v. Galvin*, 1 Allen 215; *Moore v. Mason*, 1 Allen 406. And, so far as it allowed the plaintiff to recover, in such an action, damages for the incidental injury to him or to his personal property, it has been overruled. *Eames v. Prentice*, 8 Cush. 337; *Curtis v. Galvin*, *ubi supra*.

It has also been adjudged that a landlord, who, having peaceably entered after the termination of the tenancy, proceeds, against the tenant's opposition, to take out the windows of the house, or to forcibly eject the tenant, is not liable to an action for an assault, if he uses no more force than is necessary for the purpose. *Mugford v. Richardson*, 6 Allen, 76; *Winter v. Stevens*, 9 Allen, 526. For the reasons already stated, we are all of opinion that a person who has ceased to be a tenant, or to have any lawful occupancy, has no greater right of action when the force exerted against his person is contemporaneous with the landlord's forcible entry upon the premises.

Our conclusion is supported by the American cases of the greatest weight. *Jackson v. Farmer*, 9 Wend. 201; *Overdeer v. Lewis*, 1 W. & S. 90; *Kellam v. Janson*, 17 Penn. St. 467; *Stearns v. Sampson*, 59 Maine, 568; *Sterling v. Warden*, 51 N. H. 217. The opposing decisions

are so critically and satisfactorily examined in an elaborate article upon this subject in 4 Am. Law Rev. 429, that it would be superfluous to refer to them particularly.

The tenancy of the plaintiff's husband under an oral lease was but a tenancy at will, which by the written lease from his landlord to the defendant, and reasonable notice thereof was determined, and he became a mere tenant at sufferance. *Pratt v. Farrar*, 10 Allen, 519. It being admitted that, if the defendants had the right to remove the plaintiffs by force, no more force was used than was reasonably necessary, this action cannot be maintained.

Plaintiff nonsuit.

TENANTS AT WILL.

Tenant at Will Defined.

LITTLETON'S TENURES, Sec. 68 (Littleton died A. D. 1482.)

Tenant at will is where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he has no certain nor sure estate, for the lessor may put him out at what time it pleases him. Yet if the lessee sows the land, and the lessor, after it is sown and before the corn is ripe, put him out, yet the lessee shall have the corn, and shall have free entry, egress, and regress to cut and carry away the corn, because he knew not at what time the lessor would enter upon him. Otherwise it is if tenant for years, who knows the end of his term, sows the land, and his term ends before the corn is ripe. In this case the lessor, or he in reversion, shall have the corn, because the lessee knew the certainty of his term and when it would end.

Same § 70. Also if a man make a deed of feoffment to another of certain lands, and deliver to him the deed, but not livery of seisin; in this case he to whom the deed is made may enter into the land and hold and occupy it at the will of him who made the deed, because it is proved by the words of the deed that it is his will that the other should have the land. But he who made the deed may put him out when it pleaseth him.

COKE LIT. 55a.—A. D. 1620?

It is regularly true that every lease at will must in law be at the will of both parties; and therefore when the lease is made to have and to hold at the will of the lessor, the law implyeth it to be at the will of the lessee also; for it cannot be only at the will of the lessor, but it must be at the will of the lessee also. And so it is when the lease is made to have and to hold at the will of the lessee, this must be also at the will of the lessor. And so are all the books that seem *prima facie* to differ clearly reconciled.

ANON., in Common Bench, Trinity, 20 Hen. 7.—A. D. 1505.—*Keilwey* 65a.

In debt the plaintiff counted on his lease to the defendant to have at the will of the lessor, rendering annually 20 s., and so from year to year at the will of the lessor, and for so much arrear at such a day action accrued to the plaintiff, for the sum demanded. On which came *Yaxley* for the defendant, and said that after the lease and before the day, to-wit, at such a day and place, the defendant came to the plaintiff and declared that he did not wish longer to occupy the land, after which notice the rent was arrear. The case was argued by all the bar and by all the bench for this doubt, viz. whether the lessee in such case should be tenant at the will of the lessor or at the will of the lessee, or at the will of both.

FROWIKE, (C. J.) Sir, it seems to me that it is not at the will of either, for then we would have a tenant at liberty to terminate his estate at his own will, and so tenant at his own will, which is not reason, for he did not receive his estate in that manner, but he took his estate to hold at the will of the plaintiff. And so it seems to me he should be held a tenant at the will of the lessor. And on the other hand, to adjudge his estate merely at the will of the lessor would be to create a perpetuity if the lessor pleased, which is unreasonable. But this will of the lessor must have a reasonable construction, and should be in this form, to-wit, if he (lessee) entered and occupied till a rent day is passed he remains all such year a tenant by the year, so his entry shall charge him, for in an action of debt against a tenant at will it is proper for the plaintiff to allege in his declaration that the defendant had entered and occupied by virtue of the lease, and this entry is traversable. But in such declaration against the tenant for years his entry is not traversable, for he is chargeable without entry, and so a diversity.

But yet the lessee may discharge himself reasonably, and this is as the year is ended; when he may determine his estate at his pleasure if he give up the occupation, but if he enter the commencement of the second year he has charged himself, and become tenant for all that year, and so on indefinitely. But the lessor is still at liberty to oust him; for he made his lease with these words, and also the tenant is not thus prejudiced, for else if he hold till the last day of the year and then the lessor oust him he has all his occupation to his own advantage. But on the part of the lessor, if the lessee after he had discharged himself one or two days before the end of the year, from this it follows that he takes the advantage of all the year, and discharges himself of payment of his rent by his own act, which is contrary to reason and against the custom of the realm; for by such means, if this was the law, no tenant at will in England could be compelled to pay his rent but at his own pleasure.

* * * And it was adjourned.

ANON., in Common Bench, Mich., 3 Hen. 8.—A. D. 1512.—Kellwey 162b.

A lease was made to one R. H. to have to him at his own will, and it was held by all the justices of the common bench, that it should be held at the will of either the lessor or lessee; for if it should be at the will of the lessee he might will to have it for life; and then it would be a freehold in him, which may in no way pass without livery, for it is a principle of law that no man shall have a freehold without livery or what is equivalent thereto, as livery within the ville or where the king by matter of record gives land by his letters patent. And, sir, if land is leased at the will of the lessor, yet the lessee may notify his lessor that he does not will longer to occupy the land; and so though he had the land at the will of his lessor it is in law at the will of both. This matter is discussed in 35 Hen. 6, & 18 Hen. 6. * * *

Estates at Will—How Determined.

HENSTEAD'S CASE, in Common Pleas, Mich., Term, 36 & 37 Eliz.—A. D. 1595, 5 Coke 10.

A woman, tenant for life of a house and certain land in Shoram in Kent, made a lease at will rendering rent and afterwards took husband and she and her husband brought an action of debt for arrearages after the marriage; and if the lease at will were determined by the intermarriage or not was the question.

And it was agreed by the whole court, that the will was not determined by the intermarriage; for although the woman had by marrying submitted herself to the will of her husband as her head, yet forasmuch as it might be prejudicial to the husband to have the lease determined for then he would lose the rent to be paid the next day after the marriage, and it could not be in any manner prejudicial to the wife if the lease continue but rather to her benefit. And generally it might be great prejudice to all husbands who intermarry with women who have tenants at will, for the losing of their rents. For these causes it was resolved, that without express matter done by the husband after the marriage to determine the will, it is not determined.

The same is the law if a lease be made to a woman at will and she marries; the will continues notwithstanding the marriage. So if a lease be made to three, rendering rent, and one dies, it is no determination of the will; and although nothing can survive, yet because every joint-tenant is possessed *per my & per tout*, they shall be charged with the whole rent; and so the *quare* in 10 Eliz. Dyer 269 b (pl. 20) well resolved. But in the case at bar, after the marriage the woman herself could not countermand or determine the lease at will, no more than where she and her husband make a lease at will rendering rent during the coverture, or if the lease be made to them at will; for she hath submitted herself and all her will to her husband. And so a feme covert may have a tenant at will and be tenant at will, and yet she herself

cannot countermand it; because she by her intermarriage hath put her countermanding power in this case (which doth not concern freeholds or inheritance) into her husband's mouth. Also if the husband and wife lease land at will rendering rent and the husband dies, it is no countermand of the will, but the lease continues. So it was said if two joint tenants make a lease at will rendering rent and one dies, all survives to the other and if the lessee continues his possession the survivor shall have an action for the whole rent for the privity, and it shall not be countermanded for the one moiety for the mischief which might ensue to lessors, and the rather because no mischief or prejudice can come to the lessees in such case.

SHAW v. BARBER, in *Common Bench*, *Easter*, 43 Eliz.—A. D. 1601.—Cro. Eliz. 830.

Ejectione Firmae. Upon evidence it was agreed by the whole court, and so delivered for law to the jury, that if a tenant at will make a lease for years, and the lessee enters, he is only the disseisor: and a release or confirmation to the tenant at will afterwards is void, because the privity is determined. WALMSLEY, J., said that so it had been resolved, against the opinion in 12 Edw. 4, pl. 12.

LEIGHTON v. THEED, in *King's Bench*, *Hilary* 13 Wm. 3, 1701—2 Salk. 413, s. c. 1 L. Raym. 707.

If H holds lands at will, rendering rent quarterly, the lessor may determine his will when he pleases; but if he determines it within a quarter, he shall lose the rent which should [*414] have been paid for that quarter in which he determines it. So the lessee may determine it when he pleases, but then he must pay the quarter's rent. Per HOLT, C. J.

PARKER d. WALKER v. CONSTABLE, in *King's Bench*, *Mich.* 10 Geo. 3.—A. D. 1769.—3 Wils. 25. 3 Gray Cas. 412.

Per WILMOT, C. J. and *totam curiam*: It has not been doubted of late years (and it was now resolved in this case), that half a year's notice to quit possession must be given to a tenant at will; before the end of which time an ejectment will not lie to turn him out of the farm. In a case of the demise of *Tasker v. Burr*, the same point was resolved by the court of B. R.; and per *Leigh*, sergeant, in *Easter term*, 6 or 7 Geo. 3, the same law was held in the case of an executor of a tenant at will. In the case at bar, the plaintiff, having been nonsuited for want of giving such half year's notice to defendant Constable (a tenant at will) to quit the premises, moved to set aside the non-suit; and on showing cause, the rule to set aside non-suit was discharged for the reason above in ejectment, for lands in Surrey.

RIGHT d. FLOWER v. DARBY, in *King's Bench*, *Easter Term*, 26 Geo. III.—A. D. 1786.—1 Term 159.

In ejectment it was found by special verdict that May 11, 1781, de-

defendant Darby leased the premises, a house in Salisbury, and occupied them as a public house from that time under a parol lease at a rent of ten pounds yearly, the rent to commence from midsummer following; that he let part of the premises to defendant; and that March 26, 1785, defendant Darby was served with notice to quit on Sept. 29 following. On case reserved for the opinion of this court the question was whether the plaintiff was entitled to recover.

LORD MANSFIELD, C. J.: When a lease is determinable on a certain event, or at a particular period, no notice to quit is necessary, because both parties are equally apprized of the determination of the term.

If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year. But then it is necessary for the sake of convenience, that, if either party should be inclined to change his mind, he should give the other half a year's notice before the expiration of the next or any following year: now this is a notice to quit in the middle of the year, and therefore not binding, as it is contrary to the agreement.

As to the case of lodgings, that depends on a particular contract, and is an exception to the general rule. The agreement between the parties may be for a month or less time, and there to be sure, much shorter notice would be sufficient, where the tenant has held over the time agreed upon, than in the other case. The whole question depends upon the nature of the first contract.

ASHHURST, J.—There is no distinction in reason between houses and lands, as to the time of giving notice to quit. It is necessary that both should be governed by one rule. There may be cases, where the same hardship would be felt in determining that the rule did not extend to houses as well as lands; as in the case of a lodging house in London, being let to a tenant at *Lady-day* to hold as in the present case: if the landlord should give notice to quit at *Michaelmas*, he would by that means deprive the lessee of the most beneficial part of the term, since it is notorious that the winter is by far the most profitable season of the year for those who let lodgings.

BULLER, J.—It is taken for granted by the counsel for the plaintiff, that the rule of law which construes what was formerly a tenancy at will of lands into a tenancy from year to year, does not apply to the case of houses; but there is no ground for that distinction. The reason of it is, that the agreement is a letting for a year at an annual rent; then if the parties consent to go on after that time, it is a letting from year to year. This reason extends equally to the present case; an annual rent is here reserved; and upon such a holding it has been determined that half a year's notice to quit is necessary. This doctrine was laid down as early as in the reign of Henry VIII (13 H. 8, 15 b). The moment the

year began, the defendant had a right to hold to the end of that year; therefore there should have been half a year's notice to quit before the end of the term. This gives rise to another objection in this case, upon the distinction between six months and half a year. The case in the year-books requires half a year's notice; but here there is less than half a year's notice, and therefore it is bad on that ground also.

Judgment for the defendant.

TENANCY FROM YEAR TO YEAR.

LAYTON v. FIELD, in King's Bench, Hilary 13 Wm. 3.—A. D. 1701.—3 Salk. 222.

Per HOLT, C. J. Where a lease is made at will, the lessee, after a quarter of a year is commenced, may determine his will, but then he must pay that quarter's rent; and if the lessor determine his will after the commencement of a quarter, he shall lose his rent for that quarter. But if a lease be made from year to year, *quamdū ambabus partibus, placuerit*; in such case, after a year is commenced, neither the lessor nor the lessee can determine their wills for that year, because they have willed the estate certain for so long a time.

DOE d. RIGGE v. BELL, in K. B., Mich. 34 Geo. 3.—A. D. 1794.—5 Term 471, 2 Smith Lead. Cas. *72, 3 Gray Cas. 416.

Ejectment. At the trial it appeared that the agent for the lessor of the plaintiff let the farm in question to defendants, for seven years, by parol. Defendant entered accordingly and paid rent. Afterwards notice to quit on Lady-day was served Sept. 22d, 1792. Plaintiff being non-suited, obtained a rule on defendant to show cause why the nonsuit should not be set aside.

KENYON, C. J. Though the agreement be void by the Statute of Frauds as to the duration of the lease, it must regulate the terms on which the tenancy subsists in other respects, as to the rent, the time of year when the tenant is to quit, &c. So where a tenant holds over after the expiration of his term, without having entered into any new contract, he holds upon the former terms. Now, in this case, it was agreed that the defendant should quit at Candlemas; and though the agreement is void as to the number of years for which the defendant was to hold, if the lessor chose to determine the tenancy before the expiration of the seven years, he can only put an end to it at Candlemas. Rule discharged.

CLAYTON v. BLAKEY, in K. B., Mich. 39 Geo. 3.—A. D. 1799.—8 Term 3, 2 Smith's Lead. Cas. 74, 3 Gray Cas. 417.

This was an action against a tenant to recover double rent, for holding over after the term ended, and after regular notice to quit. One

count of the declaration stated a holding under a certain term; and the others, a holding from year to year. At the trial it appeared that defendant had held two years under a parol lease for twenty-one years. It was claimed that there was a variance, because the Statute of Frauds declared such leases should operate only to create a tenancy at will. ROOKE, J., instructed the jury that it amounted to a tenancy from year to year. *Wood* now moved to set aside the verdict, on the ground of a misdirection.

KENYON, C. J. The direction was right, for such a holding now operates as a tenancy from year to year. The meaning of the statute was, that such an agreement should not operate as a term; but what was then considered as a tenancy at will has since been very properly construed to enure as a tenancy from year to year.

Rule refused.

ARBENZ v. EXLEY, in W. Va. Sup. Ct. App., April 25, 1905, 57 W. Va. 580, 50 S. E. 813, 4 A. & E. An. Cas. 625.

BRANNON, P. John Arbenz, Sr., made a written lease, but not under seal, to Exley, Watkins & Co., leasing for a term of five years and three months a brick building, including the vacant parts of certain lots, in the city of Wheeling—the term commencing January 1, 1896, and ending March 31, 1902—for the annual rent of \$700, commencing April 1, 1896, payable in monthly installments. The lessees took possession on the first week of January, and occupied the premises, paying rent monthly. On September 15, 1898, a fire totally destroyed said building. The lessees paid rent for that September, and also for October, but with the rent of October sent a letter, October 31, 1898, to Arbenz, informing him that they “hereby” vacate the premises, and surrender them to him. In November, 1898, Arbenz sued out a distress warrant against said lessees for rent from November 1, 1898, to October 31, 1899, and, the same having been levied, a forthcoming bond was given, and in the proceedings upon it in the circuit court of Ohio county a verdict was rendered for the plaintiff for \$502.54, after deducting for failure to repair an engine, and judgment given thereon, and the defendants took a writ of error. The defendants filed a plea denying grounds of attachment, and denying all liability for the rent claimed. The judgment below was affirmed by this court. Those matters will appear in 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957. On August 1, 1903, Arbenz brought assumpsit against Exley, Watkins & Co. to recover rent accruing later than that recovered in the proceeding above mentioned (to recover rent for the period beginning November 1, 1899, and ending December 31, 1902, a period of 38 months, at \$700 per year), and the suit resulted in a verdict for only \$148.15 (that is, for the 2 months of November and December, 1899; the court holding that no recovery

could be had after the current year ending that date, on the theory that the tenancy from year to year then closed).

The theory against the right to recover is that a few days after the fire defendants wrote Arbenz the following letter:

"Oct. 31st, 1898. Mr. John Arbenz, City—Dear Sir: We beg to advise that we have vacated the premises known as west building on 20th street, destroyed by fire Sept. 15th, last, and hereby surrender possession of same. Yours truly, Exley, Watkins & Co."

On the former writ of error we held that, for want of seal to the lease, the term of years named in it was not created, but that it created an estate from year to year, and that said letter did not operate as a notice to quit—to end the tenancy—so as to preclude recovery of rent up to November 1, 1899, the rent in litigation in the former proceeding. We did not go further, as no later rent was involved in that case. The question presented in the second suit is, did the tenancy end December 31, 1899? Did that letter close the tenancy and stop the rent at that date—the close of the current year 1899? For the defendants the contention is that the letter, accompanied by actual vacation of the premises and coupled with the fact that in the circuit court in April, 1899, Exley, Watkins & Co. made defense in the former proceeding, denying liability for rent, operated as a notice to quit, and closed the tenancy December 31, 1899. Take the letter. The question rests mainly on it. It states the facts that the lessees had vacated, and then surrendered possession. It does not notify that at the end of a current year in future the tenant would quit, but states present acts or past vacation and surrender. The common law, for centuries, has required, in order that lessor or lessee, under a tenancy from year to year, may close the tenancy of his own motion, that a notice to quit should be given six months before the end of the current year. That period or time of notice must be prior to the close of a year. Code 1899, c. 93, § 5, provides that "a tenancy from year to year may be terminated by either party giving notice in writing to the other, prior to the end of any year, for three months, of his intention to terminate the same." That provision recognizes as still continuing the common-law estate of tenancy from year to year, and the process of terminating it by notice to quit, and changed it only in requiring written notice and fixing a shorter time of notice. Hence it seems that we must appeal to the common law and its mode of notice to test the efficiency of the letter as notice to quit. It does not notify of a future act of quitting, but relies on past vacation and present surrender of possession for the effect of the letter. It does not name a day or time in the future when the tenancy is to end. The profession has always regarded this as a requisite in a notice to quit, I think. 2 Taylor, Landlord & Ten. § 476, says: "Form of. The notice may be given to quit on a particular day, or, in general terms, at the end of the current year of the tenancy, which will expire next after the service of the notice, or in one month after the next rent day. The latter form of expression is generally

used where the landlord is ignorant of the period when the tenancy commenced, and it is preferable even when the commencement of the tenancy is known, as it provides against any misapprehension of the exact day when the tenant entered." 1 Washburn, Real Prop. § 810, says: "Notice The Time. Whether a longer or shorter time of notice is required, it must, in order to be binding, clearly indicate the time when the tenancy is to expire, and, of course, must be given a sufficient number of days before the time so indicated." The particular question before us is whether that letter is bad as a notice to quit because (1) it is a quitting at its date, not notice of a future quitting at the end of a year; and (2) because it fails to state a time for quitting. Under the above and many other authorities, we are driven to say that it did not end the tenancy at any time. *Currier v. Barker*, 2 Gray, 224; *Steward v. Harding*, Id. 335; *Hanchet v. Whitney*, 1 Vt. 311; *Hunter v. Frost*, 47 Minn. 1, 49 N. W. 327; *Grace v. Michaud*, 50 Minn. 139, 52 N. W. 390; *People v. Gedney*, 15 Hun, 475; *Prescott v. Elm*, 7 Cush. 346; *Phœnixville v. Walters*, 147 Pa. 501, 23 Atl. 776; *Berner v. Gebhardt*, 87 Mo. App. 409; *Huntington v. Parkhurst*, 87 Mich. 38, 49 N. W. 597, 24 Am. St. Rep. 146; *Finklestein v. Herson*, 55 N. J. Law, 217, 26 Atl. 688; *Walters v. Williamson*, 59 N. J. Law, 337, 36 Atl. 665; *Godard's Ex'rs v. S. Carolina Railroad*, 2 Rich. Law (S. C.) 346; *Huyser v. Chase*, 13 Mich. 98; *Rollins v. Moody*, 72 Me. 135. The text-book writers seem to so regard the law. I have quoted from some above. Tiedeman on Real Estate, § 218, says that: "The notice must not only be given for a certain length of time before the estate is to end, but the estate can only be determined at the expiration of the time during which the tenant may lawfully hold: *i. e.*, at the end of the rental period. It can only be determined at the end of the year, quarter, or month, according as the tenancy is respectively a yearly, quarterly, or monthly tenancy. The notice must be sufficiently clear in its terms as to the time when the tenancy is to expire." 3 Minor's Inst. pt. 1, p. 241. "The notice * * * must end with the period at which the tenancy commences." 2 Kerr, R. Prop. 1310. 1 Lomax, Dig. 164; 1 Greenleaf's Cruise, R. Prop. p. 248, § 26. Chitty on Contracts (11th Ed.) 485, speaking of English common law, says, "The notice must be framed with reasonable certainty as to the time of quitting." In *Currier v. Barker*, 2 Gray, 227, it was held that a present demand or notice to quit was insufficient, and the rule is stated as follows: "The notice to quit is technical, and is well understood. It fixes a time at which a tenant is bound to quit, and the landlord has a right to enter at a time which the rent terminates. The rights of both parties are fixed by it and are dependent on it. Should the landlord decline to enter, and the tenant quit according to notice, the tenant could no longer be holden for rent, although he had given no notice to the landlord. The lease is determined by such notice properly given by either party. It is manifest, therefore, that, when such consequences depend upon the notice to be given, the notice should fix with reason-

able exactness the time at which these consequences may begin to take effect. See, also, *Walker v. Sharpe*, 14 Allen, 45." Of course, much force is to be given to the harmonious construction of the many cases by the text-writers. Still I have had a question whether the cases mean only that the period of time before the termination must expire on the day of the close of the year, or that the notice must designate the time when the tenant intends to quit. Such seems to be the law. The only question is, does it fit this case?

It does seem of great force to say that the only object of notice is to manifest an intent of one party to end the tenancy, and to inform the other party of that intent, and that the letter in this case did that. Arbenz surely knew that his tenants designed to end the tenancy, because he knew that they had quit the premises and surrendered possession. What more could formal notice do? True, it could not go to end the tenancy December 31, 1898, because from the letter to that date was not three months. But could it not end the tenancy at close of 1899? Now, if the tenants had on the date of the letter given notice that they would quit December 31, 1899, who would say that it would not be sufficient? Did not that letter disclose intent to quit? By law it could not operate to close the tenancy December 31, 1898, because the time would be too short. Would it not operate then as soon as the law would let it, just as a formal notice at the date of the letter would have done; that is, December 31, 1899? Arbenz had notice of his tenants' intention to quit. Why could not that notice operate at the earliest date the law would allow it to operate? In addition, if anything more could in reason be demanded to disclose the intention of the tenants to stop the tenancy, and to inform Arbenz of such intention we add that the tenants in April, 1899, in court, defended the claim of Arbenz to rent prior to November, 1899. Their defense was that the building was destroyed, and they had sent that letter and abandoned possession. But here comes in the answer that the statute, reiterating common law prevalent for centuries, tells how the tenant must end his tenancy; that is, by written notice. It is dangerous for us to insert an exception by saying that, if the landlord had knowledge of the tenant's intention, it stands for notice. It may not be improper to say that I have given labored investigation of this case, as other members of the court have, and I have been impressed with the weight of the line of defense just stated, and have struggled to find a justification for adopting it, as the payment of the whole rent by the defendants, without any return, works a hardship, which all the members of the court appreciate; but I am compelled to say that to decide against the plaintiff would be to fly in the face of practically a unanimity of authorities through several hundred years in all quarters where the common law rules. As applied generally, the rule is right. As applied in this case, it works hardship. But we cannot bend a fixed rule to suit a hard case.

Counsel says that the statute only requires three months' notice

before end of year, and that the written notice need not specify time of quitting, and that to say so is to read such a requirement into the statute. We answer that the statute only recognizes as the law already the requirement of notice to terminate a tenancy from year to year, and it has not changed the common-law requisites of the notice. We have cited to us the Georgia case of *Robertson v. Simons*, 34 S. E. 604, in which the opinion says that while mere abandonment of premises at the end of the year "might perhaps" be sufficient to bring home notice to the landlord of the tenant's intention to terminate the tenancy, "so as to prevent the landlord recovering rent beyond the year immediately succeeding such abandonment." This is mere opinion. It was not at all in judgment—a thought in the mind, not maturely considered for actual judgment. *Betz v. Maxwell*, 48 Kan. 143, 29 Pac. 147, seems to support the defense in saying that as the landlord, from abandonment of possession, knew of the intention to quit, formal notice was useless. This seems to be answered by the quotation above from *Currier v. Barker*. And it runs counter to the principle which all authorities assert—that mere abandonment will not dispense with notice, but the tenancy and liability for rent go on. "The tenant's liability for rent continues till he puts an end to the estate by notice, whether he continues to occupy the premises or not." 1 Washb. R. Prop. § 807. So far is this so that the landlord may, at his choice, relet and recover the difference, or let the premises stand vacant. *Merrill v. Willis*, 51 Neb. 162, 70 N. W. 914; 6 Ballard, R. Prop. § 462; *Schuisler v. Ames*, 16 Ala. 73, 50 Am. Dec. 168. *Adams v. Cohoes*, 127 N. Y. 175, 28 N. E. 25, is strongly relied on. The judge writing the opinion does say that knowledge of intention to quit, brought home to the landlord, will dispense with formal notice. In the vast mass of New York decisions it is readily noticed there are multitudinous conflicts. This case is in conflict with other decisions in New York itself. It seems that the New York statutes entered into the case.

We do not go on the theory that the former decision is *res judicata* to fix right to recover the rent involved in the present case. That case was for rent for a certain period of time; this, for another. That case is *res judicata* to establish that it was a tenancy from year to year, but did not say how long. A case may settle principle, but not be *res judicata* as to matters not immediately involved.

We are compelled to reverse the judgment and render for the plaintiff for his demand.

CHAPTER V.

CONDITIONS.

Term on Condition to Enlarge to a Fee.

BRITTON, 1 Liber c. 5, Sec. 15, p. *96.—A. D. 1275—1300.

A fee may be made to arise out of a term; as is the case where one going a pilgrimage leases his land for a term of years with this condition, that if he does not return, the land shall remain in fee to the termor; such a condition shall always be a bar to the action of the heir of the pilgrim. And thus it appears that feoffments and purchases may be conditional as well as simple and without condition.

LITTLETON'S TENURES. Littleton Died in 1482.

§ 350. Also if land be granted to a man for a term of five years, upon condition that if he pay to the grantor within the two first years 40 marks that then he shall have fee, or otherwise but for term of five years, and livery of seisin is made by force of the grant, now he hath a fee simple conditional, &c. And if in this case the grantee doth not pay to the grantor the 40 marks within the first two years, then immediately after the said two years past, the fee and the freehold is and shall be adjudged in the grantor, because that the grantor cannot after the said two years presently enter upon the grantee, for that the grantee hath yet title by three years to have and occupy the land by force of the same grant, and so because the condition is broken by the grantee and the grantor cannot enter, the law will put the fee and the freehold in the grantor. For if the grantee in this case makes waste, then after the breach of the condition, &c., and after the two years, the grantor shall have his writ of waste.

COKE LIT. 216b.—A. D. 1620-30.

Many are of opinion against Littleton in this case, and their reason is, because the fee-simple is to commence upon a condition precedent, and therefore cannot pass until the condition be performed; and that here Littleton of a condition precedent doth, before the performance thereof, make it subsequent; And for proof of their opinion they avouch many successions of authorities that no fee-simple should pass before the condition performed. * * * 217 a * * * Notwithstanding all

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this there are those that defend the opinion of Littleton, both by reason and authority. By reason, for that by the rule of law a livery of seisin must pass a present freehold to some person, they cannot give a freehold *in futuro*, as it must do in this case, if after livery of seisin made the freehold and inheritance should not pass presently, but expect until the condition be performed; and therefore if a lease for years be made to begin at Michaelmas the remainder over to another in fee, if the lessor make livery of seisin before Michaelmas, the livery is void, because if it should work at all it must take effect presently and cannot expect. Secondly, they say that when the lessor makes livery to the lessee, that it cannot stand with any reason against his own livery of seisin a freehold should remain in the lessor, seeing there is a person able to take it. But if a man by deed make a lease for years, the remainder to the right heirs of I. S., and the lessor make livery to the lessee *sucundum formam chartæ*, this livery is void because during the life of I. S. his right heir cannot take (for *nemo est haeris viventis*), and in that case the freehold shall not remain in the lessor, and expect the death of I. S. during the term; for although I. S. die during the term, yet the remainder is void, because the livery of seisin cannot expect. And they say further that seeing all the books aforesaid 217b prove that such a condition is good, and that the livery made to the lessee is effectual, by consequence the freehold and inheritance must pass presently or not at all. And it is not rare say they in our books that words shall be transposed and marshalled so as the feoffment or grant may take effect.

Condition or Declaration of Use.

ANON., 31 Hen. 8.—A. D. 1539.—Brooke's New Cases pl. 152, Bro. Abr., t. Conditions 191.

By many, if a man makes a feoffment in fee to intent to perform his will, this is not a condition but a declaration of the purpose and will of the feoffor, and the heir may not enter for non performance.

RAWSON v. INHABITANTS OF SCHOOL DISTRICT NO. 5 of UXBRIDGE, in Mass. Sup. Jud. Ct., Oct. 1863—89 Mass. (7 Allen) 125, 83 Am. Dec. 670.

Writ of entry. Demandant claimed by deed made by the heir of Daniel Taft after entry for breach of condition in the deed by Daniel in 1837 to the town of Uxbridge "to their only proper use, benefit and behoof, for a burying place forever." The town had sold the premises in 1860 to tenants who used them for school purposes. Judgment for demandant and the tenants appeal.

BIGELOW, C. J. The construction of the deed from the demandant's ancestor to the town of Uxbridge is not free from difficulty; but upon careful consideration we are of opinion that, adhering in its interpretation, as we are bound to do, to the strict rules of the common law respect-

ing grants of real property, we cannot construe it as a deed upon condition.

It is said in Shep. Touchstone, 126, that "to every good condition is required an external form;" that is, it must be expressed in apt and sufficient words, which according to the rules of law make a condition; otherwise it must fail of effect. This is especially the rule applicable to the construction of grants. A deed will not be construed to create an estate on condition, unless language is used which, according to the rules of law, *ex proprio vigore*, imports a condition, or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated. Conditions subsequent are not favored in law. If it be doubtful whether a clause in a deed be a covenant or a condition, courts of law will always incline against the latter construction. Conditions are not to be raised readily by inference or argument. Co. Litt. 205 *b*, 219 *b*; 4 Kent Com. (6th ed.) 129, 132; Shep. Touchstone, 133; *Merrifield v. Cobleigh*, 4 Cush. 178, 184.

In the deed on which the present controversy arises there are, strictly speaking, no words of condition, such as of themselves import the creation of a conditional estate. The usual and proper technical words by which such an estate is granted by deed are, "provided," "so as" or "on condition." Lord Coke says, "Words of condition are *sub conditione, ita quod, proviso*." *Mary Portington's case*, 10 Co. 42 *a*; Co. Litt. 203 *a*, 203 *b*. So a condition in a deed may be created by the use of the words "*si*" or "*quod si contingat*," and the like, if a clause of forfeiture or reentry be added. Co. Litt. 204 *a*, 204 *b*. *Duke of Norfolk's case*, Dyer, 138 *b*. 1 Wood on Conveyancing, 290. In grants from the crown and in devises, a conditional estate may be created by the use of words which declare that it is given or devised for a certain purpose, or with a particular intention, or on payment of a certain sum. But this rule is applicable only to those grants or gifts which are purely voluntary, and where there is no other consideration moving the grantor or donor besides the purpose for which the estate is declared to be created. But such words do not make a condition when used in deeds of private persons. If one makes a feoffment in fee *ea intentione, ad effectum, ad propositum*, and the like, the estate is not conditional, but absolute, notwithstanding. Co. Litt. 204 *a*; Dyer *ubi supra*; 1 Wood on Conveyancing, 290; Shep. Touchstone, 123. These words must be conjoined in a deed with others giving a right to reenter or declaring a forfeiture in a specified contingency, or the grant will not be deemed to be conditional. It is sometimes said that the words "*causa*" and "*pro*," when used in deeds, create a condition; that is, where a deed is made in express terms for a specific purpose, or in consideration of an act to be done or service rendered, it will be interpreted as creating a conditional estate. But this is an exception to the general rule, and is confined to cases where the subject-matter of the grant is in its nature executory; as of an annuity to be paid for service to be rendered or a right or privilege to be enjoyed; in such case if the service be not performed or the enjoyment of the right or privilege be withheld

which formed the consideration of a grant, the grantor will be relieved from the further execution of the grant, to wit, the payment of the annuity. Shep. Touchstone, 124; *Cowper v. Andrews*, Hob. 41; Co. Litt. 204 *a*. But ordinarily the failure of the consideration of a grant of land, or the non-fulfillment of the purpose for which a conveyance by deed is made, will not of itself defeat an estate. The reason for this distinction between the two classes of cases is, as stated by Coke, "that the state of the land is executed and the annuity executory." Co. Litt. 204 *a*. There is one other class of grants which are sometimes said to be conditional; as when a feoffment is made *ad solvendum*, "for the matter shows that the intent of the feoffor was to have the land or the money;" or a grant *ad erudiendum filium*, "because the words purport that the instruction is to be given, or the feoffment will be void." It may be doubtful whether such words do operate in strictness as a condition. The latter case is stated in the Touchstone doubtfully, in this wise: "Some have said this estate is conditional." But if grants so expressed can be construed to create a condition by which to defeat an estate on breach and entry, it is clear that such an interpretation of them is confined to cases where the whole consideration of the grant is the accomplishment of a specific purpose, and the enjoyment of the estate granted is clearly made dependent on the performance of an act or the payment of money for the use or benefit of the grantor or his assigns. We believe there is no authoritative sanction for the doctrine that a deed is to be construed as a grant on a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not enure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled.

If it be asked whether the law will give any force to the words in a deed which declare that the grant is made for a specific purpose or to accomplish a particular object, the answer is, that they may, if properly expressed, create a confidence or trust, or amount to a covenant or agreement on the part of the grantee. Thus it is said in *The Duke of Norfolk's case*, Dyer, 138 *b*, that the words "*ea intentione*" do not make a condition but a confidence and trust. See also *Parish v. Whitney*, 3 Gray, 516, and *Newell v. Hill*, 2 Met. 180, and cases cited. But whether this be so or not, the absence of any right or remedy in favor of the grantor under such a grant to enforce the appropriation of land to the specific purpose for which it was conveyed, will not of itself make that a condition which is not so framed as to warrant in law that interpretation. An estate cannot be made defeasible on a condition subsequent by construction founded on an argument *ab inconvenienti* only, or on considerations of supposed hardship or want of equity.

In the light of these principles and authorities we cannot interpret the words in the deed of the demandant's ancestor, which declare that the premises were conveyed "for a burying-place forever," to be words of

strict condition. Nor can we gather from them that they were so intended by the grantor. The grant was not purely voluntary. It was only partially so. It was not made solely in consideration of the love and affection, which the grantor bore towards the grantees, but also "for diverse other valuable considerations me moving hereunto." Previously to the time of the grant, the premises had been used for a burial-place. It is so described in the deed. Under what circumstances this had been done does not appear. It may have been for a compensation. We cannot now know, therefore, that the sole cause or consideration which induced the grantor to convey the estate to the town was, that it should be used for the specific purpose designated in the deed. There can be no doubt of the intent of the grantor that the estate should always be used and appropriated for such purpose. This intent is clearly manifested; but we search in vain for any words which indicate an intention that if the grantees omitted so to use them, and actually devoted them to another purpose, the whole estate should thereupon be forfeited, and revert to the heirs of the grantor. The words in the deed are quite as consistent with an intent by the grantor to repose a trust and confidence in the inhabitants of the town, for whom he declared his affection and love, that they would always fulfill the purpose for which the grant was made, so long as it was reasonable and practicable so to do, as they are with an intent to impose on them a condition which should compel them, on pain of forfeiture, to maintain the premises as a burial place for all time, however inconvenient or impracticable it might become to make such an appropriation of them. Language so equivocal cannot be construed as a condition subsequent without disregarding that cardinal principle of real property already referred to, that conditions subsequent which defeat an estate are not to be favored or raised by inference or implication.

Judgment for the tenants.

Rule to Distinguish Condition from Covenant.

SIMPSON v. TITTERELL, in the Common Pleas, Trinity, 33 Eliz.—A. D. 1592.—Cro. Eliz. 242.

Ejectione Firmae. B let land to defendant for years: *provided always and it is further covenanted*, that the lessee shall not assign. The lessee assigned; the lessor entered, and let it to the plaintiff. Were the words a condition or a covenant only?

All the Justices held it was a good condition to defeat the estate. PERIAM, J., said *proviso* always implies a condition if there be not words subsequent which change it into a covenant as where there is another penalty annexed to it for non-performance, as *Dockrey's Case*, 27 Hen. 8, pl. 14.

But it is a rule in provisos where the proviso is that the lessee shall perform or not perform a thing, and no penalty to it, this is a condition, otherwise it is void. But if a penalty is annexed it is otherwise. To

which the rest of the justices agreed. And it was adjudged for the plaintiff that the entry was lawful.

See the discussion as to the distinction between a condition and a limitation in *Willison v. Berkley*, ante p.

HORNER v. CHICAGO, M. & ST. P. RY. CO., Wis. Sup. Ct., Aug. Term, 1875.—38 Wis. 165.

Appeal by defendants from judgment for plaintiff in an action to recover land conveyed to defendant's grantor by plaintiff's grantor by deed "in consideration of one dollar," reciting that: "The aforesaid piece or parcel of land hereby conveyed to the party of the second part only for depot and other railroad purposes." The defendant had remained in possession of the land for ten years after receiving the deed, and no depot had ever been built thereon.

LYON, J. It is claimed on behalf of the plaintiff, that the clauses in the deed from Mary E. Watson (plaintiff's grantor) to the Milwaukee & Horicon R. Co. expressing the purposes for which the lands conveyed thereby were to be used, are conditions subsequent, a breach of which might work a forfeiture of such lands. The action is brought upon that theory, and the most important, if not the controlling question to be determined, is whether those clauses are conditions. The principles or rules of law which are believed to be conclusive upon that question will be briefly stated:

1. Although there are technical words, which, if used in a conveyance, unmistakably create a condition, yet the use thereof is not absolutely essential to that end, and a valid condition may be expressed without employing those words.

2. It is not essential to a valid condition that, in case of a breach thereof, a right of re-entry be expressly reserved in the deed, or that it be expressed therein that the estate of the grantee shall terminate with the breach of the condition.

3. Neither does the character of the clause alleged to be a condition depend upon its insertion in any particular part of the instrument. "Conditions regularly follow the *habendum* in a deed, but are good in law in any other place." Jacob Law Dict. "Condition."

4. The construction of the clause or stipulation must depend upon the intention of the parties to be gathered from the instrument and the existing facts. Says Chancellor Kent in 4 Com. 132: "Whether the words amount to a condition or a limitation or a covenant may be matter of construction depending on the contract. The intention of the party to the instrument, when clearly ascertained, is of controlling efficacy; though conditions and limitations are not readily to be raised by mere inference and argument. The distinctions on this subject are extremely subtle and artificial; and the construction of a deed as to its operation and effect, will after all depend less upon artificial rules than upon the

application of good sense and sound equity to the object and spirit of the contract in a given case."

5. When the deed does not expressly provide for a forfeiture of the estate or give a right of re-entry in case of default, words of limitation or restriction are sometimes, perhaps usually, necessary to create a condition. For want of these in the lease in *Brugman v. Noyes*, 6 Wis. 3, the instrument was held not to contain a condition or covenant.

6. In a voluntary conveyance words may be held to be a condition which if used in a conveyance for a valuable consideration would be held a covenant only.

7. Conditions subsequent are not favored in the law and are to be strictly construed.

8. To the foregoing may be added the following rule prescribed by statute: "When any conditions annexed to a grant or conveyance of lands are merely nominal, and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded, and a failure to perform the same shall in no case operate as a forfeiture of the lands conveyed subject thereto." R. S. ch. 83, sec. 46.

9. Although a deed contain a clause declaring the purpose for which it is intended the granted premises shall be used if such purpose will not inure specially to the benefit of the grantor, but is in its nature general and public, and if there are no other words in the grant indicating an intent that the grant is to be void if the declared purpose is not fulfilled, such a clause is not a condition subsequent. The application of this rule controlled the cases of *Strong v. Doty*, 32 Wis. 381; and *Rawson v. Inhabitants*, 7 Allen 125, cited and relied on by the defendants.

The foregoing rules are, it is believed, fully sustained in the elementary treatises and by numerous adjudged cases. Many of these will be found cited in the briefs of the learned counsel on both sides. Further citation of authorities on these subjects is not deemed necessary. It remains to be determined in the light of the above rules of law, whether the deed from Mary E. Watson to the Milwaukee & Horicon R. Co., conveyed an absolute fee in the lands in controversy, or only a conditional fee. The deed conveyed two parcels of land. After the description of the first parcel, and referring to it, are the following words: "The aforesaid piece or parcel of land hereby conveyed to the party of the second part only for depot and other railroad purposes." And after the description of the other parcel, which in terms is granted for a railway, the deed contains this clause: "Both of said pieces or parcels being granted solely for said road purposes." The words *only*, quoted, and *solely*, quoted, are words of restriction and exclusion. As used in this deed their effect clearly is to prohibit the grantee from using the lands for any other than the specified purposes. The grantor owned a tract of land suitable for building purposes, adjacent to the land conveyed for a depot site. She believed, as she well might, that the construction of

the railroad and the location and erection of the depot at that point, would enhance the value and facilitate the sale of her property. Hence she was willing to donate, and did donate, the land in controversy to the railroad for the purpose specified in the deed, and no other.

But it is argued that parol evidence was improperly admitted to prove that no consideration was actually paid for the land. It is claimed that because the deed recites a consideration of one dollar, it is a verity in the case that the grantor received one dollar for the land. We do not stop to inquire whether this position is correct or otherwise; for we think that it was competent for the plaintiff to prove by parol evidence, not for the purpose of showing the deed void in its inception, but as a circumstance bearing on the intention of the parties, and as aiding in a correct interpretation of the instrument, that the construction of the railroad, and the location of the depot on the granted premises, were the principal inducements to the execution of the deed. See *Hanna v. Oxley*, 23 Wis. 519 and cases cited. It may be further remarked on this subject that if substance be regarded rather than form, the distinction in principle between paying for the land a mere nominal consideration and paying nothing at all for it is not very apparent. It is a very significant fact in the case that the grantor (acting through her agent, Mr. Horner) refused to execute an unconditional conveyance of the land, and required the clauses under consideration to be inserted in the conveyance which she did execute. But their insertion was a useless act unless the clauses are held to be conditions. That the grantor intended to reserve to herself some remedy in case the grantee should make default, is too plain for argument. * * *

It must be held, therefore, that the parcel of land first described in the deed was conveyed upon condition that the grantee should use it for depot purposes, and the parcel last described upon condition that it should be used "for a railway," that is, as we understand it, the railway track should be laid upon it. And here it may be observed that we do not think that the first condition in the deed applies to the second parcel of land therein described. That is to say, we do not think the failure to use the land first described for depot purposes can alone work a forfeiture of the strip conveyed "for a railway." Having regard to the rule above stated and that these conditions are to be strictly construed, we must construe them the same as though two deeds had been made, one conveying the depot lot on condition that it be used for depot purpose, and the other conveying the strip two and a half rods wide on condition that it be used for a railway track. The track having been laid upon such strip of land in 1857 or 1858, and having been maintained there until the present time, it necessarily follows from the views just expressed, that there has been no breach of the condition upon which the same was conveyed, and hence that the circuit court erred in rendering judgment therefor for the plaintiff. But the failure to use the other parcel for depot purposes, evidenced by the erection and main-

tenance, by the grantee and its successors, of the depot for Ripon eighty rods south of such parcel and separated from it by a mill pond, was injurious to the grantor and a substantial breach of the condition upon which such parcel was conveyed.

We are next to determine whether the grantor, before she conveyed to the plaintiff, made entry for condition broken, upon the land conveyed for depot purposes. Without recapitulating the testimony on that subject, we think the fact is established by a clear preponderance of the evidence that in 1862 or 1863 the grantor, by her agent, made sufficient entry thereon to revest in her the title to such parcel. * * *

By the Court: The judgment of the circuit court is reversed, and the cause remanded with directions to that court to give judgment for the plaintiff, modified as indicated in this opinion.

Conditions and Limitations Distinguished.

NEWIS et ux. v. LARK and HUNT, in C. B., Mich. 13 & 14 Eliz.—A. D. 1572.—Often Cited as **SCOLASTICA'S CASE**, and Reported in 2 Prowd. Com. 403, and Partially in N. Bendlovs 196. Abridged from Prowd. Com.

Assize of novel-disseizin by Robert Newis and Scolastica his wife against William Lark and John Hunt for land in Middlesex. The assize was taken by default; and plaintiff gave evidence to prove, that Henry Clerk, seised in fee of the land in question, made his devise in writing, whereby he gave it to his son John in tail, remainder to his son Francis in tail, remainder to the plaintiff Scolastica his daughter in tail, with remainders over; and in this writing he declared his will that if any of those to whom the land was so given should sell, waste, mortgage, or discontinue the lands, or their interest or possibility or any part of it, or unlawfully vex or disquiet any to whom such lands were so given, the persons and their heirs so doing shall from thenceforth be clearly discharged and excluded from the entails to him or them, and from all benefit and advantage as if they had never been mentioned in the will: that after the death of the testator Francis and John joined in a covenant to levy a fine and suffer a recovery to the defendants herein, which fine was levied and recovery suffered accordingly; and that afterwards the plaintiff's entered claiming by force of the will, on whom the defendants re-entered whereupon this suit was brought. Defendants demurred in law to the evidence, and the plaintiffs joined in the demurrer. Afterwards the matter was argued at the bar and by all the judges.

OPINION OF THE COURT. It was held by all the justices that the bargain, fine, and recovery are such acts as give title and occasion to defeat the estates tail limited to John and Francis. But the great doubt was whether the penalty which the testator had added be a condition, or a limitation and no condition, and how it stands with law, and who shall take advantage of it, and by what means.

All the Justices argued that it is no condition; for if it should be a condition and should be broken by any in possession or in remainder, then the heir, to whom the privity of conditions in inheritances descends, should enter, and thereby defeat all the estates. For if a man makes a lease for life, remainder in tail, remainder in tail, remainder in fee, upon condition that some of them in the remainder shall do such an act, there, if it is not done the feoffor and his heirs may enter, and thereby defeat as well the estate in possession as all the remainders; for he that re-enters for a condition broken is in of such estate as he had before the condition made, from whence it follows that he has defeated all the estates. But here it was not the devisor's intent that all the estates-tail should be utterly defeated, for in his declaration and discourse, made after the limitation of the estates-tail he expresses that his mind was, that the said hereditaments should continue in the name of the Clerks, to the memorial of his own name; and besides this he declares, that if any of them attempt any act contrary to his limitation, the tenements shall come to the party next in tail, as if such disorderous person had never been mentioned in his will. From which clauses it manifestly appears to all to be his intent that the estate tail of one should not be defeated by the act of another, and the words of every man expressed in his will shall be taken and expounded according to his intent and meaning, from whence it follows that the penalty expressed shall not be a condition to defeat all the other estates. And hereupon the case in 29 Assize pl. 17, was cited by HARBER and DYER, [JJ.,] where a man seized in fee of lands devisable devised them to one for term of his life, and that he should be chaplain, and should sing for his soul all his life, so that after his death the said tenements should remain to the commonality of the same town, to find a chaplain perpetual for the same tenements, and he died; and the devisee, being of sufficient age to be a chaplain, entered into the tenements, and held them for six years, but was no chaplain, and the heir of the devisor ousted him, and the devisee brought an assize, and the heir pleaded to the assize, and all this matter was found by the assize, and the justices encouraged the assize as much as they could to find for the plaintiff, and at last they said that the plaintiff was seised and disseised; for there it seemed to the court that the limitation that he should be chaplain and should sing for him was no condition, for the breach whereof the heir might enter, for it he might enter, thereby the remainder would be defeated, and it appears that it was not the intent of the devisor to defeat the remainder, because it was given to find a chaplain perpetual, and the chaplain could not be found perpetually if the remainder was annulled. From whence it appears that the words in a will which seemingly tend to a condition, shall not in the law be taken for a condition, when it appears to be the intent of the party that the whole estate shall not be defeated. So here the words of the penalty shall not make a condition to defeat all the estates.

Another reason was also given in proof thereof, and that was, because the tail was first appointed to John Clerk, who was his eldest son and

heir, and it was the intent of the devisor that he should be restrained from discontinuing or barring his tail, as well as any of the others, and if it should be taken to be a condition, and that there was no other penalty for the breach of it but entry only, then if the eldest son himself, who is donee and heir, makes a feoffment, thereby the condition is extinct, for the title of the condition passes in the land, so that he cannot enter for the condition broken by himself contrary to his own feoffment, and as he is at liberty to make a feoffment, so is he to suffer a recovery, and thereby to bar all the remainders, which would be contrary to the intent of the devisor, who had a mind that he should be restrained as well as the others; and therefore, if his intent may hold place, it shall not be a condition, but there shall be some other penalty to the eldest son which is greater to him than a condition carries along with it if he breaks the intent of the devisor. And so all the justices unanimously agreed that it was not a condition which implies a re-entry.

Further it was moved that if the penalty shall not amount to a condition containing a re-entry, whether or not it shall be a limitation in estate, and if it be a limitation, whether entry is necessary before it be ended, and whether the next in remainder be privy enough to make entry. For LORD DYER, J., said, if a man makes a gift in tail, upon condition that if the donee does such an act his estate shall cease, *Frowick* [C. J.] holds in 21 Hen. 7, 12 a, that if he does the act, his estate shall not cease before entry, because it is an estate of inheritance which shall not cease by parol without an entry in fact.

And as to this, all the justices argued that the clause in the will which said: "That the person mortgaging or entangling shall be clearly discharged excluded and dismissed touching the entail, and that the conveyance of the entail shall be of no force benefit or advantage towards him or them," shall be taken and expounded in law as a limitation, that is to say, it shall be taken in sense to be a devise to him in tail until he mortgage, alien, pledge, entangle, incumber, or do the other acts there expressed, and when he shall do any of these acts then the estate shall end as fully as if he died without issue male; so that after the acts done the right of the tail shall cease, and the tail is merely dissolved; for when the intent is shown by words and the words are not aptly put, then such sense ought to be put on the words as is suitable to the intent; and for as much as in sense such words amount to a limitation, and especially when the case is upon a devise, where the intent only is regarded, and the words, although they are not apt in law for the matter, shall be drawn to the intent. For as HARPER, J., said, the devisor shall be accounted *inops consilii*, because men most commonly make their wills when they are at the point of death, and have not time to seek counsel; for which reason the law shall be their counsel and shall interpret the words, and direct the operation of them according to the intent of the party.

And each of the justices cited the last case which Fitzherbert puts in the writ of *ex gravi querela* in his *Natura Brevium*, 201 o, which is thus: A man devises land in London to his wife for life, upon condition that

if she marries the land shall remain to his son in tail, and for the default of such issue the remainder to the right heirs of the donor in fee; the wife takes husband, and she and the husband occupy the land, he in remainder dies without heirs of his body; the right heir of the donor shall have a special writ of *ex gravi querela* directed to the mayor and sheriffs of London, rehearsing this special devise and the said matter, commanding them to call the parties and hear them, &c., and to do right: So he says, it appears that he in remainder shall have advantage of the condition if it be broken, but that shall be by the way of suing this action and not of entry by force of the condition not performed; and the said writ appears in the register, and all this appears in the said *Natura Brevium*. And the justices said that the words of the condition there mentioned are not properly a condition, but words of limitation. But DYER, J., said that where it seemed to Fitzherbert in that case that the heir of the donor might not enter, in his opinion he might well enter.

And HARPER, J., also cited the case in 34 Edw. 3, Fitz., formedon pl. ult. 4, where a man had issue a son and a daughter and devised land devisable to one for life, upon condition that if the son disturbed the tenant for life, or the executors of their administration, then the land should remain to the daughter; and he died and the daughter, after the death of the tenant for life, brought a formedon in remainder against the son, and alleged that he had disturbed the tenant for life and the executors, and the son traversed it and thereupon issue was joined. So that there the condition took away the fee out of the son, and put it in the daughter by allowance of the law, in order to perform the intent of the devise, although the remainder did not vest when the first estate took effect.

And all the justices agreed upon the matter in law, viz., that the said clause of restraint shall be a limitation which shall determine the estate, and not a condition requiring re-entry, and that by the said acts, viz., the bargain, fine, and recovery, the estates tail ended, and that the plaintiffs might enter, and should not be driven to any formedon or other suit, as they should be upon discontinuance of any other estate tail general by feoffment or fine, and by dying without issue after; for here the estate ended by collateral limitation, so that the act which ends the estate by the limitation cannot make a discontinuance; for the doing of the act and the end of the estate come together, at one and the same instant; for the fine levied by John determined his interest, and was no discontinuance to Francis, because the estate tail of John was not *in esse* longer than the fine took effect, and it being determined could not be discontinued as to him, or the other, or him in remainder, and the recovery determined the estate of Francis which preceded, and so there is no discontinuance to retard the entry of the plaintiffs.

This is believed to be one of the first cases in which the rules to distinguish conditions from limitations are fully discussed; and in this respect it has been followed and much cited since. But in so far as it holds valid provisions creating forfeitures on alienations or attempts to alienate, it was

soon overruled. See Corbit's Case, post 172; and Mary Portington's Case, ante 45.

In Mary Portington's Case, 10 Coke 41, Lord Coke says: "The authority of the book of 29 Assize 17, is against that which was cited in Scholastica's Case; and thereby you may see, good reader, how dangerous it is to ground an opinion upon any abridgement; for Fitzherbert, in abridging the case abridges it without any words of express condition, as cited in Scholastica's Case. But Brooke, tit., 'Condition,' abridges it to be upon express condition. And as to the said case in F. N. B. it is cited in Scholastica's Case in this manner [stating as above]; which case so put by Fitzherbert out of the original writ in the register is utterly mistaken in two points: 1, because the devise to the wife in the case put in F. N. B. was upon express words of condition; but inspecto registro fo. 246, the devise was upon apt words of limitation * * * ; 2, where Fitzherbert saith that the right heir cannot enter, it is clear that the right heir may well enter, because he has the reversion by descent, and not by way of remainder."

Scholastica's Case was followed on similar facts in *Sharington v. Minors*, in B. R., Pasch. 41 Eliz., Moore 543, on the opinions of Fenner, Gawdy, and Clench, JJ., against the opinion of Popham, C. J., who relied on *Germin v. Arscot*, post.

The question was involved and argued at bar and bench in B. R. Mich. 39 & 40 Eliz., in *Tarrant's Case*, Moore 470; but because of the difference of opinion among the judges no decision was reached in that case at that time.

WELLOCK v. HAMMOND, in Queen's Bench, Trinity, 32 Eliz.—A. D. 1591, Cro. Eliz. 204.

Trespass. The case upon special verdict was; Thomas Wellock, copyholder in fee of land of nature of borough English, descendible to the younger son and younger brother, had issue four sons and a daughter, and surrendered the land to the use of his will, and devised it to his wife for life, remainder to his eldest son, *paying* forty shillings to each of his brothers and sister within two years after the death of the wife, and died. The wife entered and died. The eldest son entered and did not pay the legacies within two years, but within five years he did pay them. The youngest son died without issue. The oldest then surrendered the land to the use of his will, devised it to his wife, and died. She entered and married defendant. A younger son of Thomas entered, defendant ousted him, he brought trespass, and it was found that the land was worth 4£ per annum. The question was whether the entry was lawful.

Godfrey and *Cooke*, for the plaintiff, argued that the oldest was given only a life estate, since 8£ was too small a consideration to make a fee-simple on a devise without limitation; that the word *paying* was a limitation, because void as a condition, being descendable to the heir.

Shirley and *Johnson*, for the defendant, argued; that the devise was in fee because of the consideration, and the value was not material, citing 29 H. 8; Brooke's Abr., "Testaments" 18: do. "Estates" 78; 6 E. 6; 38 E. 3, 14; that the words were sufficient and apt to make a condition; that it cannot be a limitation because the lands are limited to another if he did not pay; and whether condition or limitation, it is not found that there was any demand for the money and so no breach.

PER CURIAM:—It is a fee, for the value is not material, and no book speaks of the value. It is a limitation, and not a condition; for if it be a condition it extinguisheth in the heir, and no remedy for the money. But being a limitation, the law shall construe it that upon the non-payment of the money his estate shall cease, and then the law shall carry it to the heir by custom, without any limitation over. And in a devise it may well be that an estate in fee shall cease in one, and shall be transferred to another. The money was to be paid without request. And it was adjudged for the plaintiff. See 3 Coke 20 b.

HARDY v. SEYER, in Queen's Bench, Easter, 37 Eliz.—A. D. 1596.—Cro. Eliz. 414. Abridged.

Ejectione Firmae. Upon special verdict. A lease was made to a widow for forty years, upon condition that during the time she remain sole and live in the house. She continued unmarried in the house all her life, but died within the forty years. The question between the executor of the widow and him in reversion was whether the term was determined. If these words were a condition the term remains, for she performed it till it became impossible by act of God, which shall not turn to her prejudice; but if it is a limitation it is otherwise.

POPHAM [C. J.] and GAWDY and CLENCH [JJ.] held that the words, *upon condition that if, &c.* were void words; for they are insensible, and are neither condition nor limitation; for all conditions shall be taken strictly, and no words shall be supplied by intendment to make a condition to divest or destroy an estate. And so here it is no more than that a man makes a lease for years rendering rent—on condition that if the rent be not paid—and says no more, which is without sense; for it may be intended that he shall forfeit a pain, or that the lessor shall re-enter, which is uncertain. Every *that if* ought to be answered by the words *what then*, whereby to make the intention of the parties full, what shall be done, otherwise we cannot judge of their intention: and for this uncertainty it is void, and the lease is absolute. But if the words were that the lease was for forty years, “if she so long live unmarried and inhabit therein,” POPHAM [C. J.], held it to be a limitation, and to determine the lease by her marriage or death, so that she cannot inhabit therein: and so *Bromley* [of counsel for the reversioner] affirmed was the intent of the parties, and the truth of the case, and that it was mistaken in drawing the verdict. But FENNER, J., held that the words are full enough to make a condition of re-entry without any other, and are a condition and not a limitation, and that this condition is well performed, and the lease remains absolute. Wherefore it was adjudged for the plaintiff.

HAYNSWORTH v. PRETTY, in Queen's Bench, Hilary 41 Eliz.—A. D. 1599.—Cro. Eliz. 833, Moor 644.

Trespass. Special verdict. One seised of lands in socage had issue

two sons and a daughter, and devised to his second son and daughter 20%. to be paid by his eldest son, and devised his land to his eldest son in fee, on condition that if he paid not these legacies, that his land should be to his second son and daughter and their heirs. The eldest son fails of payment. Whether the younger son and daughter shall have the land was the question. After argument it was *resolved* by the Court clearly, that they should have it; for the first devise to his son and heirs in fee, being no more than what the law gives, is void; and it is but a future devise to the second son and daughter upon the eldest son's default of payment. The case is no other but as if one had devised that if his eldest son did not pay all legacies, that his lands should be to the legatees, and there is no doubt but that in default of payment the land should vest in them. GAWDY and FENNER [JJ.] held that if it were a good devise to the eldest son, yet this condition is a limitation of his estate, and shall give it to the second son and daughter upon default of payment. wherefore it was adjudged accordingly for the plaintiff.

For neglect to enter judgment, the case was reargued and again adjudged for the defendant, for the same reasons. Cro. Eliz. 919.

WRENFORD v. GYLES, in Common Bench, Mich. 40 & 41 Eliz.—A. D. 1600.
—Cro. Eliz. 643, Noy 70.

A lease was made for 21 years if the lessee lived so long and continued in the lessor's service. The lessor died, and whether the term was determined was the question.

ANDERSON, [C. J.], OWEN and GLANVILLE, [JJ.], held that the lease continued, for there is not any laches in the lessee that he did not serve; but it is the act of God that he cannot serve any longer; and it is like to *Sir Thomas Wroth's Case*. [Dyer 167, Plowd. Com. 454.] But WAMSLEY [J.] strongly against it: because it is a limitation to the estate, that it shall not continue longer than he serves. *Quære*.

HENDERSON v. HUNTER, In Pa. Sup. Ct., 1868, 59 Pa. St. 335, Pattee's Cas. R. P. 258, Tiedman's Cases on R. P. 229. Gate's Cases R. P. 149.

AGNEW, J. This was an action of trespass by church trustees under a deed of trust made by Thomas Pillow in 1836, for taking down and removing the materials of a church building in 1867. The case turns on the limitation in the deed. The legal estate of the trustees clearly has no duration beyond the use it was intended to protect. The word "successors" is used to perpetuate the estate, but as the trustees are an unincorporated body having no legal succession, there is nothing in the terms of the grant to carry the trust beyond its appropriate use. This brings us to the limitation of the use itself.

It is for the erection of "a house or place of worship for the use of the members of the Methodist Episcopal Church of the United States

of America (so long as they use it for that purpose, and no longer, and then to return back to the original owner), according to the rules and discipline which from time to time may be agreed upon and adopted by the ministers and preachers of the said church at their General Conference in the United States of America." This is the main purpose of the trust, the other portions of the deed relating to the use being ancillary only to this principal object. The interjected words, "so long as they use it for that purpose and no longer, and then to return back to the original owner," are terms of undoubted limitation, and not of condition. They accompany the creation of the estate, qualify it, and prescribe the bounds beyond which it shall not endure.

The equitable estate is in the members of the church so long as they use the house as a place of worship in the manner prescribed and no longer. This is the boundary set to their interest, and when this limit is transcended the estate expires by its own limitation, and returns to its author. The words thus used have not the slightest cast of a mere condition. No estate for any fixed or determinate period had been granted before these expressions were reached, and they were followed by no proviso or other indication of a condition to be annexed.

"A special limitation," says Mr. Smith, in his work on Executory Interests, p. 12, "is a qualification serving to mark out the bounds of an estate, so as to determine it *ipso facto* in a given event without action, entry, or claim, before it would, or might, otherwise expire by force of, or according to, the general limitation." A special limitation may be created by the words "until," "so long," "if," "whilst," and "during," as when land is granted to one *so long* as he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents he shall have made £500. 2 Black. Com. 155; Smith on Exec. Int. 12; Thomas Coke, 2 vol., 120-21; Fearne on Rem. 12, 13 and note p. 10. "In such case," says Blackstone, "the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the £500), and the subsequent estate which depends on such determination becomes immediately vested, without any act to be done by him who is next in expectancy."

The effect of the limitation in this case was that the estate of the trustees terminated the moment the house ceased to be used as a place of worship according to the rules and discipline of the church, by the members to whose use in that manner it had been granted; and the reversion *ipso facto* returned to Thomas Pillow, the grantor. The abandonment of the house as a place of worship, therefore, became a chief question in the cause, because the title of the trustees to the property, and consequently their right to maintain this action, hinged upon this event. Then, as the use of the members of this church was to be according to the rules and discipline from time to time adopted by the general conference, it became a question whether the alleged abandonment of the house as a place of worship was by church authority, and according

to the rules and discipline then existing; for a mere temporary suspension of services there, or a discontinuance of the use without authority, would not, *ipso facto*, determine the use. Hence an inquiry both into the fact of abandonment and the authority of the church became essential. * * *

The fact of such an abandonment was submitted by the judge and found by the jury. In his charge the learned judge submitted the question on the testimony of the presiding elder and the book of discipline as to the authority for so doing; and on his testimony and that of others as to the actual discontinuance of services there and the causes thereof. This was all he could do, as the question of fact belonged to the jury. * * *

Judgment affirmed.

Impossibility of Performance.

THOMAS v. HOWELL, in King's Bench, Trinity 4 Wm. & Mary.—A. D. 1693.—1 Salk. 170, 25 Eng. Rul. Cas. 626.

One devised to his eldest daughter upon condition she would marry his nephew on or before she attained the age of 21. The nephew died young, and the daughter never refused, and indeed never was required to marry him. After the death of the nephew, the daughter, being about 17, married J. S. And it was adjudged in C. B. that the condition was not broken, being become impossible by the act of God; and the judgment was afterwards affirmed in error in B. R.

Right of Entry when not Expressly Reserved.

LITTLETON'S TENURES. Littleton died in 1482.

§ 331 * * * It is commonly used in all such cases as aforesaid to put the clauses in the deeds, *scilicet*, if the rent be behind, &c., that it should be lawful to the feoffor and his heirs to enter, &c., and this is well done, for this intent, to declare and express to the common people, who are not learned in the law, of the manner and condition of the feoffment &c., As if a man seised of land letteth the same land to another by deed indented for a term of years, rendering to him a certain rent, it is used to put into the deed, that if the rent be behind at the day of payment, or by the space of a week or month, &c. that then it shall be lawful to the lessor to distrain, &c., yet the lessor may distrain of common right for the rent behind, &c., though such words were not put into the deed, &c.

Who May Enter for Condition Broken.

LITTLETON'S TENURES (Littleton died in 1482).

§ 346. And here no two things: one is that no rent (which is properly

so called) may be reserved upon any feoffment, gift, or lease, but only to the feoffor, donor, or lessor, or to their heirs, and in no manner may it be reserved to any strange person. But if two joint-tenants make a lease by deed indented, reserving to one of them a certain yearly rent this is good enough to him to whom the rent is reserved, for he is privy to the lease and not a stranger.

§ 347. The second thing is that no entry nor re-entry (which is all one) may be reserved or given to any person but only to the feoffor, donor, or lessor, or to their heirs; and such re-entry cannot be given to any other person. For if a man letteth land to another for term of life by indenture, rendering to the lessor and to his heirs a certain rent, and for default of payment a re-entry, &c., if afterwards the lessor by a deed granteth the reversion of the land to another in fee, and the tenant for term of life attorn &c., if the rent be after behind, the grantee of the reversion may distrain for the rent, because the rent is incident to the reversion; but he may not enter into the land and oust the tenant, as the lessor might have done, or his heirs, if the reversion had been continued in them, &c. And in this case the entry is taken away forever; for the grantee of the reversion cannot enter for the reason aforesaid; and neither the lessor nor his heirs can enter, for if the lessor might enter, then he ought to be in his former estate, &c., and this may not be, because he hath aliened from him the reversion.

COKE LIT. 214b-215b.—A. D. 1620-30.

If a man have a lease for years and demise or grant the same upon condition, &c., and die, his executors or administrators shall enter for the condition broken, for they are privy in right, and shall represent the person of the dead. [215a] If *cestui que use* had made a lease for years, &c., upon condition, the feoffees should not enter for the condition broken, for they are privy in estate, but not privy in blood. Another diversity is in case of a lease for years, where the condition is that the lease shall cease, or be void as is aforesaid, and where the condition is, that the lessor shall re-enter; for there the grantee, as Littleton saith, shall never take benefit of the condition. And it is to be observed, that where the estate or lease is *ipso facto* void by the condition or limitation no acceptance of the rent after can make it to have a continuance; otherwise it is of an estate or lease voidable by entry.

Another diversity is between conditions in deed, whereof sufficient has been said before, and conditions in law. As if a man make a lease for life, there is a condition in law annexed unto it, that if the lessee doth make a greater estate, &c., that then the lessor may enter. Of this and the like conditions in law, which do give an entry to the lessor, the lessor himself and his heirs shall not only take benefit of it, but also his assignee and the lord by escheat, everyone for the condition in law broken in their own time.

Another diversity there is between the judgment of the common law, whereof Littleton wrote, and the law at this day by force of the statute of 32 Hen. VIII, c. 34. For by the common law no grantee or assignee of the reversion could (as hath been said) take advantage of a re-entry by force of any condition. For at the common law, if a man had made a lease for life reserving a rent, &c., and if the rent be behind a re-entry, and if the lessor grant the reversion over, the grantee should take no benefit of the condition, for the cause before rehearsed. But now by the said statute of 32 Hen. VIII, the grantee may take advantage thereof, and upon demand of the rent and non-payment, he may re-enter. By which act it is provided, that as well every person which shall have any grant of the king of any reversion, &c., of any lands, &c., which pertained to monasteries, &c., as also all other persons being grantees or assignees, &c., to or by any other person or persons, and their heirs, executors, successors, and assignees, shall have like advantage against the lessees, &c., by entry for the non-payment of the rent, or for doing of waste, or other forfeiture, &c., as the said lessors or grantors themselves ought or might have had. Upon this act divers resolutions and judgments have been given, which are necessary to be known: 1. That the said statute is general, viz. that the grantee of the reversion of every common person, as well as the king, shall take advantage of conditions. 2. That the statute doth extend to grants made by the successors of the king, albeit the king be only named in the act. 3. That where the statute speaketh of lessees that the same doth not extend to gifts in tail. 4. That where the statute speaks of grantees and assignees of the reversion, that an assignee of part of the state of the reversion may take advantage of the condition. As if lessee for life be, &c., and the reversion is granted for life, &c. So if lessee for years be, and the reversion is granted for years, the grantee for years shall take benefit of the condition in respect to this word (executors) in the act. 5. That a grantee of part of the reversion shall not take advantage of the condition; as if the lease be of three acres, reserving a rent upon condition, and the reversion is granted of two acres, the rent shall be apportioned by the act of the parties, but the condition is destroyed, for that it is entire and against common right. 6. That in the king's case the condition in that case is not destroyed, but remains still in the king. 7. By act in law a condition may be apportioned in the case of a common person; as if a lease for years be made of two acres, one of the nature of borough English, the other at the common law; and the lessor having issue two sons, dieth, each of them shall enter for the condition broken; and likewise a condition shall be apportioned by the act and wrong of the lessee, as hath been said in the chapter of Rents. 8. If a lease for life be made, reserving a rent upon condition, &c., the lessor levies a fine of the reversion, he is grantee or assignee of the reversion; but without attornment he shall not take advantage of the condition, for the makers of the statute intended to have all necessary incidents observed, otherwise it might be mischievous to the lessee. 9. There is a diversity between

a condition that is compulsory and a power of revocation that is voluntary for a man that hath a power of revocation may by his own act extinguish his power of revocation in part, as by levying a fine of part; and yet the power shall remain for the residue, because it is in the nature of a limitation, and not a condition; and so it was resolved in the *Earl of Shrewsbury's Case* in the court of wards, Easter, 39 Eliz. & Mich. 40 & 41 Eliz. 10. If the lessor bargain and sell the reversion by deed indented and enrolled, the bargainee is not in the *per* of the bargainor, and yet he is an assignee within the statute. [215b] So if the lessor grant the reversion in fee to the use of A and his heirs, A is a sufficient assignee within the statute; because he comes in by the act and limitation of the party, although he is in the *post*, and the words of the statute be, *to or by*, and they be assignees to him although they be not by him; but such as come in merely by act in law, as the lord of the villein, the lord by escheat, the lord that entereth or claimeth for mortmain, or the like, shall not take benefit of this statute. 11. If the lessor in the case before, bargain and sell the reversion by deed indented and enrolled, or if the lessor make a feoffment in fee, and the lessee re-enter, the grantee or feoffee shall not take any advantage of any condition without making notice to the lessee. 12. Albeit the whole words of the statute be for nonpayment of the rent, or for doing of waste, or other forfeiture, yet the grantees or assignees shall not take benefit of every forfeiture by force of a condition, but only of such conditions as either are incident to the reversion, as rent, or for the benefit of the estate, as for not doing of waste, for keeping the house in reparations, for making of fences, scouring of ditches, for preserving of woods, or such like; and not for the payment of any sum in gross, delivery of corn, wood, or the like, so as other forfeiture shall be taken for other forfeitures like to those examples which were there put (*videlicet*) of payment of rent and not doing of waste, which are for the benefit of the reversion.

ANON., 22 Edw. IV.—A. D. 1483.—Brooke Abr. t. Conditions 167, 22 Edw. IV, 17.

Debt. The master and associates of St. Bartholomews in London had granted to J. S. for life a certain corody, &c., for doing such services as N and others had done, and the grantee leased to the master and his associates for seven years rendering 10£ rent. The grantee brought debt, and the grantor said that the plaintiff had not done the services; and the plaintiff said that he was excused by reason of the lease to the grantor which is a suspense, by which it was argued that the plaintiff should be paid his rent and the corody; and see on this case 20 Edw. IV, 18, 19, BRIAN, C. J. If a man enfeoffs me on condition to pay to him 10£ on such a day or to re-enter, and I lease the land to him rendering rent, and at the day I do not pay the 10£, here he may retain the land, and the rent reserved by me is extinguished.

But if a man makes a feoffment in fee rendering rent with a clause of re-entry for non-payment, if the feoffee re-enfeoff the feoffor the feoffor may not re-enter for non-payment of the rent, for he has the same land from which the rent is issuing. Contrary it is of a sum in gross as above. And the same would seem to be the law of a lease made afterwards by the lessee to the lessor for years or life, for by this the rent is suspended.

NOTA, Easter Term.—A. D. 1496.—Year Books, 11 Hen. VII, 17, pl. 14.

If I should lease for a term of years on condition that he should go to Rome such a day, and if not that his estate should cease, here if the lessor grant the reversion to another, and he attorn, and later the condition is broken, he who has the reversion may enter, for by breach of the condition the estate is void and determined; so of a term for life. But if the condition was that he might re-enter for the condition broken, and he had granted the reversion over, the grantee may not enter.

CHAWORTH v. PHILLIPS, Moor 876. About 7 Jac. 1, A. D. 1610.

It was resolved that if a lease was made on condition to be void if 10£ be not paid by a day named, the grantee of the reversion cannot enter by such condition, because it is collateral. Resolved, also, that if a lessee for 20 years make a lease for 10 years on such condition, and afterwards the lessee for 20 years surrender to him in reversion, he in reversion may not have benefit of the condition, because he is in of another estate paramount.

WARREN v. LEE, in the King's Bench, Hilary, 2 & 3 Phil. & Mary.—A. D. 1556.—Dyer 126b.

In trespass for breaking a close, by Jasper Warren against Lee and others. The defendants pleaded not guilty, and at *nisi prius* there was a demurrer in law upon the evidence. And the case was: that the father of the plaintiff was seised in fee of land holden in socage, and by his last will in writing gave the land in the premises thereof to his wife for the term of [*127a] her life, *on condition that she should provide for the said Jasper, being the eldest son at school, and bring him up in virtue and good morals at her own expense until he should be of the full age of 21 years; and afterwards in the end of the will, he gave the land after the death of his wife to his second son in tail, reserving the fee-simple; and died. The wife entered and broke the condition; and the said Jasper, after he came of age, entered, and brought this action of trespass during the life of the wife. The question was, whether his entry was lawful or not. First, it is to be considered whether a condition can be knit to a devise or not? And*

it seems it may; and this by the statutes of wills 32 [Hen. 8 c. 1] and 35 Hen. 8 c. 5 which give power to the devisor to make devises at his free will and pleasure for the advancement of his wife, &c., or otherwise, &c.¹ Also, to prove this by a case in Littleton [§ 125], that the executors of the devisor of land devisable by custom shall sell the land, they do it not, the heir enters, &c. Also, such devises of land in use have been common. And see a condition, that the devisee shall pay rent to the wife of the devisor and a clause of distress to the wife for the same; whether this destroys the condition, *quaere bene*, H. 18 Eliz. [Dyer 348a.] Also, note for whose benefit and advantage this condition was made, and by whom it ought to be performed. Also, whether the condition knit to the particular estate only be destroyed and made void by the limitation over in tail, the fee-simple remaining in the devisor, or not? And it seems not, although the remainder had been over in fee; for there is a difference between the reservation of a rent and of a condition; for the one, viz. the latter, may be without deed by livery accordingly, and the former not without deed indented, &c.; and although the remainder be not entailed upon the condition also, yet it takes effect upon this conditional livery; and see Perkins accordant thereto, the last chapter of his book [§ 831], who makes no question of the condition, but whether he in remainder shall take advantage of the breach of it; and it seems not, &c. See also, Fitz. Nat. Brev. in *ex gravi querela* [201 C] such a devise upon condition, &c., remainder over in tail without condition, and good. And if a man make a lease for life reserving a rent and re-entry for default of payment, remainder over in tail; this remainder does not destroy the condition, because it is made all at one and the same time. But when the condition is once annexed to the particular estate, and then by another deed the reversion is granted by the maker of the condition, there the condition is gone, *causa patet*. Also, whether the entry of the heir of the devisor for breach of the condition be lawful, or not? And what estate he shall be adjudged to have? And whether the remainder be defeated, or not? And it seems the entry is lawful, although no re-entry or entry are expressly reserved to him,² because it is tacitly implied in law when the condition is to be performed by the devisee. [*127 b] And this sort of condition carries with it a penalty, viz., the defeasance of the estate to which it is annexed. And in common reason he who was prejudiced by the devise, viz., the heir who is disinherited by it, shall take advantage of the breach of the condition. For by Glanvil lib. 7, c. 1, fol. 44 the father cannot make a devise of land without the assent of the heir, but with his assent he may.³ And it seems that the remainder is not destroyed by the

¹ Note how differently this free will and pleasure phrase is construed in *Soule v. Gerrard*, post 226.

² If it is a condition, clearly the right of entry for breach exists as a natural consequence, without express reservation.

³ While Glanvil does make this statement, we hear little of it after him; and certainly it could not hold after the statute of wills expressly permitted the devisor to dispose at his free will and pleasure.

entry, but the heir shall have only an estate for the life of the wife; for there is a difference between this remainder made by will and a remainder created by deed and livery; for in the last case the entry defeats the livery, but it is not so in a will; for a remainder by will, is good although the particular estate were never good;⁴ as if to a monk, &c. And the law in this case shall be taken in the same manner as if the deviser had expressly reserved an entry and retainer during the life of the wife; and such tempering and qualifying of the penalty shall not altogether defeat the estate, &c., as Littleton [§ 327] says of re-entry and retainer until, &c. * * * Also the case in 29 assize [159 pl. 17] of a devise to Clerk to be priest, remainder to a commonalty in fee, &c., and he in remainder shall not take advantage of the breach, because no words of the will give it to him, and also he is a stranger to it; but if the words had been *provided that if the condition be broken, his estate shall cease, and he in remainder may immediately enter*; there he should take advantage, although he be a stranger, because the estate determines there without re-entry. And therefore, if I make such a conditional lease for life, with condition, viz. *that the estate shall cease*, and then alien the reversion, the alienee shall take advantage of this condition, because the estate determines without entry, &c. * * *

VAN RENSSELAER v. BALL, New York Ct. of Appeals, March, 1859.—19 N. Y. 100.

Ejectment for 120½ acres of land. Plaintiff gave in evidence an indenture dated Oct. 20, 1792, by which Stephen Van Rensselaer conveyed the land in question to William Ball in fee, reserving an annual rent payable in wheat, fowls, and a day's service each year. The deed contained a covenant by the grantee for himself, his heirs, representatives, and assigns to pay the rent and contained clauses for distress for re-entry on condition if the rent should not be paid. It was proved that W. Ball died 12 years before the trial, that defendant his son was in possession, and had paid the rent for his father but not since his death. It was also proved that S. Van Rensselaer died Jan. 26, 1839, leaving a will by which he devised to the plaintiff "all his estate, lands, tenements, rents, and hereditaments, in the manor of Rensselaerwick, on the west side of the Hudson river" including the lands here in question. The defendant objected that the indenture did not create the relation of landlord and tenant between the parties to it or their representatives; that ejectment did not lie except between land-

⁴ Observe that the future estate here is called a remainder; the name executory devise is a later invention. Observe that the doctrine, that future estates by will are liable to the rules as to remainders by deed if by possibility they could take effect as strict remainders, was as yet unknown. This rule is believed to have arisen from a desire to limit the scope of the rule in *Pells v. Brown* (1620), post 242.

lord and tenant; that the reservation called rent was not such in law, but a personal contract between the original parties, affecting only themselves and their representatives, and did not attach to or concern the land; that if this were not so, the plaintiff as devisee of the rent could not enter or maintain ejectment; and that even if he could do that, he must make strict demand of the rent before suing, and must show that there was no sufficient distress on the premises. The judge overruled the several objections, gave judgment for the plaintiff; and defendant's counsel excepted, appealed to the general term, and now appeals from the judgment of the general term affirming the judgment below.

[*102.] DENIO, J.: A condition annexed to a conveyance in fee, that the grantee his heirs and assigns shall pay to the grantor and his heirs an annual rent and that in default of payment the grantor or his heirs may re-enter, is a lawful condition. Littleton puts it as an example of a condition in deed, at the commencement of that part of his treatise which relates to estates upon condition. Such an estate, he says, "is as if a man by deed indented enfeoffs another in fee simple, reserving to him and his heirs yearly a certain rent payable at one feast or divers feasts, per annum on condition that if the rent be behind, &c., that it shall be lawful for the feoffor and his heirs to enter. &c., and if it happen the rent to be behind by a week after any day of payment of it, or by a month after any day of payment of it, or by a half a year, &c., that then it shall be lawful for the feoffor or his heirs to enter, &c. In these cases, if the rent be not paid at such time, or before such time limited and specified within the condition comprised in the indenture, then may the feoffor or his heirs enter into such lands or tenements, and then of his former estate to have and hold, and the feoffee quite to oust thereof. And it is called an estate upon condition, because that the estate of the feoffee is defeasible, if the condition be not performed, &c. (§ 325.) The systematic writers upon the law of real property from that time to the present have assumed the legality of such conditions; and the substance of the condition in the conveyance under consideration is usually put as an example. 2 Bl. Com. 154; 2 Cruise's Dig. c. 1 § 1 pl. 3, 9; 4 Kent Com. 123. Among the numerous authorities referred to by the defendant's counsel, I have been unable to find a single dictum or the slightest hint that such conditions were contrary to law, or that they could only be attached to estates for life or years, or that a common law tenure between the parties, or a reversion in the grantors, were necessary to uphold them. There is moreover, nothing in the case of *De Peyster v. Michael*, 2 Seld [467] lately decided in this court, which, properly understood, creates a doubt as to the validity of such a condition, or the lawfulness of annexing one to an estate in fee. [*103].

The books which treat of such estates do, indeed, state that a condition repugnant to the nature of the estate granted is void; and the instances given are of feoffments, or conveyances in fee, by bargain and

sale, with a condition that the feoffee or grantee shall not alien; and they say that even this could be done before the statute of *quia emptores* because the feoffor had a possibility of reverter, by the expiration of the feudal investiture upon the failure of heirs of the tenant. Coke Lit. *223a. The argument in the opinion of the chief judge in *De Peyster v. Michael* consisted in showing that a condition for the payment of one quarter part of the value of the land and improvements upon each sale by the grantee, or those who should succeed to his estate, was a restraint upon alienation repugnant to the nature of a fee simple, within the sense of the authorities; and that, although this could be done where there was a reversion, as upon the grant of an estate for life or years, or a possibility of reverter, as upon a feoffment before the statute of *quia emptores*, it was unlawful in this state, in respect to a conveyance in fee, after the re-enactment of that statute by the legislature. It seems to me, that there is nothing in the reasoning of that opinion to encourage one to question the validity of the clauses of re-entry for non-payment of rent in a conveyance in fee, even though the chief judge had not taken care to state, as he has done, that the principles which he laid down would leave to the grantee in these conveyances, and his representatives, the full benefit of the remedy of re-entry for the enforcement of their right to the rent.

But assuming that the estate conveyed to William Ball was defeasible by the non-performance of the condition to pay the annual rent; no one but the grantor or his heirs could, at common law, enter for the breach of a condition subsequent. Littleton 347; Coke Lit. *214b; 4 Kent Com. 127; *Nicoll v. N. Y. & E. R. R.*, 12 N. Y. 121. This was the consequence of a maxim of the common law that nothing in action, entry or re-entry, could be granted over; for, as Coke says: "Under color thereof pretended titles might be granted to great men, whereby right might be trodden [*104] down and the weak oppressed, which the common law forbiddeth, as men to grant before they be in possession." Coke Lit. *Supra*. The reason upon which this maxim was founded has, no doubt, become in great measure obsolete; still, the principle that the right of entry cannot in general be granted over is, I am inclined to believe, still a part of the law, notwithstanding the tendency of modern decisions and the provisions of the code. This then is the first difficulty in the plaintiff's case. He brings this action as the assignee, by devise, of the grantor, and not as his heir; and he is disabled from maintaining the action unless the act of 1805 and its different re-enactments apply to the case. Laws 1805, c. 98; 1 R. L. 1813, 364 § 3; 1 R. S. 748 § 25. I have elsewhere stated the origin and history of the series of enactments in favor of the assignees of reversions, of which this forms a supplement, and have shown that it enabled the grantees of a perpetual rent charge to maintain an action on the covenants for the payment of rent. But the original statute of 32 Henry VIII, c. 34, gives to the assignee mentioned in it not only a remedy by action, but the "like advantages" "by entry for non-payment

of the rent" which the grantors might have had, and this feature is preserved in the re-enactments in this state (2 Jones & Var. 184; 1 R. L. 1813, 363, § 1; in the Revised Statutes of 1830 the expression is that the assignees "shall have the same remedy by entry action or otherwise," as their grantor or lessor had or might have had. 1 R. S. 747 § 23. Then follows the provision first introduced by the act of 1805, and continued in the revisions, that this provision shall extend to grants or leases in fee reserving rents, as well as to leases for life or years. But in all the acts the expression is retained, which is found in the statute of Henry VIII, "as if the reversion had remained in the lessor or grantor." In grants in fee, there being no reversion these words are inapplicable, or at least incongruous: and to make the provision coherent they should be read as though the language were, "as if said right of entry had remained in the lessor or grantor;" or this particular expression in the statutes [*105] should be limited to the case embraced in the provision where the grantor had a reversion, and be dropped in the cases it is made to relate to grants in fee, upon the rule of construction *redendo singula singulis*. No one can for a moment doubt the intention of the legislature to confer upon the assignees of a grantor in fee reserving rent, the remedy by entry for the non-payment of such rent, precisely as the grantor himself had it before he parted with the right. In other words, the design is plain to make the right of entry transferable, and thus to change to this extent, in favor of this class of conditions, the rule of the common law. This is so manifest to my mind from the reading of the statutes that anything I could further say would be likely to obscure rather than to elucidate it.

There is the question, in the next place, whether where one has a perpetual rent and a right of entry on the land of another to enforce its payment, transmissible to his heirs, but not legally transferable by sale or assignment, the legislature can lawfully interpose, by an enactment declaring that thenceforward the rent and the right of entry shall be subject to transfer like a rent incident to a reversion; in other words, whether the act of 1805 can be applied to conveyances and reservations of rent existing when it was passed, without violating the provision of the constitution of the United States, which protects contracts from being impaired by the state legislatures. I think the statute is not subject to question on that ground. A conveyance, I agree, is as fully within the constitutional provision as an executory contract; and the only point is whether the obligations of the contract contained in this conveyance have been impaired within the sense of the provision. Clearly the rights of Van Rensselaer, the grantor, have not been affected unfavorably. They have been manifestly advanced; for the rent and the remedy to enforce it, have been improved by having imparted to it a vendible quality. Nor have the obligations of the grantee, or his representatives or assigns, been increased, or their remedies changed to their prejudice. The estate of the grantee was subject to be destroyed by a re-entry for non-payment (*106) of rent before

the statute, and no new or further liability is attached to it now. A re-entry can be sustained in precisely the same cases in which it could before, and in no others. The contract in question is affected in precisely the same manner as all existing non-negotiable choses in action were by the code of procedure, when it rendered them capable of assignment so as to vest the legal title and the right to sue upon them in the assignee. § 111. Yet the courts have uniformly applied this provision of the code to all existing contracts, equally with those made after the code was enacted. As to the remedies of the grantee and his representatives and privies in estate, if they have been changed at all, it is to give them a right of action where none existed before. The act of Henry VIII, which has been regularly followed in this particular in our re-enactment, and in the revision, gave a reciprocal remedy to the grantee or lessee, and his representatives, against the assignee of the reversion; and, by the act of 1805, bringing grants in fee within the purview of these provisions, the grantees acquired a remedy against the assignees of the grantor, which they did not possess before. They can now sue such assignees for any breach of the grantor's covenants, which they probably could not have done at common law, and certainly not by any of the statutes prior to the act of 1805; and they are not deprived of any remedy which they might have had against the grantor himself, and his personal representatives, upon his express covenants.

It is, moreover, argued on behalf of the defendant, that if all other difficulties were removed, an action in the nature of ejectment could not be maintained without strict demand of the rent on the land and at the precise time at which it became payable—a formality which it is admitted has not taken place. The common law requires such a demand preparatory to bringing ejectment. (Coke Lit. *201b, 202a.); and it was for the purpose of avoiding “the many niceties which attend re-entries at common law,” as it is expressed in the preamble, that the statute 4 Geo. II, c. 28, was passed. It is limited to cases between landlord and tenant where there is a right by [*107] law in the former to re-enter; and it makes the service of a declaration in ejectment to stand in the place and stead of a demand and re-entry. The provision was early re-enacted in this country, and has been continued in each subsequent revision of the laws. 2 Jones & Var. 238, § 23; 1 K. & R. 134, § 23; 1 R. L., 1813, 440 § 23; 2 R. S. 505 § 30. The statutes require, to warrant the action, evidence that no sufficient distress can be found on the premises to satisfy the rent due. The defendant's position is that these acts do not apply to the case, because, as it is argued, a reservation of an annual payment upon a conveyance in fee is not properly rent, as no distress can of common right be made for it, and it is only distrainable by virtue of an express provision contained in the indenture; and the statute requires it to be a case between landlord and tenant, which implies, it is said, that the relation should exist at common law. But such reservations as the one before us were considered as creating a rent within the legal meaning of that term, from the time of Littleton

to the present. We have seen that it was called rent in § 325 of the treatise already quoted; and by looking into § 217 and § 218. we see that it was one of the recognized species of rent, and was called rent charge. It was rent, too, as has been shown, for the non-payment of which a re-entry was given at common law, where the right to re-enter was provided for in the deed. The act of 1805 assumes that rent may be reserved upon a conveyance in fee, and the preamble of that act states that such reservations had been, long in use in this state. Now the inconvenience which the statutes making a declaration in ejectment stand in the place of a strict demand were intended to remedy, was the great particularity and nicety attending this demand at common law; and this was precisely as applicable to rents arising upon grants in fee as upon leases for life or years. I do not, therefore, see any reason, in the nature of the case, or in the language of the statutes, for confining this remedy by ejectment to cases of rent service; and I am of opinion that it is applicable to all cases of non-payment of rent where there was a right to re-enter at common law. * * *

These reasons have led me to the conclusion that none of the points so ingeniously taken and ably urged on the part of the defendant can be sustained; and I am in favor of affirming the judgment of the supreme court.

ALLEN and SHELDON, JJ., took no part in the decision, all the other judges concurring. Judgment affirmed.

Division and Waiver of Conditions.

ANONYMOUS, Easter, 20 Eliz.—A. D. 1578.—Moor 113.

A man seised of copyhold held of a manor, part borough English and part at common law, leased the land by deed indented for 21 years by license of the lord, provided always that if the lessor, his wife, heirs, assigns, or any of them, give a year's warning to the lessee that the husband, wife, or heirs will dwell there, that then the lease shall be void, except that the lessor or his heirs shall pay to the lessee 20£. The lessor and his wife died, and the reversion of the one part descended to the oldest son, and the reversion of the other part descended to the youngest, and he purchased the reversion of his older brother; and later, claiming to be a person within the proviso, gave notice to the lessee. On this two questions were moved: 1, if he was such a person as might give the warning or if the condition is destroyed, the reversion having been severed; 2, if by the words, *except the lessor or his heirs shall pay, &c.*, the intent was that this should be a consideration to the lessee for his departure, if these words were sufficient to give the lessee the 20£. MOUNSON and MANWOOD [JJ.] held that he might give the warning, and that the law which had severed the reversion had severed also the condition,

although at the commencement they were entire. And so of one part as heir and of the other as assignee of the older brother he might have advantage of the condition. But MANWOOD, J., said that if he had made feoffment of the borough English lands, and had issue two sons and died, now the elder only might have advantage of the condition, for that is a condition in gross, but in this case it was a reversion reserved to the lessor. But if two joint tenants with warranty make partition, or if one grant his part to another, now the warranty is gone; for this is their own act, and they were not compellable to make partition. And so there was a diversity taken. And as to the other question they held that the words were sufficient to give him the 20£. * * *

HARVY v. OSWOLD, in B. R. Trinity, 38 Eliz.—A. D. 1596.—Moor 456.

In *ejectione firmæ* the case was that one made a lease rendering rent, with condition that the lessee should not lease without assent of the lessor. He leased part, and the lessor without notice of it accepted the entire rent of the first lessee; and now the question was if he might enter by the condition. And it was adjudged that he might notwithstanding the acceptance, because he had no notice of the breach, which want of notice the defendant had pleaded in his rejoinder; but if he had notice the acceptance seems a bar, though the condition was collateral. Per GAWDY and POPHAM.

DUMPOR'S CASE, in King's Bench, Hilary Term 45 Eliz.—A. D. 1603.—4 Coke, 119b, 1 Smith Lead. Cas. *85.

In trespass between Dumpor and Symms, upon the general issue, the jurors gave a special verdict to this effect: the president and scholars of the college of the Corpus Christi in Oxford, made a lease for years *in anno* 10 Eliz, of the land now in question to one Bolde, proviso that the lessee or his assigns should not alien the premises to any person or persons without the special license of the lessors. And afterwards the lessors by their deed, *anno* 13 Eliz. licensed the lessee to alien, or demise the land, or any part of it, to any person or persons *quibuscumque*. And afterwards *anno* 15 Eliz. the lessee assigned the term to one Tubbe, who by his last will devised it to his son, and by the same will made his son executor, and died. The son entered generally, and the testator was not indebted to any person, and afterwards the son died intestate, and the ordinary committed administration to one who assigned the term to the defendant. The president and scholars by warrant of attorney entered for the condition broken, and made a lease to the plaintiff for 21 years, who entered on the defendant, who re-entered, upon which re-entry this action of trespass was brought; and that upon the lease made to Bolde the yearly rent of 33s. 4d. was reserved, and upon the lease to the plaintiff, the yearly

rent of 22s. was only reserved. And the jurors prayed upon all this matter the advice and discretion of the court, and upon this verdict judgment was given against the plaintiff. And in this case divers points were debated and resolved: 1. That the alienation by license to Tubbe, had determined the condition, so that the alienation which he might afterwards make could break the proviso or give cause of entry to the lessors, for the lessors could not dispense with an alienation for one time and the same estate should remain subject to the proviso after. And though the proviso be, that the lessee or his assigns should not alien, yet when the lessors license the lessee to alien, they shall never defeat, by force of the said proviso, the term which is absolutely aliened by their license, in as much as the assignee has the same term which was assigned with their assent: so if the lessors dispense with one alienation they thereby dispense with all alienations thereafter; for in as much as by force of the lessor's license and of the lessee's assignment, the estate and interest of Tubbe was absolute it was not possible that his assignee who has his estate and interest shall be subject to the first condition: and as the dispensation of one alienation is the dispensation of all others, so it is as to the persons, for if the lessors dispense with one, all the others are at liberty. And therefore it was adjudged, Trinity 28 Eliz., Rot. 256, in the common pleas between *Leeds and Crompton* (Cro. Eliz. 816, Godb. 93, Noy 32, 4 Leon. 58, 2 Bulstr. 291) that where the Lord Stratford made a lease to three, upon condition that they or any of them should not alien without the assent of the lessor, and afterwards one aliened by his assent, and afterwards the other two aliened without license, and it was adjudged that in this case the condition being determined as to one person, by the license of the lessor was determined in all. And POPHAM, C. J., denied the case in 16 Eliz., Dyer 334, that if a man lease land upon condition that he shall not alien the land or any part of it without the assent of the lessor, and afterwards he aliens part with the assent of the lessor, that he cannot alien the residue without the assent of the lessor: and conceived that this is not law, for he said the condition should not be divided or apportioned by the act of the parties; and in the same case as to parcel which was aliened by the assent of the lessor the condition is determined; for although the lessee alien any part of the residue, the lessor shall not enter into the part aliened by the license, and therefore the condition being determined in part is determined in all. And therefore the chief justice said he thought the said case was falsely printed, for he held clearly that it was not law.

NOTE reader, Paschae 14 Eliz. Rot. 1015, in the common pleas, that where the lease was made by deed indented for 21 years of three manors, A, B, C. rendering rent, for A 6*l.* for B 5*l.* for C 10*l.*, to be paid in a place out of the land, with a condition of re-entry into all three manors for default of payment of the said rents, or any of them, and afterwards the lessor by deed indented and enrolled bargained and sold the reversion of one house and 40 acres of land parcel

of the manor of A to one and his heirs, and afterwards by another deed indented and enrolled bargained and sold all the residue to another and his heirs; and if the second bargainee should enter for condition broken or not was the question. And it was adjudged that he should not enter for the condition broken; because the condition being entire, could not be apportioned by the act of the parties, but by the severance of a part of the reversion is destroyed in all. But it was agreed that a condition may be apportioned in two cases: 1, By act in law; 2, By act and wrong of the lessee. By act in law, as if a man seised of two acres, the one in fee, and the other in borough English, has issue two sons and leases both acres for life or years rendering rent, with condition, the lessor dies; in this case by this descent, which is an act in law, the reversion, rent, and condition are divided. By act and wrong of the lessee, as if the lessee makes a feoffment of part or commits waste in part, and the lessor enters for the forfeiture or recovers the place wasted, there the rent and condition shall be apportioned; for none shall take advantage of his own wrong, and the lessor shall not be prejudiced by the wrong of the lessee. And the Lord Dyer, then chief justice of the common pleas, in the same case said, that he who enters for a condition broken ought to be in of the same estate which he had at the time of the condition created, and *that* he cannot have when he has departed with the reversion of part; and with that reason agrees Littleton 80b. And *vide* 4 & 5 Phil. & Mary, Dyer 152 pl. 7, where a proviso in an indenture of lease was that the lessee his executors or assigns should not alien to any person without license of the lessor but only to one of the sons of the lessee; the lessee died, his executor assigned it over to one of his sons; it was held by Stamford and Catlin [J.J.] that the son might alien to whom he pleased without license, for the condition as to the son was determined, which agrees with the resolution of the principal point in the case at bar. 2. it was resolved that the statutes of 13 Eliz. c. 10; and 18 Eliz. c. 11, concerning leases made by deans and chapters, colleges and other ecclesiastical persons, are general laws whereof the court ought to take knowledge though they are not found by the jurors, and so it was resolved between *Claypole and Carter* (Yelv. 106, 1 Leon. 306, Moor 593) in a writ of error in the king's bench.

Conditions in Restraint of Alienation.

LITTLETON. Secs. 720, 721, 722, 723. Littleton died in A. D. 1482.

§ 720. I have heard say that in the time of king Richard II there was a judge of the common pleas dwelling in Kent called Richel, who had issue divers sons, and his intent was that his eldest son should have certain lands and tenements to him and to the heirs of his body begotten, and for default of issue the remainder to the second son, &c., and so to the third son, &c.; and because he would that none of his sons

should alien or make warranty to bar or hurt the others that should be in remainder, &c., he caused an indenture to be made to this effect, viz. that the lands and tenements were given to his eldest son upon such condition that if the eldest son alien in fee or in fee tail, &c., or if any of his sons alien &c., that then their estate should cease and be void, and that then the same lands and tenements immediately should remain to the second son and to the heirs of his body begotten, and so to the last, the remainder to his other sons, and livery of seisin was made accordingly.

721. But it seems by reason, that all such remainders in the form aforesaid are void and of no value, and this for three causes: One cause is that every remainder that begins by deed ought to be in him to whom the remainder is entailed by force of the same deed before the livery of seisin is made to him who shall have the freehold; for in such case the growing and being of the remainder is by the livery of seisin to him that shall have the freehold, and such remainder was not to the second son at the time of the livery of seisin in the case aforesaid, &c.

722. The second cause is, if the first son alien the tenements in fee, then is the freehold and the fee simple in the alienee and in none other; and if the donor had any reversion, by such alienation the reversion is discontinued; then how in reason can it be that such remainder shall commence its being and its growing immediately after such alienation made to a stranger who has by the same alienation a freehold and fee simple, &c.? And also, if such remainder should be good then might he enter upon the alienee where he had no manner of right before the alienation, which should be inconvenient.

723. The third cause is, when the condition is such, that if the elder son alien, &c. that his estate shall cease and be void, &c., then after such alienation, &c., may the donor enter by force of such condition, as it seems; and so the donor or his heirs in such case ought sooner to have the land than the second son that had not any right before such alienation; and so it seems that such remainders in the case aforesaid are void.

ANON., in Hilary Term 21 Hen. VI, 33, pl. 21.—A. D. 1443.

Note that a question was moved between the justices (NEWTON absent), as to this: A lease was made for a term of years on condition that the lessee should not grant over his estate, and whether this condition was void or not was the question. PASTON: The condition seems clearly void; for in that the lease is made is included that the lessee may grant over his estate. For, suppose that a feoffment is made in fee simple on condition that the lessee shall not make waste: the condition is void, for what is in him includes that he may commit waste; so, &c. YELVERTON: In your case, where a feoffment is made in fee on condition that he may not commit waste, or that he may not

alien, I well grant that the condition is void, because at the time of the feoffment the fee and right passes out of the person of the feoffor, and so that he had no right reserved in him; and so the condition reserved to him is void. But in the case that is here moved, the freehold and the fee did not pass out of the person of the lessor; so that he may well reserve this condition. PASTON: Suppose that the lease was made for term of life on condition that he may not commit waste, I contend that this condition is void; and yet a reversion in fee simple remains in the person of the lessor: and I claim that in such a case the condition is void, not for the damages that may result, but for the inconvenience. FULTHORP (J.): Suppose that one gives land in tail on condition that the donee in tail shall not discontinue the estate tail, is this condition void? I hold that it is not; for Thirning, who was chief justice here, gave his land to his eldest son on condition that if he alien, &c. it should remain to his younger son, and so he made the remainder to two or three others. ASCUE (J.): I understand that such a gift in tail with the condition is good and effectual, for Thirning made this gift on the advice of the justices of his time. PASTON: Not exactly; I know it was done with the assent of the justices, and he said he would have the gift openly stated in the court, and Hank said it would be valid.

And he arose and said that the whole condition was void, and so it seems to me.

And note that in [Lib.] Assize 24 plea 8 a gift in tail on condition was recited by Fulthorp and Ascue; and the condition was held good by the whole court: but of a fee simple it was said the law was otherwise. And note that it was after averment; and note also that this gift in tail was made on great deliberation on the conclusion of agreement between Lord Fitz Hugh and Lord Lescrop See 13 Hen. 4, which agrees with what Paston had said, in a writ of *ejectione firmæ*.

ANON., in Mich. Term.—A. D. 1495.—Yearbooks, Mich. Term, 10 Hen. VII 11, pl. 8.

Land was given in tail, remainder in fee, on condition that if the donee in tail or his heirs alien, to the damage of the issue, the donor and his heirs might enter: and the opinion of the court was that the condition was good, and one may make a condition on any act prohibited by law. For I may lease my land to one for term of life proviso that he shall not alien in fee, or proviso that he shall not commit waste; and I may make feoffment proviso that the feoffee shall not commit felony, or that he shall not alien in mortmain or within age. And also, I may enfeoff one and his wife on condition that they shall not enfeoff any man by deed; but I may not enfeoff them on condition that they shall not levy a fine, for this [condition] is merely contrary to law. Yet I may restrain a lessee by condition that he shall not do an unlawful act.

KEBLE held that if I infeoff a man in fee, omitting the word *assigns*, provided that he shall not alien, the condition is good, for the condition is consistent with the estate; for it is given to him and his heirs, the nature of which gift is not to have perpetual continuance, &c. Which the majority denied.

ANON., in Common Bench.—A. D. 1496.—Yearbooks, Mich. Term, 11 Hen. VII, 6, pl. 25.

Note that it was held by all the justices of the common bench, trinity term 8 Hen. VII, that if land is given in tail, remainder over to the right heirs of the tenant in tail, on condition that if he or his heirs should alien in fee the donor or his heirs might enter, this is a good condition notwithstanding the fee simple in reversion; and the diversity was taken between a fee simple in possession and a fee simple depending on another estate. And it was well argued.

ANON., in Common Bench, Mich. 31 Hen. 8.—A. D. 1540.—Dyer 45a.

A lease was made to one for term of years upon condition that the lessee should not alien his term to J. S.; and he aliens to R. B., who aliens to the said J. S. It was moved in C. B., whether the condition be broken? And it should seem not, because every condition is taken strictly; for if a man make a feoffment upon condition that he shall not enfeoff J. S., and he die, and his heir enfeoff J. S. this is not a breach of the condition. * * *

PARRY v. HARBERT, in Court of Augmentation, Mich. 31 Hen. 8.—A. D. 1540.—Dyer 45b.

A lease was made for a term of years, upon condition, *that if the lessee during his life should assign his term to any other without the assent of the lessor, it should be lawful for the lessor to re-enter.* The lessee devised his term by his will to another without the assent, &c. Whether this was cause of forfeiture? Because during his life the assignment did not take effect. And yet R. BROOKE, and HALES, the master of the rolls, thought this was a forfeiture; for the devisee, when he is in, shall be said to be in by assignment, which the lessor [lessee] made during his life. * * *

ANON., Mich. 3 Edw. 6—A. D. 1550.—Dyer 65b.

A question was asked upon these words in a lease, viz. *and it shall not be lawful for the lessee to give, sell or grant his estate and term to any person without the leave of the lessor, upon pain of forfeiture of his said term.* The lessor and lessee die, and the executors sell the term without the leave of the heir. It was holden, that this is out of the

case of forfeiture, because the restraint was only [*66a] during the lives of the lessor and lessee. And yet it was agreed in the bench, that the words above make a condition.

GOSTWICK'S CASE, in Common Pleas.—A. D. 1591.—Cro. Eliz. 163.

A lease was made for two years, upon condition, that they nor either of them shall alien any part of the land without the assent of the lessor. They make partition, and one aliens his part. This is a forfeiture of the whole.

GERMIN v. ASCOT, in Common Bench, Mich. 37 & 38 Eliz.—A. D. 1596.—Abridged from Moor 364, 1 And. 186, 2 and 7.

Waste. Carew, being seised in fee of the land, made a lease for years. and afterwards devised it to his sons in tail male successively, with proviso that if any of the devisees or their issue go about to alien, discontinue, or incumber the premises, then from the time they so go about their estate shall cease as if they were naturally dead, and from thenceforth it shall be lawful for him next in remainder to enter and hold the land for the life of him that shall so alien, and that on his death the land shall go to his issue as if no such offense had been committed. The devisor died. The eldest son and all other except the second levied a fine of the land, for which the second came and claimed by force of the devise. Afterwards the lessee committed waste, the conusee brought waste, the defendant pleaded all this matter and the plaintiff demurred.

ALL THE JUSTICES agreed that the proviso of cessor on attempt to alien or for alienation was wholly repugnant, and that the remainder to the second son limited to commence on such attempt was void; for which they adjudged against the second son, who brought this action. The justices argued the case openly, and conferred with all the justices of England, who agreed as one that the proviso was repugnant.

CORBET'S CASE, in Common Pleas, Easter, 42 Eliz.—A. D. 1600, 1 Coke 83b, 2 And. 134.—Abridged from Coke.

Christopher Corbet being seised of manor of S, covenanted by indenture with several for himself and his heirs, to stand seised of it for his own use for life, then to the use of his son Roland in tail male, and for want of such issue to use of Christopher's son Arthur in tail male, then to the use of others of his blood in tail, and finally to the use of the right heirs of said Christopher. By the same deed it was covenanted that if anything should be done by Roland or any of his heirs of his body to alienate the manor or bar the entail, that then immediately before such act attempted the use and estate in him limited should cease and the manor should immediately pass to the person next

entitled in the same manner as if the person so attempting were naturally dead. Christopher died, and Roland suffered a common recovery to his own use, whereupon Arthur entered, Roland re-entered, and Arthur sued him in trespass. Whether Arthur's entry was lawful was the question.

By ANDERSON, [C. J.] and WALMSLEY, GLANVIL, and KINGMILL, [JJ.], it was resolved that this proviso to cease an estate limited to one and his heirs male of his body as if the tenant in tail was dead, was repugnant, impossible, and against law; for the death of the tenant in tail is not a *cesser* of the estate tail, but the death of the tenant in tail without issue of his body is the determination thereof. And if the estate tail should cease as if he was dead his issue inheritable to the estate in tail would have it by descent in the life of his father, or he in remainder or reversion would have it in the life of the tenant in tail which is not possible; for to every descent, remainder, or reversion, upon the determination of an estate tail, death, either civil as entry into religion, or natural, as dissolution of the soul from the body, is requisite. It was said that there was no such repugnancy or impossibility at the time of the breach in the case at bar, because the tenant in tail had no issue at the time. To that it was answered that the having of issue was not material, that this was repugnant to the beginning: for by the express limitation he has an estate of inheritance, which by possibility may continue forever, and his estate of inheritance does not begin by the having of issue, but presently before any issue he has an estate of inheritance; and therefore before issue his feoffment is a discontinuance and no forfeiture, neither shall he in reversion be received upon his default in a praecipe.

ANDERSON, C. J., put the case in 8 Assize pl. 33, where a man gave land to Mary and Joan her sister and to the heirs of their bodies begotten, by which they had a joint estate for life and several inheritances; and the donor intending that neither of them should break the jointure, but that the survivor should have all by survivorship, added this clause, that by this provision she who survived would have the land entire; but for as much as his intent is contrary to law, therefore if the jointure be severed by a fine levied, the survivor shall not have the part so severed, by the clause which he hath inserted out of his own conceit and imagination repugnant to law and reason. So here the intent of Christopher was that the estate tail should cease as if the tenant in tail was dead, which intent is repugnant to the rules of law and against sense and reason. *Plesington's Case*, 6 Rich. 2, [Fitzherbert's Abr.] tit. *Quid Juris Clamat*, pl. 20, was also cited, in which a man made a lease on condition that if the lessor grant the reversion the lessee should have the fee. If the lessor grant the reversion by fine, he shall not have the fee, for the condition is repugnant and void. He also discussed at length two cases adjudged in point on the case at bar, one

in the case of a will *Germin v. Arscot*, [Moor 364, 4 Leonard '83, 1 Anderson 186,] and the other in the case of a use, *Chomley v. Humble*, [1 Anderson 346, Cro. Eliz. 379, post 189.]

WALMSLEY, J., said that when an estate is given to one it may be defeated wholly by a condition or limitation; but the same estate or any part of it cannot be determined as to one, and given in part or in all to another, for that is repugnant to the rules of law. As if a man makes a lease for life on condition that if he do not pay 20£ that another shall have the land, this future limitation is void. And in the case at the bar the donor might have annexed a condition or limitation to determine his estate; but in this case the donor intended to continue the estate tail, and to cease it as to one, and in his life transfer it to another. It would be strange and against reason that this estate in the case at bar should end in regard to one and continue in regard to another, and that Roland should be dead when one saw him, and be alive when another saw him. An act of parliament or the common law may make an estate void as to one and good as to another but a man by his words and the breath of his mouth cannot do it.

GLANVIL, [J.], said that betwixt the making of the statute *De Donis Conditionalibus*, 13 Edw. 1, c. 1, and the Statute of Uses, 27 Hen. 8. c. 10, such proviso annexed to an estate tail that it should cease as if the tenant in tail was dead was never seen nor heard of; and therefore he concluded that it cannot be done by the law. Uses were not within the letter of the statute *De Donis*, which speaks only of lands and tenements, but are within the equity, and therefore ought to follow the nature of the land. Richill, who was a judge in the time of Richard 2, and Thirning, who was chief justice of the common pleas in the time of Henry 4 intended to have made perpetuities, and upon forfeiture of the estate tail of one of their sons to have given the remainder an entry to another, but such remainders were utterly void and against the law.

And for these reasons it was resolved by the whole court without dissent that judgment should be given against the plaintiff.

This is usually cited as the leading case on the questions decided; but why it should be considered so important is not easy to see, when it follows other decisions in the same court so nearly like it on the facts, viz: *Germin v. Arscot* ante 172, and *Chomley v. Humble*, post 189.

HARDY v. GALLOWAY, in N. Car. Sup. Ct., Oct, 19, 1892.—111 N. Car. 519, 15 S. E. 890, 32 Am. St. Rep. 828.

Suit to foreclose a mortgage including an acre conveyed to the mortgagor by a deed stating that the grantors (Galloway) "retaining for themselves, and their heirs and assigns, the right to repurchase said land when sold, the said Jefferson Evans [grantee] conveying a

title for said lands, either by deed or mortgage, without first giving J. B. Galloway and wife, and their heirs and assigns, the privilege of repurchasing the same, renders this deed null and void, otherwise it remains in full force." When Galloway learned of the mortgage to plaintiffs he took possession of the lot, and was in possession when this suit was brought. Judgment for plaintiffs and defendant appeals.

SHEPHERD, J. Considered either as a conditional sale or a contract to reconvey, his honor was entirely correct in holding as void for uncertainty the provision in the deed respecting the right of the grantor to repurchase the land when sold. No time is fixed for performance, nor is there any stipulation whatever as to the price to be paid. The provision, not being a limitation, can therefore only take effect, if at all, as a condition subsequent; and, viewed in this light, we cannot hesitate in deciding that the restriction upon alienation, attempted to be imposed after the grant of the fee, is repugnant to the nature of the estate granted, contrary to the policy of the law, and therefore inoperative. Ever since the statute of *quia emptores*, the right of alienation has been considered as an inseparable incident to an estate in fee, (Co. Litt. 436; Williams, Real Prop. 61, 62; 1 Washb. Real Prop. 79;) and except in some cases, where the restriction is only partial, the law does not recognize or enforce any condition which would directly or indirectly limit or destroy such a privilege,—*iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem*. Accordingly it has been held by this court that a condition that a devisee in fee shall not sell or incumber his land before attaining the age of 35 is void, "because it is inconsistent with the full and free enjoyment which the ownership of such an estate implies." *Twitty v. Camp*. Phil. Eq. 61. To the same effect has it been ruled as to a condition that a devisee in fee shall make oath "that he will not make any change during his life" in the testator's will respecting his property, (*Taylor v. Mason*, 9 Wheat. 350,) or that he shall not offer to mortgage or suffer a fine or recovery, (*Ware v. Cann*, 10 Barn. & C. 433,) or that he shall contract in writing not to alienate before the proceeds of certain realty are paid to him, (*Mandlebaum v. McDonnell*, 29 Mich. 78,) or that land devised to a number of persons shall not be divided, (*Smith v. Clark*, 10 Md. 186.) Such conditions are not sustained where they "infringe upon the essential enjoyment and independent rights of property, and tend manifestly to public inconvenience." 4 Kent, Comm. 131; Bac. Abr. tit. "Conditions;" Shep. Touch. *131. "A condition annexed to an estate given is a divided clause from the grant, and therefore cannot frustrate the grant precedent, neither in anything expressed nor in anything implied, which is of its nature incident and inseparable from the thing granted." *Stukeley v. Butler*, Hob. 170. While unable to find any decision exactly in point, we feel assured that our case falls within the principle stated and illustrated by the foregoing authorities. The restriction is certainly inconsistent with the ownership of the fee, as well, it would seem, as

against public policy. The right to repurchase is of indefinite extent as to time, (it being reserved to the grantors, their heirs or assigns,) and may be exercised whenever the property is sold, although no amount is fixed upon as purchase money. In other words, we have an estate in fee without the power to dispose of or incumber it, unless first offering it for no definite price to the grantors, their heirs or assigns. The condition is repugnant to the grant, and therefore void. Even if the right to repurchase could be sustained, the defendant has no cause of complaint, inasmuch as the court in decreeing foreclosure has ordered that 30 day's notice of the sale shall be personally served on him. The exception to the insufficiency of the description in the mortgage from Evans to the plaintiffs is plainly untenable. *Henley v. Wilson*, 81 N. C. 405; *Euliss v. McAdams*, 108 N. C. 507, 13 S. E. Rep. 162, and the cases cited. * * *

Judgment affirmed.

CHAPTER VI.

FUTURE ESTATES.

REMAINDERS.

To begin in Future without Particular Estate.

HOGG v. CROSS, in Queen's Bench, Mich. 33 & 34 Eliz.—A.D. 1593, Cro. Eliz. 254.

Ejectione firmæ of a house and garden in London. J. Warren seised of it by burgage in fee, devised it to his wife for life, and after his death she married Rice, who leased to plaintiff. Before making the will, testator made a deed of feoffment to G, his son, *habendum* after the death of the feoffor to said G in tail, and made livery of seisin *secundum formam chartæ*. Whether anything passed by this was the question.

G. Wray, for the plaintiff, argued that the feoffment was void, and nothing passed, and then the will made afterwards was good: for when no estate is expressed in the beginning of a deed, but only an implied estate for life, as here, and by the *habendum* an express estate is limited, this controls the implied limitation; and if this be void and repugnant in law, as it is here, being after the death of the feoffor, all is void. But if there be an express limitation in the beginning, if the *habendum* be repugnant, it is void, and the first is good. And though livery be made, yet it is limited to the terms of the charter of feoffment, which is void, and so all is void; for it is but the execution of a void deed, citing Mayn's Case.

Dalton, for the defendant, argued that an estate for life passed by the premises and the *habendum* was void.

ALL THE JUDGES resolved the contrary: for it appears to be the intent of the feoffor that no estate shall pass but *in futuro*, viz. after his death, which is against law; and it being all the purport of the deed, nothing shall pass in any other manner; for nothing shall pass by the premises but according to his intent, which is nothing; for he intended not to pass the freehold immediately. But if one grant a term by deed, *habendum* after his death, this passes by the premises; for the premises are sufficient to carry it, and the *habendum* shall not utterly destroy it. But it is otherwise here, where it is so take effect by limitation of the party, which is void; and the livery is also void to execute a void deed. And without further argument it was adjudged for the plaintiff.

BUCKLER v. HARVY, in Common Bench, Mich. 37, & 38 Eliz.—A. D. 1597.—Cro. Eliz. 450.—Abridged from Croke.

Ejectione firmæ. Upon special verdict, the case was, tenant for life,
(177)

remainder to Buckler in tail. The tenant for life made a lease for four years, and afterwards granted the reversion, to have said tenement after midsummer next ensuing for the life of the grantor. After midsummer the lessee for years attorned, the term expired, the grantee entered, the grantor levied a fine to him *sur conusance de droit come ceo, &c.*; the tenant in tail in remainder entered for the forfeiture, and let it to the plaintiff; upon whom the defendant, being the grantee in reversion, re-entered, the first tenant for life being yet alive. The first question was whether by this grant of the reversion, *habendum* after midsummer, and the attornment made, the grant was good or void. Secondly, admitting it to be void, the grantee entering in disseisin, and the tenant for life levying the fine to him, whether this be a forfeiture.

WALMSLEY, J. A grant of a reversion, *habendum* after the death of the tenant for life is good; for so is the course of fines, for this limitation is as to the having the possession, and not as to having the reversion, for that is in the grantee presently. But when a reversion is granted *habendum* after a future day, he is thereby excluded to have the reversion until that time, and therefore it is utterly void. The *habendum* shall not be void but where it is not requisite, as in release of a right, or grant of a term; but here the *habendum* is necessary to show the estate.

BEAUMOND, J. The grant is void: for if the estate had passed by the livery, it had been clearly void; and the same is law here; for the *habendum* is not void otherwise but in regard that no estate is limited in the premises. And because the *habendum* limits the estate, and all the estate depends on that which is void; and the grant being void, the grantee by his entry is a disseisor.

Upon these reasons it was adjudged to be a forfeiture, and the entry of him in reversion to be lawful.

Afterwards this case was argued in the Queen's Bench on another special verdict, and the judges of that court were of the same opinion. *Buckler v. Hardy* (1597), Cro. Eliz. 585, 5 Gray P. Cas. 44.

BARWICK'S CASE, in Exch., Trinity, 39 Eliz.—A. D. 1600.—Abridged from 5 Coke 93b.

Information of intrusion into a house and lands in York County, against P. Barwick and others. Queen Elizabeth having the reversion of lands in lease for years to H. Barwick, demised them to him by letters patent to have from the day of the making of such letters for the lives of three others and the survivors of them; and under this demise the defendant claimed. Whether the lease was valid was the question. And after many arguments at bar and bench, judgment was given by PERIAM, C. J., and the whole court of exchequer, for the queen; and in this case these points were resolved.

OPINION OF COURT. 1. When the queen demised the manor from the day of making the letters patent, that day is without question excluded.

2. An estate of freehold could not by the common law begin *in futuro* but ought to take effect presently in possession, reversion or remainder. The difference is between a lease for life and a lease for years: for a lease for years may begin *in futuro*, but not a lease for life. As if a man makes a lease for years to begin at Michaelmas next ensuing, it is good; but if a man makes a lease for life to begin at Michaelmas, it is void; and the reasons and causes of this difference are: 1. because a lease for years may be made without livery of seisin, but so cannot an estate of freehold without livery, either in fact or in law. And therefore when a man makes a lease for life to begin at a future day he cannot make present livery to a future estate, and therefore in such a case nothing passes. And it was said that letters patent under the great seal amount to a livery in law; and therefore, by letters patent a lease cannot be made for life to begin at a day to come.

If any freehold should pass presently by the letters patent from a day to come, then the queen in the mean time would have a particular interest and term without any donor or lessor, which would be against the rules of the law. But no such consequence will follow in the case of a lease for years; and therefore it was resolved in the case at bar that the lease for three lives was void, because it was to begin the next day after the teste of the letters patent. And if the lease should be good the queen would have an interest for the day, and although the lease was to begin the next day after the teste of it, it is all one in law as if it had been to begin twenty or forty days or years to come, for the difference of the time doth not make an alteration of the law in such case. And in this case it was agreed, that if a man makes a lease for years to A & B, the remainder to C for life, in that case the lessor ought to make livery to A & B before their entry, and by the livery to A & B, C shall take a perfect estate for life by way of remainder, by force of the livery made to the lessees for years.

SWYFT v. EYRES, in King's Bench, Trinity, 15 Car. 1.—A. D. 1640.—
Abridged from Cro. Car. 546.

Debt by Swyft, subchantor, and one of the vicars choral of Litchfield, against Eyres and others, lessees of Sir Edward Peto, to recover under the statute of 2 Edw. 6 for not setting out tithes. On *non debit* pleaded, it was found by special verdict, that the subchantor and vicars choral, being seized in fee of the rectory on which the tithes are claimed, leased them to John Peto for 42 years, and later, by indenture reciting that Richard and John Woodward had bought that lease, granted the tithes to them "*habendum* from and after the said term and determination thereof and the years in the said indenture comprised," &c, then to

Richard Woodward for one month, and after that month fully expired then to John Woodward and his heirs and assigns forever, rendering rent, &c.; and later by another indenture misreciting the facts, granted the same to Humphrey Peto and his heirs. Defendants' lessor claimed under both indentures. The only questions were as to the validity of these indentures.

As to the first, ALL the JUSTICES argued for the plaintiffs, that they have a good title, notwithstanding this indenture; for this indenture is merely void, because it is to convey an inheritance *in futuro*; for the month is not to begin until the forty and two years be expired; and it is a grant of *interesse termini*, and no grant of a reversion; for the inheritance is granted therein, which was not in the lease before; and as it is an *interesse termini* for the tithe hay, so ought it to be for the residue, for there cannot be fraction of the estate; and then, being only an *interesse termini* in Richard Woodward, there cannot be a grant of the remainder or reversion to commence *in futuro*. And to prove this see 5 Coke 25, *Buckler's Case* [reported herein ante p. On the second indenture they held defendant had title notwithstanding the misrecital, although such mistake would void letters patent by the king.]

Acceleration of Remainders.

**RICKMAN v. GARDENER, in Common Pleas, Mich. 2 & 3 Phil. & Mary.—
A. D. 1556.—Dyer 122a.**

A man seised of land in fee had issue two sons and a daughter, and made his last will and testament in writing after the statute, &c., and thereby devised his lands to his wife for the term of ten years after his death, *remainder to his youngest son and his heirs forever; and that if either of his two sons should die without issue of his body lawfully begotten, that then the land should remain to his daughter and her heirs in fee.* And afterwards, viz., in the life-time of the testator, the said youngest son died without issue, and then the father died without making any alteration of his will. Whether the eldest son shall have the land as tenant in tail, or in fee-simple by the intention of the deviser, or the daughter? was the question. And it was demurred in law in waste by Rickman and his wife against Gardener. And by the opinion of all the judges of C. B. this was a good remainder to the daughter, notwithstanding the death of the devisee without issue in the life-time of the testator, and they would not argue the case. See Perkins, accordingly, in *Devise*, fol. 120 [f. 246, § 568] where the case is a man devised his lands to one for life, remainder over in fee; the devisee for life died in the life-time of the deviser, and then the divisor died: he in the remainder may well enter and execute his remainder. But see *contra* in this matter E. 7 Eliz. fol. 237.

FULLER v. FULLER, in B. R., Hilary, 36 Eliz.—A. D. 1595.—Moor 353, Cro. Eliz. 422.—Abridged from Cro. Eliz.

Trespass for lands. Upon not guilty pleaded, a special verdict found, that "Henry Fuller, seized of socage lands in fee, had issue, John, Henry, Richard, and Edward; and devised the land to Richard and the heirs of his body; and after his death without issue, to Edward in tail, and then to John in tail, remainder to the right heirs of the devisor. Richard died leaving issue, T, and W. Afterwards Henry, the devisor, said, 'My will is that the sons of Richard, my deceased son shall have the land devised to their father, as they should have had if their father had lived, and had died after me.'" The devisor died and T. the son of Richard entered, on whom John, the eldest son of the devisor entered. T. re-entered and John brings trespass.

GAWDY, J., held that he in remainder shall have it presently; for the devise being void as to the first, it is as if it never had been made; so it is if the first devisee refuse, he in the remainder shall have it presently; as 37 Hen. 6; Plowd. Com. 414. And in this point all the other justices agreed with him. Wherefore the plaintiff has no cause of action.

When All to Particular Tenant and So No Remainder.

ANONYMOUS, Mich. 29 Eliz., 1587.—Moor 247.

Puckering, sergeant, moved that a lease was made to three, *habendum* to them for 99 years, viz: to the first if he so long live, and if he die to the second for the residue of the term of years, and if he die within the term then to the third for the residue of years. And he moved that if the first die, what estate the second had. **PERRIAM** and **WINDHAM, JJ.**, held that he had a good estate for so many of the years as yet remained; for **PERRIAM** said that this inured as a grant of so many years in remainder, and the law may be applied to the intent of the parties; but he said if it were for the residue of the term and no more, that would be void to the second, because the term is ended by the death of the first. **ANDERSON, C. J.**, contra: for he said that it might not inure by way of remainder, because there was no estate in being during the particular term; and he would not allow the diversity made by **PERRIAM**, because the residue of the term is intended as a residue of years, for the term is not that continuance for years. **PERRIAM** changed opinion on the diversity, but he held the law yet good for the estate of the second, as before, for this inured as a new grant. **ROODS** was of the same opinion. *Sed quaere*, for they were all parties to the deed, wherefore it would be better that by way of remainder to one who is not party, as the case in **Dyer 150**.

GREEN v. EDWARDS, in the Common Pleas, Hilary, 33 Eliz.—A. D. 1592.
—Cro. Eliz. 216, Moor 297.

Demurrer. Land was let to J. S. for ninety years if he so long live, and if he die within the term, then his wife shall have it during the whole residue of the term aforesaid, J. S. died within the term, and the question was whether his wife should have it during the residue.

By all the Justices, resolved, that she shall not, for the term was wholly determined, and the limitation to her was void; for as a remainder it cannot inure, for a remainder must be created with a particular estate, and is to be limited for a certain estate, viz. for years, life, in fee, &c. And here no certain estate is limited to her; for although it is limited to her during the residue of the term, and so shall be intended a lease for years, yet for as much as every lease for years is to have a certain commencement and ending, here it is uncertain whether she shall ever have it, for J. S. may outlive the ninety years. And so a termor cannot grant the term after his death, and so the remainder here is void. ANDERSON, C. J., said that if the wife had been a party to the deed this peradventure might have been good to her, not by way of remainder, but by immediate grant and demise for so many years which shall be to come; and *durante termino* shall not be taken for the interest but for the time: which WALMSLEY and WINDHAM [JJ.,] did expressly deny, for they held it is at first void for the uncertainty when it shall commence, or whether it shall commence. It was adjudged that the wife took nothing.

Cecil's Case (8 Eliz., 1566), 3 Dyer 253b, was so decided on a lease for 41 years to W if he so long live, and if he die within the term to E for the residue, and if she die within the term to W's son for the residue. But the reasons are not so fully stated.

Remainders After Fee Tail.

BRACTON, Book 1, c. 6, sec. 1, fo. 18b.—A. D. 1260?

A donation may be made to several persons under a mode, together and severally; as if a person has several sons, and has thus made a donation to the first-born, and says, I give to A, my first-born son, so much and such land, &c., to have and to hold to himself and his heirs procreated of his body, and if he have no such heirs, or has had them and they fail, then I give that land to B, my after-born son, and I will that land to revert to B, to have and to hold to him and his heirs procreated of his body, and if he have no such heirs, or if he has had them and they fail, then I will and grant, on behalf of myself and my heirs, that the aforesaid land shall revert to C, my third son, to have and to hold to him and his heirs procreated of his body (and so, of several). And if the aforesaid A, B, C die without such heirs procreated of their bodies, then I will that land to revert to me and to

my other heirs (which would be done without being expressed), under a tacit condition, unless the donor has otherwise thereupon ordained.

See the discussion of the common law as to remainders after a fee in *Willion v. Berkley*, ante p. 35.

When in Abridgment of Prior Estate or on Condition.

COLTHIRST v. BEJUSHIN, in *Common Bench*, *Easter*, 4 *Edw. 6.*—*A. D. 1551.*—Abridged from *Plowden Com. 21 to 35.*

Trespass quaere clausum. Defendant pleaded not guilty and further that the prior of bath, being seised in fee of the close wherein the trespass is alleged to have been committed, leased it by deed indented to Henry Bejushin and Eleanor his wife, for term of their lives, remainder to William, a son of said Henry and Eleanor, for life, if he should always reside on the place; and if he should die before said Henry and Eleanor, then the said prior appointed it to Peter Bejushin, another son, who is the defendant herein, if he should likewise reside on the place; that by force of this lease said Henry and Eleanor entered and were seised, and being so seised William died, and then Henry and Eleanor died; after which Peter, the defendant, entered and was and still is seised and at all times since his entry has resided on the place; which is the trespass complained of. He gave color to the plaintiff, and the plaintiff demurred.

Pollard, serjeant, argued for the plaintiff, that the remainder is void.

1. Because the limitation of the remainder is here appointed during the particular estate, and every remainder ought to be limited to take effect after the particular estate, and if limited to take effect during the particular estate it is repugnant to the first estate, and so utterly void. So here this remainder is void, because it is limited to take effect immediately after the first estate for life is determined; and when the first estate for life is determined, then the first remainder for life commences; and if it so commences, it follows that the second remainder cannot then begin, for it would avoid the first.

2. This remainder is void, because it is limited to commence upon condition, which no remainder may do, for conditions always inure in privity, so that none but privies shall take advantage of them; for none shall enter for a condition broken except the lessor, donor, and feoffor, or their heirs. And as none but privies shall avoid an estate before made for breach of condition, so none but privies shall take a new estate by performance of a condition. If I make a lease for life, upon condition that if the lessee do not pay me 20£. at such a day then it shall remain over to a stranger in fee, and he fails of payment, this is a void remainder, for the cause stated. (*M. 18 Henry 8, 3 b, arguendo.*) But if I make a lease for life, upon condition that if the lessee do a certain act he shall have the fee, and he does it accordingly, there he shall have the fee; because he is privy to the condition,

and therefore he shall take the benefit of it. And so the diversity appears where the estate upon condition is appointed to a privy, and where it is to a stranger. In our case the remainder is limited to the defendant if his brother first dies in the life of his parents, and if he does not, then the defendant shall not have the remainder. So that the remainder is to commence upon a contingent, and for this cause it is good. If an estate is made for life upon condition that if the tenant for life die, then it shall remain over, this remainder is good because it commences upon the termination of the particular estate, which is certain, and so no condition; M. 27 Henry 8, 24 a, by Fitzherbert, J.,) but in our case it is uncertain, and may be performed or broken.

3. This remainder is void, because in every state it is necessary that conveyances be certain, for certainty is the mother of repose, and uncertainty is the mother of contention, which our law has ever guarded against. For which reason it has ordained certain ceremonies to be used in the transmutation of things from one to another (and especially of freeholds, which are of greater price and estimation in our law than other things) in order to know the certain times when things pass; and therefore in every feoffment the law has appointed that livery and seisin shall be had, and in every grant of reversions or rents that attornment shall be made; which are certain points, containing the time when, and to whom such estates do pass. And for the same reason the law has ordained and appointed that every remainder shall have three things, besides those before mentioned, as rules whereby to know when remainders are good, viz.: *a*, an estate precedent, made at the same time that the remainder commences; *b*, that the particular estate shall continue when the remainder vests; *c*, and that the remainder be out of the donor at the time of the livery. If any of these three fail, the remainder is void. And therefore as to the first point, if the lessor confirms the estate of his tenant for years, the remainder in fee, this remainder is void, because the estate for years was made before and not at the time of the remainder, and he shall not take it as a grant of the reversion, because he is not a party to the deed. So if the lessor disseizes his tenant for life, and afterwards makes a new lease to him for life, remainder in fee, this remainder is void, for the same reason. As to the second point, the precedent ought to continue when the remainder vests; and therefore if a man makes a lease for life, and that the day after the death of the tenant for life it shall remain over, this remainder is void, because the first estate is determined before the remainder is appointed. As to the third point, that the remainder ought to pass out of the lessor at the time the livery is made, or else it shall be void, this is proved by the common case where a lease is made for life, remainder to the right heirs of a person living; this remainder passes out of the lessor presently, though it does not vest presently. But in our case the estate precedent was made long before the re-

mainder, and therefore the remainder shall be void; and also the remainder is not out of the lessor at the time of livery, but is appointed to pass upon the performance of a condition, for the words are, if the son in the remainder die, *then* it shall remain to the defendant.

Cook, serjeant to the contrary. The remainder here is good, for first there is an estate on which the remainder may be built, and the remainder here is appointed upon it. The cause why the remainder shall not be good is alleged in two grand points: *a* because the fee does not pass presently out of the lessor; and *b*, because the remainder may not pass upon a condition. It seems to me that the remainder passes out of the lessor presently, as in *Littleton's* case (Litt. § 350), viz. if one makes a lease for 5 years, upon condition that if he pay to him 20£. within the first two years, that then he shall have fee, the fee passes out of the lessor presently. So shall it be here. And sir, a remainder may well commence upon condition, as if a lease is made for life, upon condition that if J. S. marry my daughter during the estate for life it shall remain to him, this is a good remainder, and yet it commences on condition. That which I may give without condition I may give on condition. If one makes a disseisin to the use of a stranger, and the stranger afterwards agrees to it, he shall have the land thereby. And if land may be transferred by such assent, all the more may it pass upon a condition, especially with a freehold estate precedent.

HALES, J., said: It seems to me that the remainder is good. When the lessor appoints the remainder to the defendant as above his intent may be perceived herein, and it is reasonable that the same should be fulfilled, viz. that the defendant should have it in such manner and form as it is appointed. And this limitation is not against law, nor against any principle thereof, as I shall prove hereafter; neither is it repugnant in itself, therefore it is good. And to prove that it is not against law, I shall put some cases founded upon like reason, and which will also answer the reason of that which has been alleged, viz. that the remainder ought to pass out of the lessor presently, which I utterly deny. And therefore if I made a lease for years, the remainder for life, upon condition that if he in the remainder do not such an act, the remainder shall be void, now before the condition is broken the remainder is good, and in him to whom it is appointed; but if the condition is broken, then the remainder is out of him, and in the person of the lessor again, which proves that a freehold by agreement had upon the livery may be transferred from one to another by matter *ex post facto*. So if one grants a rent or reversion, and afterwards attornment is had, now the reversion shall pass thereby, and yet it did not pass presently by the grant, which case proves that upon the assent first had, and act done afterwards, a freehold may be divested out of one and vested in another. So if a man makes a lease for life by deed, remainder to the king, and makes livery of

seisin, the remainder does not pass presently, but if the deed is afterwards enrolled, then the remainder shall be in the king from the time of the first livery (T. 1 Hen. 7, 30b, 31a). So that by the limitation declared upon the livery, the remainder which did not pass out of the lessor at the time of the livery shall pass by the act done afterwards. So in *Plesington's Case* (H. 6 R. 2; Fitz. Abr. *Quid Juris Clam.* 20), one condition was that if the lessor died within the term, then the lessee for years should have the land for life, and it was there held, that if the lessor died, his estate should be enlarged *causa qua supra*. So if one makes disseisin to the use of J. S., now the freehold is not in J. S.; but if J. S. afterwards agrees to it, then the freehold is in him. (P. 12 Ed. 4, 12 pl. 23; Fitz., Disseizin 3; Brooke Abr. 66, Agreement 4.) Which cases prove that when livery is made, or when a man first meddles with the possession of land, and thereupon words are spoken, there by force of such words and of some act afterwards done, a freehold may be transferred from one to another. So in the principal case, livery is made, and thereupon the lessor hath declared and appointed that if William die living the husband and wife, then it shall remain to the defendant; in which case I will readily agree that the remainder does not pass out of the lessor until William is dead, and when he is dead, it shall well pass by force of the first words annexed to the livery.

To make a difference where the fee is appointed upon condition to a privy, and where to a stranger, is but an idle and *insignificant* conceit. As to what has been said touching the words *if William die living the husband and wife, then it shall remain* to the defendant, which word *then* shall be intended presently during the lives of the husband and wife, so as to defeat their estate; sir, the sentence is not to be so understood, but it shall have a beneficial construction, viz. that then it shall remain as a remainder ought to do, and that is, to vest, and be executed after the death of the husband and wife. As if a gift in tail is made to one upon condition that if he do such an act, then the land shall remain to his right heirs, this word *then*¹ is not so to be understood as to avoid the estate tail, and to be executed presently upon the performance of the act, but it must be taken in this manner, viz. that upon the performance of the act the remainder shall vest, and after the estate ended it shall be executed. So shall it be understood here, and then there is no such repugnancy as has been alleged, nor is there any prejudice to a stranger. But if any prejudice shall arise to a stranger thereby, then the remainder shall not be good. As if it was that if William die, then the defendant shall have the land during the lives of the husband and wife, this should be void in respect to the prejudice to the particular estate, for things which are done in prejudice of others shall be void.

¹ On this point see *Boraston's Case* post p. 212.

HINDE, [J.] The remainder is good. That the remainder commences upon condition, sir, I deny that: for the remainder is limited to the defendant if William die living the husband and wife, which is not a condition, but a limitation when the remainder shall commence; for no words make a condition unless such as restrain the thing given, as upon condition that he shall not do such an act, or the like; but here these words limit the time when the remainder shall commence, and do not restrain the thing given, and therefore they may not be called a condition, but rather a limitation. If I make a lease for life upon condition that if the lessee die I may enter, this is only a limitation of the time of my entry; which is void, because it is no more than the law says; and it is no condition because it does not restrain the estate. So if I make a lease for life upon condition that if the lessee does waste, and I recover the place wasted, I shall enter into it, this is no condition because it does not restrain the estate. So if I make a lease for life upon condition that if I recover in waste any parcel, that I shall enter into the whole land, &c., this is a condition for that part in which no waste was done, for the condition is restrictive, and goes in defeasance of that part. The common case of fines are, where an estate tail is that if it happen the donee die without issue, that then it shall remain to a stranger, which is not a condition, but a limitation of the time when the remainder shall commence. So in the principal case, it is but a limitation and an explanation of the time when the remainder shall commence. And I do not see any cause or reason why I may not make a remainder to commence and vest in the midst of a particular estate, as well as I may at the beginning or end of a particular estate: for there is no repugnancy, but that it may commence to vest at any time during the particular estate; for when the fee simple is in me I may condition with it as I please, if it be not contrary to law, which it is not in ours, or such like cases. But if I make a lease for life upon condition that if J. S. pay me 20£. then I shall enter upon the tenant for life, and then it shall remain, &c., this remainder is void; because by the entry the first livery is annulled and defeated, and then there is no particular estate continuing upon which the remainder may depend: but here there is no such matter, for which reason the remainder seems to me to be good. And if it be a condition, yet the remainder may commence upon it well enough, seeing it is the will of the lessor that it should be so. Wherefore it seems to me that the plaintiff shall be barred.

BROWN, J., spoke to the same purpose, on another day; and argued that the remainder should be good upon condition. And if it should not be good upon condition, he said it should be good to the defendant as a grant of the reversion; and therefore the plaintiff should be barred.

MONTAGUE, C. J. If it was a condition, yet the plaintiff has not enabled himself to take benefit of it; for, as been said, none

but privies shall take benefit of conditions by entry, by the common law. And now by the statute of 32 Hen. 8, c. 34, the grantees and patentees of the king shall also take advantage of conditions. And here the plaintiff has not conveyed to himself a capacity to take benefit of the condition, as privy, nor as patentee or grantee of the king, nor in any other manner. And further the remainder seems to be good; for in the first place, it appears to me that there is not any condition here whereupon the remainder depends, but that it is a limitation and appointment of the time when the remainder shall vest, and in this point I agree with my brother *Hinde*. But even admitting it to be a condition, or call it a limitation, or give it what other term you please, yet it seems to me that the remainder is good; for every man who is lawful owner of any land, may give it to what person, in what manner, and at what time he pleases, so that his gift be not contrary to law, nor repugnant. Here it seems to me that his gift is not contrary to law. In 10 Ed. 3, 30 pl. 33, Fitz, Assize 161, a man made a lease for years to J. S. and in surety of his term he made him a charter of feoffment, upon condition that if the lessee was disturbed within the term, that then he should hold the tenement to him and his heirs, and J. S. was disturbed and afterwards ousted, and he brought an assize, and it was awarded that he should recover; which proves that a freehold may pass by a condition well enough, where the condition is expressed at the time of the livery. And by the reason of this case a man may make as many remainders as he will to commence upon the like condition; and although he is in the one case immediately privy, and not in the other case, this is no matter to stay the remainder, for his livery shall be taken most strongly against himself. When I was at the bar I was counsel with one Mr. Melton (M 27 Hen. 8, 24 pl. 2), and the case was thus: a fine was levied *sur grant & render*, whereby the counsee granted and rendered to the conusor the tenements in tail upon condition that the conusor and his heirs of, &c., should bear the standard of the conusee when he went to battle, and if the conusor or his heirs failed to do it, then the land should remain to a stranger; and I moved the case then to the court, and it was greatly wondered that the fine upon condition was received. But Fitzherbert, J., then held the remainder good, and they did not wonder at it, nor held it any great question but that it might commence upon condition.

Adjudged for defendant.

COGAN v. COGAN, in C. B., **Easter, 38 Eliz.—A. D. 1597.**—Abridged from **Cro. Eliz. 360.**

Trespass. Upon demurrer, the case was, that John, seised in fee, let to Robert for life, remainder to Catherine, the defendant, for life, "*provided*, that if John, the lessor, had issue a son during life, who should live to the age of five years, that the estate limited to the de-

fendant, Catherine, should cease, and it should remain to the said son in tail." The lessor had issue, the plaintiff, who attained his age of five years. Whether the remainder limited to the defendant shall cease and the remainder limited to the plaintiff were good, was the question. THE COURT resolved for the defendant after the sergeants had argued. ANDERSON, [C. J.], said there are certain rules in law touching remainders, viz. that a remainder ought to pass at the first by the livery, and shall not take effect with a condition precedent, nor shall begin upon such a condition; for a remainder depending upon a condition precedent is merely void. And further in this case, an entry is requisite to avoid the remainder for life; for a freehold cannot determine without the ceremony of entry, but otherwise it is of a lease for years. WALMSLEY, [J.], said, by Littleton, the remainder ought to pass at the time of the livery, and the nature of a livery is a giving, and there cannot be a giving, but there ought to be one to take, *in præsentia* or in expectancy, so that the law shall preserve it in the interim; and there need be no deed of a remainder, which proves that it passes by the livery. A remainder cannot pass by contingency, for then there would an absurdity follow, viz., there should, by the first livery, be an immediate reversion, expectant on the remainder for life; and afterwards this remainder shall be turned out, and the reversion also; and a new remainder and reversion should come in place of them; so as there should be turnings out and turnings in at several times, by one livery which was made at one time. But as touching the ceasing of the remainder, he conceived it might very well be without any entry, by the operation of law, the particular estate remaining in being. BEAUMOND, [J.], to the same intent. But he held that a remainder of an estate of freehold or inheritance cannot cease without entry or claim, no more than an estate of freehold in possession. OWEN, [J.], agreed with BEAUMOND, [J.], entirely. Adjudged for the defendant.

CHOMLEY v. HUMBLE, in Common Bench, Hilary, 35 Eliz.—A. D. 1594.—Cro. Eliz. 379, 1 And. 346. Abridged from Croke.

Trespas. On demurrer, the case was, a feoffment was made to the use of one for life, remainder to Chomley in tail, remainder to another in tail, remainder to the lord chamberlain, with this proviso, "that if any of them in remainder go about to levy a fine, or do any act whereby the uses limited shall not take effect according to the limitation, then the estate of him who so goeth about shall cease as if he were naturally dead and no otherwise." Whether this were a good proviso, was the question.

The Court, after argument on either side, delivered their opinion, that it was not good. ANDERSON, [C. J.], said, at the common law the *cestui que use* had nothing: and an estate of inheritance at the common law cannot cease; and the Statute of Uses does not help it; for the statute cannot help any use where there is not any person who is seised

to the use. WAMSLEY, [J.], said, the proviso, that it shall cease as if he were naturally dead, is void, and without sense; for if he were dead, it should descend to his son, and he should be in, in the *per*, by the father, but that cannot be when the father is living; and so it is an estate tail absolute and without condition. BEAUMOND. [J.], agreed, and said, an estate tail cannot cease at the common law; no more can it in use at this day, for it is as an estate executed at the common law; and the issue cannot have a *formedon*, living the father; and that feoffees at this day should be seised to his use is absurd.

In the next term adjudged that the proviso was not good, and that the issue could not have it for the forfeiture. 1 Coke, 86 [*Corbet's Case*, ante 172].

Alternative Remainders in Fee.

LODDINGTON v. KIME, in Common Bench, Mich., 6 W. & M.—A. D. 1695.
—1 Salk. *224, 3 Lev. 431, 1 Ld. Raym. 203, 5 Gray P. Cas. 54. From Salk.

In replevin a special verdict was found, viz: That Sir Michael Armin, being seised in fee, devised a rent charge, and then devised the land to A for life, without impeachment for waste, and in case he have any issue male, then to such issue male and his heirs forever; and if he die without issue male, then to B and his heirs forever. A entered and suffered a common recovery, and died without issue.

1. Question was whether A was tenant in tail by his devise? POWELL, J., held the express estate for life not destroyed by the implication that arose on the latter words following, so that A was only tenant for life, and the rather, because these words viz. *impeachment of waste*, and *for life*, must in that case be rejected, *quod Treby, C. J., concessit*.

2. The court held that issue was to be taken here as *nomen singulare*, because the inheritance was annexed and limited to the word issue; so that the inheritance was in the issue, and not in A, the father.

3. That this limitation to the issue was not an executory devise, being after a freehold, but a contingent remainder, so that a posthumous son could never take.

4. That the remainder limited to the issue of A was a contingent remainder in fee, and that the remainder to B was a fee also; but those fees are not like one fee mounted on another nor contrary to one another, but two concurrent contingencies, of which either is to start according as it happens; so that these are remainders contemporary and not expectant one after another.

5. The court held that the remainder in fee to B was not vested, because the precedent limitation to the issue of A was a contingent fee; and they took this difference, viz: where the mesne estates limited are for life or in tail, the last remainder may, if it be to a person *in esse*, vest; but no remainder limited after a limitation in fee can be vested.

6. That the recovery suffered by A had barred the estate limited to his issue, that being contingent, and likewise the remainder limited to B and his heirs, because that was contingent, not vested, and now never could vest; and that A had gained a tortuous fee, which would be good against B and his heirs, and likewise against all persons but the right heirs of the devisor.

This case is cited in *Hennessey v. Patterson*, 85 N. Y. 91, Finch R. P. Cas. 868, recognizing that alternative limitations in fee are remainders.

DOE D. HERBERT v. SELBY, in B. R., Easter, 1824.—2 Barn. & Cres. (9 E. C. L.) 926, 5 Gray's P. Cas. 1.

Ejectment for houses and lands in Middlesex county. Plea, general issue. A verdict was found for plaintiff, subject to the opinion of the court, as follows: Thomas Herbert, being seised of the lands in fee, made his will duly executed, devising the lands to his son George "during the term of his natural life; and from and after his decease, I give and devise the same estates unto all and every the child and children of my said son George and their heirs for ever, to hold as tenants in common. But if my son George should die without issue, or leaving issue and such child or children should die before attaining the age of twenty-one years, or without lawful issue; then I give and devise the same estates unto my son Thomas, my daughter Ann, my son-in-law William Duke, and their heirs for ever, to hold as tenants in common." After the death of the testator, George suffered a common recovery to his own use, conveyed the land to the defendant in fee, and died without having had issue. The plaintiff is the lessee of the said Thomas, Ann, and William, claiming under the gift over.

Chitty for the plaintiff. It will be contended on the other side that the ultimate remainder was contingent, and therefore defeated by the destruction of the particular estate. But that is not so, for either the estate given to G.'s children was an estate tail, in which case the ultimate remainder would be vested, or it was a contingent fee determinable, and the limitation over must take effect as an executory devise, according to *Gulliver v. Wickett*, 1 Wils. 105. In either case the destruction of the particular estate would not destroy the remainder. 1. Even if G. had died leaving a child, who had died under age without issue, the devise over would take effect; it could not therefore be a contingent remainder, but must be an executory devise: *Pells v. Brown*, Cro. 590 [post p. 242]. *Doe v. Webber*, 1 B. & A. 713. 2 George's children would take an estate tail, for the gift over is on their death without issue, which reduces their interest to an estate tail. Besides the ultimate remainder is to persons who would be heirs general to the children, so they would never die without heirs as long as those persons lived. This case is therefore different from *Lodding v. Kime*, 3 Lev. 431 [ante p.]; and *Goodright v. Dunham*, 1 Doug. 264. (Bailey, J. But here you must read the devise, "if the children should

die before twenty-one *and* without issue," otherwise the remainder over will be too remote.)

BAILEY, J. * * * It is not contended that George took an estate tail; and, indeed, *Goodright v. Dunham*, 1 Doug. 264, clearly shows that he took for life only, and that the children would take as purchasers by way of remainder, and they would take in fee. It has been contended that the ultimate devisees took either by way of executory devise or vested remainder. But it is clear that where a devise may operate as a contingent remainder, it cannot be considered as an executory devise. If a fee be given by way of vested limitation, but determinable, a remainder after that must be an executory devise; but if a fee is limited in contingency, and upon failure of that the estate is given over, that is a contingency in a double aspect; and if the estate vests in the one, it cannot in the other: *Loddington v. Kime*, 3 Lev. 421 [ante p.]. But it may happen, that an estate may be devised over in either of two events; and that in one event the devise may operate as a contingent remainder, in the other as an executory devise. Thus if George had left a child, a determinable fee would have vested in that child, and then the devise over could only have operated as an executory devise. But George having died without having had a child, the first fee never vested, and the remainder over continued a contingent remainder. *Gulliver v. Wickett*, 1 Wil. 105, was clearly a case of executory devise. The estate was given to testator's wife for life, and after her death to such child as she was then supposed to be *enceint* with, and to the heirs of such child forever, provided, that if such child shall die before twenty-one, leaving no issue of its body, then the reversion over. The description of the child there was a clear *designato personæ*, and as a child *in ventre sa mere*, is for many purposes considered as *in esse*, the first remainder, a fee determinable was vested in that child, and the remainder over could only operate by way of executory devise. The other cases which I have mentioned are not in substance distinguishable from this. *Doe v. Burnsell*, 6 Term 30, was a devise to Mary Owstwhick, and the issue of her body, as tenants in common; but in default of such issue, or being such, if they should all die under twenty-one, and without leaving any lawful issue of their bodies, then over. Mary Owstwhick suffered a recovery, and died without having any issue, and it was held that all the limitations subsequent to that to her were contingent, and destroyed by the recovery. No question was raised as to ultimate remainder operating by way of executory devise, but that could not be raised, as Mary Owstwhick never had any issue in whom the first remainder might vest. But *Crump d. Wooley v. Norwood*, 7 Taunton 362, is on all fours with the present case. There the devise was to the testator's wife for life, if she should so long remain unmarried, and immediately after her decease or marriage, to testator's three nephews, share and share alike, for life, as tenants in common, remainder to the heirs of their bodies respectively in fee; if more than

one, then to all equally, as tenants in common; "and if any of his said nephews should die leaving no such issue, or leaving any such, they should all die without attaining the age of twenty-one years, then over;" and it was held that the remainders subsequent to the devise to the nephews were contingent, and defeated by the destruction of the particular estate. And one of the nephews having died without having had issue, Gibbs, C. J., considered that in that event the question of executory devise did not arise; although if there had been issue, the ultimate devise over might have operated in that mode. These authorities satisfy me, that in the event which has happened, the devise to the lessors of the plaintiff in this case did not operate by way of executory devise. It has been argued, that it might operate as a vested remainder, for that the devise to George's children was only of an estate tail, because they could never die without heirs as long as the lessors of the plaintiff lived, and therefore, "heirs" must mean "heirs of the body." But although it may be so where, after a devise to a man and his heirs the estate is devised over simpliciter to a collateral heir, yet it is not so where the limitation over depends upon the party dying within a limited time. Upon the whole, I am of opinion that George Herbert took an estate for life only, and that his children, if there had been any, would have taken a fee; but in the event of there not being any, which is the event that has happened, the remainder over was given by way of contingent remainder, and was defeated by the destruction of the particular estate. Our judgment must therefore be for the defendant.

HOLROYD, J. Under the will in question, George took an estate for life, and his children in fee. In the event of his having no children, the devise over would operate as a contingent remainder; but if he had children, then it could only take effect as an executory devise. That it was not an executory devise, in the event that has happened, is clearly proved by the cases which my brother Bailey has cited; and the language of Gibbs, C. J., in *Crump v. Norwood*, is peculiarly applicable. Here the estate is given over on either of two contingencies, one of them George's dying without children; that has happened, and upon that the remainder over would, if at all, take effect as a contingent remainder. But the particular estate having been previously destroyed, the contingent remainder was thereby defeated.

LITTLEDALE, J. The principles applicable to this case were fully considered in *Crump v. Norwood*, which cannot be distinguished from it. *Doe v. Burnsell* is also in point. It is true, that in that case the words were, "if all such issue should die under twenty-one *and* without issue;" but here the word *or* must be read *and*; and although the point of the executory devise was not there agitated yet Gibbs, C. J., thought it an express authority for his judgment in *Crump v. Norwood*, where

it was raised. Upon these authorities it seems to me clear that the lessors of the plaintiff cannot recover. *Judgment for defendant.*

WADDELL v. RATTEW, in Pa. Sup. Ct., April 16, 1835.—5 Rawle 231, 2 Shars. & B. 316, Finch R. P. Cas. 932.

Action by Maris Waddell, claiming as a grand-child and heir of Mary (daughter of testator), against John and Eleanor (son and daughter of testator's son John) to recover land in Middleton Tp., Montgomery county. From judgment for defendants plaintiff bring error.

John Rattew, being seised in fee, devised the land in question to his son Aaron "during the term of his natural life, and if he shall hereafter have issue of his body lawfully begotten, then to hold to him and his heirs and assigns forever; but in case he shall die without leaving such issue, then I give and devise the same to all the rest of my children, their heirs and assigns forever, as tenants in common." After testator's death Aaron suffered a common recovery and died without issue.

KENNEDY, J. * * * The plaintiff's counsel contend that Aaron took under the will a contingent fee, determinable upon his dying without issue living at his death, and that the limitation over in that event to the testator's other children, must therefore be considered an executory devise, and consequently not affected by the common recovery suffered by Aaron; or in other words, they allege that Aaron, according to the terms of the will, in case he had had issue, would thereupon have become immediately vested with a fee-simple estate in the land devised to him, defeasible however upon his dying without issue living at the time of his death—that the birth of issue would have instantly determined his life estate, by enlarging it into a fee; and again in the event of his surviving such issue, and dying without any living at the time of his death, the ulterior devise to the other children of the testator, could only have operated as an executory devise; because as a contingent remainder it could not take effect after a determinable fee had become vested in Aaron. I must confess that this view of the devise in question, when first presented by counsel for the plaintiff, struck me forcibly as having something in it; and it was certainly maintained on their part with great ingenuity. And if Aaron had not suffered the common recovery and had had issue who had died during his life, and he had then died himself without any living at the time of his death, it may possibly be that the ulterior devise of the land to the other children of the testator, would have operated and taken effect as an executory devise; for it has been said, that an estate may be devised over in either of two events, so that in one event the devise may operate as a contingent remainder, and in the other as an executory devise. *Doe d. Herbert v. Selby*, 2 Barn & Cress. (9 E. C. L.) 926. Be that however as it may, the event which has occurred in this case, does not render it necessary to decide it under such aspect; but if it did, I see no objection that could be made to it,

unless it might possibly be thought by some, that to adopt such a principle, would be intrenching upon a rule that has been said to prevail without even an exception to it; which is, that when a devise is capable according to the state of the objects at the death of the testator, of taking effect as a remainder, it shall not be construed to be an executory devise. *Reeve v. Long*, Caruth. 310; *Burefoy v. Rogers*, 2 Saund. 380, and cases cited in note nine. Besides this, there is said to be another rule by which an executory devise is distinguishable from a contingent remainder, which seems to be opposed to the construction contended for by the plaintiff's counsel; it is this: that to constitute an ulterior limitation an executory devise, where there is a prior estate of freehold devised, the latter must not be merely *liable* to be determined before the former shall take effect, which only renders the remainder dependent on it contingent, but it must be determined before the taking effect of the ulterior devise; as in the case of a devise to A for life, and after his decease to the unborn children of B, this would be a contingent remainder in such children; but under a devise to A for life and after his decease to the unborn children of B, this would be a contingent remainder in such children; but under a devise to A for life, and after his decease *and one day*, to the children of B, the children of B in this case would take an executory devise. 2 Pow. on Dev. by Jarman 238. And for the day undisposed of between the death of A and the time fixed for the ulterior devise to the children of B to take effect, the estate would belong to the heir or residuary devisee. *Id.*; *Stephens v. Stephens*, Cas. temp. Talbot 238. Now it is obvious in the case under consideration, that the prior estate devised to Aaron for life, could not be said to be necessarily determinable before the time at which the ulterior limitation over to the other children of the testator was to take effect; it was at most, even upon the construction contended for by the counsel of the plaintiff only liable to be determined before that event might happen; and hence according to the rule just mentioned cannot, or at least in the event that has occurred, cannot be considered an executory devise, but must be deemed a contingent remainder. This construction seems to be requisite, also, for the purpose of carrying into effect an intention pretty plainly manifested by the testator, that Aaron should not have it in his power to dispose of the land beyond the period of his own life; so that by construing the prior devise to Aaron, for the term of his natural life, an absolute vested estate on him for life, making it neither more nor less, with a contingent remainder to him in fee upon his dying, leaving issue living at the time of his death; we give full effect to the latter of the will as well as the intent of the testator.

If the fee given to Aaron, which is admitted to be determinable, had vested in him during his life, the limitation over to the other children of the testator could only have taken effect as an executory devise, but being ever in contingency, and the event having failed upon which it is claimed by the counsel for the plaintiff, that it would have become vested, the ulterior devise of the land to the other children had all the

properties of a contingent remainder, and as such might and would have taken effect, if the recovery had not been suffered, and therefore could not have operated as an executory devise. The devise to the other children of the testator, is not then the case of a limitation over to them, after a prior vested determinable fee given to Aaron, which would make it an executory devise, but it is one of two several fees, limited merely as substitutes or alternatives, one for the other, that is the first to Aaron, if he should die leaving issue living at the time of his death, but if not, then to the other children of the testator in lieu thereof; thus substituting the latter in the room of the former, if it should fail of effect. This is the principle which was decided in *Luddington v. Kime*, 3 Lev. 431, 1 Ld. Raym. 208, where it was held that the first remainder was a contingent remainder in fee to the issue of A and the remainder to B was also a contingent fee, not contrary to, or in any degree derogatory from the effect of the former, but by way of substitution for it. And this sort of alternative limitation was termed a contingency with a double aspect. *Fearne on Cont. Rem.* 373. So if the estate vested in the one, it never could in the other. *Doe d. Herbert v. Selby*, 2 Barn & Cress. (9 E. C. L.) 926, [ante p. 191]. The ulterior devise then to the other children of the testator, being considered in the event that has taken place, a contingent remainder, and Aaron, by suffering a common recovery, having determined his life estate, the only prop of the remainder, before it became vested, it fell, and never could take effect afterwards. The plaintiffs therefore have no right to recover the land, and the judgment is affirmed.

Sufficient Particular Estate to Support.

NOTE BY DYER AND MANWOOD, JJ., in Common Pleas, Mich. 19 Eliz. —A. D. 1587.—4 Leonard 21, Cas. 67.

A leaseth to B for years, the remainder to the right heirs of the said B, and makes livery. The remainder is void, because there is not any person *in esse* who can take presently. But where a lease is made to B for life, the remainder to his right heirs, there he hath a fee executed; and it shall not be in abeyance, for there he takes the freehold by the livery.

Limited on Remote Possibility.

ANON., 40 Edw. 3.—A. D. 1367.—Brooke Abr. t. Done & Rem. 6, Yearbooks 40 Edw. 3, 9.

There were father and two sons. The father levied a fine to N *sur grant & render* to the father for life, remainder to the eldest son and his wife in tail, remainder to the right heirs of the father; the father died, and afterward the tenant in tail and his wife died without issue, the younger son entered, and the lord avowed on him for relief as heir

of the elder brother to the remainder in fee, and had return by judgment notwithstanding that the younger son would have to be adjudged in as a purchaser by the name of right heir of the father, because by his acceptance the fee and the estate tail might not be at the same time in the elder son; which would seem contradictory, for he may have in him the possession and the other be in abeyance, and this may be given and forfeited; and it is said that where a gift is made to N for life the remainder to the right heir of J who is living, the remainder is in suspense or abeyance during the life of J, and from this it was said that if J die during the life of N the remainder is good, but if J survive N the remainder is void, because there is nothing to sustain it so.

CHOLMLEY'S CASE, in the Exchequer, 39 Eliz.—A. D. 1597.—2 Coke 50, Moor 342, 2 Roll Rep. 60. Abridged from 2 Coke 50.

Trespass *quare clausum* by Hugh Cholmley against Randall Hanmer and others. Plea not guilty. It was found by special verdict, that: Thomas Holford, being seized of the land in question, and having two sons (Christopher and George), said Thomas, Jane his wife, and Christopher the elder son, levied a fine of the land to John Warren and T. Stanley, to the use of Thomas for life, then to the use of Christopher and the heirs male of his body, then to the use of George and the heirs male of his body, then to the use of the right heirs of Thomas. Later Thomas died, and still later George, by indenture duly enrolled, bargained and sold all his right, title, and interest in the tenements to John Warren, to have to said John's use during the life of Christopher, remainder to the queen her heirs and successors forever, upon condition that the estate should be void upon tender of 20£. to Warren, or to the queen. Later Christopher enfeoffed the land to several and their heirs, and later a common recovery was had against them, who vouched Christopher to warranty, who vouched the common vouchee, and execution was had accordingly, which was to the use of Christopher and his heirs. Afterwards George paid 20£. to Warren, who received it. Afterwards the queen, reciting the grant by George to Warren remainder to her and that the remainder to her was by fraud, of her own motion granted it to Christopher in fee. Later George bargained and sold the tenements to John Bruin, by indenture duly inrolled, to have and hold for the life of Christopher, remainder to the queen on condition to cease on tender of 30s., to which grant Bruin agreed. Later another recovery was suffered with double voucher, in which Christopher was again vouched; which recovery was to the use of Christopher and his heirs. Later Christopher died without issue male. His daughter Mary had married the plaintiff, who claims in her right. George paid the 30s. to Bruin according to the condition, which was found by inquisition by virtue of a commission under the great seal of England; and upon showing his right, it was awarded that the queen's claim be released. Thereupon defendants entered by command of George, and

plaintiff brought trespass. Whether the entry was lawful was the question.

Opinion of the Court. And after many arguments at the bar, case was argued at the bench by EWEN and CLARK, BB., and PERIAM, C. B., and it was unanimously agreed by them, that the entry of George Holford was not lawful; wherefore judgment was given for the plaintiff. And in this case divers points were unanimously resolved by the court:

1. That the remainder limited to the queen after the death of Christopher was void for three reasons: (A) Because Warren, who was party to the first indenture, took nothing; and by consequence the queen, who is not party to the indenture, but named by way of remainder after the *habendum*, the particular estate being void, shall take nothing; for the estate which is limited to Warren is for the life of Christopher. This grant is void, because it can never take effect in possession, nor can the grantee ever have any benefit thereof. And therefore a difference was taken between such grant of a reversion and the said grant of a remainder, for the grant of a reversion during the life of a tenant in tail is good because he shall have the service which the tenant in tail ought to do during the life of the tenant in tail; but such grant of a remainder can never to any purpose take effect, and therefore it is void. Moreover, a manifest difference appears between this case at bar and a lease to Christopher for his life, the remainder to another for the life of Christopher, for by possibility the remainder may take effect; *e. g.*, if the tenant for life makes a feoffment in fee, or commits any forfeiture, he in the remainder may enter for the forfeiture; and that is proved by the book in 41 Edw. 3, Fitz. tit. *Waste* 83, and (*remanere dicitur quasi terra remanens*) that cannot be when a remainder cannot by any possibility fall into possession; for a remainder ought to vest in estate during the particular estate, and ought to take effect in possession when the particular estate ends, for vain is the possibility that may not in any way come into action.

It was objected that Christopher might enter into religion, and then might Warren enter during his natural life, for as much as Christopher had no issue male. But as to what it was answered and resolved, that such possibility shall not make the remainder good, because it is such a remote possibility as shall not be intended by a common intendment to happen. A possibility which shall make a remainder good, ought to be a common possibility, and possibility proximate, as death, or death without issue, or coverture, or the like. The logician says that possibility is of two kinds, remote and proximate. 9 Hen. 6, 24b. The remainder to a corporation which is not at the time of the limitation of the remainder, is void, although such be erected during the particular estate, for it is a possibility remote. And this difference plainly appears in a common case in our books: if a lease be made for life, the remainder to the right heirs of J. S., this is good; for by common possibility J. S. may die during the life of the tenant for life; but if at the time of the limitation of the remainder there is no such J. S. but

during the life of the tenant for life J. S. is born and dies, his heirs shall never take it is agreed in Y. B. 2 Hen. 7, Hilary 13 b. pl. 16. And in 10 Edw. 3, 45 a & b, and 46a, the case was, that upon a fine levied to R he granted and rendered the tenements to one I and Florence his wife for their lives, the remainder to G (son of I) in tail, the remainder to the right heirs of I; and in truth at the time of the fine levied, I had not any son named G, but afterwards he had a son named G and died; and in a praecipe against Florence it was adjudged that G should not take the remainder in tail; because he was not born at the time of the fine levied, but long after, wherefore another who was right heir to I, by judgment of the court, was received; for when I had not any son named G at the time of the fine levied the law will not suppose that he will afterwards have a son named G, for that is a possibility remote. Note reader a difference between a remainder limited by a particular name, and by a general name; for a remainder limited by general name may be good, although the person be not in being at the time of the remainder limited; as if a lease for life be made, the remainder to the right heirs of J. S., who is alive, this remainder may be good, and yet he has no heir at the time of the remainder limited. The same law of a remainder to the first born son. But a remainder limited in particular by name of baptism and sir name is not good if the person be not in being. It is held in 7 Edw. 3 that if the advowson of the church of D. be granted to the person of D. and his successors, it is void to the successors, because the successor who ought to take it can never be benefited by way of presentation.

(B.) The remainder to be the queen is void, because the law will never adjudge a grant good by reason of a possibility or expectation of a thing which is against law, for that is a possibility remote and vane, which by intendment of law never can happen.

(C.) The remainder to the queen is void, because George, having a remainder in tail, has granted all his estate to Warren, *habendum* all his estate during the life of Christopher, the remainder to the queen, in which case, when he granted all his estate to Warren, he cannot limit any remainder thereof to the queen; for a remainder is but a remnant of the estate of the grantor, and the queen cannot have any remnant of the estate of George, when he having an estate in tail has granted all his estate to Warren. Littleton, § 649, says that in such case the estate tail is in abeyance. It was adjudged in *Blitheman's Case*, (1 And. 291, Moor 345, 683, Lit. Rep. 122, Yelv. 51, Cro. Eliz. 279, 280, Nov. 46, 2 Roll Rep. 70, Godb. 442, Dyer 55 pl. 3 in margin), that if tenant in tail in consideration of parental love, covenants by deed to stand seised to the use of himself for his own life and after his death to the use of his eldest son in tail, and after this covenant the covenantor marries and dies, the wife shall be endowed; for when tenant in tail has limited the use to himself for the term of his own life, he cannot limit any remainder over; for an estate for his own life is as long as he can limit by the law, and therefore the limitation of the remainder is void. Where-

fore it was concluded, that upon consideration of the first point Warren had nothing. And upon consideration of this latter point, if he should take entirely he would take too much, and by consequence the remainder to the queen is void which ever way decided. And it was agreed that the limitation to Warren by the *habendum* for the life of Christopher was void and repugnant.

2. Admitting the remainder to the queen was good, yet it was resolved that the common recovery did bar the estate of Warren, and by consequence the condition also during his life. It was resolved that the recovery does bar not only the estate tail, but also the estate for life of Warren, although the remainder of the fee was in the queen; for it is out of the statute 34 & 35 Hen. 8, c. 20, because the estate tail was not of the queen's gift, nor any of her ancestors, kings of England, as it has been adjudged. *Jackson v. Drury*, Moor 115, 3 Leon. 37; *Wiseman's Case*, 2 Coke 15, Moor 195, 1 And 140.

This payment to Warren cannot divest the remainder out of the queen for three reasons: 1, because the condition during the life of Warren was discharged; 2 because he who takes benefit of a condition ought to have the whole estate given re-vested in him as in his first estate, and that cannot be here, for the estate of Warren was barred by the recovery; also, 3, the tender to Warren was to the intent to re-vest his estate, and that cannot be when his estate was barred: for which cause this payment cannot divest the remainder out of the queen.

Destruction of Contingent Remainders by Discontinuance or Failure of Particular Estates.

EARL OF BEDFORD'S CASE, in Court of Wards, Hartford Term, 34 & 35 Eliz.—A. D. 1593.—Abridged from Moor 718. S. C. 2 And. 197.

Francis, Earl of Bedford, having four sons, Edw., John, Francis and William, and being seised of lordships in fee, enfeoffed them to several for the use of himself for 40 years, then to the use of John and the heirs male of his body, and for want of such to the use of the right heirs of the said earl forever. Later Edw. died without issue and later John died without issue male, leaving issue Elizabeth and Anne; after which the earl by deed indented, to provide jointure for his wife and to advance his heirs of his body, covenanted with several that from thenceforth he and his heirs should stand seised of the lands, &c., to the use of himself for life, then to the use of his son Francis and the heirs male of his body, with remainders over. Afterwards Francis the son died leaving his son Edward surviving, and shortly afterwards Francis the earl died. The question was whether said Edward now Earl of Bedford as heir of his father ought to have the lands by virtue of the indenture last mentioned, or whether the daughters of John ought to have them by force of the feoffment first made, as heirs of Francis, by purchase, or otherwise.

The case was argued openly before *Wray* and *Anderson*, chief justices,

and the master and counsel of the court, by Popham for the daughters, and by Egerton for the heir male. The case by order of the court was divided into points; and the counsel on one side made objections on these points, and the other made response in writing, that the court might see the difference. The objections and responses were as follows:

1. We object that the earl over-living John Lord Russell his son, who died without issue male, in the life of the earl, the remainder limited to the right heir of the earl is void, for that the earl could not have an heir in his lifetime, and every remainder must depend upon a particular estate, and vest during the particular estate; as if a man make an estate in tail, remainder to the right heirs of J. S., and the tenant in tail die living J. S. the remainder is void, for that J. S. cannot have an heir during his life, and the remainder cannot vest during the estate in tail. The answer was: We agree the law to be so in feoffments and gifts executed in possession, and the reason for that there is no person able to take the freehold in the mean time, and the freehold in that case cannot be in abeyance or in no person, for then no stranger that hath any right in the land can have any praecipe, or recover the land if the freehold should be in no person. But in the case of feoffees to uses the use may be in abeyance in no person for a time, for the feoffees in the mean time are persons able to hold the land, and are liable to every man's praecipe, and mischief at all. And this agrees with the common practice and experience, for who doth not upon establishment of his lands limit uses to his first, second, third, sons, &c., albeit he hath none at that time, for the feoffees are persons able to hold the land to a future use.

2. We object, that if the earl had limited an estate for life to himself, the remainder in tail, the remainder to his right heirs, the remainder had been executed in him. The response was: We agree this, for it is a principle of law, that wheresoever the ancestor takes an estate for life, or any estate of freehold in any conveyance, and after in the same conveyance an estate is limited to his right heirs, the law will conjoin the estates in the ancestor, for the ancestor and his heirs be correlative; but otherwise it is where the ancestor takes but an estate for years; and therefore if a lease be made to A for years, remainder to B in tail, remainder to the right heirs of A, the right heir of A shall be a purchaser without question, and the remainder doth not vest in A.

Lastly, we object that if a man maketh a lease for years, the remainder in tail, the remainder to the right heirs of the lessor, the remainder is void; for a man cannot limit a remainder to his right heirs; no more in the case at bar. The response was: True it is that in acts executed in possession a man cannot limit a remainder to his right heirs, for the law prefers the descent before the remainder. No more can a man by any conveyance in possession limit a remainder to himself; and therefore, if A maketh a lease for life, the remainder in tail, the remainder to A himself in tail or in fee, or the remainder to the right heirs of A, the

remainder is void; for no more than he can limit a remainder to himself, no more can he limit it to his heirs, for the son is part of the parent. But otherwise it is in case of uses, for without question a man may make a feoffment to the use of A for life, and after to the use of B in tail, and after to the use of the feoffor himself in fee, or in tail, or for life, &c., and by consequence to his heirs.

On which matters and more, arguments were made at the Hartford term with all the justices of England; and the case was argued again before them by serjeant Glanville and by Coke. And afterwards it was resolved by the greater part of them, and so ruled and decreed, that the use limited to the right heirs by the earl was the old use and not a new use; also, that the death of John Russell without heir male had so determined the particular freehold on which the remainder to his right heirs depended, that the remainder by this reverted to the donor. And by this the now earl held the land.

CHUDLEIGH'S CASE, argued in the Exchequer Chamber before all the judges of England, Hilary, 36 Eliz.—A. D. 1594. Abridged from 1 Coke 120-140b. S. C. 1 And. 309, Popham 70.

Trespass *quare clausum* by William Dillon against John Freine in king's bench. Plea not guilty. It was found by special verdict, that Richard Chudleigh, seised in fee of the place where the trespass is alleged to have been committed, had issue four sons: Christopher his oldest, Thomas second, Oliver third, and Nicholas. Being so seised, the father enfeoffed the manor by indenture to several persons and their heirs, to the use of the said Richard and the heirs of his body on certain persons named and in default of such issue to the use and performance of his will for ten years after his death and then to the use of the feoffees during the life of Christopher, and then to the first son of Christopher in tail, and so on to the tenth, then to the use of Thomas in tail, then to the use of Oliver in tail, then to the use of Nicholas in tail, and finally to the use of the feoffor's heirs. The feoffor died, and then, before any issue born to Christopher, the feoffees enfeoffed him, having notice of the former uses. Afterwards Christopher had issue John, under whom defendant claims. The question was whether the uses which before were in contingency, should vest in the son of Christopher, and be executed by the statute of uses, 27 Hen. 8, c. 10.

WALMSLEY, J. Before the statute 1 Rich. 3, c. 1, the feoffees had not only the whole estate in the land, but also the whole power to give and dispose of it; for the *cestuy que use* was a trespasser if he entered on the land against their will. And after that statute the *cestuy que use* had a power to make a disposition of the land itself and yet the whole estate of the land did remain in the feoffee till the *cestuy que use* had made such disposition; for which reason, said act, intending to provide for the *cestuy que use*, had not made a sufficient provision for him. For

the estate of the land remaining in the feoffees, they many times, contrary to the trust reposed in them, by secret feoffments and other covinous acts, had defrauded the *cestuy que use*, and had prevented such disposition of the land as the statute gave him. And sometimes there was fraud in both; for the *cestuy que use* by force of the statute, and the feoffee by the common law, had both severally power to dispose of the same land. Sometimes the *cestuy que use* by his secret estate prevented the feoffees, and sometimes they prevented him, so that they played at double hand, and thereby frustrated the true intent of the act.

The statute of 27 Hen. 8, c. 10, was not made to extinguish or eradicate any uses, but has advanced uses, and established safety and assurance for the *cestuy que use* against his feoffees; for before the statute the feoffees were owners of the land, and now the statute has made the *cestuy que use* owner of the land; before the statute the possession governed and ruled the use, but now since the statute the use governs and rules the possession; for by the act 27 Hen. 8, c. 10, the possession is the subject and follower of the use. No word of the preamble condemns uses; but for the extirpating and extinguishing of all such subtle practiced feoffments, fines, abuses, &c.; so that the uses are not guilty of the inconveniences mentioned in the preamble, but the feoffments, fines, and recoveries subtly and craftily practiced. So that the intent of the act was to extirpate and extinguish, which are both significant words, all such feoffments, fines, recoveries; but how? By destroying the uses? No, truly; but by divesting the whole estate out of the feoffees, conusees, and recoverers, and vesting it in the *cestuy que use*; so that it would be against the meaning and letter of the law also to say that any estate or right or *scintilla juris* should remain in the feoffees after the statute 27 Hen. 8, c. 10.

The statute of 27 Hen. 8, c. 10, extends to all lawful and good uses, as well future as *in esse*, and no such use is destroyed but advanced and extolled. As a fountain gives to every one that comes in his turn to it his just measure of water, so the first seisin and estate in fee, given by the first feoffment to the feoffees, is sufficient to yield to all persons to whom any use present or future is limited, a competent measure of estate in their time, proportionable to their estates which they shall have in the use. But the whole estate shall be first vested in those who are *in rerum natura*, and the possession shall be vested in him who has the future use when it comes *in esse* by force of the first livery, and shall divide the estates which were joined before. The future uses in our case cannot be suspended, for a thing which never was *in esse* cannot be suspended, but when the future uses come *in esse*, then they shall come in between the other estates which were joined before.

If feoffment be made of land to the use of A, and there is also a rent issuing out of the same land to the use of B, although the possession of the land be disturbed by disseisin, yet the use of the rent is not dis-

turbed thereby, because the disturbance is done to another seisin, that is to say, to the land, and not to the seisin of the rent out of which the use is limited. So in the case at bar, the disturbance is not to the first seisin, given by the feoffment, out of which all the uses, as out of a fountain, flow; but the disturbance is done to the other seisins, to wit to the seisins executed by the statute of 27 Hen. 8, c. 10, and not to the first seisin, which by no means can be tolled or divested; for it has not any essence until the future use has essence, which by force of the statute shall draw a sufficient estate to it; but when the future use is come *in esse*, now by reference and relation to the first seisin, there is seisin and use within the statute of 27 Hen. 8. c. 10.

PERRIAM, C. B., conceived that these future uses before their births are not preserved in the bowels and belly of the land, but that they were *in nubibus*, and in the preservation of the law; for he well agreed with WALMSLEY, J., that by force of the act the whole estate shall be out of the feoffees, and then of necessity it ought to be in some person, or in abeyance and consideration of law; and it would be absurd to say that the feoffees had a less estate than they took by the first livery. And therefore, because nothing remains in the feoffees, and this future use cannot be executed until the person who should take it comes *in esse*, it must of necessity be in the meantime in the preservation of the law.

If the estate in our case had been limited in possession by livery and seisin, the remainder to the eldest son, &c., till his birth it would be by the rule of the common law in the consideration of the law; and by force of the same reason the use shall be in our case, and as the use shall be so shall be the possession by force of the statute; for be the use *in esse* or in consideration of law, the possession shall be transferred to it by force of the statute. The statute does not say, to the use of any person or persons *in esse*, but to the use of another person, and that shall be intended when his time shall come; and it would be a hard construction to destroy these future uses in our case, which were limited upon good cause and consideration, and especially when the sons who were not then *in esse*, were not parties to any wrong. These uses have extended themselves into many branches, and are to be resembled to Nebuchadnezzar's tree, for in this tree the fowls of the air build their nests, and the nobles of this realm have established their houses; and if this tree should be felled or subverted it would make a great impression in the land; and therefore it is convenient to repose the mischief after by parliament, and not to have any respect to the cases before.

He and WALMSLEY, J., also agreed in their argument that the uses in this case should follow the rules of the common law; and therefore, if in this case tenant for life dies before the birth of a son, the remainder in use shall be void, for such remainder would be void by the rule of the common law, if the remainder do not vest during the particular estate, or at least when the particular estate determines, and no difference be-

tween uses and estates made in possession to this purpose. And so they concluded that judgment ought to be for plaintiff.

ANDERSON, C. J., of the common bench, POPHAM, C. J., of the queen's bench, OWEN, BEAUMONT, FENNER, GAWDY, and CLENCH, JJ., and EWENS and CLARK, BB., argued to the contrary. And it was agreed by them all that the feoffment made by the said feoffees who had an estate for life by limitation of the use devested all the estate, and the future uses also, and although Richard Chudleigh their feoffee had notice of the first use, yet it was immaterial, because all the ancient estates were devested by the said feoffment, and this new estate cannot be subject to the ancient uses which rise out of the ancient estate which was devested by the feoffment.

GAWDY, J., conceived that the uses limited to the eldest son, &c., were in abeyance, and that the estates of the land sufficient to serve these future uses were in abeyance also; but he agreed that this was not by the letter of the statute 27 Hen. 8, c. 10, for the letter of the statute is to the use of any person, and here wanteth the person. If a feoffment in fee be made to the use of one for life, and after to the use of the right heirs of J. S., the fee simple of the land shall be in abeyance; and before the statute if a man had made a feoffment to the use of one for years, and after to the use of the right heirs of J. S., this limitation had been good, for the feoffees remain tenants of the freehold; but such limitation after the statute is void, for then the freehold would be in suspense, for nothing can remain in the feoffees. But he said that these remainders in future were devested and destroyed by the feoffment of the tenants for life; and although the remainders be in custody of the law, yet they ought to be subject to the rules of the law, for the law will never preserve anything against the rule of law; and because the rule of the law is that the remainder must take the land when the particular estate determines, or else the remainder shall be void, for this reason these remainders *in futuro*, by this matter *ex post facto*, were utterly destroyed. A remainder without a particular estate can no more exist in the case of a use than in the case of an estate made in possession. Of the same opinion were POPHAM, C. J., CLARK, B., and OWEN, J., as to the point of forfeiture.

It was held by EWENS, B. OWENS, BEAUMOND, FENNER, CLARK, and CLENCH, JJ., and by the two chief justices, that, at the common law, by disseisin or by such feoffment as in the case at bar, as well all future uses or uses in contingency are devested and discontinued, as uses *in esse*, till the first estate out of which the uses rise be recontinued; and that the statute of 27 Hen. 8 c. 10, does not transfer any possession to any use but only to uses *in esse*, and not to any use in future or in contingency till it comes *in esse*, and this appears by the letter of the act. They held that those who had argued on the other side had taken but the first part of the sentence, that is to say, that the estate shall be out of the feoffees; but they had forgot the latter part of the sentence, to wit, that the estate shall be in such person who hath the use, and that cannot

be till the person and the use also be *in esse*. And by this clause it also appears that no estate shall be transferred in abeyance out of the feoffees and vested in no body, or transferred to a possibility of a use which has no being, which would be against reason, and against the letter and meaning of the act.

So all the justices and barons of the exchequer, except **PERRIAM, C. B.**, and **WALMSLEY and GAWDY, JJ.**, did conclude, that, for as much as the statute of 27 Hen. 8, c. 10, extends only to uses *in esse*, and to persons *in esse*, and not to any uses which depend only in possibility; for that reason, the contingent uses in the case at bar remain so long as they depend in possibility only at the common law; and by consequence they might be destroyed or discontinued before they came *in esse*, by all such means as uses might have been discontinued or destroyed at common law. And all the justices and barons did agree with **WALMSLEY, J.**, in the point that these remainders limited in use in the case at bar should follow the rule and reason of estates executed in possession by the common law; and therefore they all unanimously agreed, that if the estate for life in the case at bar had been destroyed by the death of the feoffees before the birth of the eldest son, that the said remainders *in futuro* were void, and should never take effect although the sons were born afterward; for a remainder in use ought to vest during the particular estate, or at least *eo instante* when the particular estate ends, as well as an estate in possession. And it was held by all the justices that if the contingent use in the case at bar had come *in esse* without any alteration of the estate of the land, that it should be executed by the statute 27 Hen. 8, c. 10; but the alteration of the estate before it came *in esse* had destroyed it.

POPHAM, C. J., said in argument, that by force of the statute 27 Hen. 8, c. 10, some uses are executed immediately, some uses are executed by matter *ex post facto*, and some uses are extirpated and extinguished by the act. Uses *in esse* draw the possession immediately, and uses *in futuro* limited agreeable to the rule of the common law are also, if they come *in esse* in due time, within the purview of the statute. But uses not limited agreeable to the ancient common law of the land are utterly extirpated and extinguished by this act. He said if such a construction upon the statute, 27 Hen. 8, c. 10, by equity or otherwise should be made for maintenance and preservation of future uses as has been made by those who have argued on the other side, greater inconveniences would be introduced than were before the statute.

POWLE v. VEERE, in Chancery, 41 Eliz.—A. D. 1599.—Moor 554.

The case referred to **WALMSLEY & KINGSMILL [JJ.]**, was that John, Count of Oxford, made a lease by indenture to Robert Veere, his brother, of a manor in Berks, for his life, which was executed by livery with these words, that if Robert should marry and his wife should out-live

him it should remain to her for her life if he should by sealed writing or his last will declare he wished her to have it. Before taking any wife Robert made a feoffment to Tho. Nooke, the father, to whom the Count of Oxford levied a fine after the feoffment, and bargained and sold the land and suffered a common recovery as vouchee. Afterwards Robert took the defendant to wife and made declaration that she should have the remainder; and afterward he and his wife levied a fine *come ceo*, &c. with warranty of Robert and Nooke and their heirs. Later Robert made another declaration that his wife should have the remainder, and died, and she entered. And the question was if her entry on Powle the purchaser from Nooke was lawful. And the justices certified that it was not; but that the remainder, if it was ever good, was destroyed by the feoffment, because the freehold was supplanted before the vesting of the remainder; and also that the possibility in the wife was included in the fine, and the warranty was also barred. Wherefore the decree was accordingly for Powle.

WELLS v. FENTON, in C. B., Hilary, 43 Eliz.—A. D. 1600.—Cro. Eliz. 826.

Ejectione Firmae. R. seized in fee, levied a fine to the use of himself for life, and after to the use of his wife who should be at the time of his death, for life, remainder to E in tail. R takes to wife A; he and A his wife, by fine, reciting that he is tenant for life, remainder to said A for life, give it to a stranger in fee, who renders it to the husband for life, remainder to F for 60 years, remainder to the right heirs of the husband. The husband dies, the said A being his feme, survives, and disclaims to have anything in the land. E enters, lets to the defendant, she takes another husband, and they make a lease to the plaintiff. Upon all these matters disclosed these points were moved: 1. Whether this contingent remainder to the wife who should be, was good. For although such a contingent remainder may be by way of limitation of an estate of land *in esse*, yet it cannot be of any use; for the statute of 27 Hen, 8, c. 10, doth not execute uses, but those only which are *in esse*. and preserves not any contingent uses, for no seisin continues to preserve them. And of that opinion was ANDERSON, C. J. But WALMSLEY and WARBURTON, JJ., *e contra*; for it was good at the time of limitation, and stood with the rules of common law, and for the benefit of the commonwealth, that such limitations or jointures should be good; and therefore the law preserves and regards them, unless there be some mean act afterwards done to destroy them. But an use limited to J. S. until a præcipe be brought, and then to the use of J. D., this contingent use of J. D. is against law and justice to defraud a præcipe, and therefore is void.

2. Whether by the joinder in this fine the feme hath given her possibility, so as she cannot afterwards claim it. WALMSLEY, J., held that she had not for she hath not any estate, nor was there any certain person who might have it: for it is unto her who shall be his wife at the

time of death, and it is not known who that shall be. But where the person is certain, although the estate be but in possibility, there peradventure she might have excluded herself thereof. Adjudged for the plaintiff.

ANONYMOUS, in Common Bench, Mich. 5 Jac. 1.—A. D. 1608.—4 Leon. 236.

If land be given to A & B for the life of C, remainder to the right heirs of A *or* B who shall survive; it was held that if A release to B, that the remainder was destroyed. And if land be given to one in tail, and if J comes to Westminster such a day, the remainder to J in fee, if the estate tail descends to two coparceners, who make partition; now if J come to Westminster the fee shall not accrue, because the particular estate is not in the same plight as it was before.

REEVE v. LONG, in King's Bench, Easter, 6 W. & M.—A. D. 1695.—1 Salk. 227, Carth. 309, 3 Lev. 408, 4 Mod. 282, Skin. 430, Comb. 252, Holt 228, 286, 5 Gray P. Cas. 53. From Salk.

Error of a judgment in common bench in ejectment, wherein a special verdict was found, and the case was: John Long being seised in fee devised the lands to his nephew Henry Long for life, remainder to the first son in tail male, and so on to the second, third, &c. And for default of such issue, remainder to his nephew Richard Long, lessor of the plaintiff, for life, remainder to the first son in tail, and so on to the second, third, &c., with divers remainders over. The devisor died, Henry married, and died without issue, leaving his wife enseint with a son. Richard entered as in his remainder, and afterwards the posthumous son (the defendant) was born, and his guardian entered upon the lessor; whereupon he brought this ejectment and judgment was given for the plaintiff in the common bench by the whole court. And now that judgment was affirmed by this court; and resolved: 1. That the remainder to the first son of Henry is a contingent remainder, and must take effect during the particular estate of Henry or the instant that it determines; that by consequence this remainder to the son became void by the death of the tenant for life before he had a first son.

2. That this was such a default of issue, or dying without issue, that instantly the remainder limited over to Richard vested in him, and he became seised in possession; and this cannot be defeated, nor the estate fetched back again, though Henry has a son born afterwards.

But *note*: this judgment was afterwards reversed in the house of lords, against the opinion of all the judges, who were very much dissatisfied, and blamed the judge who tried the cause, for suffering a special verdict to be found.

ADAMS v. SAVAGE'S tenants, in King's Bench, Easter, 2 Ann.—A. D. 1703.
 —2 Lord Raym. 854, 2 Salk. 679, 5 Gray's P. C. 119. Given according
 to L. Raym.

A *scire facias* was sued by the plaintiff as administrator, to J. S., upon administration granted to him by the arch-deacon of Dorset, upon a judgment recovered by the intestate against Savage in this court. The issue after pleading, was, whether Savage was seised of the lands, &c., in fee? Upon which the jury found a special verdict, that Savage, being seised in fee, conveyed the lands by lease and release to trustees and their heirs, to the use of himself for 99 years, if he should so long live, remainder to the trustees for 25 years, remainder to the heirs male of his body, remainder to his own right heirs. The question was, if Savage, during his life, not having heirs male of his body, should have a use result to him for his life, and so become tenant in tail in possession; or if no use could result, and then, there being no freehold to support the contingent remainder to the heirs male of the body of Savage, the said remainder would be void, and Savage seised in fee as before.

THE COURT HELD, that no use could result to Savage during his life, and therefore the remainder to the heirs male was void, and Savage seised in fee. And their reasons were, because the limitations to himself for 99 years and to the trustees for 25 years, and the heirs male were new uses, and new estates. As if a man, by lease and release, or by covenant to stand seised, limit the use to himself for life, or in tail, these are new estates and not parcel of the old estate, according to *Englefield's Case*, 7 Coke 13b. And where in such case upon a conveyance such uses are limited, as (supposing the limitations to be good), would pass the whole estate, there no use will result contrary to the express limitations of the party. But if the limitations are void, the conveyance of necessity will fail. If a man seised in fee convey his estate by lease and release to the use of himself for life, remainder to trustees for lives, remainder to the heirs of his body, he hath an estate tail in him; but he is but tenant for life in possession; otherwise if there had been no intermediate estate in the trustees for their lives. And in the former case, if a man makes a feoffment, it is no discontinuance, but only divests the estate. And for the same reason in this case, where the first limitation is only for years, the remainder to the heirs of the body of the tenant for years is a contingent remainder, and void. These are the reasons of Chief Justice HOLT.

POWELL, justice, said, that there was a difference, where the limitation was upon a covenant to stand seised, and where upon a lease and release. For where the limitations are to take effect out of the estate of the covenantor, there if the limitations were such as could not take effect immediately, or not till after the death of the covenantor, as in the case of *Pybus v. Midford*, 2 Lev. 75, there the law may mould the estate remaining in the covenantor into an estate for life; but that

cannot be where the limitations are to take effect out of the estate of the trustees, for want of a limitation, much less against an express limitation. And therefore (by him) if there had been an express limitation in the case of *Pybus v. Midford*, limited to the convenantor, the judgment would have been otherwise. And for these reasons, the whole court ordered last hilary term, that judgment should be entered for the plaintiff, unless cause should be shown to the contrary by the first day of this term. * * *

In accord with this decision is *Rawley v. Holland* (1712), 22 Vin. Abr. 187, pl. 11. These cases have been doubted by Mr. Sergeant Hill and Mr. Sanders (1 Sanders Uses 142, 143; 148, 5th ed.), and denied by Mr. Butler to be law (note y to Fearn's Cont. Rem. p. 41), and Mr. Preston lays down a doctrine opposed to these cases (1 Prest. Abst. 114, 130, 131). Sir Edward Sugden defends these decisions (Sugden's Gilbert on Uses and Trusts 35, note); and, in the opinion of Mr. Williams, has sufficiently answered Mr. Butler's objections (Williams on Real Prop. 17th ed. p. 457, note i). Prof. Gray considers these cases substantially overruled by *Gore v. Gore*, post 263, and believes that if brought directly in question they would be expressly overruled. See Gray on Perpetuities §§ 59, 60.

FABER v. POLICE in S. Car. S. Ct., 1877—10 S. Car. 376, Tied. R. C. 367.

Action by John L. Faber against J. G. Police to recover damages for breach of a contract to buy land of plaintiff. From judgment for plaintiff defendant appeals.

The defense was that the plaintiff's title was defective. Plaintiff's father devised the land to trustees "in trust to and for the use, benefit, and behoof of my son," the plaintiff, for life, and then "in trust to and for the lawful issue of my said son living at the time of his death: * * * and should my said son die without leaving lawfully begotten issue, living at the time of his death, * * * then unto my residuary devisees and legatees, their heirs and assigns forever." After the death of the testator the plaintiff conveyed the land by deed of feoffment with livery of seisin to another who deeded it back the next day, after which plaintiff deeded it to his mother, through whom he claims title as her sole heir.

McIVER, A. J. * * * The appellant contends that the estate limited to the issue of John Lewis Faber is vested and not a contingent remainder, and therefore the remainder was not barred by the deed of feoffment and livery of seisin * * * It is very clear, from the language used, that the testator did not intend that the issue should take the estate in remainder absolutely and at all events, but only on a contingency—that of their surviving their father; and it is equally clear that he did not intend that the residuary legatees and devisees should take the estate in remainder absolutely and at all events, but only on a contingency—that of the son dying without issue living at the time of his death. * * * A vested remainder is one which is limited to an ascertained person in being, whose right to the estate is fixed

and certain, and does not depend upon the happening of any future event, but whose enjoyment in possession is postponed to some future time. A contingent remainder on the other hand is one which is limited to a person not in being or not ascertained; or if limited to an ascertained person, it is so limited that his right to the estate depends upon some contingency in the future; so that the most marked difference between the two kinds of remainders is that in the one case the *right to the estate* is fixed, though the *right to the possession* is deferred to some future period; while in the other the right to the estate as well as the right to the possession of such estate is not only deferred to a future period, but is dependent upon the happening of some future contingency.

* * * These estates, as well the particular estate for the life of John Lewis Faber as the estate in remainder to his issue, and in default of such issue to the residuary legatees and devisees, passed out of the testator at the time of his death—the time when his will, the instrument by which the estates were created, speaks. Then it was that these estates were created, and to that point of time must we look to determine their character. It is very clear that at that time it was wholly uncertain who would be the persons to take at the termination of the particular estate. The life tenant then had no issue, and it was of course uncertain whether he would ever have any; and as to the issue which he has subsequently had it is yet uncertain whether any of them will be living at his death; and the same uncertainty exists as to whether the residuary legatees and devisees will ever have a right to take. * * *

Hence the remainders are contingent. If so, then it necessarily follows, upon the authority of *Redfern v. Middleton*, Rice (S. Car.) 459, in which the court of errors adopted the reasoning of Chancellor Harper in his decree in *Dehon v. Redfern*, Dud. 115, that the contingent remainders to the issue of John Lewis Faber, and in default of such issue to the residuary legatees and devisees, were barred by the deed of feoffment and livery of seisin to Folker. * * *

But, second, it is argued by the appellant that, even if the remainders be construed to be contingent and not vested, yet the deed of feoffment and livery of seisin could not bar such remainders, because the legal estate was vested in the trustees. This proposition might be admitted if it were true that the legal estate was in the trustees. It becomes necessary, therefore, to consider that question. The rule undoubtedly, is that where there is a conveyance to one for the use of another, and the trustee is charged with no duty which renders it necessary that the legal estate should remain in him to enable him properly to perform such duty, the statute of uses executes the use and carries the legal title to the *cestui que use*. By the terms of the will under consideration it does not appear that the trustees are charged with any duty whatever.

* * * The other justices concurred.

Affirmed.

What are Contingent?

BORASTON'S CASE, in Queen's Bench, Hilary, 29 Eliz.—A. D. 1587.—3 Coke 19a, 25 Eng. Rul. Cas. 579. Abridged from Coke.

Ejectione firmæ by Richard Hynde against William Ambrye. Plea, not guilty. The jury gave a special verdict finding that Thos. Boraston, seised of the lands in fee, and having issue two sons, Humphrey the elder, and Henry the younger, made his will in writing, Aug. 12, 1559, by which he devised the lands in these words: "Item, I give to Thomas Amery and Amphillis his wife, all that my upper part of my close called Reading, for eight years next after my decease; * * * And after the said term of eight years, the said upper part to remain to my executors until such time as H. Boraston shall accomplish his full age of 21 years, and the mean profits to be employed by my executors towards the performance of this my last will and testament; and when the said Hugh shall come to his age of 21 years, then I will he shall enjoy the said upper part, to him and his heirs for ever." The testator died Aug. 14, 1559. Hugh died when nine years old. After the expiration of the terms of Thomas Amery and wife and to the executors, Philip Boraston entered on the lands as brother and heir of Hugh, and leased them to William Ambrye, defendant herein; on whom Thomas Brand and Constance his wife, and William Davies and Margaret his wife, claiming in right of their wives as daughters and heirs of Humphrey, testator's oldest son, entered and leased the lands to the plaintiff herein, by force whereof he was possessed, till the defendant by command of Philip re-entered. The question referred to the court was whether the entry of the defendant was lawful.

Counsel for Plaintiff argued that no remainder vested in Hugh till he attained 21 years of age, and that in the mean time the lands descended to the daughters of the eldest son, as general heirs of the devisor; and because Hugh never attained his age of 21, the land never vested in him, but remained in the general heirs; for by the words of the will he should not have it till his said age. So it appears that the devise to Hugh depends on the contingency of his attaining his age, and whether he would ever attain it no man could know.

It was also said, that when a particular estate which doth support a remainder may determine before the remainder can begin, there the remainder shall not presently vest, but shall depend in contingency; as if one makes a lease to J. S. for his life, and after the death of J. D. to remain to another in fee, this remainder doth depend in contingency; for if J. S. dies before J. D. the particular estate is determined before the remainder can begin. So and on the same reason it was adjudged in *Colthurst v. Bejushin* [reported ante p. 183]. A lease is made to one for life, remainder to the right heirs of J. S., this remainder is good upon a contingent, that is to say if the lessee survives J. S., otherwise not. So, and for the like reason, if a man having a son of the age of nine

years, makes a lease until his son shall attain his full age, and after he shall attain his full age, that it shall remain over to another in fee, nothing presently vests in him in remainder, which was granted by the whole court. And it was said by the plaintiff's counsel, that such remainder is utterly void, and yet it may take effect; for, in as much as the remainder ought to pass out of the lessor presently, either to him in remainder, or to be in abeyance and custody of the law, and a freehold cannot in such case be in abeyance, for this cause the remainder is utterly void; as if a man makes a lease to A for 21 years if B shall live so long, and after the death of B that it shall remain over in fee, this remainder over is void. So if a lease for years be made, the remainder to the right heirs of J. S., this remainder is void; which was granted by the whole court. Also it was said, that when a remainder is limited to take effect on the doing of an act, which act will be the determination of the particular estate, yet if the act depends on a casualty and mere uncertainty whether it will ever happen or not, there also the remainder doth depend in contingency, and shall not presently vest: as if A makes a feoffment to the use of B till C come from Rome to England, and after such return to remain over in fee, this remainder doth depend in contingency, for it is uncertain whether C will ever return; which was granted by the whole court. And so it was concluded by plaintiff's counsel, that for all these causes judgment ought to be given for the plaintiff.

Defendant's Counsel conceived the remainder vested in Hugh presently by the death of the deviser; and by his death without issue, the land descended to Philip his brother, who leased to the defendant. It was said that although Hugh died before his full age, yet the interest and term of the executors did not cease; and their reason was, because in wills the intent of the devisor is to be considered, and when he deviseth his lands to his executors till Hugh his son shall come to his full age, for payments of his debts, and to perform his will, it is to be intended that he hath computed that the profits to be taken of his lands during the minority of his son, would suffice to pay his debts and perform his will, and that he did not intend it should determine by the death of his son; for then the means which he had prescribed to satisfy his debts and perform his will would be defeated, and by consequence his debts would remain unsatisfied and his will unperformed; and therefore this case of a devise doth differ from a lease or a grant made in like manner. For the devisor is intended to be without counsel, and therefore the law will be his counsel. Although the devisor being hindered by sickness or want of good advice, makes his will in a disordered manner, and in barbarous and unfit words, the law in such case will reduce his words which want order into good order, and sentence his unfit words to words sufficient in law, according to his intent which appears by his own words, as was adjudged in *Wellock v. Hammond*, [reported ante p. , which Coke here states at considerable length.] Upon which it was concluded by defendant's counsel, that the executors had a good term for 12 years,

which was not determined by the death of Hugh; which was granted by the whole court. And the general rule put by counsel of the other side was well agreed, that the remainder ought to commence in possession when the particular estate ends, as well in wills as in grants; but that doth not concern the case at bar; for here, in as much as the term did not end by the death of Hugh, the remainder did begin in possession at the end of the term. As to the uncertainty, it was said, that the case at bar is no other in effect, but that a man devises his lands to his executors for the payment of his debts, until his son shall or should have come to his age of 21 years, the remainder to his son in fee: for although these are adverbs of time, *when*, &c., and *then*, &c., yet they do not amount to make anything precede the settling of the remainder. A man leases land for life or years, and after the decease of the lessee, or the term ended, the remainder to another, yet it shall remain presently; for when these adverbs refer to a thing, which must of necessity happen, there they make no contingency: and it is certain that every man must die, and every term end. So that these adverbs *then* and *when* in our case, are demonstrations of the time when the remainder to Hugh shall take effect, in possession, as in the said cases of a lease for life and a lease for years, and not when the remainder shall vest; which was granted by the whole court. And judgment was given that the plaintiff should take nothing by his bill.

NAPPER v. SANDERS, in *Common Bench*, 7 Car. 1.—A. D. 1632.—Hutton 118, 5 Gray's P. C. 48.—Abridged.

Ejectione firmæ by Robert Napper against Henry Sanders, on a lease by indenture of Francis Sanders, John Napper, and Elizabeth, John's wife. Plea, not guilty. On special verdict the case was, that, one seised in fee of the land in question, made feoffment of it to the use of herself for life, then to the use of the feoffees for 80 years if Nicholas Sanders and Elizabeth his wife should so long live, and if Elizabeth survive Nicholas, then to her use for life, and after her death to the use of Posthumous Sanders her son in tail, and for default of such issue to the use of plaintiff's lessors in tail, remainder to the heirs of the feoffor. The feoffor died, the feoffees entered, Elizabeth Sanders died (Nicholas yet living), Posthumus died without issue, plaintiff's lessors entered and were possessed, and defendant entered as son and heir of the feoffor, and ejected them and the plaintiff; whence this action. The sole question was whether the remainders to Posthumus and plaintiff's lessors were vested or contingent.

It was resolved by all the COURT, that the remainders *were* not contingent in the estate for life which was to come to Elizabeth Sanders, the wife of said Nicholas, but were vested presently. And it was agreed, that the estate for life, if she survive her husband was contingent; and when that had happened, being by way of limitation of an use, it shall be interposed when the contingent happen; as in *Chudleigh's Case*

[ante p. 202], a feoffment to the use of the feoffor, for life, and after his death to his first son which shall be afterwards born, for life, and so to divers, and afterwards to the use of J. D. in tail, it is resolved that all the uses limited to persons not *in esse* are contingent, but the uses to persons *in esse* vest presently, and yet these contingent uses when they happen vest by interposition, if the first estate for life which ought to support them be not disturbed. And in this case it was a good estate for life to Margaret [the feoffor], and then gives the remain in the feoffees for eighty years, if Nicholas and Elizabeth Sanders so long should live, and if Elizabeth survive Nicholas, then to Elizabeth for her life, and after her decease to Posthumus in tail, and after his decease to the said three daughters in tail, so that there the estate for years determines upon the death of Elizabeth, and so also the estate for the life of Elizabeth, which was contingent, determines by her death. [After citing and admitting *Lord Derby's Case* Litt. Rep. 370; *Boraston's Case*, ante p. 212, and others, and distinguishing *Colthurst v. Bejushin*, ante p. 183, the report proceeds.] And after argument at bar, this term (it being before that the LORD RICHARDSON was there, who was of the same opinion) we all concurred, and judgment was entered for the plaintiff.

EDWARDS v. HAMMOND, in Common Pleas, 35 Car. 2.—A. D. 1683.—3 Lev. 132, 1 B. & P. N. R. 324n., 2 Danv. 16, pl. 12, 5 Gray P. C. 52.

Ejectment, upon not guilty and special verdict, the case was; a copyholder of lands, borough English, surrendered to the use of his eldest son and his heirs, *if he live to the age of 21 years, provided and* upon condition, that if he die before 21, that then it shall remain to the surrenderer and his heirs. The surrenderer died, the youngest son entered, and the eldest son being 17 brought ejectment. And the sole question was whether the devise to the eldest son be upon condition precedent, or if the condition be subsequent, viz., that the estate in fee shall vest immediately upon the death of the father, to be divested if he die before 21. For the defendant it was argued, that the condition was precedent, and that the estate should descend to the youngest son in the mean time; and so the eldest son has no title now, being no more than 17. On the other side it was argued, and so agreed by the COURT, that though by the first words this may seem to be a condition precedent, yet, taking all the words together, this was not a condition precedent, but a present devise to the eldest son, subject to and defeasible by this condition subsequent, viz. his not attaining the age of 21; and they resembled this to *Springe v. Caesar*, W. Jones 389. * * * Adjudged.

EXECUTORY DEVICES AND SPRINGING AND SHIFTING USES.**Without Prior Particular Estate.**

ASSABY v. LADY ANNE MANNERS, in Exchequer Chamber, 6 & 7 Eliz.—
1565.—2 Dyer, 234b.

Before 27 H. 8, c. 10, one seized of land in fee, in consideration of a marriage to be had between his daughter and heir apparent with B, the son and heir apparent of C, covenanted by indenture with C, that he himself would have, hold, and retain, the land to himself and the profits of it during his life, and after his decease the said son and daughter should have the land, to them and the heirs of their two bodies, and that all persons then or afterwards seised of the land should stand and be seised immediately after the marriage solemnized to the use of said A for term of his life, and after his death to use of said son and daughter in tail as above, and covenanted further to make an assurance accordingly before a day named. Then the marriage took effect; and afterwards A bargained and sold the land for 200 marks, of which not a penny is paid, to a stranger, who has notice of the first covenants and use, and enfeoffed divers persons to this last use, against whom a common recovery was had to this last use; and also A levied a fine to the recoverers before any execution had; and notwithstanding all these things A continued in possession in taking the profits during life, and afterwards died. And afterwards the son and daughter entered and made feoffments to their use. And all this was found by special verdict in assize in 8 H. 8. And judgment was given upon great deliberation in the exchequer chamber, that the entry and feoffment were good, and the use changed by the first indenture and agreement. * * *

MUTTON'S CASE, Hilary, 14 Eliz.—A. D. 1572.—Moor 96, 1 And. C. P. 42,
pl. 106, Dyer 274.

Jane Mutton brought a writ of entry against Anne Mutton, who pleaded in bar that John Mutton, the father of the said Jane, was seised of the lands in question, and 1 & 2 Phil. & Mary, levied a fine of them to the use of himself and the woman he should afterwards marry, and after their death to the use of said Jane and the heirs of her body; and that afterwards he took to wife said Anne, now tenant, and died; that Jane by color of descent, without any right in possession, entered on said Anne, who re-entered, for which re-entry Jane conceived this action. Jane demurred to the plea. The case was argued by Jeoffreys for the plaintiff and Mead for the defendant; and the only question in the case was whether by the limitation of the use to the woman he should afterwards marry, Anne obtained a jointure with John, or was the limitation of the use and estate on this void, for want of a woman in being at the time of the limitation. It was argued on both parts that such an

estate limited in possession would be wholly void. But by the limitation of the use in the present case, MANWOOD, MOUNSON, and HARPER, JJ. in their arguments held clearly that the law is otherwise, and that the demandant was barred. DYER, J. contra. And they all argued *anno* 17 Eliz. in the common bench openly.

With this agree the opinions of three justices in 6 Edw. 6, Brooke, feoffments to uses 30; and 38 Hen. 8, Brooke Assurances; and the case between *Newes and Lark* in Plowden's Com. [ante p. 146] and the case of petition by *Basset v. the Queen*, 4 Mary, Dyer; and 15 Eliz, in *ejectione firmæ* by *Huddy v. Gilbert*.

Before this time it had been held otherwise in several cases. A feoffment was made to the use of a man and woman and the heirs of their two bodies, afterwards they inter-married, then the statute of uses was passed, vesting the estate in them as they had the use; and held that they were not joint-tenants, and the wife surviving was entitled to a moiety only; though the statute vested the possession in them at the same time, when they were husband and wife. *Bedyll v. Holstoke* (T. 3 & 4 Ph. & Mary, A. D. 1556); *Fuljambe v. Lyndacre* (4 & 5 Ph. & Mary); and *Morgan v. Wharton* (E. 8 Eliz., A. D. 1566, in Com. Bench); all reported in 2 Dyer 149b, and one in 1 And. 303.

ANONYMOUS, in C. B., Mich. 24 Eliz.—A. D. 1582.—Moor 177.

MEAD and PERRIAM, JJ., affirmed that it was adjudged in the time of Lord Dyer, that if lands are devised to two men and to the child with which the wife of the devisor is *enseint* that this devise is good; and the child shall take by the devise; but if he should take in common or in jointure the LORD DYER doubted.

WOODLIFF v. DRURY, in B. R., 37 & 38 Eliz.—A. D. 1597.—Cro. Eliz. 439.

Trespass. After verdict, Coke, Att. Gen., moved in arrest of judgment, the case on the pleadings was, that one made a feoffment, and it was declared in the indenture that it was to the use of himself and A, his feme that should be, after their marriage, and to the heirs of their bodies; and he took A to feme. Whether she should take by the limitation of this use was the question. And he moved that she should not: for presently by this feoffment the fee is in the baron by the possession, executed to the use which he had before the marriage; which cannot after the marriage be divided and made an estate tail in him; for he had the fee in him until the marriage; for it might have been that the marriage had never taken effect, and that would have confounded the other use; and uses *in futuro* shall not rise on such future acts; for then an use should rise out of an use. [*Tyrrel's Case*] Dyer 155.

But All the Justices held, that although he be seised in fee in the meantime, as in truth he is; yet by the marriage the new use shall arise and vest, if there be no act in the meantime to destroy that future

use (as it was in *Chudley's Case*,) according to the limitation of the use. And judgment was given accordingly for the plaintiff.

PAY'S CASE, in B. R. Easter, 44 Eliz.—A. D. 1602.—Cro. Eliz. 878.

Upon a special verdict the case was, that one devised his land to J. S. from Michaelmas following for five years, remainder after to the plaintiff and his heirs. He [testator] died before Michaelmas: The question was whether this were a good remainder, because it could not enure instantly upon his death? For it may not begin until the particular estate, which is not to begin till after Michaelmas, and a freehold cannot be in expectancy. But ALL THE COURT held, that it very well might expect; for in case of a devise, the freehold in the mean time shall descend to the heir, and vest in him. Wherefore, without argument, it was adjudged accordingly, and that the remainder was good.

HOPKINS v. HOPKINS, in Court of Chancery, 1734.—Cas. Tem. Talb. 44, 5 Gray's P. C. 168, Gate's Cas. R. P. 221.

The testator, Mr. Hopkins, by his will, devises his real estate to trustees and their heirs, to the use of them and their heirs, in trust for Samuel Hopkins (the plaintiff's only son, which plaintiff is heir at law to the testator) for life; and from and after his decease, in trust for the first and every other son of the body of the said Samuel, lawfully to be begotten, and the heirs male of the body of every such son; and for want of such issue, in case the said John Hopkins, the plaintiff, should have any other son or sons of his body lawfully begotten, then in trust for all and every such son and sons respectively and successively, for their respective lives, with remainders over, then in trust for the first and every other son of his cousin Anne Dare (wife of Francis Dare) lawfully to be begotten, with like remainders to the heirs male of the body of every such son of the said Anne Dare; and for default of such issue, then in trust for his own right heirs forever.

Samuel Hopkins died in the testator's lifetime, without issue; and some time after, the testator died without any alteration made of his will; nor had John Hopkins any other son; nor were any of the other remaindermen *in esse* at the testator's death, except Dare, son of Anne Dare.

The cause was first heard at the rolls, and there decreed to be an executory devise.

TALBOT, Lord Ch. Two questions have been made upon this will: The first is, whether this limitation to the first and every other son of John Hopkins can now take effect as an executory devise? or whether it shall be taken as a contingent remainder, and consequently void for want of a particular estate to support it, by reason of Samuel's death in

the testator's lifetime, and that John Hopkins had no son *in esse* at the testator's death, in whom the remainder might vest? The next question is, in case the limitation be taken as an executory devise, what is to become of the rents and profits of this estate until John Hopkins has a son? As to the first, I think it impossible to cite any authorities in point. None have been cited. It seems to be allowed, that if things had stood at the testator's death as they did at the time of the making of the will, the limitation in question would have been a remainder, by reason of Samuel's estate, which would have supported it. So is the case of *Purefoy v. Rogers*, 2 Saund. 380, 388, and limitations of this kind are never construed to be executory devises but where they cannot take effect as remainders. So on the other hand, it is likewise clear, that had there been no such limitation to Samuel and his sons, the limitation must have been a good executory devise, there being no antecedent estate to support it; and consequently not able to inure as a remainder; so that it must be the intervening accident of Samuel's death in the testator's lifetime, upon which this point must depend. And as to that, I am of opinion that the time of making the will is principally to be regarded in respect to the testator's intent. If an infant or feme covert make a will, and do not act either at full age or after the coverture determined, to revoke this will, yet the will is void, because the time of making is principally to be considered; and the law judges them incapable of disposing by will at those times. The same reason holds in the case of a devise of all the lands which a man has or shall have at the time of his death, no after-purchased lands shall pass without a republication, which was the case of *Bunter v. Cook*, 1 Salk. 237, because the time of the will made is chiefly to be regarded. Indeed it is possible that subsequent things may happen to alter the testator's intent; but unless that alteration be declared, no court can take notice of his private intent, not manifested by any revocation of the former; though these subsequent accidents may and must, in many cases, have an operation upon the will; as in the case of *Fuller v. Fuller*, Cro. Eliz. 422, [ante p. 181], and *Hutton v. Simpson*, 2 Vern. 722. And in the *Lord Landsdown's Case*, 10 Mod. 96, the first limitation did not expire by effluxion of time, but by the intervening alteration of things between the time of the will made and the testator's death; and the words there, *for want of such issue*, were not construed to create another estate tail to postpone the limitation, but only to convert the second estate to the precedent limitation. So we see, that in these cases the method of the courts is not to set aside the intent because it cannot take effect so fully as the testator desired; but to let it work as far as it can. And if, in this case, we consider it as an executory devise, the intent will be served in case John Hopkins has a second son; but if it is taken as a remainder, the intent plainly appearing that a second son of John Hopkins should take, is quite destroyed; there being no precedent estate to support it as a remainder. The very being of executory devises shows a strong inclination, both in

the courts of law and equity, to support the testator's intent (*Doe v. Fonnereau*, 2 Doug. 487), as far as possible; and though they do not of ancient date, yet they are of the same nature with springing uses, which are as old as uses themselves. I can see no difference between this case and the others of like nature, that have been adjudged. And if such a construction may be made consistently with the rules of law, and agreeable to the testator's intent, it would be very hard not to suffer it to prevail. In *Pay's Case*, Cro. Eliz. 878 [ante p.], had the testator lived to Michaelmas, the limitation had been a remainder; and if a remainder in its first creation does, by any subsequent accident, become an executory devise, why should it not be good here, upon the authority of that case, where by the testator's death before Michaelmas, what would otherwise have been a remainder, was held to be good by way of executory devise? I think, that in this case the limitation would operate as an executory devise, if it was of a legal estate; and therefore shall do so as a trust, the rules being the same.

The next question is, what is to become of the rents and profits, in case this be taken to be an executory devise, until the birth of a son to John Hopkins? * * * Until somebody is *in esse* to take under this executory devise, the rents and profits must be looked upon as a residue undisposed of, and consequently must descend upon the heir-at-law; the case being the same where the whole legal estate is given to the trustees, and but part of the trust disposed of, as in this case; and where but part of the legal estate is given away, and so the residue undisposed of, the legal estate descends upon the heir-at-law. So it was held by the Lord King in the case of *Lord and Lady Hertford v. Lord Weymouth*—which shows that equity follows the law.

One objection indeed has been made, which is, that the testator having in this case devised another estate to John Hopkins, his heir-at-law, can never be supposed to have intended him this surplus. And to warrant that objection, the case of *North v. Crompton*, 1 Ch. Cas. 196, has been cited. I answer, that in these cases the heir does not take by reason of the testator's intent being one way or the other; but the law throws it upon him: and wherever the testator has not disposed (be his intent that the heir should take or not take), yet still he shall take, for somebody must take; and none being appointed by the testator, the law, throws it upon the heir. * * * Decree affirmed.

GORHAM v. DANIELS, in Vermont Sup. Ct. June, 1851.—23 Vt. 600.

Trespass quare clausum fregit. Amaziah Richmond, being well seised in fee of the land in dispute, made a deed "meaning to convey one half of the above described land, * * * and the other half not to come into possession of it not till after my decease, Amaziah Richmond's and Sarah Richmond's decease; it is meant to convey the whole of the above land after the decease of Amaziah Richmond and Sarah Richmond." The consideration expressed was \$750. The grantee was the son of

Amaziah and Sarah, went into possession on execution of the deed, and later borrowed money and gave a mortgage on the land, which was foreclosed on default, and plaintiff claims under the foreclosure decree. Plaintiff being in possession, defendants entered, claiming under Sarah, widow of the grantor. It was agreed that if Sarah then had title or right of entry, defendant should recover costs; otherwise judgment should be for plaintiff for \$8.00 damages and costs. The county court gave judgment for plaintiff and defendant excepts.

REDFIELD, J. This case has been twice argued, and mainly upon the question how far the statute of Henry 8 of England, called the Statute of Uses, is to be considered in force in this state. It seems to me very much to be regretted, that so important a question should have come to a final determination in a case so utterly insignificant in pecuniary consequence. But I have given my best attention to the subject, during the two arguments, and notwithstanding, it seems to be conceded, that the Statute of Uses is considered in force in most of the other American states, and would answer a good purpose, in many cases, in effecting, at law, the real intention of the parties, without the necessity of a resort to a court of equity, and the farther consideration, that it is known, that the late Mr. Justice Thompson of the United States supreme court, while presiding in the circuit court, in this state, upon argument, and after a deliberate consideration, in a written opinion of considerable labor, decided that it was in force here, still I cannot bring my mind to that conclusion. See 1 Greenleaf's Cruise, 349, and the learned editor's elaborate note upon the subject, where the matter is fully discussed.

But so far as the conveyance of lands, in this state, is concerned, it seems to me, that our statutes are fully adequate to all the ordinary incidents of the subject, and that in those extraordinary cases, where the statute of uses might answer a good end, it will be safer and better every way, to have resort to a court of equity, than to introduce a portion of the ancient common law system of conveying real estate, most of the incidents of which have been materially modified, even in England, since the separation of this country from that, it would become necessary immediately to resort to very extensive legislation, in order to render this addition to our present laws even tolerable. (*610)

This view is certainly confirmed by the history of our jurisprudence on this subject. Nothing ever existed in the history of this state, calling, in the slightest degree, for the use of such a statute, except in those cases, where, by some mistake, the parties have failed fully to effect their intention in the prescribed mode. The Statute of Uses would no doubt aid somewhat this class of cases. But its original purpose and design had not the remotest bearing, or purpose in that direction even. And to adopt a portion of a system of laws, which will in its train, very likely, draw in the whole, for the mere purpose of effecting some collateral purpose in a particular cause, seems almost absurd.

We entertain no doubt, that our system of conveyancing, so different from the English, so simple and intelligible to all, and so intended to be, by means of a thorough system of registry, from the very first, was designed to be entire in itself. And although most of its terms, and many of its forms of deeds even, like that of bargain and sale, derived their meaning and operation to some extent, from the common law and the English statutes, and that of uses among others, yet it was no doubt the purpose of the framers of our laws upon conveyancing to have them "understood" of the people, without the necessity of resorting to the study of the subject in other quarters. Such has been the practical construction of the subject by all, professional or unprofessional, ever since. With rare exceptions the profession in this state have never supposed any of the common law modes of conveyancing to be regarded as in force here. The attempt to bar an entail in this state by a common recovery or the rights of a married woman by a fine would, I think, strike the profession with some surprise. * * * [*611] * * *

The granting of an estate in fee, to take effect after a particular estate reserved, as an estate for life, or lives, is not inconsistent with the law of England. And if it were, it could have no application here; for under our statute of conveyancing, there being no livery of seisin in fact necessary to invest the grantee with the title, but only the seisin resulting from the due execution and recording of the deed, there is no objection whatever to the creating of a freehold estate, in terms, to take effect in future. This has been expressly decided in some of the American states and we see no valid objection to holding the same under our statute.

**WARDWELL v. BASSETT, in Rhode Island Supreme Ct., March, 1866.—8
R. I. 302.**

Trespass and ejectment for possession of land and buildings in Providence. Defendants claim under the deed of Chloe Bassett, *habendum* to Amey Bassett and her heirs to her and their sole use and benefit "from and after the day of my decease." Plaintiff claims under the grantor's will.

BRADLEY, C. J. The question in this case arises upon the construction of a quitclaim deed made in the common form under our practice, with the *habendum* providing that it shall not take effect till after the decease of the grantor. This is not an unusual mode of conveyance in this and other New England states, and is, upon the face of it, open to the objection of attempting to create an estate in fee *in futuro*. It is a duty of the court, of course, to sustain the intention of the parties if upon any legal grounds it can be sustained. [*305]

The language of the instrument may be construed as a covenant to stand seised, as the intention is clear, and as, upon inquiry, we find that the relations of the parties to this deed are such as to furnish a sufficient consideration; for it is admitted in the case, though not upon

the face of the deed, that the grantor was the mother of the husband of the grantee, by whom he had children. The case of *Wallis v. Wallis*, 4 Mass. 135; *Gale v. Coburn*, 18 Pick. 397; *Bell v. Scammon*, 15 N. H. 381, 41 Am. Dec. 706, are strictly analogous to this case, upon the point here decided. See also *Byron v. Bradley*, 16 Conn. 473. It is unnecessary to consider whether the deed could be sustained upon other grounds.

Judgment for the defendant.

FERGUSON v. MASON, in Wisconsin Sup. Ct., April 15, 1884,—60 Wis. 377, 19 N. W. 420.

Ejectment to recover undivided third interest in land. John Ferguson, Sr., conveyed the land to defendant by deed "in consideration of one dollar and love and affection." The deed contains the clause: "The party of the first part reserves the sole, free, and absolute use and control of all the above described lands so long as he and his wife, or either of them, may live." The grantor and his wife are dead, and the parties and one Margaret are the only heirs. On the death of her father, defendant went into possession and entirely excluded the plaintiff. From judgment for defendant plaintiff appeals.

LYON, J. Laying aside the question of homestead for the present, it is necessary first to determine whether a conveyance of land by the owner thereof in fee is valid in which it is stipulated that the grantor shall have the possession and absolute use and control of the land during his life.

In very many of the older cases the courts, out of tender regard to the subtle and technical distinctions and niceties of the common law rules respecting the tenure and alienation of real estate, seem to have held that if such a conveyance be regarded as a feoffment, or bargain and sale, it could not be upheld. The reason given was that the effect of the exception or reservation therein contained was to retain the whole estate in the grantor during his life, and to uphold the conveyance would be to violate the rule that a freehold cannot thus be created to commence *in futuro*. So those courts upheld such conveyances on the ground that a covenant might be implied from their terms, on the part of each grantor, to stand seised of the lands to his own use during his life, and, after his decease, to the use of the grantee and his heirs. Hence upon the execution of the deed, the grantor was tenant for life, and a remainder in fee was vested in the grantee. Thus, those courts were strictly loyal to the common law rules which grew out of tenures that never obtained in this country to any great extent; and at the same time gave judgments which are clearly reasonable and just. Many of the cases above referred to are cited in the briefs of the respective counsel. Such conveyances cannot, however, be upheld in this state on any implied covenant, or on the doctrine that the grantor stands seised to the use of the grantee, for our statutes long since abolished both implied

covenants and such uses. Rev. St. 1858, c. 84, § 1; Id. c. 86, § 5; Rev. St. §§ 2071, 2204. But we think they may be upheld on other grounds.

The statutes recognize and define future estates in expectancy as follows: "A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise of a precedent estate created at the same time." Rev. St. 1858, c. 83, § 10; Rev. St. 1878, p. 614, § 2034. At common law the intervention of a precedent estate, created at the same time, was essential to the validity of a conveyance of an estate of freehold, to commence at a future time, which is an estate in remainder. It was said that without such precedent estate there could be no valid remainder. The reason was (and it was conclusive to the minds of our English ancestors) that unless a precedent estate was created there could be no livery of seisin to support the remainder; and without livery of seisin, no estate of freehold could be created. After laying down the rule and giving the reasons therefore above suggested, Blackstone informs us how the future expectant estate, that is, the remainder, may be created. He says: "So, when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time is completed; and for the grantor to deliver immediate possession of the land to the tenant of the particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law. * * * The whole estate passes at once from the grantor to the grantees, and the remainder man is seised of his remainder at the same time that the termor is possessed of his term. The enjoyment of it must, indeed, be deferred till hereafter; but it is, to all intents and purposes, an estate commencing *in presenti*, though to be occupied and enjoyed *in futuro*." 2 Bl. Com. 165. But this refined doctrine of the necessity to create a particular estate to support a freehold estate to commence at a future time, has been overturned by the statute above quoted. Similar statutes prevail in a large number of the states of the Union. These are referred to in 2 Washb. Real Prop. 265 (4th ed. 592).

Conveyances of land containing exceptions or reservations, similar to that in the conveyance under consideration in the present case, are very common, and always have been in general use in this country, as reports of judicial decisions abundantly show. Because of this fact, some courts, in the absence of statutory provisions on the subject, have held such conveyances valid, without much regard to any other ground upon which their judgments might have been placed. This is notably true of the supreme court of Connecticut. *Barrett v. French*, 1 Conn. 362; *Fish v. Sawyer*, 11 Conn. 545; *Bissell v. Grant*, 35 Conn. 288.

Our constitution thus ordains: "All lands within this state are declared to be allodial, and feudal tenures are prohibited." Art. 1, § 14. That is to say, the owner of land in this state holds the same of no

superior. He has absolute dominion over it, owing no rent, service, or fealty to any, on account thereof. His obligation of fealty to the government is an obligation arising out of his citizenship, and is no greater or different because he is a proprietor also. Even the government may not condemn his land to the public use without paying him a just compensation therefor. Why has not the owner of land, held by a tenure so absolute, the right to convey it on such terms and under such restrictions as he chooses to impose, so long as he contravenes no public policy or positive rule of law? And what policy or rule of law is contravened, if, instead of making his conveyance take effect immediately, he stipulates that it shall take effect at the end of a month, or a year, or on the happening of some future event? We should be strongly inclined to uphold that right as a necessary incident to allodial tenure, were there no statute expressly conferring it. The conclusion is inevitably, that, if otherwise sufficient, a conveyance of land in fee, to take effect at a future time, is valid, and will vest the fee in the grantee according to the terms of the conveyance. * * *

In conclusion it is but just to say that the case was argued by learned counsel for both parties with great ability, and their learning and research have been of much value to us in determining it. The judgment of the circuit court must be affirmed.

A Fee After A Fee.

ANON., in Common Bench, Easter, 28 and 29 Hen. 8.—A. D. 1538.—1 Dyer 33a.

The custom of London is that a man may devise his purchased lands in mortmain. And a purchaser devised by his will, that the prior and convent of St. Bartholomew in West Smithfield and their successors should have the lands, so as they paid annually to the dean and chapter of St. Paul sixteen marks; and if they should fail of payment, that their estate should cease, and that the said dean and chapter and their successors should have it. And for a breach of the condition, they of St. Paul entered. And to FITZHERBERT [J.] and BALDWIN [C. J.] it seemed clear, that the condition is void; for it cannot continue after the fee-simple given, for the feoffor has determined his right and interest, and then the stranger cannot enter for the condition broken, but the heir may.

In speaking of this case in *Gardner v. Sheldon*, Vaughn 271, Judge Vaughn said Baldwin and Fitzherbert were the greatest lawyers of their age. Fitzherbert was the author of the Abridgment.

In *Trinity*, 19 Hen. 8, A. D. 1529, Fitzherbert, J. said: "If a man devise land to H in fee, and if he die without heir that M shall have the land, this devise is void as to M; for a fee-simple cannot depend upon another fee-simple by the law."

This point was made a question in 2 & 3 Ph. & Mary, A. D. 1553, on a devise in fee by a debtor to his sons on condition to pay his debts, devise over to an uncle on like condition; and the first devisees failed to pay, and the

second died without payment, and whether his heir could enter for the condition broken and make payment? But no decision reported. *Wilford v. Wilford*, Dyer 128a.

HARWELL v. LUCAS, Hilary, 14 Eliz.—A. D. 1572.—Moor 99.

Replevin by Thomas Harwell against William Lucas. Thomas Bracebridge, seised of the manor of K in Warwick county, made a lease for 21 years of six acres of the manor to Thos. Moore without rent, and afterwards he made a lease of the said six acres to John Curtes for 26 years to commence after the first lease expired, rendering certain rent; and afterwards he made a feoffment of the manor and all other his lands, to the use of the feoffees and their heirs, on condition that if they do not pay 10,000£. within fifteen days to Thomas Bracebridge or his assigns, then they shall be *seised* to the use of said Thomas and Joyce his wife, remainder to Thomas their second son in tail, with divers remainders over, remainder to the right heirs of said Thomas the father. Livery was made of the land in possession only, and nothing in the six acres; the money was not paid; and afterwards the first lessee for years attorned, Thomas Sr. and wife died, the first lease expired, the second lessee died, his wife being executor married Lucas, and Harwell the plaintiff distrained the cattle of Lucas for rent arrear, as bailiff of Thomas Bracebridge the son. The case was argued at bar and bench, and at last adjudged for the defendant.

For although they held that the reversion of the six acres did not pass by the livery of the manor without attornment, yet they held that the attornment of the first lessee was sufficient; and also that although the use limited to the feoffees and their heirs was determined before the attornment, yet the attornment was good so as to pass the reversion to the subsequent contingent use; and so the title of Thomas Bracebridge the son to the rent was good, and the conusance of the defendant his bailiff was sufficient.

This is given by Cruise as the second case of a shifting use decided after the passage of the Statute of Uses, the first being reported in Brooke Abr. feoff. al Use pl. 30, and he adds: "It is observable that these cases were prior to that of Chudleigh [ante p. 202] so that the doctrine of a possibility of entry or scintilla juris was not then established. But since Chudleigh's Case it is settled that all contingent uses must arise out of the seisin of the covenantors, feoffees, or releasees to uses, and not out of the seisin of any prior cestui que use." 2 Cruise's Digest *356.

SOULLE v. GERRARD, in C. B., Mich. 38 & 39 Eliz.—A. D. 1597, Cro. Eliz. 525. Abridged from Croke.

Ejectione firmæ. Upon not guilty pleaded, a special verdict found, that Richard Baker seised in fee of land held in socage, devised it to his son Richard and his heirs for ever, and if he died within age of 21 or without issue, then the land should be divided equally amongst his three other sons. The devisor died; Richard the son had issue Mary, and died

within age; the other sons entered, and let it to the plaintiff; and the defendant, by Mary's command, ousted him. *Glanville*, for the plaintiff, argued that *or* cannot be taken for *and*; and that while a remainder limited after a fee is held void at common law, as in 19 Hen. 8, pl. 8, and 29 Hen. 8, 1 Dyer 33, [ante p. 225.] it might well be under the statute of wills 32 Hen. 8. c. 1; for the statute gives liberty to every owner to dispose of his land by devise at his will and pleasure; and as a remainder may be limited to depend on a fee by act of parliament, so it may by will, which is to be so construed. And this is the opinion of *Monson* in [*Newis v. Lark & Hunt* 2] Plowden 413 [ante p. 146].

ANDERSON, [C. J.] The words of the act of parliament, that "he may dispose at his will and pleasure," are not to be construed so largely as has been said; but he may dispose at his will and pleasure, so as it be according to the rules of law, otherwise it is a vain will. * * * I conceive that this part of the limitation, "If he die within age," is utterly void; for a remainder cannot depend upon a fee; and then it is all one as if the limitation had been single, "if he die without issue," so Richard had an estate tail, which descended to his daughter, and so the defendant's entry was lawful. WALMSLEY, BEAUMOND, and OWEN, [J J.], agreed with ANDERSON, [C. J.], and it was adjudged for the defendant.

A fee on a fee by devise was held valid in *Wellock v. Hammond* (1591), Cro. Eliz. 204, ante, , under conditions.

PLUNKET v. HOLMES, in King's Bench, 13 Car. 2.—A. D. 1661.—1 Lev. 11, 2, L. Raym. 28, 1 Sid. 47, 1 Keb. 29, 119, 5 Gray P. C. 50. Given according to Levin.

In ejectment, not guilty was pleaded and a special verdict found, on which the case was, a man seised in fee devised the land to his eldest son Thomas *for life*, and if he dies without issue living at the time of his death, to Leonard, another son, and his heirs; but if Thomas had issue living at his death, that then the fee should remain to the right heirs of Thomas forever. Thomas enters after the devisor's death, and suffers a common recovery, under which the defendant claims, and dies without issue. Two questions were made; 1, if by the will Thomas had only a life estate, with a contingent remainder to Leonard, or whether the fee was vested in Thomas, with an executory devise to Leonard; 2, if it be an executory devise to Leonard, if the common recovery has barred it. For the plaintiff it was argued, that Thomas had the fee, for though only an estate for life be devised to him, yet by descent the whole fee was in him, which merged his estate for life, and this is executed in him; and then the estate to Leonard cannot be any other than an executory devise; for when the whole fee is given or vested in one person, with a limitation of a fee to another upon a contingency, this cannot be a remainder, for one fee cannot remain (*12) upon another, but of necessity must take effect as an executory devise. But when part of an

estate is disposed of, as for life or in tail, and the residue given to another on a contingency, as to the right heirs of J. S. who is in life, or to such a person as shall be living in the house at such a time, this is a contingent remainder. But here the whole estate is in Thomas, either by the devise or by descent, and then the devise to Leonard must of necessity be an executory devise, which being to happen within the compass of a life, has been allowed, as in *Pell and Brown's Case*, 2 Cro. [post p. 242]. And as to the second question they also relied on *Pell and Brown's Case*, where it was adjudged that a recovery shall not bar in such a case. But on the other side it was argued, and so resolved by the WHOLE COURT in Michaelmas term, 13 Car. 2, that Thomas took but an estate for life by the will, and the remainder to his heirs not executed; and though he be the heir, to whom the reversion descends, that shall not drown the estate for life contrary to the express devise and intent of the will, but shall leave an opening, as they termed it, for the interposing of the remainders when they happen to interpose between the estate for life and the fee; and they compared it to *Archer's Case*, 1 Coke [ante p. 55]; where though Robert the devisee for life was heir, yet the remainder to his next heir male was contingent, and so not an estate for life merged by the descent of the reversion. And so the estate of Thomas here being only for life, by this devise the remainder to Leonard was a contingent remainder, and barred by the recovery. And then the second point will not come in question, whether an executory devise shall be barred by a common recovery. But on the first point, they all gave judgment for the defendant.

SMITH v. BRISSON, in N. Car. Sup. Ct., Feb., 1884.—90 N. Car. 284.

Ejectment. Both parties claim under a deed containing these words: "For and in consideration of the natural love and affection I have for my son, Rowland Mercer, and the further sum of one dollar to him in hand paid, the receipt of which is hereby acknowledged, has given, granted, bargained, sold, and conveyed, and do hereby give, bargain, sell and convey, to the said Roland Mercer and the heirs of his body, and if the said Roland Mercer should have no heirs, the said land shall go to the heirs of my son James A. Mercer, all that tract of land," &c.

ASHE, J. Both parties to this action claim title to the land described in the complaint under the deed executed by Roland Mercer, Sr., to Roland Mercer, Jr., on the 30th day of August, 1859. The plaintiffs contend that the deed conveyed an absolute estate in fee simple in the land to Rowland Mercer, Jr., and by his will the fee simple title to the same was devised to the feme plaintiff. The defendants, on the other hand, insist that the deed conveyed only a determinable fee to Rowland Mercer, Jr., which terminated by his death without children, and vested an absolute fee simple, by the limitation in said deed, in the children of James A. Mercer. * * *

At common law a fee simple could not be limited after a fee simple.

There was no way known to that law by which a vested fee simple could be put an end to and another estate put in its place; and the reason is, because no freehold could pass without livery of seisin, which must operate immediately or not at all. But after the Statute of Uses, 27 Hen. 8, when the possession of the legal estate was transferred to the use, vesting the legal estate in the *cestui que use* in the same quality, manner, form, and condition that he held the use, and the courts of law assumed jurisdiction of uses, it was held that an estate created by deed operating under the statute might be made to commence *in futuro*, without any immediate transmutation of possession; as by bargain and sale, or a covenant to stand seised to uses. *Cessante ratione cessat et lex*. And consequently it was held that, by such conveyances, inheritances might be made to shift from one to another upon a supervening contingency; which to avoid perpetuities, was required to be such as must happen within a life or lives in being, and the period of gestation and twenty-one years thereafter. * * *

Thence arose the doctrine of springing and shifting uses, or conditional limitations. * * * It was under this doctrine of a shifting use that it has been (*289) held since very early after the Statute of Uses, that a fee simple may be limited after a fee simple, either by deed or will; if by deed, it is a conditional limitation; if by will, it is an executory devise. "And in both these cases a fee may be limited after a fee." 2 Bl. Com. 334. * * *

The Statute of Uses is in force in this state. Code § 1330. And the deed, under which both parties to the action claim title to the land in controversy, has its operation under the statute, and as the consideration mentioned in it is both pecuniary and natural affection, it may operate either as a bargain and sale or as a covenant to stand seised, as to both parties, for they are all the blood relations of the grantor.

Our conclusion is that the limitation over to the children of James A. Mercer was good, and that there was error in the court below in not rendering judgment in their behalf upon the case agreed. * * * Reversed.

ALLEN v. FOGLER, in S. Car. Ct. of App., Dec. 1852.—6 Rich. Law 54.

Trespass to try title, by W. H. Allen and others, claiming as the heirs of Josiah Gillett Allen, against John J. Folgar, claiming under a deed made by Harriet Allen, who has died without issue. All parties claim through a deed in these words: "Know all men by these presents, that, I, Elijah Gillett, of state and district aforesaid, do, for the love and affection I bear towards Harriet Allen and Joseph Gillett Allen, give and bequesth to Harriet Allen, and to the heirs of her body, and in case of her death before she has an heir, I desire whatever I may give to her, may be the right and property of Josiah Gillett Allen, and in case of his death before he has an heir," &c.

O'NEALL, J. * * * That the limitation over would be good by way of executory devise, I do not entertain a doubt; for it would be within a life or lives in being and twenty-one years after. But the misfortune to the plaintiffs is that the question arises under a deed, and not under a will. It is a case of remainder. Mr. Fearne, in his book on Remainders. c. 6 § 8, p. 371, says, "A fee at common law cannot be mounted on a fee; as if lands are limited to one and his heirs, and if he dies without heirs, then to another, this last is void." In this case the first estate is a fee conditional at common law,¹ and upon that is mounted a fee eventually to Elijah Gillett Allen and his heirs. The latter is void under the rule cited from Mr. Fearne. The motion to reverse the decision below is dismissed. All concurred.

PALMER v. COOK, in Ill. Sup. Ct., 1896, 159 Ill. 300, 42 N. E. 796, 50 Am. St. Rep. 165.

Bill for dower and partition by the surviving husband of Emily Cook. Her title was by the following deed: "The grantor, Thomas Stewart, of, [&c.], for and in consideration of one dollar in hand paid, doth hereby grant, bargain, sell, convey, and warrant to Mary A. Stewart and Emily C. Stewart, of Macoupin county, the following real estate [describing it]. And I, Thomas Stewart, as for myself, retain possession and reserve the use, profits, and full control, during my life; and further, in case either of the grantees dies without a heir, her interest to revert to the survivor. Dated this 10th day of March, 1883. Thomas Stewart." The trial court held the fee vested in the grantees, and decreed dower and partition. Mary, the other grantee, appeals, and contents that the grantees took simply a life estate, with a contingent remainder to the survivor in fee.

PHILLIPS, J. * * * By the thirteenth section of chapter 30 of the Revised Statutes it is provided: "Every estate in lands which shall be granted, conveyed, or devised although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed, or devised by construction or operation of law." By § 9 of the same chapter the words "convey and warrant" to the grantee are declared to be a conveyance in fee simple to the grantee, and his heirs and assigns, with certain covenants, &c.

This deed is clearly within the letter and spirit of § 9, and, by the two sections above named, a fee simple estate was vested in the grantees. It is an established principle of construction of contingent remainders, that an estate cannot, by deed, be limited to another after a fee already granted. The term "remainder" necessarily implies what is left, and, if the entire estate is granted, there can be no re-

¹ Because the Statute De Donis was not in force in South Carolina.

mainder. This deed affected an absolute fee simple conveyance by the first clause of the deed and vested the estate. By the last clause an attempt is made to mount a fee upon a fee, which can only be done by executory devise; *Smith v. Kimbell*, 153 Ill. 368, 38 N. E. 1029; *Fowler v. Black*, 136 Ill. 363, 26 N. E. 596; *Griswold v. Hicks*, 132 Ill. 494, 24 N. E. 63, 22 Am. St. Rep. 549. * * * Under these principles this deed reserved to the grantor a life estate, and vested the fee in the grantees; and the clause, "and further, in case either of the grantees dies without a heir, her interest to revert to the survivor," must be held to be inoperative as a limitation of a fee.

Decree affirmed.

The case above was cited and distinguished in *Cover v. James* (1905), 217 Ill. 309, 75 N. E. 490, ; in which it was held that, "convey and warrant to A. Fred Cover and Bessie Cover * * *. In case of the death of either * * * the other to have the whole of said property without litigation," gave them an estate as tenants in common for their joint lives, with remainder to the survivor.

By the Statute of Uses a fee might be limited after a fee, and that statute is expressly re-enacted in Illinois. Does that fact affect this case?

After Life Estate out of Term for Years.

ANON., 33 Hen. 8.—A. D. 1541.—*Brooke's New Cases* pl. 209, *Marsh's Translation, Chattels*. Bro. Abr. *Chattels* 23.

If a lessee for years devise his term, or other his chattel or goods, by testament, to one for term of his life, the remainder over to another, and dies, and the devisee enters and aliens not the term, nor gives nor sells the chattel, and dies, there he in remainder shall have it. But if the first devisee had aliened, given, or sold it, there he in remainder had been without remedy for it. And so, it seems, if they be forfeit in his life, he in remainder hath no remedy.

ANON., in *King's Bench*, Mich. 6 Edw. 6.—A. D. 1553.—*Dyer* 74a.

A termor of a parsonage devised his entire lease, term, and interest, to another, provided, if it should happen that the devisee die in the life-time of I. S., that then the said lease, term, and [*74b] interest, should remain entire to the said I. S. during the residue of the term of the lease. The devisee sold the term entire, and died in the life-time of I. S. Whether I. S. hath any remedy for the term or not? And LORD MONTAGUE [C. J.] and Justice HALES thought not. And it was said by MONTAGUE, that the case was ruled by the opinion of all the justices in the time of LORD RICH, when he was chancellor.

See the comment on this and the other cases of this kind by Lord Chancellor Nottingham in the *Duke of Norfolk's Case*, post p. 248 at p. 257.

STANLEY v. BAKER, in Queen's Bench, Mich., 27 & 28 Eliz.—A. D. 1586.—Moor 220.

Hitchcock, possessed of a lease for years, devised it to his oldest son and the heirs of his body, and if he die without issue to his younger son and the heirs of his body, and on default of such issue that the term remain to his daughters. He died leaving two daughters and another was afterwards born. The eldest son sold the term and died without issue; the younger also died without issue; and the three daughters entered. And the term was adjudged to the three, although the younger was not born till after the death of the devisor. Otherwise, if the two daughters had been named in the devise by their proper names.

RAYMAN v. GOLD, in Common Bench, Hilary, 34 Eliz.—A. D. 1592.—Moor 635.

Ejectione firmæ. It was found by verdict that Soper, possessing a term for 80 years, devised that after the death of his wife, whom he made sole executor, his sons John and Edw. shall have the whole profit of the farm, and the longest liver of them shall appoint who shall have the residue of the years which shall be remaining at the time. The points moved were three: 1. If the widow had any estate by implication for her life, as she would have in land of inheritance; and they agreed that she would not, because the devisor could not in his life make an estate for life out of a term. 2. If the devise of the profits was a devise of the term itself, and it was so agreed. 3. If the term may be devised to one for life, with remainder of the years to another which should be to come at the time of the death of the first devisee, or the same land after the death of the tenant for life. As to this the court held that he could not, yet that a termor may demise the land for certain years if the lessee so long live, and may demise the same land to another to commence after the death of the first devisee, and it will be good. But note that in the principal case the widow all her life held the term as executor, and not by implication of the devise; and the estate of the sons is not appointed to commence till after the death of the widow; by which it seemed to the court that it may well be as a devise to the sons after the death of the widow, she having taken nothing by the devise; and this inured as if the termor devise that after the death of a stranger J. S. should have the land for such years as then should be to come; and this is good by devise, because he might so have done by demise in his life.

FOSTER v. BROWN, in Trinity 2 Jac. 1.—A. D. 1605.—Moor 758.

A lessee for years devised the profits of his term to his wife for life, remainder to Agnes Hast for her life if Gabriel Mermion, his son-in-law, within two years after devisor's death should not bind himself in 100£.

to pay 5£ a year to said Agnes during her life, and if he bind himself then all the term was devised to said Gabriel and the issue male of his body, and if he die without issue, remainder over. Agnes died within two months; and Gabriel, not having entered into the obligation, died leaving issue male, who died within the term; and the plaintiff claimed by release and assignment of the executor against him in remainder. The question was if the remainder was good or destroyed. The attorney general allowed that the devise of the profits is a devise of the term; and he held the remainder good, and not to be interrupted by what had happened; and on this he cited *Palmer's Case*, in the exchequer 33 Eliz. ; *Almer v. Lodington*, in C. B. 35 Eliz. *Pierpont's Case*, 27 Eliz., adjudged in C. B. and affirmed on error in B. R. ; which cases prove a remainder good after a life estate of a term. But remainder in tail, where after an estate in tail of a term is void, as adjudged in trinity 27 Eliz. in B. R. in *Miller's Case*. Brooke, on the other side, cited *Chedington's Case*, 1 Coke 153; 37 Hen. 6 ; 28 Hen. 8, 7; Dyer 33 H. 8. Brooke *Hoe's Case* 334; Brooke Abr. t. demise 13; 2 Ed. 6; Brooke 168; 10 Eliz., Dyer 177; 13 Eliz., Dyer 358; Trin. 29 Eliz. rot. 1874, *Hamington's Case*, that the devise of the profits to the woman during her widowhood with remainder over was good. The second point was if the remainder limited to Gabriel on a condition precedent of entering into bond within the year after the death of the deviser was good, as he did not enter into bond. They agreed that it was good notwithstanding, because the time he was to have was a year, and the woman died within two months, so that the condition was discharged by the act of God. Note that the case was adjudged with Brooke, but with a special entry by the court in the roll that they did not give judgment on the remainder but on the release afterward procured of the executors.

PRICE v. ALMORY in King's Bench, Trinity, 10 Jac. 1.—A. D. 1613.—Moor 831.

In *ejectione firmæ*, it was found specially that Tho. Moore, possessing a term for 40 years, devised it to his wife for life if so long a widow, remainder to his son and the heirs of his body. The wife being executor entered and claimed the term as a legacy. John the son died in the life of the wife, the wife died, John's executor entered, and the court was of opinion that the entry of the executors was not lawful, because John had only a possibility and no interest. See *Chedington's Case* 1 Coke 153, where such possibility did not pass to the administrator; and *Manning's Case*, 8 Coke 96, where such devise was good as an executory devise; but the case did not say that if the devisee of such possibility die before the event happened, if the possibility would pass to the executor. The court agreed that the heir of John the son could not take the possibility by limitation.

REVERSIONS.

ANON., Hilary, 22 Hen. 7.—A. D. 1507.—Kellwey 88b.

The opinion was that if one make a feoffment of land in fee to the use of himself and his heirs, if the feoffor make a lease for a term of years to a man rendering rent, and die, that the lease is good by the statute (1 Rich. 3, c. 1). If the heir in this case should bring an action of debt generally and show the lease made by his father, and though the reversion descended to him, and by rent becoming in arrear after the death of his father an action accrued to him, by all the court such a count would not be good, but he ought to show the feoffment made by his father to the use of himself and his heirs, and so to make a special count. And it was also said, that although the rent was reserved only to the lessor and not to his heirs, yet his heir should have it during the term, for the rent is parcel of the reversion; and as the reversion descended to the heir, so the rent though not thus limited expressly in the lease.

ANON., 3 Mary.—A. D. 1556. Brooke's New Cases pl. 470, Marsh's translation t. Feoffments to Uses, Bro. Abr. t. Feoffments to Uses 59.

If a covenant by indenture be that the son of A shall marry the daughter of C, for which C. gives A 100£., and for this A covenants with C. that if the marriage takes not effect, that A and his heirs shall be seised of 150 acres of land in D to the use of C and his heirs until A his heirs or executors repay the 100£., and afterwards C has issue within age and dies, and afterwards the marriage takes not effect, by which the estate is executed in the heir of C by the statute of uses made 27 Hen. 8, notwithstanding that C died before the refusal of the marriage, for now the use and possession vests in the heirs of C, for that the indentures and covenants shall have relation to the making of the indentures, for these indentures bind the land with the use, which indentures were made in the life of C. But by Brooke query whether the heir of C shall be in ward to the lord, for he is heir, and yet a purchaser, as it seems.

BULLEN v. GRANT, in Queen's Bench, Mich. 31 & 32 Eliz., A. D. 1591.—Cro. Eliz. 148.

Trespass. The case upon evidence was, Hugh Bullen, father of the plaintiff, being a copyholder in fee, surrenders the land to the use of his last will, and devises it to his wife for life, remainder to G, his son in tail, remainder to T, his son, in tail. The lord admits M and afterwards admits G. The wife dies. G dies without issue. T is admitted and surrenders to the use of the defendant and dies without issue. The plaintiff, before admittance, being the heir of Hugh B, enters, and upon an

ouster brings trespass. It was held PER CURIAM that the heir may enter without admittance; for WRAY said when the surrender is to the use of his last will, this is at first of all the whole fee; but when he deviseth the land for life or in tail, and doth not meddle with the reversion, by this the reversion never passed out of him, to the lord, but descends to his heir, and he shall have it without any admittance. * * *

MILFORD v. FENWIKE, in the King's Bench, Mich., 32 & 33 Eliz.—A. D. 1591.—1 And. 288. Same case sub nom. *Fenwike v. Mitforth*, Moor 284, 1 Leon. 182.

Ejectione firmæ was brought in the king's bench by Margery and Mary Milford against Fenwike, in which the case was that Anthony Milford, being seised of land in fee, levied a fine of it to divers persons to the use of his wife for life, and after to the use of Jasper his son in tail, and after to the use of his right heirs; after which the said Anthony leased the land for 1000 years to said Fenwike and died, later the wife died, and the son also without issue; on which matter the doubt was if the lease was good or not. And those who argued against the lease claimed that this was a remainder to the right heirs of Anthony, and that they took the land as purchasers, and so now the lease is determined by the death of the lessor, and on this an action would not lie. On the other side it was said that it should be a reversion; the cause of which, as it was said, was, for this, that what the said Anthony had limited in remainder in fee to his right heirs he should have in himself, and if he limit such a thing in use or possession to his heirs the limitation is void; for it may not take effect in the heir of him who limits it if not by descent. And other arguments were made on uses express and implied, * * *. And at last it was adjudged by the court, Mich. 32, 33 Eliz., that the lease was good, for this that the fee simple remained in the lessor, and was as a reversion, and they gave their reason on the cause above.

ANON., in King's Bench, uncertain time.—1 And. 256, pl. 264.

If one make a feoffment in fee to the use of himself for life, remainder over to a stranger for life in use, and after this to the use of the right heirs of the feoffor; the question was if this fee simple was to this day in the feoffor or not; and this in the nature of a reversion in him or not, or if it should be in the nature of a remainder to the heirs of the feoffor; and it was agreed by the COURT of king's bench (as the chief justice said to me), that the fee is in the feoffor, and the use limited to the heirs of the feoffor is a use of the fee in himself in the nature of a reversion; for this that it came from himself and by his own act, and not from any other; which being the law, it follows that the feoffor may sell the land, &c., and if he should die without heir of age it shall be in ward; and so here it is accounted in all cases as a

reversion; see before [1 And.] case 3, but it is better, reported by Dyer in his book.

That limitation to heirs of feoffer is reversion. *Jordan v. McClure* (1877), 85 Pa. St. 495.

BEDINGFIELD v. ONSLOW, in *Common Pleas, Easter, 1 Jac. 2.—A. D. 1685.—3 Lev. 209.* Abridged.

Case, and declares that plaintiff was seised in fee of a close, and defendant possessed of the adjoining one, between which closes ran a rivulet, and that defendant stopped it, and so that plaintiff's trees were drowned, and perished. Defendant pleads that the tenant holding under lease by plaintiff's father had accepted satisfaction for said trespass, to which plaintiff demurs. And after arguments at the bar, and consideration of the books of 19 Hen. 6, 12; 12 Hen. 6, 4; 2 Roll Abr. 551; *Love v. Piggot*, Cro. Eliz. 55; it was resolved by CHARLTON, LEVINZ, and STREET, who only were in court, that this was no plea; for the plaintiff, in respect of the prejudice done to the reversion, may maintain an action; * * * and satisfaction given to one is no bar to the other. But trespass during the plaintiff's term could not be had, it being founded merely on the possession.

METHODIST PROTESTANT CHURCH v. YOUNG, in *N. Car. Sup. Ct., Feb. 18, 1902.—130 N. Car. 8, 40 S. E. 691.*

Action by the Methodist Protestant Church of Henderson and others against J. R. Young and others, to quiet title. From a judgment in favor of plaintiffs. Defendants appeal.

FURCHES, C. J. On the 21st of September, 1880, in consideration of \$1. W. A. Harris conveyed the land in controversy to "D. E. Young, Geo. A. Harris, and John F. Harris," trustees of the plaintiff church, "and to their successors in office, upon which to build a church for the worship of Almighty God," with full warranty against the right and claim of all other persons whatsoever. But he provided that if said church "discontinue the occupancy of said lot in manner as aforesaid, then this deed shall be null and void, and the said lot or parcel of ground shall revert to the said W. A. Harris and his heirs and assigns forever." The plaintiffs erected a church building on said lot soon thereafter, and continued to occupy and use the same as a place of worship until December, 1900, at which time, their church having increased until the building could not afford suitable accommodation for the congregation, the plaintiffs decided to build a new church; and for the reason that the location had become undesirable for a church, and for the reason that the plaintiffs thought the lot would be more valuable to sell it with the building on it than it would be to tear down the building, which they would have to do to build on the

same lot, they purchased another lot near by, and built a church on that lot. In December, 1882, the said W. A. Harris died, leaving a last will and testament, and one son, W. C. Harris, and one daughter, Pattie Young, his only children, and heirs at law. By his said will he devised and bequeathed his property to his two children, in which he used the following language: To Pattie Young, "one-half of all my real and personal estate, of every kind and description, not hereinbefore disposed of." Walter C. Harris is still living, but Pattie died in October, 1892, without issue, leaving a last will and testament, in which, after making numerous other dispositions of her property, she willed in item 19 as follows: "It is my will and desire that all the rest and residue of my property, real, personal, and mixed, of which I may die seised and possessed, shall be sold and collected by my executor hereinafter named, upon such terms as to time as he may deem best." She then named the defendant Young as her executor, and he claims one-half of the property in controversy, under this nineteenth item of Pattie Young's will; and the plaintiffs for the purpose of removing this cloud upon the title, brought this action.

It will be observed that the deed from W. A. Harris to the plaintiff is an absolute fee, which may have continued forever. But it contains a condition by which this absolute estate may be defeated, which makes it an estate in fee upon condition, or, as it is called in the old books, a base or qualified fee and is sometimes called a conditional limitation,—a condition by which the estate may be defeated or is limited. It is admitted that the condition had been broken by the plaintiff, and that W. A. Harris, if living, might enter and revest himself of the estate, and, as he is dead, that his heirs might do so. But it is contended that no one else can do so, and that at the time of the breach both W. A. Harris (the grantor) and Pattie Young being dead, Walter C. Harris being the only heir of said W. A. Harris and of Pattie Young, is the only one who could enter,—Gray, *Perp.*, p. 6, § 12 (2),—and that since the breach of the condition, and before the commencement of this action, the plaintiff has received a quitclaim deed of conveyance from said Walter C. Harris, and is now the absolute owner of said property in fee simple; while the defendant contends that, although the breach did not take place until after the death of both W. A. Harris and Pattie Young, the said W. A. had a right or interest in said property which he could will and did will to Pattie, and that the will of W. A. gave her an interest which she could and did will to the defendant, and that the deed from Walter C. to the plaintiff only conveys a one undivided half interest therein, and that this defendant is entitled to the other half thereof. Until the breach of the condition, neither said W. A. Harris nor said Pattie Young had any interest or estate in this property. The absolute estate was in the plaintiff, and therefore could not be in any one else. Neither W. A. nor Pattie ever had an estate, an interest nor even an expectancy in this property, as an heir may have in the estate of his ancestor, as by reason of natural causes the ancestor

must die, and the law declares his heirs, to whom his estate will descend. But in this case there was nothing to limit the estate of the plaintiff, and until the breach the grantee had the same rights as if it was a fee simple. 2 Chit. Bl. *109, *110, note 15; Id. *155-*157; Gray, Perp., supra. And the grantor having nothing, he could convey nothing by his will, and Pattie had nothing to convey by her will. Suppose that A. is the next of kin and heir at law of B., and A. should die. His children would be the next of kin and heirs at law of B. A. dies in the lifetime of B. leaving a last will and testament, in which he willed to C. (item 19) as follows: "It is my will and desire that all the rest and residue of my property, real, personal, and mixed, of which I may die seised and possessed, shall be sold and collected by my executor hereinafter named,"—and named Y. as his executor. After the death of A., B. dies intestate. Would it be contended that the estate coming to A.'s children from B.'s estate passed to C. by A.'s will? It most certainly would not, for the reason that A. had no interest in B.'s estate at the time of his death. And for the same reason the will of W. A. Harris passed no title, estate, or interest to Pattie in the property in controversy, because he had no interest in it to convey, and Pattie's will passed nothing to the defendant.

It seems that it is hardly denied by the defendant but what at the common law the estate in the land in controversy would have reverted to the heir at law, Walter C. Harris, upon condition broken. But he contends that this is changed by the act of 1844 (Code, § 2141), which makes the will speak from the death of the testator, and by the provisions of section 2140 of the Code. Other clauses are relied upon by the defendant to sustain his contention, but the following paragraph seems to be most nearly in point, and controls the others, if any of them bear upon the question, and that is as follows: "And also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estate, interest and rights respectively, and other real and personal estate as the testator may be entitled to at the time of his death." This evidently means rights of entry for conditions broken in the lifetime of the testator, and where he had the right of entry while living. This seems to us manifestly the proper construction of this statute,—such rights as he has "at the time of his death." And besides this being manifestly the proper construction of the statute, it puts the statute in harmony with the plainest principles of law governing the rights of property, as it cannot be supposed that the legislature intended to authorize a testator to will what he did not have.

Our opinion, then, is that at the death of W. A. Harris he had no interest in the property in controversy, and no interest therein passed to Pattie Young by his will. And of course, if W. A. Harris had no interest, none passed to her under the will of W. A. Harris, nor could she inherit what her father did not have; and she had nothing to will to the defendant Young, and he has no interest in the same. Our opinion, further, is that upon the breach of the condition in 1900 the

right of entry and the estate in the land in controversy reverted to Walter C. Harris, the only heir at law of the grantee, W. A. Harris, at the time of the breach, and that, as plaintiff has acquired the title of W. C. Harris in and to said land, it is the absolute owner thereof in fee simple. The judgment below is affirmed.

MONTGOMERY, J., did not sit on the hearing of this appeal.

DOUGLAS, J. (concurring only in the result). I cannot agree with the opinion of the court that until the breach of condition "the absolute estate was in the plaintiff, and therefore could not be in any one else." The deed of W. A. Harris to the plaintiff conveyed a determinable fee, having the incidents of a fee simple, except that of alienation, but liable to be entirely defeated. By its very terms it could never be enlarged into a fee simple absolute, except, of course, by the release of the grantor or his heirs. It contained no inherit power of enlargement. It is true, such an estate is sometimes called a fee simple limited or conditional, which always seemed to me a misnomer; but it can never be an absolute fee. If it were, nothing would remain in the grantor, and hence no one could take advantage of the possible defeasance. There must remain in the grantor at least a possibility of reverter, which, while not an estate, is in itself a right, coupled with the contingent right of entry. This right may be in abeyance, but if it exists at all, actually or potentially, it must exist in the grantor. It seems to me that the possibility of reverter is also an interest in the land, and thereby, by a double title, comes within the provisions of section 2140 of the Code. The word has been thus defined: "Interest means concern; also, advantage; good; share; portion; part; participation; any right in the nature of property, but less than title. Its chief use seems to designate some right attaching to property which either cannot or need not be defined with precision." 16 Am. & Eng. Enc. Law (2d Ed.) 1102. Coke says: "Interest, *ex vi termini*, in legal understanding, extended to estates, rights, and titles that a man hath of, in, to, or out of lands; for he is truly said to have an interest in them." Co. Litt. 345a. Interests may be vested, executory, or contingent. In *Young v. Young*, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642, it was held that a contingent remainder was an interest or claim to real estate, and might be disposed of by deed or will under a statute using those terms. In fact, the word seems to be one of extreme elasticity, which may be used to include nearly everything legally connecting the claimant with the subject-matter. Section 2140 of the Code provides that: "Any testator * * * may dispose of all real and personal estate, which he shall be entitled to at the time of his death; * * * and the power hereby given shall extend to all contingent, executory or other future interest in any real or personal estate, whether the testator may or may not be the person or one of the persons, in whom the same may become vested, or whether he may be entitled thereto under the instrument by which the same was created,

or under any disposition thereof by deed or will; and also to all rights of entry for condition broken, and other rights of entry," etc. It would be difficult for one to make the language of the statute any broader; and I cannot doubt that it includes, and was intended to include, all contingent, executory, or other future interests, as well as all rights of entry, whether vested or contingent. The possibility of reverter is a contingent interest, which becomes vested upon condition broken. Upon entry the grantor or his heir is remitted to his former estate, and the reversion, of course, becomes merged into the fee. I see no reason of public policy why the statute should exclude a possibility of reverter, with its contingent right of entry, from the power of testamentary disposition, but a very strong reason why it should be included. In England, the home of the common law, the rule of primogeniture made the entry of the heir a very simple matter, as there was practically but one heir; but here it is different. Determinable fees may last for a very long time, and the grantor may have a large number of descendants scattered over the country. Must they all enter upon condition broken, or can one enter for all and hold as tenant in common? These are questions difficult of solution and inconvenient of application, which may be avoided by testamentary disposition. I am therefore forced to the conclusion that the possibility of reverter could have been devised by either the grantor or his daughter, Pattie, but whether it can be brought within the terms of the will of the latter is a different question. I am not prepared to say that a person "may die seised and possessed" of a possibility of reverter. If it did not pass by Pattie's will, it went to Walter, as Pattie's heir, and was by his deed conveyed to the plaintiff. I am thus brought to the conclusion of the court.

Accord: 4 Kent Com. *511; *Deas v. Horry* (1835), 2 Hill (S. Car.) 244, 249.

In *Austin v. Cambridgeport Parish* (1838), 38 Mass. (21 Pick.) 215, the interest of the grantor under a deed conveying land in fee subject to a condition subsequent was held to be a devisable interest before breach, and the devisee's action to recover was sustained.

D conveyed a strip of land to a railway company for its tracks, on express condition that the road should be built by a time named. Before the time expired D conveyed all the land to Nicoll including by general terms the strip previously conveyed, but subject to the right of the railway company. The road not having been built by the time specified, Nicoll brought ejectment to recover the strip. The court held that D parted with all his interest, having only a possibility of reverter, not transferable; and that therefore he could not by deed made before condition broken pass any right to the plaintiff. Various statutes claimed to enable such transfers were held not to have that effect. *Nicoll v. New York & E. Ry. Co.* (1854), 12 N. Y. 121, *Pattee Cas.* 471, *Finch Cas.* 527.

Mrs. Davey conveyed land to Bishop Hughes on condition that he consecrate the property or cause it to be consecrated, and cause a church to be built upon it within a reasonable time. Mrs. D died later leaving her will, by which she gave to a residuary devisee all property and estate real and personal not previously effectively disposed of. Her heir brought ejectment against Hughes' successor, Corrigan, for breach of the condition, 29 years having passed and no church built. The defense was that the possibility of reverter passed by Mrs. D's will, but the court held that she had no devisa-

ble interest, and judgment for plaintiff was affirmed. *Upington v. Corrigan* (1896), 151 N. Y. 143, 45 N. E. 358, 37 L. R. A. 704, Finch. 533.

H. Venable conveyed land to trustees to be conveyed by them to a corporation in fee for an academy as soon as the corporation should be formed. The corporation was formed and deed to it made by the trustees. Later H. V. died devising all his estate to his wife. Later the corporation lost its charter on quo warranto; and the plaintiff, claiming under quit claim deed from the widow devisee, sued in ejectment, claiming that the possibility of reverter passed by the will. The court cited *Nicoll v. New York & E. Ry. Co.*, above, and held that at the death of the testator he had no interest but a mere possibility of reverter, a thing not devisable. Judgment for plaintiff, reversed. *Trustees of Presbyterian Church v. Venable* (1896), 159 Ill. 215, 42 N. E. 836.

CHAPTER VII.

RULE AGAINST PERPETUITIES.

EDWARD PELLIS v. WILLIAM BROWN, in B. R., Hilary, 17 Jac. 1.—A. D. 1620.—Cro. Jac. 590, 2 Roll 196, 216, Palmer? 5 Gray's P. C. 163. Given according to Croke.

Replevin for the taking of three cows at Rowdham. The defendant justifies for *damage fesant* as in his freehold. The plaintiff traverseth the freehold; and, thereupon, being at issue, a special verdict was found, in which the case appeared to be, that one William Brown, father of the defendant, being seised of this land in fee, having issue the defendant, his son and heir, and Thomas Brown his second son, and Richard Brown a third son, by his will in writing devised this land to "Thomas his son and his heirs forever, paying to his brother Richard twenty pounds at the age of twenty-one years; and if Thomas died without issue, living William his brother, that then William his brother should have those lands to him and his heirs and assigns forever, paying the said sum as Thomas should have paid." Thomas enters and suffers a common recovery, with a single voucher, to the use of himself and his heirs; and afterwards devises it to the use of Edward Pellis, the plaintiff, and his heirs; and dies without issue, living the said William Brown, who entered upon Edward Pellis, and took the distress.

This case was twice argued at the bar and afterward at the bench; and the matter was divided into three points; 1, whether Thomas had an estate in fee, or in fee-tail only; 2, admitting he had a fee, whether this limitation of the fee to William be good to limit a fee upon a fee; 3, if Thomas hath a fee, and William only a possibility to have a fee, whether this recovery shall bar William, or that it be such an estate as cannot be extirpated by recovery or otherwise.

As to the first, all the justices resolved, that it is not an estate tail in Thomas, but an estate in fee; for it is devised to him and his heirs forever, and also paying to Richard twenty pounds; both which clauses show that he intended a fee to him. And the clause "if he died without issue," is not absolute and indefinite whensoever he died without issue, but it is with a contingency, "if he died without issue, living William;" for he might survive William, or have issue alive at the time of his death, living William; in which cases William should never have it, but is only to have it if Thomas died without issue living William, See 19 Hen. 6, pl. 74; 12 Edw. 3, pl. 8; *Berisford's Case*, 7 Coke 41; *Lampet's Case*, 10 Coke 50. And therefore it is not like to the cases cited on the other part: 5 Hen. 5, pl. 6. 37 Assize, pl. 15 & 16; and (242)

Dyer 330, *Clactey's Case*: for it is an exposition of his intent what issue should have it, viz. of his body; and whensoever he died without issue, the land should remain, &c. But here it is a conditional limitation to another, if such a thing happen; and therefore they all relied upon the book, Dyer, 124, and Dyer 354; which are all one with this case.

Secondly, they all agreed that this is a good limitation of the fee to William by way of that contingency, not by way of immediate remainder (For they all agreed it cannot be a remainder: as if one deviseth land to one and his heirs, and if he die without heir, that it shall remain to another; it is void and repugnant to the estate; for one fee cannot be in remainder after another; for the law doth not expect the determination of a fee by his dying without heirs, and therefore cannot appoint a remainder to begin upon determination thereof, as 19 Hen. 9, pl. 8; 29 Hen. 8, Dyer 33 a [ante p. 225], but by way of contingency, and by way of executory devise to another, to determine the one estate, and limit it to another, upon an act to be performed, or in failure of performance thereof, &c.; for the one may be and hath always been allowed: as devise of his land to his executors to sell, if his heir fail of payment of such a sum at such a day, this is an executory devise. So the case cited in *Boraston's Case*, 3 Coke 20 [reported ante p. 212], of *Wellock v. Hammond* [reported ante p. 150], where the devise was to the eldest son and heirs, paying such a sum to the younger sons, otherwise that the land should be to him and his heirs, is a good executory devise. And a precedent was shown, Trinity term, 38 Eliz. Roll 867, *Fullmerson v. Stewart*; where upon special verdict it was adjudged, that whereas Sir Richard Fulmerson devised to Sir Edward Cleere and Frances his wife, daughter and heir of the said Sir Richard Fullmerson, certain lands in Elden in the county of Norfolk, to them and the heirs of Sir Edward Cleere, upon the condition that they should assure lands in such places to his executors and their heirs, to perform his will; and if he fail, then he devised the said lands in Elden to his executors and their heirs. It was adjudged to be a good limitation and no condition; for if it should be a condition it should be destroyed by the descent to the heir; but it is a limitation, and as an executory devise to his executors, who for the non-performance of the said acts entered and sold, and adjudged good. So here, &c. For it is a good executory devise upon this limitation, and DODERIDGE said the opinion 29 Hen. 8, Dyer 33 a [ante p. 225], was, that such a limitation in fee upon an estate in fee cannot be, and it had been oftentimes adjudged contrary thereto.

To the third point DODERIDGE held that this recovery should bar William; for he had but a possibility to have a fee, as if a contingent estate which is destroyed by this recovery before it came *in esse*; for otherwise it would be a mischievous kind of perpetuity, which could not by any means be destroyed. And although it was objected that a recovery shall not bar, but where a recovery in value extends thereto, as appears by *Capel's Case*, 1 Coke 62 a, where a rent charge granted by him in remainder was bound; yet he held that this recovery destroying the

immediate estate, all contingencies and dependencies thereupon are bound, and a recovery shall bind everyone who cannot falsify it; and here he who hath this possibility cannot falsify, therefore he shall be bound thereby. But all the other justices were herein against him, that this recovery shall not bind; for he who suffered the recovery had a fee, and William Brown had but a possibility if he survived Thomas; and Thomas dying without issue, in his life, no recovery in value shall extend thereto, unless he had been party by way of vouchee, and then it should; for by entering into the warranty he gave all his possibility; therefore they agreed to the case which Dampart at the bar cited to be adjudged, 34 Eliz., where a mortgagee suffers a recovery it shall not bind the mortgagor; but if he had been party by way of voucher it had been otherwise. And here is not any estate depending upon the estate of Thomas Bray, but a collateral and mere possibility, which shall not be touched by a recovery; and if such recovery should be allowed, then if a man should devise that his heir should make such a payment to his younger sons, or to his executors, otherwise the land should be to them; if the heir by recovery might avoid it, it would be very mischievous, and might frustrate all devises; and there is no such mischief that it should maintain perpetuities, for it is but a particular case, and upon a mere contingency, which peradventure never may happen, and may be avoided by joining him in the recovery who hath such a contingency; and on the other part it would be far more and a greater mischief that all executory devises should by such means be destroyed.

HOUGHTON, J., in his argument, put this case: if a man give or devise lands to one and his heirs as long as J. S. hath issue of his body, he shall not by recovery bind him who made this gift without making him a party by way of vouchee; for a recovery against tenant in fee simple never shall bind a collateral interest, title or possibility, or a condition or covenant, or the like. Wherefore they all (except DODERIDGE) held that this recovery was no bar.

Then DODERIDGE took exception to the verdict that the lands were not found to be holden in socage; for otherwise it might be intended to be holden in knight-service, and so it shall be intended, and then the devise is void for a third part. And so it was resolved 24 Eliz., Dyer, that it ought to be shown that the land was holden in socage, otherwise the devise was not good for the entire; but *all the judges* held it not to be material, as this case is, for the issue is whether it was the freehold of William Brown, who is found to be the heir of the devisor; then although it were admitted that the land was held by knight-service, yet he hath the entire: viz. two parts by the devise and a third part by descent. Wherefore the tenure is not material as this case is. And it was adjudged for the defendant.

CHILD v. BAYLIE, in Exchequer Chamber, Hilary, 20 Jac. 1.—A. D. 1623, on error from judgment of King's Bench, Hilary, 15 Jac. 1.—Cro. Jac. 459, Palmer 333, 5 Gray P. C. 495.

EJECTMENT of a lease of Thomas Heath of lands in Alchurch.

Upon not guilty pleaded, a special verdict was found upon the case; which was, that William Heath, possessed of a lease for seventy-six years of the land in question, let it to one Blunt from the day of his death until the first of May, 1629 (which was three months before the end of the lease), if Dorothy his wife lived so long. Afterwards he devised, that William Heath his son and his assigns should have the said tenements, and the reversion of them, and all his title and interest in the said tenements, for all the others of the said seventy-six years which should be unexpired at the time of his wife's death, "provided, that if the said William die without issue living at the time of his death, that Thomas his son (the now lessor) should have it for all the residue of the seventy-six years unexpired from the death of his said wife, and of William without issue; and if he died without issue, then to his daughters;" and made his wife his executrix, and died. The wife assented to the legacies; William assigned all this lease and his interest thereto to the said Dorothy, who assigned it to Mr. Comb, under whom the defendant claims; afterwards Dorothy died, and then William died without issue. Thomas the devisee enters, and makes this lease to the plaintiff.

After divers arguments at the bar, it was adjudged for the defendant.

First, it was resolved, where a lessee for years let it after his death until the first of May, 1629, that it was a good lease, which began immediately by his death, he dying within that time.

Secondly, that the lease being made to begin after his death unto the first of May, 1629, the lease being made (12 August, 1553), if Dorothy his wife should so long live, he did not thereby convey the interest and remainder of the term, viz. from the first of May, 1629, to 12 August, 1629, and the possibility of a long term if Dorothy died before the first of May, 1629, which interest and possibility together he might devise to William Heath his son.

The third and main question was, whether this devise being to William Heath and his assigns, with a *proviso*, that if he died without issue living, that Thomas Heath should have it, and he aliens it, and afterwards dies without issue, whether this alienation shall bind Thomas Heath, or that he may avoid it?

It was resolved, that this alienation shall bind; for when he limited to him and his assigns, all the estate was vested in him, and he had an absolute power to dispose thereof; for the law doth not expect his dying without issue. The difference therefore is, where a lease is devised to one *if he live so long*, and afterwards to another, the first hath but a qualified estate, and the other hath the absolute interest, and therefore this alienation shall not prejudice him who hath the absolute estate;

but when it is limited to him and *his assigns*, then the proviso thereto added, is void to restrain the alienation: and the limitation to the heirs of the body, and the proviso, are all one; for all long leases would be more dangerous than perpetuities: and therefore this case differs from the cases in 8 Co. 96, and 10 Co. 46, *Lampet's Case*, that a devisee for life could not bar him in remainder: and *Lewknor's Case* [easter term, 14 Jac. 1, 1 Roll. Rep. 356], the exchequer chamber, was cited. Wherefore it was adjudged for the defendant.

Note.—Upon this judgment a writ of error was brought in the Exchequer Chamber; and the error assigned in point of law, that the remainder of this term limited to Thomas Heath after the death of William without issue then living, was good, and the alienation of William shall not bind him in remainder.

It was argued by *Bridgman*, and afterward by *Humphrey Davenport*, for the plaintiff in error, that it was a good limitation of the remainder of the term to William and his assigns, with the *proviso*, that if he died without issue then living, the then remainder should be to Thomas, &c., and that it is no more in effect than after his death; and therefore it differs from *Lewknor's Case*, adjudged in the Exchequer, where a devise of a term to one, and the heirs of his body, and if he die without issue, that it shall remain to another, was held to be a void remainder; for he cannot limit a remainder upon a term after the death of another without issue, but here it is but a remainder after the death of one without issue, viz. William dying without issue then living; so upon the matter it depended upon is death, and therefore not like to the said case; but it is agreeable to the reasons put in the cases of 8 Co. 94, *Matth. Manning's Case*, and 10 Co. 46.

But it was now argued on the other part by *Thomas Crew* and *George Croke*, that the judgment was well given in the King's Bench; for here the limitation being to William after the death of the devisor's wife, of all his estate and interest to him and his assigns, it is but a remainder; for the wife may outlive all the term, and then this devise of the remainder of the term is given to him in particular, and William hath but a possibility; and then to limit it to Thomas after the death of William then living, is to limit a possibility upon a possibility, which is against the rules of law, as it is held in the *Rector of Chedington's Case*, 1 Co. 156, and *Lord Stafford's Case*, 8 Co. 73.

Secondly, that this limitation to Thomas after the death of William without issue then living, is all one as if it had been limited upon his death without issue: and the addition "*then living*," doth not alter the case; for at the first limitation, *non constat* that he should die without issue; and the law shall not expect his death without issue; and it is not like to the case when it is limited after the death of one; for it is certain that one must die, and it may be that he may die during the term, and the law may well expect it; but that one should die without issue, the law will never expect such a possibility, nor regard it: and it would be very dangerous to have a perpetuity of a term in that manner; for

it would be more mischievous than the common cases of perpetuities which the law hath sought to suppress: and therefore it was said, that this case was like to some of the cases which had been adjudged, that the remainder of a term after the death of one person is good, and should not be destroyed by the alienation of the first devisee. *Vide* 8 Co. 94, *Manning's Case*. 10 Co., *Lampet's Case*. Plowd. 520 and 540; Dyer 74, 277.

After divers arguments, all the judges of the Common Pleas, viz. HOBART, WINCH, HUTTON, and JONES, and all the Barons (except TANFIELD, Chief Baron) agreed with the first judgment: for they said: that the first grant or devise of a *term* made to one for life, remainder to another, hath been much controverted, whether such a remainder might be good, and whether all may not be destroyed, by the alienation of the first party; and if it were not first disputed, it would be hard to maintain; but being so often adjudged, they would not now dispute it.—But for the case in question, where there was a devise to one and his assigns, and if he died without issue then living, that it would remain to another, it is a void devise; and it is all one as the devise of a term to one and his heirs of his body, and if he die without issue, that then it shall remain to another, it is merely void; for such an entail of a term is not allowable in law, for the mischief which otherwise would ensue, if there be such a perpetuity of a term. And although TANFIELD, Chief Baron, doubted thereof, especially by reason of a judgment given before in the King's Bench in *Rethorick v. Chappel*, Hil. 9 Jac. 1; 2 Bulst. 28; Godol. 149, where "William Cary possessed of a term for years devised it to his wife for her life, and afterwards that John his son should have the occupation thereof as long as he had issue; and if he died without issue unmarried, that then Jasper his younger son should have the occupation thereof as long as he had issue of his body; and if he died without issue unmarried, he devised the moiety to Dorothy his daughter, the other moiety to Robert and William his sons, and made his wife executrix, who assented to the legacies and died. John and Jasper died without issue, unmarried; and afterward Robert and William entered upon the defendant, claiming the moiety, and let to the plaintiff. Upon a special verdict, all this matter being discovered, it was adjudged for the plaintiff, that he should recover the moiety, which is all one case with the case in question. But the defendant's counsel in the writ of error showed, that there was a difference betwixt the said cases: for, First, in that there is a devise but of the occupation only; but here, of the term itself. Secondly, it is a devise here of his estate and term to him and his assigns, wherein is authority given that he may assign. Thirdly, the limitation is there, if he die without issue unmarried, which is upon the matter, that if he die within the term; for if he be not married he cannot have issue"—but in the case here, he might have issue; and yet if that issue should die without issue in his life-time, it should remain; which the law will neither expect nor will suffer: yet the JUSTICES AND

BARONS, by the assent of TANFIELD, all agreed, that judgment should be affirmed: and in Hilary Term, 20 Jac. I., it was affirmed.

DUKE OF NORFOLK'S CASE, in Chancery, High Court of Chancery, and House of Lords,—reported in 3 Chancery Cases 1-54, and partially reported in 5 Gray's P. C. 498. Abridged from 3 Ch. Cas.

This case was argued by counsel in the court of chancery, Dec. 26, 1677, and at other times afterwards; the opinions of the judges and the first opinion of the Lord Chancellor were delivered March 24th, 1682; the opinion of the Lord Chancellor on re-hearing was delivered and final decree entered June 17th, 1682; which decree was reversed in the High Court of Chancery by the Lord Keeper of the great seal of England, on bill for review, May 15th, 1683; and this last decree was reversed and the decree of the Lord Chancellor affirmed by the House of Lords, after argument, on petition and appeal, June 19th, 1685.

This is a bill in chancery by Charles Howard against his brother Henry Howard, Duke of Norfolk, and others, to establish and have execution of trusts created by two deeds executed by their father (Henry Frederick, Earl of Arundel and Surry), March 20th and 21st, 1647. Being seised of the baronies of Grostock and Burgh in fee, and having sons as follows—Thomas Lord Maltravers (*non compos mentis*), Henry (now Duke of Norfolk and defendant herein); Charles (plaintiff herein), Edward, Francis, and Bernard, and having a daughter, Lady Katharine—the father made the deeds above mentioned, to provide settlement for his estates and family. By the first of these deeds he bargained and sold these baronies to the Duke of Richmond, Marquess of Dorchester, and others, and their heirs, to the use of the father for life, then to the use of his wife for her life, remainder to these trustees for 200 years, for the trusts created by the other deed, remainder to the use of Henry and the heirs male of his body, with like remainders in tail to Charles, Edward, and the other brothers, successively. The other deed was made to declare the trusts of the term for 200 years; and that declares that it was intended this term should attend the inheritance, and that the profits thereunder should be received by Henry and the heirs of his body so long as Thomas or any issue male of his body should live, and if he should die without issue, in the life of Henry and not leave his wife pregnant with a son, or if after his death the dignity of Earl of Arundel should descend on Henry; then Henry or his issue should have no farther benefit or profit of the term of 200, but then the term shall be in trust for Charles and the heirs male of his body, remainder to Francis and the heirs male of his body, remainder to Bernard and the heirs male of his body, remainder to Henry and the heirs male of his body, remainder to the heirs of the father making the deed.

The father died in 1652; his wife died in 1673; the Marquess of Dorchester, surviving trustee, assigned his estate to Marriot, in 1675;

later Marriot assigned it to Henry now Duke of Norfolk, and Henry by bargain and sale enrolled sold to Marriot to make him tenant to a præcipe, Oct. 24, 1675, and next day a deed was made declaring the recovery to be to the use of Henry and his heirs, the recovery was suffered accordingly; later Thomas died without issue and unmarried, in Nov. 1677; by whose death the earldom of Arundel as well as the dukedom of Norfolk descended to Henry; and thereupon this bill was filed by Charles to have execution of the trust in his favor.

The case was argued by several eminent counsel on each side, and these arguments are reported at some length in 3 Ch. Cas. 1-13. LORD CHANCELLOR NOTTINGHAM was assisted at the hearing by LORD CHIEF BARON MONTAGUE of the exchequer, LORD CHIEF JUSTICE NORTH of the common pleas, and LORD CHIEF JUSTICE PEMBERTON of the king's bench. The better parts of their several opinions delivered when they met, March 24, 1681, the day appointed for judgment in the cause, are given below.

MONTAGUE, C. B. [* 15] * * * The plaintiff's bill is to have execution of the trust of the term of the barony of ———, to the use of himself and the heirs male of his body. This I conceive was opposed by the counsel for the defendant upon these grounds: 1. That by the assignment made by Marriot to my Lord Duke Henry, the term was surrendered and quite gone. 2. The second ground was the common recovery suffered, which they say barred the remainders which the other brothers had, and so also would be a bar to the trust of this term. 3. And the other ground was, that the trust of a term to Henry and the heirs male of his body, until, by the death of Thomas without issue, the earldom should descend upon him, and then to Charles, is a void limitation of the remainder.

As to the first, that by the assignment of Marriot to Henry Howard, the whole term was surrendered, and being so surrendered, hath no existence at all; that I find was barely mentioned, and I think cannot be stood upon. For this, the term by surrender is gone indeed and merged in the inheritance; yet the trust of that term remains in equity; and if this trust be destroyed by him that had it assigned to him, this court has full power to set it up again, and to decree the term to him to whom it did belong, or a recompense for it. Therefore, I think that stands not at all as a point in the case, or as an objection in the way. [On this point the chancellor and other judges agreed with Montague.]

[*16] As to the next thing, the common recovery now suffered by the now duke, that doth bar the remainders to the other brothers, and also the trust of this term? That I conceive to be so in case this can be interpreted to be a term to attend the inheritance; and indeed in the reciting part the deed doth seem to say that it was intended to attend the inheritance. But by that part of the deed which followeth after *now this indenture witnesseth*, there it is limited that the term should be to Henry Howard and the heirs male of his body until such

time as the honor of the Earl of Arundel, by his elder brother's death without issue, should come to him; then to the plaintiff, which doth convey the estate of the term in a different channel from that in which the inheritance is settled; and taking this deed all together, it doth limit this term in such various estates, that it can no way be construed to be a term attending the inheritance; and then, I conceive, the recovery doth not bar the trust. For the recovery would bar the incident to any estate, as this would do here, if it attended the inheritance; but being only a term in gross and a collateral thing, I conceive the recovery has no operation to bar the trust in the term. [On this point the other judges agreed with Montague.]

Then the case singly depends upon the third point: Whether the trust of a term thus limited to Henry Howard and the heirs males of his body until his brother die without issue, whereby the honor came to him, with such contingent remainders over, be a good limitation—this is the question. * * * I am of opinion that these limitations to the younger brothers upon this contingency are absolutely void in the first creation, and are gone without the surrender; and that upon this recovery Henry Howard, now Duke of Norfolk, ought to have the trust of the whole term. The expositions of devises of terms, or the dispositions of the trusts of terms, have proceeded by many steps to higher degrees than was at first thought of by the makers. It would be too long to give a distinct history of it; but it is so plain that it is now a resolved and decreed thing and settled, therefore, it were in vain to tell you the steps taken towards it. That the devise of a term and the limitation of a trust of a term to one and the heirs of his body is good, though *Burgess's Case* was only for life, the cases are very full in it. On the other side, where there is a limitation of a term to one and the heirs of his body, there a positive limitation of the estate over, after his death without issue, that I think also is as fully declared to be void. [Here his honor reviewed the cases of *Jenkins v. Kennish*, in the exchequer; *Leventhorp v. Ashby* (11 Car. 1, in King's Bench), 1 Rolls Abr. 611; *Sanders v. Cornish*, Cro. Eliz. 230] [*18] But now the doubt in this case that is made ariseth upon this point, that this limitation over to the brothers is upon a mere contingency, and whether that be good, I think, is the main question. And truly, upon the reasons of *Child* and *Bailie's Case* [ante p.], I cannot think it is a good limitation. [Here his honor reviewed *Child v. Bailie*; *Rhetorick v. Chappell*, cited ante p. ; *Gibson v. Sanders* ; *Jay v. Jay*, Stiles 258, 274; and *Pells v. Brown*, ante p.] * * * If you admit a limitation of a term after an estate tail, where shall it end? For if after one, it may as well be after two; and if after two, then as well after twenty. For it may be said he may die within twenty years without issue; and so if within 100 years; and there will be no end, and a perpetuity will follow. It was said that at the bar, it will be hard to frustrate the intention of the parties. To that I answer, intentions of parties not according to law are not to be regarded. It was the intention in *Child* and *Bailie's*

Case, that the younger son should have it; and so in *Burgess's Case* it was the intention the daughter should have it. * * * [*20] It has also been objected, but then here is a contingency that has actually happened, upon Thomas's death without issue and so the honor is come to Henry. I say the happening of the contingency is no ground to judge. * * * So then for that I think these expositions have gone as far already as they can; for my part I cannot extend it any further. And therefore I conceive in this case, the plaintiff has no right to this term, but the decree ought to be made for the defendants.

NORTH, C. J., * * * I conceive the rules of law to prevent perpetuities are the policy of the kingdom, and ought to take place in this court as well as any other court. So I take it then, that the trust of a term is as much a chattel, and under consideration of this court, as the term itself. And, therefore, I cannot see why the trust of a term upon a voluntary settlement should be carried further in a court of equity than the devise of a term in the courts of [*21] common law. * * * Now let us see, and a little consider what those rules are, and how they are applicable to this case. * * * It is clear there can be no direct remainder of the trust of a term upon an estate-tail. The question then is, whether there can be any contingent remainder, for this case depends upon that consideration; that is, it is limited upon a contingency, if such a thing should happen in the life of a man, and so it is a springing trust and good that way. My lord, I take it in this case, where there can be no direct remainder there can be no contingent remainder, though it happen never so soon. Therefore, if a term be limited to one and his heirs of his body, and he die without issue of his body within two years the remainder over, there can be no remainder over, there can be no such remainder limited at all, and therefore no contingent remainder; for this remainder is limited at the end of an entail, and that is so remote a consideration, that as the law will not suffer a direct remainder upon it, so upon a contingency neither. * * * [* 22] * * * The rule, in *Child and Bailie's Case* [ante p.] is firm, that the expiring of the limitation of a term in tail without the life of a man will not make good a limitation of the remainder over; which I hold to be a good rule; and the reason of it, I conceive, will reach to this case. * * * So that I think the whole term is swallowed in the estate-tail upon this consideration; and there can be no remainder of it, no executory devise, nor any springing trust to Charles upon this contingency. And, my lord, upon that reason, I think this settlement fails, and is disappointed as to the younger brothers. * * *

PEMBERTON, C. J. [* 23] * * * I do first think that the Earl Arundel did certainly design, that if my Lord Maltravers should die without issue male, whereby the honor of the family should come to my lord duke that now is, Charles should have this estate; and his

intentions are manifest by creating this term, which could be of no other use but to carry over this estate to Charles a younger son, upon the elder son's dying without issue. And I do think truly that this was but a reasonable intention of the father. For there being to come with the earldom a great estate that would well support it, it was but reason, and the younger sons might expect it, that their fortunes might be somewhat advanced by their father in case it should so happen. It was a reasonable expectation in them; and truly I think it was the plain intention of the earl. And there is no great question but it might have been made good and effectual by the limitation of two terms; for if one term had been limited to determine upon the death of Thomas without issue, and that to be for the now Duke of Norfolk, and another term then to commence and go over to Charles, that would certainly have been good and carried the estate to Charles upon that contingency. But as this case now is, I do think that this way that is now taken is not a good way nor a right way; for I take this limitation to Charles to be void in law. And as to that I know there is a famous difference of limiting terms that are in gross, and terms that attend the inheritance. As to terms that are in gross, I think it will be granted (because it hath been settled so often) they are not capable of limitation to one after the death of one without issue. * * * This term here doth partake somewhat of a term in gross, and somewhat of a term attendant upon an inheritance; and if there should be such a limitation admitted such a foreign limitation as this is (I call it foreign, because [*25] it is not that which goes along with the inheritance)—if that be allowed, we know not what inventions may grow upon this. For I know men's brains are fruitful in inventions, as we may see in *Matthew Manning's Case* [ante p.]. It was not foreseen nor thought when that judgment was given, what would be the consequence, when once there was an allowance of the limitation of a term after the death of a person. Presently it was discerned, there was the same reason for after twenty men's lives as after one; and so then it was held and agreed, that so long as the limitation exceeded not lives in being at the creation of the estate it should extend so far. That came to grow upon them then; and now if this be admitted, no man can foresee what an ill effect such an ill allowance might have. There might such limitations come in as would encumber estates, and mightily entangle lands. This is certain, such an allowed limitation would add a greater check to estates than ever was made by limitations of inheritance; for when an estate of inheritance was limited to a man and his heirs males of his body, with remainders over, and a term was limited accordingly to wait upon the inheritance; in that case, he that had the first estate-tail, had full power over the term, to alienate it if he pleased. * * * But now if this limitation in question were good, then Henry could not part with it; because it is to him and his heirs males of his body under a collateral limitation of his brother's dying without issue. * * *

LORD CHANCELLOR NOTTONGHAM. * * * These indentures are both sealed and delivered in the presence of Sir Orlando Bridgman, Mr. Edward Alehorn, and Mr. John Alehorn, both of them by Lord Keeper Bridgman's clerks; I knew them to be so. This attestation of these deeds is a demonstration to me they were drawn by Sir Orlando Bridgman. * * *

The whole contention in the case is to make the estate limited to Charles void—void in the original creation; if not so, void by the common recovery suffered by the now duke, and the assignment of Marriot. If the estate be originally void, which is limited to Charles, there is no harm done. But if it only be avoided by the assignment of Marriot, with the concurrence of the Duke of Norfolk, he having notice of the trusts, then most certainly they must make it good to Charles in equity; for a palpable breach of trust which they had notice. [*28] So that the question is reduced to this main single point, whether all this care that was taken to settle this estate and family, be void and insignificant; and all this provision made for Charles and the younger children to have no effect.

I am in a very great strait in this case. I am assisted by as good advice as I know how to repose myself upon; and I have the fairest opportunity, if I concur with them, and so should mistake, to excuse myself, that I did *errare cum patribus*. But I dare not at any time deliver any opinion in this place, without I concur with myself and my conscience too. * * * Whether this limitation to Charles be void or no is the question. Now, first, these things are plain and clear; and by taking notice of what is plain and clear, we shall come to see what is doubtful: 1. That the term in question, though it were attendant upon the inheritance at first; yet upon the happening of the contingency, it is become a term in gross to Charles. 2 That the trust of a term in gross can be limited no otherwise in equity than the estate of a term in gross can be limited in law; for I am not setting up a rule of property in chancery other than that which is the rule of property at law. 3. It is clear that the legal estate of a term for years, whether it be a long or of short term, cannot be limited to any man in tail, with the remainder over to another after his death without issue; that is flat and plain, for that is a direct perpetuity.¹ * * * 5. If a term be limited to a man for life, and after to his first, second, third, &c., and other sons in tail successively, and for default of such issue the remainder over; though the contingency never happen, yet that remainder is void, though there were never a son then born to him, for that looks like a perpetuity; and this was *Sir William Backhurst his Case* [16 Jac. 1, 1 Mod. 115] * * * 7. If a term be devised or the trust of a term limited to one for life, with twenty remainders for life successively, and all the persons *in esse* and alive at the time of the limitation of their estates; these, though they look like a possibility upon a possibility,

¹But see such an executory devise in *Stanley v. Baker*, ante p. 232.

are all good, because they produce no inconvenience, they wear out in a little time with an easy interpretation; and so was *Alford's Case*. I will yet go further. 8. In the case cited by Mr. Holt, *Cotton and Heath's Case* [Rolls Abr., tit. Devise, 612], a term is devised to one for 18 years, after to C his son for life, and then to the eldest issue male of C for life; though C had not any issue male at the time of the devise or the death of the devisor, but before the death of C, it was resolved by Mr. Justice Jones, Mr. Justice Croke, and Mr. Justice Berkley, to whom it was referred by the Lord Keeper Coventry, that it only being a contingency upon a life that would be speedily worn out, it was very good; for that there may be a possibility upon a possibility, and that there may be a contingency upon a contingency is neither unnatural nor absurd in itself. But the contrary rule given as a reason by my Lord Popham in the *Rector of Chedington's Case* [1 Coke 156], looks like a reason of art; but in truth, has no kind of reason in it; and I have known that rule often denied in Westminster-hall. In truth every executory devise is so, and you will find that rule not allowed in *Blanford and Blanford* (13 Jac. 1), 1 Rolls Abr. 318; where he says; if that rule take place it will shake several common assurances; and he cites *Paramour and Yardley's Case* in the Commentaries [2 Plowd. Com. 539], where it was adjudged a good devise, though it were a possibility upon a possibility. * * * [*34] * * *

But now let us, I say, consider whether this limitation be good to Charles or no. It has been said: 1. It is not good by any means; for it is a possibility upon a possibility. That is a weak reason, and there is nothing of argument in it; for there never was yet any devise of a term with remainder over, but did amount to a possibility upon a possibility, and executory remainders will make it so. 2. Another thing was said: It is void, because it doth not determine the whole estate, and so they compare it to *Sir Anthony Mildmay's Case* [ante p. 6 Coke 40], where it is laid down as a rule, that every limitation or condition ought to defeat the entire estate, and not to defeat part and leave part not defeated; and it cannot make an estate to cease as to one person, and not as to the other.¹ But I do not think that any case or rule was ever worse applied than that to this; for if you do observe this case, here is no proviso at all annexed to the legal estate of the term, but to the equitable estate that is built upon the legal estate unto the estate to Henry and the heirs males of his body, to attend the inheritance, with a proviso if Thomas die without issue in Henry's life and the earldom come to Henry, then to Charles; which doth determine the estate to Henry and his issue. But the other estate given to Charles doth arise upon this proviso; which makes it an absurdity to say, that the same proviso upon which the estate ariseth should determine that estate too. [*35] 3. The great matter objected is, it is against all

¹As to the rule that a condition cannot operate to determine part only of the estate, but must determine all or none, see further in *Colthurst v. Bejushin*, ante p. ; *Scolastica's Case* or *Newes v. Lark*, ante p.

the rules of law, and tends to a perpetuity. If it tends to a perpetuity, there needs no more to be said; for the law has so long labored against perpetuities, that it is an undeniable reason against any settlement if it can be found to tend to a perpetuity, therefore let us examine whether it do so; and let us see what a perpetuity is, and whether any rule of law is broken in this case.

A perpetuity is the settlement of an estate or an interest in tail with such remainders expectant upon it as are in no sort in the power of the tenant in tail in possession to dock by any recovery or assignment, but such remainders must continue as perpetual clogs upon the estate. Such do fight against god; for they pretend to such a stability in human affairs as the nature of them admits not of; and they are against the reason and the policy of the law, and therefore not to be endured. But on the other side, future interests, springing trusts, or trusts executory, remainders that are to emerge and arise upon contingencies, are quite out of the rules and reasons of perpetuities, nay, out of the reason upon which the policy of the law is founded in those cases, especially, if they be not of remote or long consideration, but such as by a natural and easy interpretation will speedily wear out, and so things come to their right channel again.

Let us examine this rule with respect to freehold estates, and see whether there it will amount to the same issue. There is not in the law a clearer rule than this, that there can be no remainders limited after a fee simple; so is the express book, case, 29 Hen. 8, 33, in my Lord Dyer [ante p.]. But yet the nature of things, and the necessity of commerce between man and man, have found a way to pass by that rule, and that is thus: either by way of use or by way of devise. Therefore, if a devise be to a man and his heirs, and if he die without issue in the life of B, then to B and his heirs; this is a fee-simple upon a fee-simple, and yet it has been held to be good. My lord chief baron did seem to think that this resolution did take its original from *Pells and Brown's Case* [ante p.]; but it did not so, the law was settled before. You may find it expressly resolved 19 Eliz. in a case between *Hinde and Lyon*, 3 Leonard [64] (which, of the books that have lately come out, is one of the best); and it was there adjudged to be so good a limitation that the heir who pleaded *reins peer descent* [nothing by descent] was forced to pay the debt. And it had the concurrence of a judgment in 38 Eliz., grounded upon the reason of *Wellock and Hammond's Case* [ante p. 150] cited in *Boraston's Case* [ante p. 212] where it is said, Croke Eliz. 204, in a devise it may well be that an estate in fee shall cease in one and be transferred to another. All this was before *Pells and Brown's Case* [ante p.], which was in 18 Jac. [1]. It is true, it was made a question afterwards in the sergeants' case. [*36]. But what then? We all know that is no rule to judge by; for what is used to exercise the wits of the sergeants is not a governing opinion to decide the law. It was also adjudged in Hil. 1649, when my Lord Rolls was chief justice, and again

in 1650; and after that, indeed, in 1651, it was resolved otherwise in *Jay and Jay's Case* [Stiles 258]. But it has been often agreed that where it is within the compass of one life, that the contingency is to happen, there is no danger of a perpetuity. And I oppose it to that rule which was taken by one of the lords the judges, that where no remainders can be limited no contingent remainders can be limited, which I utterly deny; for there can be no remainder limited after a fee-simple; yet there may a contingent fee-simple arise out of the first fee, as hath been shown.

Thus it is agreed to be by all sides in the case of an inheritance. But now, say they, a lease for years, which is a chattel, will not bear a contingent limitation in regard of the poverty and meanness of a chattel estate. Now as to this point. The difference between a chattel and an inheritance is a difference only in words, but not in substance, nor in reason, or the nature of the thing; for an owner of a lease, has as absolute power over his lease, as he that hath an inheritance has over that. And therefore where a perpetuity is introduced, nor any inconvenience doth appear, there no rule of law is broken.

The reasons that do support the springing trust of a term, as well as the springing use of an inheritance, are these:

1. Because it hath happened sometimes, and doth frequently, that men have no estates at all but what consist in leases for years. Now it were not only very severe, but (under favor) very absurd, to say that he who has no other estate but what consists in leases for years shall be incapable to provide for the contingencies of his own family, though these are directly within his view and immediate prospect. And yet if that be the rule, so it must be; for I will put the case: A man that hath no other estate but leases for years, chattels real, treats for the marriage of his son, and thereupon it comes to this agreement: these leases shall be settled as a jointure for the wife, and provision for the children. Says he, I am content, but how shall it be done? Why, thus: You shall assign all these terms to John A. Stiles, in trust for yourself and your executors if the marriage take no effect; but then, if it takes effect, to your son while he lives, to his wife after while she lives, with remainders over. I would have anyone tell me whether this were a void limitation upon a marriage settlement, or if it be, what a strange absurdity is it, that a man shall settle it if the marriage take no effect, and shall not settle it if the marriage happen.

2. Suppose the estate had been limited to Henry Howard and the heirs males of his body till the death of Thomas without issue, then to Charles: there it had been a void limitation to Charles. If then the addition of these words: *If Thomas die without issue in the life of Henry*, &c. have not mended the matter, then all that addition [*33] of words goes for nothing, which it is unreasonable and absurd to think it should.

3. Another thing there is, which I take to be unanswerable, and gather it from what fell from my Lord Chief Justice PEMBERTON; and when

I can answer that case, I shall be able to answer myself very much for that which I am doing. Suppose the proviso had been thus penned: *and if Thomas die without issue male, living Henry, then the term or 200 years limited to him and his issue shall utterly cease and determine, but then a new term of 200 years shall arise and be limited to the same trustees, for the benefit of Charles in tail.* This he thinks might have been well enough, and attained the end and intention of the family: because then this would not be a remainder in tail upon a tail, but a new term created. Pray let us so resolve causes here, that they may stand with the reason of mankind, when they are debated abroad. Shall that be reason here that is not reason in any part of the world besides? I would fain know the difference, why I may not raise a new springing trust out of the same term, as well as a new springing term out of the same trust. That is such a chicanery of law as will be laughed at all over the Christian world.

4. Another reason I go on is this: That the meanness of the consideration of a term for years, and of a chattel interest, is not to be regarded. For whereas this will be no reason any where else; so I shall show you, that this reason, as to the remainder of a chattel interest, is a reason that has been exploded out of Westminster-hall. There was a time, indeed, that this reason did so far prevail, that all the judges, in the time of my Lord Chancellor Rich, did, 6 Edward 6, deliver their opinions, that if a term for years be devised to one, provided that if the devisee die living J. S., then to go to J. S.; that remainder to J. S. is absolutely void, because such a chattel interest of a term for years is less than a term for life, and the law will endure no limitation over [1 Dyer 74b, ante p. 231]. Now this being a reason against sense and nature, the world was not long governed by it; but in 10 Eliz., in Dyer [fol. 277], they began to hold that the remainder was good by devise; and so 15 Eliz. seems to [Dyer 328], and 19 Eliz. [Dyer 358] it was by the judges held to be a good remainder; and that was the first time that an executory remainder of a term was held to be good. When the chancery did begin to see that the judges of the law did govern themselves by the reason of the thing, this court followed their opinion. The better to fix them in it, they allowed of bills by the remainder man to compel the devisee of the particular estate to put in security that he should enjoy it according to the limitation. And for a great while so the practice stood, as they thought it might well, because of the resolution of the judges, as we have shown; but after this was seen to multiply chancery suits, then they began to resolve that there was no need of that [*34] way, but the executory remainder man should enjoy it, and the devisee of the particular estate should have no power to bar it. Men began to presume upon the judges then, and thought if it were good as to remainders after estates for lives, it would be good also as to remainders upon estates tail. That the judges would not endure; and that is so fixed a resolution, that no court of law or equity ever attempted to break in the world.

Now then we come to this case, and if so be where it does not tend to a perpetuity, a chattel interest will bear a remainder over, upon the same reason it will bear a remainder over upon a contingency, where that contingency doth wear out within the compass of a life; otherwise it is only to say it shall not because it shall not, for there is no more inconvenience in the one than in the other. Come we then at last to that which seems most to choke the plaintiff's title to this term, and that is the resolution in *Child and Bailie's Case* [ante p.]; for it is upon that judgment it seems all conveyances must stand or be shaken, and our decrees made. * * * First, it must be observed, that the resolution there did go upon several reasons which are not to be found in this case. * * * Secondly, at last, allowing this case to be as full and direct an authority as is possible, and as they would wish that rely upon it; then I say: 1, the resolution in *Child and Bailie's Case* is a resolution that never had any resolution like it before nor since; 2, it is a resolution contradicted by some resolutions: and to show that that resolution has been contradicted, there is (1) *Cotton and Heath's Case* [Roll. Abr. t. Devise 612.] * * * but (2), to come up more fully and closely to it, and to show you that I am bound up by the resolutions of this court, there was a fuller and flatter case, 21 Car. 2, in July 1669, between *Wood and Saunders* [1 Cases in Ch. 131]. The trust of a long lease is limited and declared thus: to the father for sixty years if he lived so long, then to the mother for sixty years if she lived so long, then to John and his executors if he survived his father and mother, and if he died in their lifetime having issue, then to his issue, but if he die without issue living the father or mother, then the remainder to Edward in tail. [*36] John did die without issue in the lifetime of the father and mother, and the question was, whether Edward should take this remainder after their death; and it was resolved by my Lord Keeper Bridgman, being assisted by Judge Twisden and Judge Rainford, that the remainder to Edward was good; for the whole term had vested in John if he had survived; yet the contingency never happening, and so wearing out in the compass of two lives in being, the remainder over to Edward might well be limited upon it. Thus we see, that the same opinion which Sir Orlando Bridgman held when he was a practicer and drew these conveyances upon which the question now ariseth, remained with him when he was the judge in this court, and kept the seals. And, by the way, I think it is due to the memory of so great a man, whenever we speak of him, to mention him with great reverence and veneration for his learning and integrity.

They will perhaps say: Where will you stop if not at *Child and Bailie's Case*? Where? Why everywhere where there is any inconvenience, any danger of a perpetuity. And wherever you stop at a limitation of a fee upon a fee, there we will stop in the limitation of a term of years. No man ever yet said a devise to a man and his heirs, and if he die without issue living B, then B, is a naughty remainder; that

is *Pells and Brown's Case*. Now the *ultimum quod sit*, or the utmost limitation of a fee upon a fee, is not yet plainly determined; but it will be soon found out if men shall set their wits on work to contrive by contingencies, to do that which the law has so long labored against.
* * *

Therefore my present thoughts are that the trust of this term was well limited to Charles, who ought to have the trust of the whole term decreed to him, and an account of the mean profits for the time past, and a recompense made to him from the duke and Marriot for the time to come. But I do not pay so little reverence to the company I am in, as to run down their solemn arguments and opinions upon my present sentiments; and therefore I do suspend the enrollment of any decree in this case as yet. But I will give myself some time to consider before I take any final resolution, seeing the lords, the judges, do differ from me in their opinions.

[On the day appointed by the chancellor for final judgment May 13th, 1682, counsel for the Duke of Norfolk begged permission to be heard further, and by grace of the chancellor, the case was continued from time to time till June 17th, 1682, at which time it was argued at some length, and then the following opinion and decree given by the lord chancellor.]

LORD CHANCELLOR NOTTINGHAM. I am not sorry for the liberty that was taken at the bar to argue this over again, because I desired it should be so; for in truth I am not in love with my own opinion. * * * It will be good for the satisfaction of the public in this case, to take notice how far the court is agreed in this case, and then see where they differ, and upon what grounds they differ, and whether anything that hath been said be a ground for the changing this opinion. The court is agreed thus far: [*48] That in this case it is all one, the limitation of the trust of a term, or the limitation of the estate of a term, all depends upon one and the same reason. The court is likewise agreed (which I should have said first, to dispatch it out of the case, that it may not trouble the case at all) that the surrender of Marriot to the Duke of Norfolk, and the common recovery suffered by the duke, are of no use at all in this case. For if this limitation to Charles be good, then is this surrender and the recovery a breach of trust, and ought to be set aside in equity; so all the judges that assisted at the hearing of this cause agreed. If the limitation be not good, then there was no need at all of a surrender to bar it, nor of the common recovery to extinguish it. But then we come to consider the limitation, and there it [is] agreed all along in point of law, that the measures of the limitations of the trust or a term and the measures of the limitations of the estate of a term, are all one and uniform, here and in other cases, and there is no difference at chancery and at common law, between the rules of the one and the rules of the other. What is good in one case is good in the other. And therefore in this case the

court is agreed too, that the limitations made in this settlement to Edward, &c., are all void; for they tend directly and plainly to perpetuities, for they are limitations of remainders of a term in gross after an estate-tail in a term, which commenceth to be a term in gross when the contingency for Charles happens.

Thus far there is no difference of opinion; but whether the limitation to Charles if Thomas die without issue living Henry, whereby the honor of the earldom of Arundel descends upon Henry—I say, whether that be void too is the great question of this case, wherein we differ in our opinions.

It is said that is void too. And yet (sever it from the authority of *Child and Bailie's Case*, which I will speak to by and by) I would be glad to see some tolerable reason given why it should be so; for I agree it is a question in law upon a trust, as it would be elsewhere upon an estate; and so the questions here are both questions of law and equity. It was well said, and well allowed by all the judges, when they did allow the remainders of terms after estates-tail in these terms to be void. I shall not devise a term to a man in tail with remainders over. The judges have admirably well resolved in it; and the law is settled; and *Matthew Manning's Case* [ante p.] did not stretch so far, because this would tend to a perpetuity. Now, on the other side, I should fain know, when there is a case before the court, where the limitation doth not tend to a perpetuity, nor introduceth any visible inconvenience, what should hinder that from being good. For though if there be a tendency to a perpetuity, or a visible inconvenience, that shall be void for that reason; yet the bare limitation of the remainder after an estate-tail which doth not tend to a perpetuity, that is not void. Why? Because it is not? I dare not say so. See then the reasons why it is so.

[*49] The reasons that I lie under the load of, and cannot shake off, are these: The law doth in many cases allow of a future contingent estate to be limited, where it will not allow a present remainder to be limited; and that rule, well understood, goeth through the whole case. How do you make that out? Thus: If a man have an estate limited to him his heirs and assigns for ever (which is a fee-simple), but if he die without issue, living J. S., or in such a short time, then to J. D., though it be impossible to limit a remainder of a fee upon a fee, yet it is not impossible to limit a contingent fee upon a fee. And they that speak against this rule, do endeavor as much as they can to set aside the resolutions of *Pells and Brown's Case* [ante p.], which (under favor) was not the first case that was resolved; for, as I said before, when I first delivered my opinion, it was resolved to be a good limitation, 19 Eliz., in the case of *Hinde and Lyon*, 3 Leonard 64; which, by the way, is the best book of reports of the later ones that hath come out without authority. If that be so, then where a present remainder will not be allowed a contingent one will. If a lease for years come to be limited in tail, the law allows not a present remainder to be limited thereupon, yet it will allow a future estate arising

upon a contingency only, and that to wear out in a short time. But what time, and where are the bounds of that contingency? You may limit, it seems, upon a contingency to happen in a life. What if it be limited, if such a one die without issue within 21 years, or 100 years, or while Westminster-hall stands? Where will you stop if you do not stop here? I will tell you where I will stop. I will stop wherever any visible inconvenience doth appear; for the just bounds of a fee-simple upon a fee-simple are not yet determined; but the first inconvenience that ariseth upon it will regulate that.

First of all then, I would fain have anyone answer me, where there is no inconvenience in this settlement, no tendency to a perpetuity in this limitation, and no rule of law broken by the conveyance, what should make this void? And no man can say that it doth break any rule of law, unless there be a tendency to a perpetuity, or a palpable inconvenience. Oh, yes, terms are mere chattels, and are not in consideration of law so great as freeholds or inheritances. These are words, and but words; there is not any real difference at all, but the reason of mankind will laugh at it. Shall not a man have as much power over his lease as he has over his inheritance? If he have not, he shall be disabled to provide for the contingencies of his own family that are within his view and prospect, because it is but a lease for years and not an inheritance or a freehold. There is that absurdity in it which is to me insuperable; nor is the case that was put, answered in any degree. * * * [*50] * * *

But I expect to hear it said from the bar, and it has been said often: The case of *Child and Bailie* is a great authority. So it is. But this I have to say to it: First, the point resolved in *Child and Bailie's Case* was never so resolved before, nor ever was such a resolution since. *Pells and Brown's Case* was otherwise resolved, and has often been adjudged so since. In the next place, I will not take much pains to distinguish *Child and Bailie's Case* from this, though the word *assigns* and the grant of the remainder by the mother who was executrix, are things which Rolls lays hold on as reasons for the judgment. But I know not why I may not, with reverence to the authority of that case and the learning of those that adjudged it, take the same liberty as the judges in Westminster-hall sometimes do, to deny a case that stands single and alone of itself. And I am of opinion the resolution in that case is not law, though there it came to be resolved upon very strange circumstances to support such a resolution; for the remainder of a term of 76 years is called in question when but 15 years of it remained, and after possession had shifted hands several times, and therefore I do not wonder that the consideration of equity swayed that case. But I put it upon this point, pray consider, there is nothing in *Child and Bailie's Case* that doth tend to a perpetuity, nor anything in the settlement of the estate there, that could be called an inconvenience, not any rule of law broken by the conveyance; but it is absolutely a resolution

quia volumus; for it disagrees with all the other cases before and since, all which have been otherwise resolved. [*51] But it is a resolution. I say, merely because it is a resolution. And it is expressly contrary to *Wood and Sanders's Case* [1 Ch. Cas. 131], which no art or reason can distinguish from our case or that. For here is that case which was clipped and minced at the bar, but never answered. *Wood and Sander's Case* is this: to the husband for 60 years if he lived so long, to the wife for 60 years if she lived so long, then if John be living at the time of the death of the father and mother, then to John, but if he die without issue living father or mother, then to Edward. Suppose these words *living father or mother* had been out of the case, and it had been to John, and if he die without issue, then to Edward. will any man doubt but then the remainder over had been void, because it is a limitation after an express entail? How came it then to be adjudged good? Because it was a remainder upon a contingency that was to happen during two lives, which was but a short contingency, and the law might very well expect the happening of it. Now that is this case, nay ours is much stronger; for here it is only during one life, there were two. The case of *Cotton and Heath* [Rolls Abr. t. Devise 612] in Rolls comes up to this: A term is devised to A for 18 years, the remainder to B for life, the remainder to the first issue male of B; which is a contingent estate after a contingency, and yet it was adjudged good, because the happening of the contingency was to be expected in so short a time. Now that case was adjudged by my Lord Keeper Coventry, Mr. Justice Jones, Mr. Justice Croke, and Mr. Justice Berkley, as *Wood and Sanders's Case* was by my Lord Keeper Bridgman, Mr. Justice Twisden, and Mr. Justice Reinford. So that however I may seem to be single in my opinion, having the misfortune to differ from the three learned judges who assisted me, yet I take myself to be supported by seven opinions in these two cases I have cited.

If then this be so, that here is a conveyance made which breaks no rules of law, introduces no visible inconvenience, savours not of a perpetuity, tends to no ill example, why this should be void, only because it is a lease for years, there is no sense in that.

Now if Charles Howard's estate be good in law it is ten times better in equity. For it is worth the considering, that this limitation upon this contingency happening (as it hath, God be thanked), was the considerate desire of the family, the circumstances whereof required consideration, and this settlement was the result of it, made with the best advice they could procure, and is as prudent a provision as could be made. For the son now to tell his father that the provision that he had made for his younger brother is void, is hard in any case at law; but it is much harder in chancery; for there no conveyance is ever to be set aside where it can be supported by a reasonable construction, and here must be an unreasonable one to overthrow it. [*52] I take it then to be good both in law and equity; and if I could alter my opinion, I would not be ashamed to retract it; for I am as other men are, and

have my partialities as other men have. When all this is done, I am at the bar desired to consider further of this case. I would do so if I could justify it; but expedition is as much the right of the subject as justice is, and I am bound by *Magna Charta, nulli negari, nulli differre justitiam*. I have taken as much pains and time as I could to be informed. I cannot help it if wiser men than I be of another opinion; but every man must be saved by his own faith, and, I must discharge my own conscience. * * * I must decree for the plaintiff in this case, and my decree is this: That the plaintiff shall enjoy this barony for the residue of the term of 200 years; the defendant shall make him a conveyance accordingly, because he extinguished the trust in the other and the term, contrary to both law and reason, by the merger and surrender and common recovery; and that the defendants do account with the plaintiff for the profits of the premises by them or any of them received since the death of the said Duke Thomas, and which they or any of them might have received without wilful default; and that it be referred to Sir Lacon William Child, Knight, one of the masters of this court, to take the said account. * * *

[This decree was reversed in the high court of chancery May 15, 1683 by Lord Keeper North, on bill for review filed by defendants herein; and that decree of the high court of chancery was reversed and the above decree of Lord Chancellor NOTTINGHAM affirmed by the House of Lords, June 19th, 1685, on appeal by Charles Howard.]

GORE v. GORE, in Chancery, referred to the judges of the King's Bench, in 1722 and 1733—2 P. Wms. 28, 2 Strange 958, 10 Mod. 501, 2 Kel. 254, 2 Barnard K. B. 209, 229, 355, 5 Gray's P. C. 166. Abridged from P. Wms. and Strange.

This case came on before Lord Chancellor Macclesfield, who referred it to the judges of the king's bench for their opinion. William Gore, being seised in fee, devised to trustees and their heirs to the use of the trustees for 500 years, to raise younger childrens' fortunes and pay debts, and after the determination of that estate, then to the first and every other son of Thomas Gore (devisor's eldest son), in tail male, remainder to Edward Gore (devisor's second son) in tail male, remainders over. At the death of the devisor, Thomas was a bachelor, but afterwards married and had a son; and upon this two questions arose: 1, whether this son of Thomas could take; and, 2, in whom the freehold vested at the death of the devisor.

The judges certified their opinion as follows: "We have heard counsel on both sides on the question above specified, and having considered the same, are of opinion, that the devise of the manors above mentioned to the first son of Thomas Gore is void, because he cannot take by way of remainder, for that there is no freehold to support it; nor can he take by way of executory devise, because it is not to take place within that compass of time which the law allows: and we are also of opinion, that

the freehold of the same manors, on the death of the devisor, were vested in Edward, the second son. JOHN PRATT [C. J.], LITTLETON POWLS, R. EYER, J. FORTESQUE ALAND [JJ.], 1722.

LORD MACCLESFIELD expressed some dissatisfaction with the opinion of the judges, saying that though the law might be so, yet the term of 500 years being but a trust term, and so to be considered in equity as a security only for money, was not to be so regarded, at least in equity, as to make the devise over void. After which the son of Thomas came to agreement with his uncle Edward, which was confirmed by the court.

Afterwards Thomas had a second son, and died, and this second son brought the matter up again in the chancery; and LORD KING, now being Lord Chancellor, sent it a second time to the court of king's bench, and the justices this time certified against the opinion of their predecessors, as follows: "Upon hearing counsel on both sides, and consideration of this case, we are of opinion, that the devise of the manors of Barrow and Southley to the first son of Thomas Gore is good by way of executory devise, and that the freehold of the said Manors, on the death of the devisor, vested in his heir at law. HARDWICKE [C. J.], F. PAGE, E. PROBYN, W. LEE [JJ.], Jan. 26, 1733.

This being certified, the cause was set down before LORD TALBOT, after Trinity term, 1734, who declared his agreement in opinion with the last certificate, and made his decree accordingly. LORD RAYMOND was also of the same opinion.

THELLUSSON v. WOODFORD, in the House of Lords, 1805.—1 Bos. & Pul. N. R. 357, 11 Ves. 212, Cruise Dig. tit. Devise 524, 5 Gray's P. C. 530.

This is an appeal to the House of Lords by the complainants in a bill in chancery, and seeking a reversal of the decree (reported in 4 Ves. Jr. 227) of the chancellor dismissing the bill. Decree affirmed.

The complainants are the sons, widow, daughters, and husbands of the daughters of Peter Thellusson; and the defendants are the trustees under his will; and the bill seeks a construction of the will and an adjudication that the trusts are in violation of the rule against perpetuities, and therefore void. The testator being seised of vast estates, real and personal, and having three sons (Peter, George, and Charles) a wife, and several daughters, made his will, dated April 2, 1796; by which he gave to each of his children, besides small annuities, sufficient to make the portion for each son £23,000, and each daughter £12,000, previous advances being reckoned as part of such portions; gave £22,000 of bank stock and £600 per annum long annuities, to his children, subject to a life interest to his wife; and gave all the residue of his estate real and personal to the defendants herein, the survivors and survivor of them and the heirs of the survivor, in trust to permit his wife to use and occupy the capital mansion and grounds and the furniture, horses, books, &c., thereon during widowhood; he then directed that on the death

or marriage of the widow the trustees should sell such premises and property and that the proceeds should be considered a portion of the residue of his personal estate. The residue of his personal estate he gave to the same trustees in trust to invest the same in freehold estates in fee in England, and that the rents and profits of the other lands owned by him and the lands so directed to be purchased should be regularly collected by such trustees and accumulated and invested until the death of the last of the children and grandchildren of the testator in being at his death or born in due time afterwards; and he directed his trustees, on the death of such survivor, to divide the residue of the estate real and personal and the accumulations into three lots of equal value, and give the first choice of the three to the then eldest surviving male issue of the testator's son Peter, in tail, with divers remainders over; the second choice in like manner to the eldest male descendant of testator's son George then surviving, in tail, with like remainders over; the remaining lot to the eldest male descendant of testator's son Charles then surviving, in tail, with remainders over; with remainders over as to all the lots to the king or queen of England on failure of issue of such sons.

The property subject to the trust consisted of land in England of the annual value of £4,500, and of land in the West Indies and personal property estimated at above £600,000 value.

The trustees filed a cross-bill praying that the trusts be established and carried into execution. Both the original and cross-bills coming on before Lord Loughborough, assisted by Richard P. Arden (master of the rolls), Buller and Lawrence, JJ., at Lincoln's Inn Hall, Dec. 5th, 1798, were heard on that and several subsequent days. On Feb. 19th, 1802, the chancellor pronounced his decree dismissing the original bill and establishing the trusts as prayed in the cross-bill on appeal to the House of Lords, the case was argued at the bar of the house on several days by Mansfield and Romilly for the appellants, and by Att. Gen. Percival, Sol. Gen. Sutton, and Pigott, Richards, Alexander, and Cox, for the respondents. After the argument the following questions were submitted to the judges on motion of Lord Chancellor Eldon:

1. A testator by his will, being seised in fee of the real estate therein mentioned, made the following devise:—I give and devise all my manors, messuages, tenements, and hereditaments, at Brodsworth in the county of York, after the death of my sons, Peter Isaac Thellusson, George Woodford Thellusson, and Charles Thellusson, and of my grandson John Thellusson, son of my son Peter Isaac Thellusson, and of such other sons as my son Peter Isaac Thellusson may have, and of such sons as my said sons George Woodford Thellusson and Charles Thellusson may have, and of such issue as such sons may have, as shall be living at the time of my decease, or born in due time afterwards, and after the deaths of the survivors and survivor of the several persons aforesaid, to such person as, at the time of the death of the survivor of the said several persons, shall then be the eldest male lineal

descendant of my son Peter Isaac Thellusson and his heirs forever.—At the time of the testator's death, there were seven persons actually born answering the description mentioned in the testator's will, and there were two *in ventre sa mere* answering the description, if children *in ventre sa mere* do answer that description; all the said several persons, so described in the testator's will, being dead, and, at the death of the survivor of such several persons, there being living one male lineal descendant of the testator's son Peter Isaac Thellusson, and one only; Is such person entitled by law, under the legal effect of the devise above stated, and the legal construction of the several words in which the same is expressed, to the said manors, messuages, tenements, and hereditaments at Brodsworth?

2. If at the death of the survivor of such several persons as aforesaid, such only male lineal descendant was not actually born, but was *in ventre sa mere*. Would such lineal descendant when actually born be so entitled?

The unanimous opinion of the judges was pronounced as follows by

LORD MACDONALD, C. B. [*385] The first objection to the will is, that the testator has exceeded that portion of time within which the contingency must happen, upon which an executory devise is permitted to be limited by the rules of law, for three reasons. *First*, because so great a number of lives cannot be taken as in the present instance to protract the time during which the vesting is suspended, and consequently the power of alienation suspended. *Secondly*, that the testator has added to the lives of persons who should be born at the time of his death the lives of persons who might not be born. *Thirdly*, that, after enumerating different classes of lives during the continuance of which the vesting is suspended, the testator has concluded with these restrictive words, "as shall be living at my decease, or born in due time afterwards," and that as these words appertain only to the last class in the enumeration, the words which are used in the preceding classes being unrestricted, they will extend to grandchildren and great-grand children, and their issue, and so make this executory devise void in its creation, as being too remote.

With respect to the first ground, viz. the number of lives taken, which in the present instance is nine, I apprehend that no case or *dictum* has drawn any line as to this point, which a testator is forbidden to pass. On the contrary, in the cases in which this subject has been considered by the ablest judges, they have for a great length of time expressed themselves as to the number of lives, not merely without any qualification or circumscription, but have treated the number of co-existing lives as matter of no moment; the ground of that opinion being, that no public inconvenience can arise from a suspension of the vesting, and thereby placing land out of circulation during any one life, and that in fact the life of the survivor of many persons named or described is but the life of some one. This was held without dissent by Twisden, J., in *Love v.*

Wyndham, 1 Mod. 50, twenty years before the determination [*386] of the *Duke of Norfolk's case*, who says that the devise of a farm may be for twenty lives, one after another, if all be in existence at once. By this expression, he must be understood to mean any number of lives, the extinction of which could be proved without difficulty. When this subject of executory trusts came to be examined by the great powers of Lord Nottingham as to the time within which the contingency must happen, he thus expresses himself: "If a term be devised, or the trust of a term limited, to one for life with twenty remainders for life, successively, and all the persons are in existence and alive at the time of the limitation of their estates, these, though they look like a possibility upon a possibility, are all good, because they produce no inconvenience; they wear out in a little time." With an easy interpretation, we find from Lord Nottingham what that tendency to a perpetuity is, which the policy of the law has considered as a public inconvenience, namely, where an executory devise would have the effect of making lands unalienable beyond the time which is allowed in legal limitations, that is, beyond the time at which one in remainder would attain his age of twenty-one, if he were not born when the limitations were executed. When he declares that he will stop where he finds an inconvenience, he cannot consistently with sound construction of the context, be understood to mean, where Judges arbitrarily imagine they perceive an inconvenience, for he has himself stated where inconvenience begins, namely, by an attempt to supersede the vesting longer than can be done by legal limitations. I understand him to mean, that wherever courts perceive that such would be the effect, whatever may be the mode attempted, that effect must be prevented; and he gives the same but no greater latitude to executory devises and executory trusts as to estates tail. This has been ever since adopted. In *Scatterwood v. Edge*, 1 Salk 299, [ante p.] the court held, that an [*387] executory estate, to arise within the compass of a reasonable time is good as twenty or thirty years so is the compass of a life or lives, for let the lives be never so many, there must be a survivor, and so it is but the length of that life. In *Humberston v. Humberston*, 1 P. Wms. 332 [ante p.] where an attempt was made to create a vast number of estates for life in succession, as well to persons unborn as to persons in existence, Lord Cowper restrained that devise within the limits assigned to common law conveyances, by giving estates for life to all those who were living (at the death of the testator,) and estates to those who were unborn considering all the co-existing lives (a vast many in number) as amounting in the end to no more than one life. His Lordship was in the situation alluded to by Lord Nottingham, where a visible inconvenience appeared. The bounds prescribed to limitations in common law conveyances were exceeded, the excess was cut off, and the devise confirmed within those limits. Lord Hardwicke repeats the same doctrine in *Sheffield v. Lord Orrery*, 3 Atk. 282, using the words life or lives without any restriction as to number. Many other cases might be cited to the

like effect, but I shall only add what is laid down in two very modern cases. In *Gurnall v. Wood*, Willes, 211 Lord Chief Justice Willes speaks of a life or lives without any qualification; and Lord Thurlow, in *Robinson v. Hardcastle*, 2 Brown Ch. Cas. 30, says that a man may appoint 100 or 1000 trustees, and that the survivor of them shall appoint a life estate. It appears then, that the coexisting lives, at the expiration of which the contingency must happen, are not confined to any definite number. But it is asked shall lands be rendered unalienable during the lives of all the individuals, who compose very large societies or bodies of men, or where other very extensive descriptions are made use of? It may be answered that when such cases occur, they will, according to their respective circumstances, [*388] be put to the usual test, whether they will or will not tend to a perpetuity, by rendering it almost, if not quite, impracticable to ascertain the extinction of the lives described, and will be supported or avoided accordingly.

But it is contended, that in these and other cases the persons, during whose lives the suspension was to continue, were persons immediately connected with or immediately leading to, the person in whom the property was first to vest when the suspension should be at an end. I am unable to find any authority for considering this as a *sine qua non* in the creation of a good executory trust. It is true that this will almost always be the case and mode of disposing of property, introduced and encouraged up to a certain extent, for the convenience of families, which in almost all instances look at the existing members of the family of the testator and its connections. But when the true reason for circumscribing the period, during which alienation may be suspended, is adverted to, there seems to be no ground or principle that renders such an ingredient necessary. The principle is, the avoiding of a public evil by placing property for too great a length of time out of commerce. The length of time will not be greater or less, whether the lives taken have any interest, vested or contingent, or have not; nor, whether the lives are those of persons immediately connected with or immediately leading to that person in whom the property is first to vest, terms to which it is difficult to annex any precise meaning. The policy of the law can no way be affected by those circumstances, which I apprehend looks merely to duration of time. This could not be the opinion of Lord Thurlow in *Robinson v. Hardcastle*, nor is any such opinion to be found in any case or book upon this subject. The result of all the cases upon this point is thus summed up by Lord Chief Justice Willes (Willes 215) with his usual accuracy and perspicuity: "Executory devises have not been considered as mere possibilities, but as certain interests and estates, and have been resembled to contingent remainders [*389] in all other respects; only they have been put under some restraints to prevent perpetuities. As at first it was held that the contingency must happen within the compass of a life, or lives in being, or a reasonable number of years; at length it

was extended a little further, namely, to a child *in ventre sa mere* at the time of the father's death; because, as that contingency must necessarily happen within less than nine months after the death of a person in being, that construction would introduce no inconvenience, and the rule has in many instances been extended to 21 years after the death of a person in being, as in that case likewise there is no danger of a perpetuity." Comparing what the testator has done in the present case with what is above cited, it will appear that he has not postponed the vesting even so long as he might have done.

The second objection which has been made in this case is, that the testator has added to the lives of persons in being at the time of his decease, those of persons not then born. It becomes, therefore, necessary to discover in what sense the testator meant to use the words "born in due time afterwards." Such words, in the case of a man's own children, mean the time of gestation; what is to be intended by these words in this will must be collected from the will itself. It may be collected from the will itself, that by those words the testator meant to describe the period of time within which issue might be born during whose lives the trust might legally continue, or, in other words, whom the law would consider as born at the time of his decease. Now these could only be such children of the several persons named as their respective mothers were *ensient* with at the time of his death; or, he may have meant to use the words, "due" as denoting that period of time which would be the necessary period for effecting his purpose. This is probable from his using the same word, as applied to the time during which the presentation to the advowson of *marr* might be suspended [*390] without incurring a lapse. That a child *in ventre sa mere* was considered as in existence, so as to be capable of taking by executory devise, was maintained by Powell, J., in the case of *Loddington v. Kime*, 1 Ld. Raym. 207 [ante 190], upon this ground, that the space of time between the death of the father and birth of the posthumous son was so short that no inconvenience could ensue. So in *Northy v. Strange*, 1 P. Wms. 340, Sir J. Trevor held, that by a devise to children and grandchildren an unborn grandchild should take. Two years after Lord Macclesfield in *Burdett v. Hopegood*, 1 P. Wms. 486. held that where a devise was to a cousin, if the testator should leave no son at the time of his death, a posthumous son should take as being left at the testator's death. In *Wallis v. Hodgson*, 2 Atk. 117, Lord Hardwicke held that a posthumous child was entitled under the statute of distributions and his reason deserves notice. "The principal reason (says he) that I go upon is, that the plaintiff was *in ventre sa mere* at the time of her brother's death, and consequently a person *in rerum natura*; so that by the rules of the common and civil law she was, to all intents and purposes, a child as much as if born in the father's lifetime." Such a child, in charging for the portions of other children living at the death of the father, is included as then living, *Beal v. Beal*, 1 P. Wms. 244, and so in a

variety of other reports. In *Bassett v. Bassett*, 3 Atk. 203. Lord Hardwicke decreed rents and profits which had accrued at a rent-day preceding his birth to a posthumous child, and since the stat. of 10 & 11 W. 3, c. 16, such children seem to be considered in all cases of devise, and marriage or other settlement, to be living at the death of their father, although not born till after his decease. It is otherwise considered in the case of descent. In *Roe v. Quarterly*, 1 Term 630, the devise was to Hester Read for life (daughter of Walter Read) and to the heirs of her body; and for default of such issue, to such child as the wife of Walter Read is now [*391] *ensient* with, and the heirs of the body of such child, then to the right heirs of Walter Read and Mary his wife. It was contended that the last limitation was too remote, as coming after a devise to one not in being, and his issue. But the court said, that since the stat. of King William, which puts posthumous children on the same footing with children born in the life-time of their ancestor, this objection seemed to be removed, whatever was the case before. In *Gulliver v. Wickett*, 1 Wils. 105, the devise was to the wife for life, then to the child, with which she was supposed to be *ensient*, in fee, provided that if such child should die before 21 leaving no issue, the reversion should go to other persons named. The court said, if there had been no devise to the wife for life, which made the ulterior estate a contingent remainder, the devise to the child *in ventre sa mere* being *in futuro*, would have been a good executory devise. In *Doe v. Lancashire*, 5 Term 49, the court of king's bench has held that marriage and the birth of a posthumous child revoke a will, in like manner as if the child had been born in the lifetime of the father. In *Doe v. Clarke*, 2 H. Bl. 399, Ld. Chief Justice Eyre holds, that independent of intention an infant *in ventre sa mere*, by the course and order of nature, is then living, and comes clearly within the description of children living at the parent's decease; and he professes not to accede to the distinction between the cases in which a provision has been made for children generally, and where the testator has been supposed to mark a personal affection for children who happened to have been actually born at the time of his death. The most recent case is that of *Long v. Blackall*; there the court of king's bench had no doubt that a devise to a child *in ventre sa mere* in the first instance was good, and a limitation over was good also, on the contingency of there being no issue male, or descendant of issue male, living at the death of such posthumous child. It seems then, that if estates [*392] for life had been given to the several *cestuis qui vie* in this will, and after their deaths to their children, either born or *in ventre sa mere* at the testator's death, they would have been good. No tendency to perpetuity then can arise in the case of such lives being taken, not to confer on them a measure of the beneficial interest, but to fix the time during which the vesting of the property which is the subject of this devise, shall be protracted; inasmuch

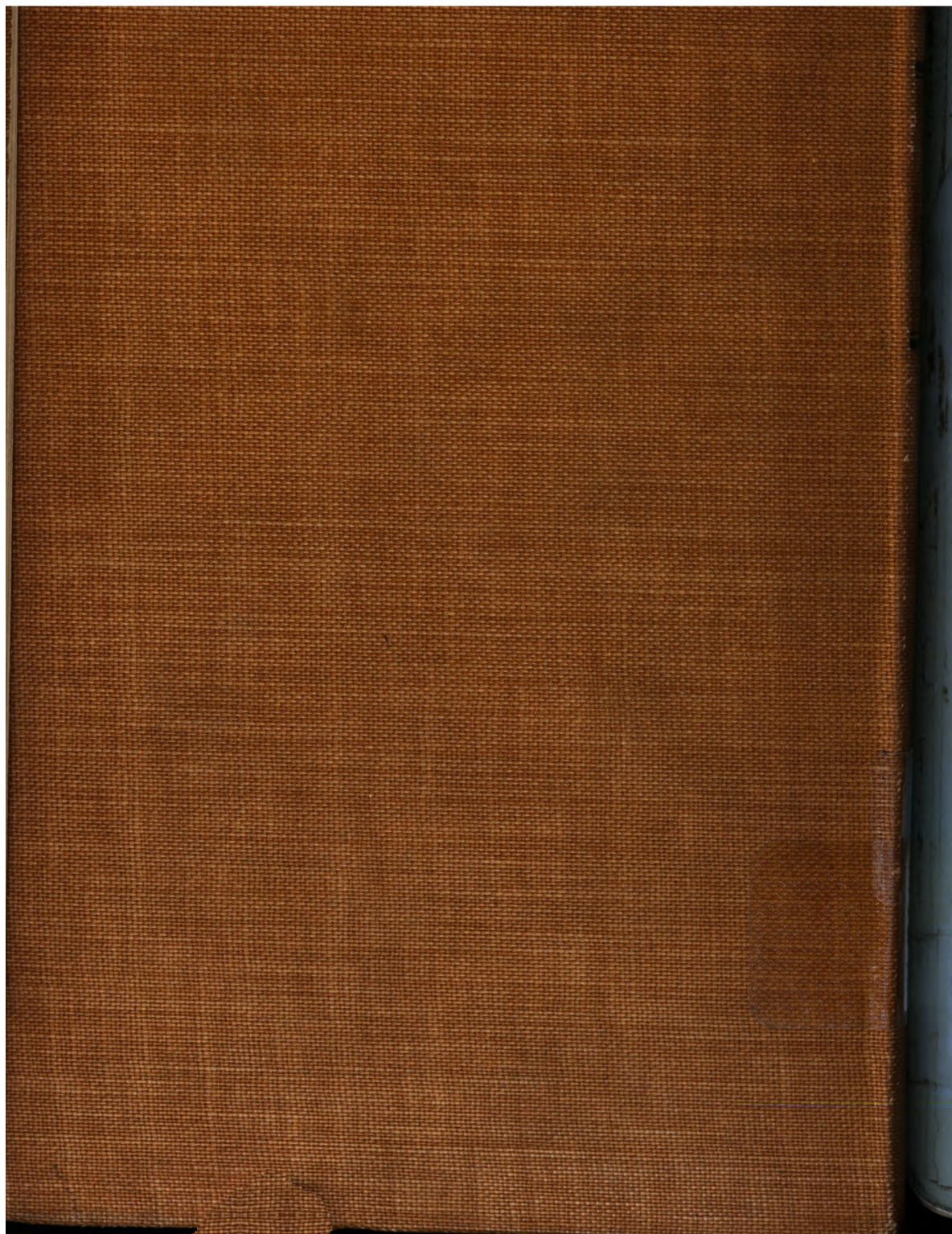
as the circulation of real property is no more fettered in the one case than in the other. It is, however, observable that this question may never arise, if it shall so happen that the children *in ventre matris* at the death of the testator shall not survive those who were then born.

The third ground of objection depends upon the application of the restrictive words which are added to the enumeration of the different classes of persons during whose lives the restriction is suspended. This objection I conceive will be removed by the application of the usual rules in construing wills, to the present case. First, where the intention of the testator is clear, and is consistent with the rules of law, that shall prevail. His intention evidently was to prevent alienation as long as by law he could; if then it is to be supposed that the restrictive words are to be confined to the last of seven different descriptions of persons, and that the testator intended to leave the four descriptions of persons which immediately preceded this 7th class, without the benefit of such restriction, although they equally stand in need of it, we must do the utmost violence to all established rules on this head. That construction is to be adopted which will support the general intent. The grammatical rule of referring qualifying words to the last of the several antecedents, is not even supposed by grammarians themselves to apply when the general intent of a writer or speaker would be defeated by such a confined application of them. Reason and common sense revolt at the idea [*393] of overlooking the plain intent which is disclosed in the context, namely, that they should be applicable to such classes as require them, and as to the others to consider them as surplusage; if words admit of more constructions than one, that which will support the legal intention of the testator is in all cases to be adopted. I do not trouble your lordships with any observation upon the objections arising from the magnitude of the property in question, either as it now stands, or may hereafter stand, or as to the motives which may have influenced this testator, nor his neglect of those considerations by which I or any other individual may or ought to have been moved; that would be to suppose that such topics can in any way affect the judicial mind. For these imperfect reasons, I concur with the rest of the judges in offering this answer to your lordships' first question.

With respect to your lordships' second question, the objection to such child being entitled must arise from an allowance having been made for the time of gestation at the end of the executory trusts. It seems to be settled that an estate may be limited in the first instance to a child unborn, and I apprehend to the first and other sons in fee as purchasers. The case of *Long v. Blackall*, 7 Term 100, seems, to have decided that an infant *in ventre matris* is a life in being. The established length of time during which the vesting may be suspended is during a life or lives in being, the period of gestation, and the infancy of such posthumous child. If then this time has been allowed in some cases at the beginning, and in others at the termina-

tion of the suspension, and if such children are considered by the construction of the Stat. of 10 & 11 W. 3, c. 16, as being born to such purposes, what should prevent the period of gestation being allowed both at the commencement and termination of the suspension, if it should be called for? In those cases where it has been allowed at the commencement, and particularly in *Long v. Blackall*, [*394] it must have been obvious to the Court that it might be wanting at the termination, yet that was never made an objection. In *Gulliver v. Wickett*, the child which was supposed to be *in ventre sa mere* might have married and died before 21, and have left his wife *ensient*; in that case a double allowance would have been required, yet that possibility was never made an objection, although it was obvious. In *Long v. Blackall*, according to the printed report, the prices point was not gone into. But it is plain that the attention of the court must have been drawn to it for the learned judge who argued that case in support of the devise, expressly stated "that every common case of a limitation over, after a devise for a life in being, with remainder in trust to his unborn issue, includes the same contingency as was then in question; for the heir for life may die leaving his wife *ensient*, and the only difference is that the period of gestation occurs at the beginning instead of the end of the first legal estate. It must have been palpable that it might possibly occur at both ends. Every reason then for allowing the period of gestation in the one case seems to apply with equal force to the other, and leads the mind to this conclusion, that it ought to be allowed in both cases, or in either case but natural justice in several cases having considered children *in ventre sa mere* as living at the death of the father, it should seem that no distinction can properly be made, but that in the singular event of both periods being required, they should be allowed, as there can be no tendency to a perpetuity.

Judgment affirmed.





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