The Struggle for a Perpetuity

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THE STRUGGLE FOR A PERPETUITY.

It is natural for us moderns to conceive of the right to alienate as an inseparable incident of ownership, since we have known no other condition; and in the modern books and decisions the subject is generally disposed of with the curt statement as if it were a truism. It is believed that to such as are not familiar with the history of that doctrine a review of the struggle through centuries, by which it was finally established on its present firm foundation, would not be devoid of interest.

As a preliminary to this inquiry, it may not be out of place to show that the power to alienate is not naturally an inseparable incident of ownership; and in other systems of law, as well as in our own, has in times past been denied. By the code of Hammurabi, king of ancient Babylon, B. C. 2285-2242, a father could not disinherit a son for a single offense nor for a second offense unless it was very great. By the laws of Moses only land in a walled city could be sold absolutely: "The land shall not be sold forever; for the land is mine; for ye are strangers and sojourners with me: and in all the land of your possession ye shall grant a redemption for the land. If thy brother be waxen poor, and hath sold away some of his possession, and if any of his kin come to redeem it, then shall he redeem that which his brother sold; and if the man have none to redeem it, and himself be able to redeem it, then let him count the years of the sale thereof, and restore the overplus unto the man to whom he sold it, that he may return unto his possession. But if he be not able to restore it unto him, then that which is sold shall remain in the hand of him that hath bought it until the year of jubilee; and in the jubilee it shall go out, and he shall return into his possession. And if a man sell a dwelling-house in a walled city, then he may redeem it within a whole year after it is sold, within a
full year may he redeem it; and if it be not redeemed within the space of a full year, then the house that is in the walled city shall be established forever to him that bought it throughout his generations: it shall not go out in the jubilee. But the houses of the villages which have no wall around about them shall be counted as the fields of the country; they may be redeemed, and they shall go out in the jubilee. Notwithstanding, the cities of the Levites and the houses of the cities of their possession may the Levites redeem at any time.  

By the law of the Romans a covenant not to alienate was valid and the vendor had remedy for its breach. The vendee's heirs took also an indefeasible interest as purchasers under the grant, the ancestor could not entirely disappoint them. Justinian says: "Sui heredes are so called because they are family heirs, and, even in the lifetime of their father, are considered as owners of the inheritance in a certain degree." In the Saxon laws there was a birthright in the heir apparent, either at birth or at adolescence; there was a sort of family ownership which the inheritor of ancestral land could not defeat. Already, in the times of Alfred the Great, about A. D. 890, donors were seeking a sort of indefeasible estate-tail, and the law took their side; it was enacted that "the man who has book-land, and which his kindred left him, then ordain we that he must not give it from his kindred 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." It has been argued that this was an attempt to impose on the book-land the restraints generally applicable to the folk-lands. The motive would seem to have been, not only to prevent putting the property out of the family, but also, perhaps principally, to preserve equality among the sons.

Absolute freedom of alienation came only with the establishment of primogeniture, and then it came quickly. The restraint became inappropriate and unbearable when the eldest would have all. A rule designed to secure equality was operating to make it impossible. The royal court was seeking to make primogeniture general; to permit provision for the other children would remove some opposition to it. The lords and the king saw no special injury to them in granting it, as they designed to exercise considerable control of alienation by their tenants. The reports begin too late to inform us of the establishment of the doctrine that the owner may disapp-

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1 Leviticus c. 25, vv. 23-32.
3 Laws of Alfred the Great, c. 41.
point his heir. Glanvill writes just in time (A. D. 1188?) to give us a glimpse of the old law, it is already passing, the ancestor may dispose of part of his property, but not all, the writer does not tell us just how much. It seems that the power of the ancestor to disappoint his heirs entirely and in all cases, first came with the establishment of the doctrine that the heir was liable for the debts of the ancestor created by deed. If the heir is liable on the ancestor's covenants, if the specialty obligation as well as the property descends upon the heir, it necessarily follows that by inserting in the charter of feoffment a covenant on behalf of the feoffor and his heirs to warrant and defend the land to the feoffee and his heirs, the heir of the feoffor is estopped by the covenant to claim the land though it be his; for in case the feoffee were ousted even by a stranger, the heir is the very person whom the feoffee could command to defend the title. Such seems to have been the origin of the curious and troublesome doctrine of warranty. In later times it no longer came into play when a tenant in fee simple conveyed the fee, but only when the life tenant conveyed in fee, or the husband conveyed in fee the property of the wife with a warranty which descended upon and barred their son and heir when he would set up his inheritance from her. Warranties came into play only when the feoffor or warrantor had done something he had no business to do. It is believed that the barring of the heir from the inheritance was the first exploit performed by warranties, while as yet the heir was regarded as taking a sort of interest under the original donation. "Alan alienates land to William; Alan declares that he and his heirs will warrant that land to William and his heirs. Alan being dead, Baldwin, who is his son and heir, brings suit against William, urging that Alan was not the owner of the land, but that it really belonged to Alan's wife and Baldwin's mother, or urging that Alan was a mere tenant for life and that Baldwin was the remainderman. William meets the claim thus: 'See here the charter of Alan your father, whose heir you are. He undertook that he and his heirs would warrant this land to me and mine. If a stranger impleaded me you would be the very person whom I should vouch to warrant me. With what face then can you claim the land?' Baldwin is rebutted from the claim by his ancestor's warranty."

We are next and very soon to learn that the heir has no rights; a gift to A and his heirs is a gift to A only, and his heirs take noth-

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4 Glanvill, Liber 7, c. 1.
5 2 Pollock & Maitland, 310.
ing by the gift, nor at all unless by inheritance from him. In A.D.
1225, Ralph, son of Roger, demanded of William land which Ralph
claimed as his inheritance as heir of Roger; to which William re-
plied that he had it by the charter of Roger which he then produced;
Ralph confessed that it was the deed of his father, but denied that
his father could convey away the whole land and reserve nothing to
his heirs; but because he confessed the deed, and it showed an abso-
lute conveyance, it was held that William go thereof discharged.6
The idea that a father could convey his inheritance absolutely and
reserve nothing for the heirs, is a new and strange doctrine; had
not the point been an important one and the case a leading one it
would never have found its way into Bracton's collection of choice
cases. But when writing on this point thirty years later, Bracton
finds it so well settled that he considers it unnecessary to notice
Glanvill's restrictions or mention the decision that established the
rule; he merely says: "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; * * * *
and if a person so enfeoffed has further enfeoffed some person, he
holds the feoffment, and his [the first feoffee's] heirs are held to the
warranty since they can claim nothing except from the succession
and the descent from parents; although it appears to some that they
were themselves enfeoffed at the same time with their parents, which
is not true."

The common observer would suppose that the promulgation of the
doctrine of warranties, and the recognition that while the tenant in
possession lives he bears in his body all his heirs, and represents and
can dispose of the whole right in the fee, had forever blasted the
hopes of those who would establish a perpetuity. On the contrary
these decisions merely served to spur conveyancers to discover other
means of accomplishing the desires of clients who wished to create
perpetuities. It was soon found that it is not so easy to set limits
which ingenuity will not find means to escape. Ambition for do-
minion has in all ages manifested itself in attempts to exercise un-
restricted control and to impose its will inevitably on all persons
present and to come. Throughout the whole history of property
nothing seems so to have engaged the affections and enlisted the
efforts of men as the desire to fix the future use of property into a
course from which it could by no means ever be diverted, and to
break through the similar bounds already fixed by other men. The

6 D'Arundel's Case, Bracton's Notebook, case 1054.
7 Bracton Liber II, c. 6, fo. 17.
struggle of these contending forces is the most prominent feature in the history of property, in its course has made use of almost every principle of law applicable to property, and has in turn served to develop and establish each principle. Vast estates have been the prizes in these great contests. The prize could hire and has retained the best brains of the legal profession. If you would discover the establishment of any principle search the battle-fields that mark the course of that struggle; there you will find the monuments that mark the buried hopes of those who would have created perpetuities, and those monuments define the bounds of the legal principles.

In point of time, the first scheme devised to evade the doctrine that by a gift to one and his heirs the heirs take nothing unless by descent, was the fee conditional at common law. The logic of the inventors of this estate was perfect and unanswerable according to the law as established up to that time. If it be true, as the courts had held, that while the tenant lives he bears in his body all his heirs, that there are no heirs of the living, it must of necessity follow that if a gift is made to one on condition to become a fee if he has heirs, there is a gift of a life estate subject to a condition to enlarge into a fee upon his having heirs, a condition which cannot be performed till he is dead, and till the condition is fulfilled he has no fee. This course of reasoning would seem to satisfy all the requirements of the settler of the estate; his only fear is that the donee will dispose of the inheritance; but this contrivance has put the estate beyond his reach. He cannot sell the fee till he gets it; till he has heirs he has no fee; till he is dead he has no heirs; and when he is dead there is no danger of his disposing of the estate. The difficulty is that when judges determine to accomplish a certain purpose they will always find means of doing it. The courts had just unfettered feuds—as to the lord's restraint by sanctioning subinfrudation by the tenants, as to the tenant's heirs by declaring that he has no heirs while he lives and can dispose of the whole inheritance. They were in no mood to allow this new liberty to be destroyed by a system of logic however cogent, nor especially by any new turn given to the maxims they had announced to secure that liberty. When the case came before them they made no attempt to answer the logic of the conveyancer, there was no answer to it; but being determined on the object to be accomplished, they defeated the donor's purpose by giving to his conveyance a distorted, illogical, and unnatural construction, warranted only by the notion that the end justifies the means. They admitted that if the donee had issue born, made no conveyance, and
finally died with no issue surviving him, the land reverted to the
donor by the terms of the donation. But they held that as soon as
issue was born the condition was so far fulfilled as to enable the
donee to convey an absolute fee, defeat the reversion, and bar the
issue.

We feel a great desire to read more of the cases in which these
doctrines were established, but the material is not very accessible.
These questions seem to have been tried out between A. D. 1200 and
A. D. 1260. Bracton's Note Book stops about A. D. 1240. The
Year Books do not begin till A. D. 1292. There are no reports cov-
ering the period between. All that is said by the late writers on the
subject seems to be based on the writings of Coke, and what Coke
says on this point is largely guesswork. He seems to have had
nothing reliable before the Statute *De Donis*, other than Bracton's
text. He had neither the Note Book nor the court rolls, apparently.
The only case referred to by him as of date prior to the statute
seems to be Fitz. Abr. t. Formedon 64 (4 Hen. III). In referring
to this case in *Nevill's Case,* Coke says it was there 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 col-
lateral issue should not inherit, for the donor recovered the land in
a formdon in the reverter." The case thus referred to is believed
to be reported in Bracton's Note Book as No. 61, and if that is the
case it sustains no such proposition. That case was a formdon by
the daughter of the deceased donor, to recover the land from an in-
truder who entered after the death of the son of the donee in frank-
marriage without issue; and the suit failed because it appeared that
there were living sons of an elder deceased brother of the plaintiff,
who would therefore have the better right. That the land would
revert is mere inference, and nothing is said of the right of the
donee in frank-marriage to sell the fee after issue born, nor was that
point in any way involved in the case, for he had not attempted any
conveyance. In Bracton's Note Book are reported a number of
cases of gifts in frank-marriage, the most common fee-conditional
at common law, but they throw little light on the power of the donee
to alienate or the effect of the birth of issue on that power. What
is found in the first of the Year Books comes too late, for the doc-
trines are then settled, and we get merely recitals of history, and
mere application of well known rules, so far as this point is con-
cerned.

The earliest satisfactory account of the rules concerning the fee

*7 Coke 33.*
conditional at common law we find in about A. D. 1260 in the text of Bracton (Lib. II, c. 6, fo. 17), in which he says: "For the limitations fix the legal effect of the gift, and the limitations of the gift must be abided by contrary to common right, and contrary to the general law; as if the words are: 'I give to such a one so much land with the appurtenances in N. to have and to hold to him and his heirs whom he may have begotten of his body by his wedded wife,' *** In which case, since a restricted class of heirs is mentioned in the gift, it may be seen that the descent is only to the common heirs of husband and wife, according to the limitations expressed in the gift, all other heirs of the husband being altogether excluded from the succession, because such was the intention of the donor. Hence it is that if heirs of this kind have been begotten, they alone are called to the inheritance, and if one who is enfeoffed in this manner has proceeded to enfeoff anyone else of the land, this feoffment holds good, and the heirs of the feoffor are bound to warranty, since they can claim nothing except by succession and descent from their ancestors, although some think that the heirs themselves have been enfeoffed together with their parents, which is not true. But if a feoffee to himself and the heirs of his body have no such heirs, the land will revert to the donor by an implied condition, even if there be no mention in the deed of gift of such reversion, or if there be such express mention; and this will be the case too if heirs have at any time come into existence and have failed. But in the first case, where no heir has come into existence the donee will always hold the property given as a life estate and not as a fee; also in the second case, until an heir has come into existence the estate is an estate for life." It will be noticed that the result against the disappointed heir was accomplished by means of the doctrine of warranties above referred to.

The next development historically, and the last substantial victory of those who desired perpetuities, was the Statute De Donis, A. D. 1285; and the recitals of this statute show how the donors of such estates felt concerning the construction given by the courts of the fee-conditional at common law. Being worsted in the courts, they took the matter to the legislature; and courts felt bound to observe the legislative command. The statute says: "First, concerning lands that many times are given upon condition, that is, to-wit, where any gives 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 begotten, the land so given shall revert to the giver
or his heir, in such case also where one gives lands in free marriage, which gift has 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 gives land to another and the heirs of his body issuing, it seemed very hard, and yet seems, to the givers and their heirs, that their will being expressed in the gift was not heretofore nor is yet observed. In all the cases aforesaid, after issue begotten and born between them to whom the lands were so given under such condition, heretofore such feoffees had power to alien 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 the form of the gift expressed in the deed, though the issue, if any were, had died; yet by the deed and feoffment of them to whom the land was so given upon condition, the donors have heretofore been barred of their reversion of the same tenement, which was repugnant to the form of the gift.” With this recital of the grievances, the statute proceeds to enact that the will of the giver shall be observed.

The result of this statute was the estate tail; and by this means the purpose of the makers of the statute was accomplished in a measure for nearly two hundred years before a means of evading it was discovered. The mischiefs that took shelter behind this stub- born statute and had to be endured during this long period served to administer a wholesome lesson on the evils that perpetuities would produce if they were allowed; and these evils finally drove the courts to the desperate straits by which the statute was finally evaded and defeated; for the House of Lords would never consent to repeal the statute, though many attempts were made. From these estates tail it was discovered that children who could not be in any way dis- inherited abused their parents, creditors were defrauded of their dues, traitors became bold to plot against the government, knowing that no attainder of treason could forfeit their estates, farmers were ousted from their leases, and no purchaser could be sure of his estate. Finally a means of evasion of the statute was discovered by the allowance by the court that a judgment recovered against the tenant in tail by one claiming adversely to him was binding on the heir of the tenant in tail, on the principle that a judgment is conclusive of the point in issue against all parties and all other persons claiming under or through them. As soon as the doctrine was es-
established fictitious suits were prosecuted to disentail lands, and these covenous suits took the name of common recoveries. The security of entails being thus broken, the king soon obtained a multitude of statutes to strip them of their privileges. Thus estates tail came to be merely a special fee, limited as to its mode of descent and manner of conveyance.

Even before a means was found of escaping from entails, attempts were made to accomplish the same result of indestructibility as entails enjoyed when the donor desired to convey a fee simple. This was sought to be accomplished by a conveyance to the donee expressly for life only; and then limiting the remainder in fee to his heirs, thinking thereby to make his heirs purchasers. But the courts as early as A. D. 1325, in Abel's Case, declared that a man could not limit a gift to his own heirs as purchasers, and that a gift to one for life with remainder in fee to his heirs was no more than a more elaborate expression of the intention more commonly expressed by a gift to one and his heirs; for it could not have been intended and never had been understood by such a gift that the donee and his heirs should take concurrently, but rather should take in succession. Some 250 years later this doctrine acquired the name of the Rule in Shelley's Case, from the fact that it was invoked and cited in the argument of counsel before all the judges of England in the celebrated case over the estate of Judge Shelley. The substance of this rule, when stripped of technical phrase designed to include all possible cases is, that if a gift is made to one for life' with remainder to his heirs, or to one for life, remainder to another for life, remainder to the heirs of the first life tenant, the remainder designed to be given to the heirs of the life tenant belongs to the life tenant himself, and may be disposed of by him so as to disinherit his heirs entirely.

Another doctrine, the exact origin of which I have never been able to discover, sealed the doom of another scheme to create a perpetuity by limiting a series of life estates to children and children's children from generation to generation. This rule was that a remainder to the child of an unborn person is void the day it is created, because it is limited to arise on a possibility too remote to be recognized by the law as likely to happen. This doctrine is usually stated as an essential to a good remainder, that it must be limited to arise on a common and proximate possibility, and

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9 Maynard's Year Books 16 Edw. II, fo. 577.
10 1 Coke 93b, 1 Anderson 69.
not as a possibility on a possibility, first that a child should be born, and second that it should have a child.\(^\text{11}\)

At an early day, which cannot be stated exactly, a rule was established which made it impossible to restrict the freedom of alienation for even a single day by creating contingent remainders. The rule was that the contingent remainder depended on the particular estate which preceded it, and that if the particular estate was destroyed before the remainder could vest the remainder was forever defeated. Therefore, all that was necessary in such a case was for the life tenant to make any conveyance in fee or in tail, by feoffment, grant, lease and release, or otherwise, so as to discontinue the life estate on which the remainder depended, and by this simple process the remainder was forever and absolutely tolled and destroyed, and the title of the grantee or feoffee absolute and indefeasible.\(^\text{12}\)

Another plan that was tried to create a perpetuity was by inserting in the deed of feoffment a condition that if the feoffee or his heirs should make a feoffment or gift of any part of the land the feoffor or his heirs might enter and terminate the feoffment and recover his former estate. As to this scheme it was said by Justice Green in A. D. 1360: "If I alien to a man in fee on condition that if he or his heirs make an assignment I or my heirs may enter; if he assigns I may not enter, for it is contrary to law that he should have a fee in himself by the feoffment to him and his heirs, and may not sell it."\(^\text{13}\) This was denied by another justice, and was not necessary to the decision of the case before them; nor is the final decision in the case reported. I have not found that such a condition was ever sustained; and it soon became settled that such conditions were void, on grounds of public policy, and, as it was said, because they are repugnant to the grant. Within the next hundred years this became settled law, is so declared in Littleton's Tenures, written about A. D. 1470, and has never since been questioned.\(^\text{14}\)

\(^{11}\) See Cholmsley's Case, 2 Coke 30.

Mr. Josiah Williams claimed that this doctrine of a possibility on a possibility originated with the case above cited. Wms. on Real Property (18 Am. Ed.) 420. See also the comments on this subject by Lord Chancellor Nottingham, in the Duke of Norfolk's Case, 3 Chancery Cases, at page 29. Mr. Williams also puts the rule that a remainder to the child of an unborn person is void as on a different foundation, and the origin of it as over a hundred years later. Wms. Real Property (18 Am. Ed.) 479, citing Humberston v. Humberston (1716), 1 P. Williams 332.

\(^{12}\) A Littleton's Tenures, H 360-.363.

\(^{13}\) Hen. VII, 12a, pl. 12, per Frowle, C. J. Archer's Case, 1 Coke 66b.

\(^{14}\) Littleton's Tenures, §§ 360-363.
ed him, saying that they would not hear him argue that conceit, because it was against common learning and would overthrow all the ancient precedents.\textsuperscript{16}

The reason for the rule that a condition in a feoffment in fee that if the feoffee should alien the estate should be void and the feoffor might enter, was differently put by different judges. In one of the first cases (\textit{33 Edw. III, A. D. 1360, 33 Assize pl. 11}) Justice \textit{Grazen} put it on the ground that the right is a necessary incident of the estate, an inseparable quality, and an impossibility that he should have a fee and no power to alienate. Later in A. D. 1443 (\textit{21 Hen. VI, 33, pl. 21}) Justice \textit{Yelverton} put it on the ground that the feoffor had left in him no reversion, holding that if he had in him a reversion the condition would be good; but in the same case Justice \textit{Paston} put it squarely on the ground of public policy for the inconvenience and damage that would follow if one owning the estate could not sell it, and he said the case would not be altered if the grantor retained a reversion. Littleton said it was because when a man is enfeoffed of lands or tenements he has power by law to alien, and it would be against reason to oust him of the power which the law gives him as owner. (Lit. §360.) In his comments on this section Coke puts the rule on the same ground; and suggests that it is a rule that applies to both land and goods; but he adds that if the condition is against doing an unlawful thing, as selling in mortmain, the condition is good when annexed to a feoffment in fee. He also mentions the objection on the ground of public policy in restricting trade and commerce. He does not, however, forget to make a further point of Yelverton’s position regarding the reversion, saying: “And so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel, real or personal, and give or sell his whole interest and property therein upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him, and he hath no possibility of a reverter.” (Coke Lit. 223a.)

In the case in 13 Henry VII, 22 (A. D. 1498) the whole question was more fully discussed by court and counsel on general principles than in any other case before or since that has fallen under my observation, where the discussion was essential to the decision. In that case the feoffment was to one in tail remainder to him and his heirs, so that he had a fee tail in possession with a remainder in fee expectant thereon, which the statute of Westminster 2d, o. 1., out of consideration to the will of the giver, would not permit to merge.
The charter of feoffment contained an express condition that if the feoffee or any of the heirs of his body should make alienation the feoffor or his heirs might enter and recover the property. Some of the judges thought that the rule that a condition in restraint of alienation of the fee is void applied only to estates in possession, and there was no objection to restraints on alienation of expectant estates. Others thought the condition would be good as to the estate tail, because the discontinuance of that estate would be contrary to the intent of the statute of Westminster 2d, c. 1; and if alienation of a future fee could be restrained in case the estate tail had been given to one and the remainder in fee to another, and thus the condition would be good as to both, there is no reason why the same rule would not hold and the condition be good as to both when they were in the same person. On the other hand, it was argued that the condition was clearly void as to the fee, and being void as to part it was void as to all. Others contended that though a reversion had been retained in the donor and he had given only an estate tail, a condition in restraint of an estate tail would be void, because the statute of Westminster 2d, c. 1, did not restrain the alienation of estates tail but only gave the heirs in tail remedy to recover the land sold. After much discussion the case was continued for further discussion at a later term, and what finally became of it is not reported.

From this time on the validity of conditions in restraint of alienation of the fee has never been sustained, it is believed, and it is now established that even a condition against alienation without permitting the vendor to buy is void.10

The validity of conditions in restraint of alienation of estates tail seems never to have been squarely adjudicated; but that a condition against the tenant in tail suffering a common recovery would be void was stated in a great many of the reported cases in the time of Queen Elizabeth and since in which the validity of conditional limitations for the same purpose were before the court for consideration;11 and it would seem to follow with greater reason that a condition of that kind would be void if a limitation for the same purpose would be void. In the Earl of Arundel's Case (3 Dyer 342b, A. D. 1575), in which a donation in tail was made on condition that the donor or his heirs might enter if the donee or his heirs of his body did anything to hinder or prevent the reversion accruing to the donor or his heirs

11 For example see: Mildmay's Case, 6 Coke 40a; Corbet's Case, 1 Coke 83b; Sunday's Case, 9 Coke 127b; Mary Portington's Case, 10 Coke 35b.

The question was squarely presented in 33 Assize pl. 11 (A. D. 1360), but no decision is reported, the case being adjourned for deliberation.
on the death of the donee without issue, it was held that the donor
could not recover the land of the queen on its forfeiture for the
treason of the donee; but the court said that the queen had a base
fee determinable on the death of the donee and all his issue, where-
on the land would be recoverable by the donor. The validity of
such conditions was thus inferentially established for a time; but
no later decisions affirming their validity have been found, and even
in this case the same conclusion would follow though the condition
were void.

The next plan chronologically that was adopted to create a per-
petuity was a gift in tail with remainders over in tail, provided
that if any of the donees in tail or their heirs should discontinue,
levy a fine, suffer a recovery, or do any other act to prevent the full
enjoyment of the estate by their issue and those in remainder, the
estate of him or them so offending should immediately cease as if
he were naturally dead, or dead without issue, or as if no gift to
him or the heirs of his body had been contained in the donation.
The first we hear of this scheme is at least fifty or a hundred years
after it was invented and introduced into general practice. The
first we hear directly of the practice is the indefinite hint given by
Justices FULTHORP and ASCUE by way of argument on another point
in A. D. 1443, 21 Hen. VI, 33, pl. 21, in which FULTHORP said that
THIRNING, who was chief justice of the common pleas court in the
reign of Hen. IV, (1399-1413), gave his land to his eldest son on
condition that if he should alien it should remain to his younger son,
and so he made the remainder to two or three others; and then ASCUE
said he understood that such a gift in tail would be good, for
THIRNING made this gift on the advice of the justices of his time. Justice
PASTON made light of this suggestion, saying: “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 Hanx said it
would be good.” And he laughed, and said that the whole condi-
tion was void. Nevertheless, such conveyances were taken seriously
enough that common forms providing for such dispositions seem
to have been in use in the time of Henry IV (1399-1413). When
Littleton was writing his “Tenures,” about A. D. 1470, he put the
introduction of the practice back into the reign of Rich. II (1377-
1399), and gave his opinion that such provisions were invalid, thus
showing that the point was then a debated question. He said: “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

28 Madox, Form No. 756, cited in 3 Holdsworth's History of English Law 101.
issue divers sons, and his intent was that his eldest son should have certain lands and tenements to him and to his 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 the 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 seizin was made accordingly. But it seems by reason, that all such remainders in the form aforesaid are void and of no value; and this for three reasons: 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 seizin 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 seizin to him that shall have the freehold, and such remainder was not to the second son at the time of the livery of seizin in the case aforesaid, &c. 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 a 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. The third reason 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.18

The validity of such provisions was thus manifestly undecided in the time of Littleton, and they so remained for another hundred

18 Littleton's Tenures, §§ 720-723. In 21 Hen. VII, 11b, it was held that such a limitation to a stranger was not good because a right of entry could not be reserved to a stranger and the estate did not end without entry.
years. In 2 & 3 Phil. & Mary, A. D. 1556, the contention of Littleton that the donor or his heir ought sooner to have the estate than the next remainderman on breach of the condition received a partial temporary answer in the case of *Warren v. Lee* (Dyer 126b), in which land was devised to the testator's widow for life, on condition to support and educate the testator's eldest son, remainder over to the testator's second son in tail, reserving the fee simple, and the wife failed to support the eldest son, on which he entered for breach of condition, and the question was whether the condition and entry defeated the remainder; and the court decided: "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. * * *

And it seems that the remainder is not destroyed by the 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 in a will is good although the particular estate were never good."

Soon after this decision a case came before the justices of the common bench which reminded them that to treat such provisions as conditions requiring an entry to make them operate, which entry could only be made by the heir of the devisor, would frequently defeat the will of the testator; for if the heir was the person to be restrained and the only person who could take advantage of the breach, the person designed to take the gift over would be without remedy. In this case the devise was to the testator's first son in tail, remainder to his second son in tail, remainder to his daughter Scolastica in tail, with divers remainders over; and in the will the testator provided that if any to whom the lands were so given should sell, waste, mortgage, or discontinue the estate, or their interest or possibility, or any part of it, the person so doing and his heirs should be from thenceforth discharged and excluded from all benefit and advantage of the entail as if he or they had never been mentioned in said will. The first two sons entered into a covenant to levy a fine and suffered a common recovery, on which Scolastica entered, was ousted, and brought assize of novel disseizin. The reason of the decision is thus given by the reporter: "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, whereby 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 were 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. * * * 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 plaintiff might enter, and should not be driven to any formedon or other suit.

Thus was the contention of Littleton for the time upset. The justices of the common bench denied the validity of such provisions in the year A. D. 1594, in the case of Chomley v. Humble; but two years later the validity of such a limitation was sustained in the King’s Bench by Fenner, Gawdy, and Clench, justices, against the opinion of Popham, C. J., in the case of Sharington v. Minors, in which the chief justice said: “Although it should be a limitation and not a condition, and though the will is to have a favorable interpretation according to the intent, yet if the limitation should be an act impossible or against law it is void, as Germain and Arscot’s Case (A. D. 1596, Moore 364) adjudged in the common pleas, that the proviso that the estate of the one who entailed should entirely cease in his life is a void limitation because repugnant and impossible. In the case at the bar if the estate of the seller should cease as if no such estate had been made (as the words of the will indicate), then he should be a trespasser from the beginning, which is

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22 Moore K. B. 343.
repugnant and impossible, because it should be construed to cease only from the time of the alienation; and if so, then it is to say that it shall not cease till the alienation consummated, and by that time there is a discontinuance of the entail already, though but for an instant, which discontinuance is to be purged by a formedon by him in remainder by pleading the special matter as if the first tenant were dead without issue, and by this he would avoid the discontinuance and the estate, but his entry is not lawful, and so it now remains."

Four years later the court of common pleas again declared such provisions void, in the celebrated Corbet's Case (1600), and finally the same conclusion was reached in the king's bench, in Mildmay's Case (1606). Chief Justice Popham's objection that the estate was terminated and the estate and the remainder over discontinued and destroyed before the limitation could operate was obviated by the conveyancer who drew the conveyance in Mildmay's Case, above, and the will involved in Mary Portington's Case, which came before the common bench in the year A. D. 1614, in which the provision was that as soon as any of the tenants in tail should determine and go about to discontinue, levy a fine, suffer a recovery, or do any other act by which the lands may not descend or remain to the others intended by the testator to be benefited by the will and before such act done, the estate and interest of any so going about should immediately cease, and the land immediately pass to the next in remainder. But it was decided that the law did not know of any condition or limitation to prevent goings about, nor had any such provisions ever been known or heard of "till now of late"; and that such provisions were wholly void. Lord Coke, who had stood at the bar or sat on the bench through the quarter of a century and more in which most of the cases involving such limitations had been in litigation, and who had seen and appreciated the evils of uncertainty in titles and of the inability to deal with lands affected by such limitations, was now persuaded that at last a limit had been found to the ingenuity of those who would create inalienable estates, and felt so rejoiced at the decision that he said in his preface to the report containing this case: "Then have I published in Mary Portington's Case, for the general good of both prince and country, the honorable funeral of fond and new-found perpetuities, a monstrous brood carved out of mere invention, and

23 1 Coke 83b, 2 And. 124, Moore 601.
24 6 Coke 402.
25 10 Coke 35a.
never known to the ancient sages of the law; I say monstrous, for
the naturalist saith 'Quod monstra generantur propter corruptionem
alicujus principii;' and yet I say honorable, for that these vermin
have crept into many honorable families. At whose solemn funeral
I was present and accompanied the dead to the grave of oblivion,
but mourned not, for that the commonwealth rejoiced, that fettered
freeholds and inheritances were set at liberty, and many and mani-
fold inconveniences to the head and all the members of the com-
monwealth thereby avoided."

Yet, how impossible it is to foresee the results that will come in
the way of evil from a decision or statute made to attain the ends
of practical justice and indicating on the face of it no danger! Even
before Mary Portington's Case was decided it had been held in
Matthew Manning's Case (1610), \(^{26}\) that when one holding a term
for years in land devises it to one for life with limitation over to
another by way of executory devise the life tenant cannot destroy
the remainder by an absolute assignment, but that when the life
tenant is dead the devisee over may recover the term. The doctrine
being thus established that the executory devise over was not in the
power and at the mercy of the life tenant, the rule was carried to its
logical conclusion, almost at the very time when Lord Coke was
penning his exultation over the final destruction of perpetuities, and
it was held in the king's bench in the case of Pells v. Brown (1620), \(^{27}\)
that if one owning a fee devises a future contingent estate or possi-
bility which cannot take effect as a remainder, and is therefore an
executory devise, the indestructible quality ascribed to executory de-
vises in Matthew Manning's Case applied to it. The same quality
was also held to apply to future uses other than remainders.

The establishment of this doctrine made it necessary to set some
reasonable bounds to the remotesness of these future estates that
would be tolerated by the law; and from this necessity has grown
the series of doctrines now known as the rule against perpetuities.
But that is another story.

JOHN R. ROOD.

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\(^{26}\) 8 Coke 94b.
\(^{27}\) Cro. Jac. 590.